Tulsa Law Review

Volume 37
Issue 1 *2000-2001 Supreme Court Review*

Fall 2001

By the Dawn's Early Light: The Administrative State Still Stands after the 2000 Supreme Court Term (Commerce Clause, Delegation, and Takings)

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"BY THE DAWN'S EARLY LIGHT:" THE ADMINISTRATIVE STATE STILL STANDS AFTER THE 2000 SUPREME COURT TERM (COMMERCE CLAUSE, DELEGATION, AND TAKINGS)

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I. INTRODUCTION

To a certain extent, the modern environmental regulatory regime in the United States depends on the viability of the "administrative state," a term some use with admiration and others with disdain. To attempt a neutral definition, the "administrative state" is simply the ability of Congress to address problems by providing nation-wide guidance, through delegated authority, to a federal agency with expertise. In order to enable such a regulatory tack to be laudatory, the process must be consistent with the ideals of our nation, which include accountability and individual liberty. Therefore, it is not surprising that the three cases the Supreme Court decided in the 2000 term with an environmental "tinge" dealt with Commerce Clause jurisdiction,[1] the nondelegation doctrine,[2] and takings jurisprudence,[3] all of which have implications that are at the heart of the "administrative state." These cases are also identifiably "environmental" because environmental statutes were at issue in each of them.

The "administrative state" survived this year's Supreme Court term. Although the environmental community might breathe a sigh of relief about "what might have been" had the Supreme Court decided to use heavy artillery, it might reflect that the EPA's ozone standard cannot be implemented in non-attainment areas[4] and the Corps of Engineers has been found to have no jurisdiction over certain isolated waters.[5] The Court

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1. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engrs.*, 531 U.S. 159 (2001).

2. *Whitman v. Am. Trucking Assns., Inc.*, 121 S. Ct. 903 (2001).

3. *Palazzolo v. R.I.*, 121 S. Ct. 2448 (2001).

4. *Am. Trucking*, 121 S. Ct. at 919. The D.C. Circuit Court of Appeals had found that EPA's use of PM_{10} as the indicator for coarse particulate matter was arbitrary and capricious. *Am. Trucking Assns., Inc. v. U.S. Envtl. Protection Agency*, 175 F.3d 1027, 1034 (D.C. Cir. 1999), *on rehearing*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, 121 S. Ct. 903 (2001). No one brought this issue to the Supreme Court.

5. *Solid Waste*, 531 U.S. at 174.

did not blast these regulations to smithereens on constitutional grounds, but as a "minimalist" Court, it invalidated these regulations on basic statutory interpretation grounds.[6] Twice, the Supreme Court found that an agency interpretation of a statute was erroneous.[7] In so doing, the Court camouflages its activism and its antagonism to some aspects of the administrative state.

The Court had to face the Constitutional issues in the takings case because that case did not involve interpretation of a federal statute. The Supreme Court did not, however, require the over-use of a checkbook in a manner that would necessarily impede environmental regulation. In fact, the Court did not find a denial of a permit to be either a categorical taking or a compensable taking on other grounds.[8] In the process, however, it rejected a *per se* rule on the impact of a regulation at land acquisition on a landowner's reasonable investment-backed expectations; the existence of the regulation on that date does not make the regulation a part of background property rights and therefore foreclose the possibility of a taking. The regulation, however, could affect such expectations.[9]

This Article examines these three cases in historical perspective and assesses their impact on the administrative state. First, however, Section II addresses the need for the administrative state in the environmental arena. When this is completed, Section III looks at the *Solid Waste* case, exploring its impact from the vantage points of both Commerce Clause jurisprudence and commentary on statutory interpretation. The case has not moved commerce clause jurisdiction significantly from its current status, except by intimating future reviews of environmental statutes may be more rigorous. The statutory interpretation evinced by the majority, however, is revealed as shallow and manipulative. Section IV of the Article provides a similar analysis of *American Trucking.* This discussion explains why no one seems to be reviving a strong non-delegation program. It also examines whether *American Trucking* has changed standards of judicial review of agency action and concludes that it does not. Section V considers the last case, *Palazzolo.* Again, the Supreme Court does not offer clarion guidance on takings, but gives Delphic hints of what might come. The Article, therefore, concludes that the administrative state still is intact, but smoke from the bombardment may deter aggressive environmental action.

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6. The term "minimalist" is used in the sense employed by Cass R. Sunstein. *See generally* Cass Sunstein, *One Case at at Time: Judicial Minimalism on the Supreme Court* (Harv. U. Press 1990).

7. Once because the agency violated the clear meaning of a statute, *Solid Waste*, 531 U.S. at 172-74, and once because the agency interpretation of an unclear statute was unreasonable, *Am. Trucking*, 121 S. Ct. at 918-19.

8. *Pallazzolo*, 121 U.S. at 2464-65.

9. *Id.* at 2464. The Court also concurred that there was no categorical taking because the remaining upland portion of the land could be developed and yield a more than nominal value. Because the plaintiffs had not raised the issue below, the Court declined to enter an opinion on whether the property affected was the wetland area alone. *Id.* at 2465.

Changing the metaphor from war, but still clinging to the star-spangled banner, one could say that the cases reveal some threads are dangling from these doctrinal flags.

II. CONTOURS OF THE ADMINISTRATIVE STATE

Under the current regime of environmental law, much guidance comes from the federal government, as either federal agencies or state agencies enforce the standards contained in federal statutes. This focus on administrative action, especially federal, was not always the norm. In the past, state and local governments determined what environmental protection there would be.[10] The effects of pollution were treated as local for two reasons. First, neighbors were believed to primarily suffer the costs from a particular polluting entity. Second, the benefits of the activity, be it a desired product or a job base, also generally were distributed locally. Therefore, most believed state common law or statutory law to be the best venue to balance the costs and benefits of the activity. Eventually, this perspective changed.

Before the change, however, the common law was the primary arbiter of disputes. Property and tort law provide at least four possible causes of action. First, trespass could be alleged if pollutants actually land on the plaintiff's property. Second, nuisance laws protect one party's use of property from another's unreasonable use of their property even without a physical intrusion. A third tort, that of negligence, also could come into play if the offending activity violates a duty of care to another. Finally, if activities are "ultra-hazardous," they could engender liability for damages to others despite the participant's lack of negligence.

Tort law, nevertheless, could not and cannot readily address all environmental claims.[11] One problem is proving causation. It might be easy to trace particles of coal dust to a factory if only one factory is present in a town, but if numerous factories spew particulate matter into the air, determining the proper defendant becomes more difficult. Additionally, it is easy to prove that the offending coal dust dirtied laundry hanging in a backyard, but harder to prove that the dust caused a particular illness in a particular plaintiff. It is even more difficult to prove that in the future the coal dust *would cause* a particular illness. Moreover, in addition to these problems proving causation, tort law often examines the benefits of the defendant's activity; strict liability is the exception, not the norm.[12] With

10. The following four paragraphs were adapted from Marla E. Mansfield, *Energy Policy: The Reel World: Cases And Materials on Resources, Energy, and Environmental Law* 394-95 (Carolina Academic Press 2001).

11. J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 Vand. L. Rev. 1407, 1454-56 (1996) (nuisance was the beginning of environmental law, but the doctrine could not evolve sufficiently to continue its central role).

12. For example, nuisance law directly compares the plaintiff's harm with the harm that would occur if the defendant were forced to forego its activity. Similarly, negligence often

neighbors profiting from jobs, a plaintiff might fight a lonely uphill battle to stop the activity the plaintiff found believed to be damaging.

Therefore, state and local governments could and did employ their police powers, which allow them to moderate private activities and protect public welfare and health, and supplemented private tort action. One important avenue for this type of intervention is through zoning laws, which can separate industrial areas from residential ones. Boards of health at the state and local level also might act in some instances. Beyond legislative or regulatory activities, public nuisance actions could be brought under common law and under various statutes. These actions would seek abatement of activities that affect many and spare the cost of individual suits.

Despite the presence of state and common law remedies, however, beginning after World War II and culminating in the 1970s, Congress began to address the problems of pollution on a national level.[13] For example, the evolution of the Clean Water Act ("CWA") is instructive.[14] As constituted before 1972, the CWA's goal was setting quality standards and, essentially, it was a zoning statute. The Federal Water Pollution Control Act Amendments of 1972 changed the federal program from one that simply sought quality standards to one that allowed for national effluent limitations and enforcement mechanisms to reach the standards. To understand the CWA as set up in 1972, one must first examine the types of sources of water pollution.

There is a dichotomy in regard to sources in the Clean Water Act. The CWA looks at "point sources" and "non-point sources" of pollution. Point sources are discrete dischargers of effluent. A traditional point source would be a pipe entering a water body, but point sources do not need pipes. Point sources, because they are discrete, are amenable to technology. A technological "fix" could control the problem before the pollutants have a chance to enter water. Non-point sources of pollutants are those that create pollution in a dispersed, non-discrete manner. Non-point sources are more land-use based. Examples include urban run-off, agricultural cropping practices, forestry practices such as clear cutting, logging road construction, and atmospheric disposition of pollutants such as PCB's. To address non-point sources of pollution requires meshing local, state, and federal land use planning.

The 1972 Amendments initiated two major changes in the now-deemed "comprehensive" Act. First, it legislated a new goal; the goal of no

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requires an element of unreasonable activity on the part of the defendant; if the offending factory is meeting all industry standards and there is no alternative technology, its owners might not be guilty of negligence.

13. The following four paragraphs were adapted from Mansfield, *supra*, n. 10, at 401-02.

14. It was not until the 1977 Amendments that the act was named the Clean Water Act, but for ease of reference the major federal water pollution control legislation will be called the CWA. It is currently codified at 33 U.S.C. §§ 1251-1387 (1994).

pollution discharge substituted for the earlier goal of calibrating discharges to water use. Basically, it is illegal to discharge effluent into the waters of the United States from a point source without a NPDES permit (National Pollutant Discharge Elimination System). In addition to changing the Act's goal, another big change in the 1972 Act was that the federal government takes a front seat in regulation. A state may "drive" - that is, may permit discharges and enforce the Act's provisions - but only if the state has an approved program. This is the co-operative federalism model popular in the 1970s. The Environmental Protection Agency ("EPA"), however, sets the effluent limitations on discharges. These limits are uniform nationally for the same type of source, but the limits vary from point source type to point source type. The effluent limitations are geared to what is possible for each type of point source to achieve.[15]

If the federal government is to have the ability to intervene in such a manner, of course, there must be an enumerated power. The ability to "regulate Commerce . . . among the several States,"[16] the so-called Commerce Clause, is the obvious choice. In the Clean Water Act setting, not only does some water flow interstate or form a part of a navigable network,[17] but also the impacts of pollution may be felt in interstate commerce. As the Supreme Court stated in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*:[18] "[W]e agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause 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."[19] Moreover, each state may fear to individually regulate its industry for fear that it would suffer a commercial disadvantage. *Hodel v. Virginia Surface Mining* again instructs on the need for federal action: "The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause."[20]

For environmental law, therefore, Commerce Clause jurisdiction to enact national law is the first building block of the "administrative state." Although the main statutes have been upheld, issues emerge at the individual regulation or application.[21] If jurisdiction is confirmed, the next

15. The CWA has a 2-tier system of technology-based effluent limitations. The effluent limitations require levels of treatment and restrict quantities, rates, and concentrations of chemical, physical, biological, or other constituents of a discharge. The limits supplement existing water quality standards set by a state. The required permit will tell the level of effluent discharge allowed.

16. U.S. Const. art. I, § 8, cl. 3.

17. Protection of navigation was one of the first recognized federal duties. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

18. 452 U.S. 264 (1981).

19. *Id.* at 282.

20. *Id.* at 282.

21. *See infra* Sections III.B. and III.D.2. *See Gibbs v. Babbitt*, 214 F.3d 483, 492-94 (4th Cir. 2000) (prohibition of acts on private property that would "take" a red wolf even if the

building block that Congress must have is a way of executing the laws. To do so, Congress creates an agency.

The administrative system Congress creates provides three essential elements to complete the lawmaking Congress began pursuant to the Constitution.[22] First, agencies offer additional expertise. They can transform policy into particular requirements for particular situations in order to meet goals. Second, the agency provides a mechanism for enforcement. Finally, the rules and agency precedent interpreting the rules may provide remedies for those who believe that agency personnel are not complying with the law. There is a definite practical justification for agencies even if they are not mentioned in the Constitution.

Nevertheless, for a time earlier in the century there was some doubt as to whether Congress could delegate lawmaking authority to an agency. Additionally, the appropriate role model for an agency has gone through several incarnations.[23] First, concern over the ability to delegate legislative power lead to a requirement that legislation contain standards that would guide the agency.[24] One way of describing the resulting agency was that the agency should be a "transmission belt," and simply implement policy Congress denominated.

During the New Deal, another model of an agency gained credence. During this period, there was more faith in agency expertise. New Dealers believed an agency could reach an abstract "public interest" if left alone. Therefore, they desired to insulate an agency from central policy control by giving an agency discretion. In this era, statutes were not stricken as being unlawful delegations of legislative power. Additionally, it was deemed desirable to isolate the agency from even executive control and further to limit judicial oversight. If there were few standards in the legislation, it would be difficult for a court to find an agency "arbitrary and capricious." Many, however, saw the New Deal model leading to agencies that were "captured" by industry, and unresponsive to new needs. Agencies were labeled "arrogant," and this disenchantment solidified to a certain extent with the environmental movement. Many stopped believing in an objective "public interest" and stopped considering expertise to be a savior.

The resulting third model of administrative law is referred to as the

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same were re-introduced to historic range was valid); *Natl. Assn. of Home Builders v. Babbitt*, 130 F.3d 1041, 1041-57 (D.C. Cir. 1997) (ESA take provision as applied to an endangered fly found only in California was within Commerce Clause), *cert. denied*, 524 U.S. 937 (1998).

22. The following five paragraphs were adapted from Mansfield, *supra* n. 10, at 31-32.

23. For an excellent history of administrative models, albeit with different labels, *see* Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. Kan. L. Rev. 689 (2000); Mark Siedenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 Tex. L. Rev. 83, 88-93 (1994).

24. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

"public interest representation" model.[25] Under it, agencies provide an alternative forum to balance and weigh interests. Therefore, all parties must have access to the decision-making. Agencies are thus surrogate legislatures taking the place of a Congress that failed to make hard choices. Under this model, courts more actively enforce rights to participate. Adherents would applaud decentralized and open decision-making.

Finally, a fourth movement seemed to be afoot in the eighties and nineties, which may be referred to as a "post modern" view. This model of an agency reflects some characteristics of the first two eras. Reliance on agency expertise and deference to the agency may be prevalent, but there is also a resurgence of separation of powers analysis, which may require Congress to legislate with more detail. Since the New Deal, the law has stated that, in theory, so long as there is an "intelligible principle," Congress may make a delegation to the executive. Conventional wisdom might say the question had been decided and that such delegations could occur with minimal guidance. Chief Justice Rehnquist, however, in past concurring opinions, argued to invalidate laws under the nondelegation theory.[26] The issue reasserted itself when the Court of Appeals for the D.C. Circuit remanded a regulation promulgated under the Clean Air Act to the Environmental Protection Agency. The Court required the agency to define its statutory command in a manner that would limit the unlawful discretion the statute provided.[27]

The last portion of the "administrative state" the Supreme Court considered in the 2000 term was a Fifth Amendment restraint, namely, that "private property [not] be taken for public use, without just compensation."[28] The provision is hard to classify as procedural or substantive. It does not forbid a government from taking property so long as it is for a public use, but the Amendment provides another prerequisite before the appropriation can proceed.[29] Just compensation must be paid. This requirement could be deemed a procedural requirement to substantively compensate. However, in some instances, compensation may be prohibitive and therefore the Fifth Amendment constraints could end up defeating the governmental program.

This latter situation is not much of an issue when a government affirmatively and physically requisitions land or property. The government

25. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975).

26. *See e.g. Indus. Union Dept. v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

27. *Am. Trucking*, 175 F.3d at 1038.

28. U.S. Const. amend. V.

29. Of course, as with all governmental action, the program the government forwards must be within the government's authority. For the federal government, this means that if a statute is involved, it must be within one of the enumerated Congressional powers. If a regulation is at issue, it must meet this test plus be within the statutory authorization of the agency. The question of authority is perhaps easier on the state level; the program simply must be within the state's police power.

generally budgets for acquisitions before it proceeds. Compensation rendering a program infeasible more often rears its head in the setting of so-called "regulatory takings." In this situation, the private party alleges that a governmental regulation so impedes that party's ability to use private property that it has, in effect, "taken" the property away. An 1887 case boldly stated "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[30] In 1922, a second famous case, *Pennsylvania Coal Company v. Mahon*,[31] changed the landscape without overruling *Mugler*. In it, Justice Holmes declared: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[32] Although still an *ad hoc* factual matter, the test later more openly balanced several factors in the "too far" equation when income-producing property was at issue: 1) the character of the government action; 2) the economic impact of the regulation on the claimant; and 3) the interference, if any, with investment-backed expectations.[33]

In 1992, the Supreme Court decided a case that purported to give some additional guidance.[34] In *Lucas*, the Court stated that any regulation that fell into the following categories would be a taking: 1) if it created a permanent physical intrusion on real property; or 2) if it denied all economical use of property.[35] The second category of automatic takings would not apply if the limitation "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[36] If the law simply duplicated a restriction on private property development, such as nuisance law or the public trust doctrine, it would not be a taking. Several questions, however, remained. For example, it is not clear how to define the "property" impacted by the regulation, a necessary predicate to ascertaining if the regulation denied "all" economically viable use. Nor is it clear what restrictions, other than the common law restriction on nuisances, provide the background principles of law tempering the "right" of private landowners to do as they might please. The Supreme Court had the opportunity to explicate the contours of the second category of automatic taking this term.

The Supreme Court therefore considered three of the main building blocks of the administration state in these cases. The results could have redefined environmental law as well as other regulatory regimes.

30. *Mugler v. Kan.*, 123 U.S. 623, 668-69 (1887).
31. 260 U.S. 393 (1922).
32. *Id.* at 415.
33. *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).
34. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).
35. *Id.* at 1015.
36. *Id.* at 1029.

III. COMMERCE CLAUSE AND STATUTORY INTERPRETATION: *SOLID WASTE*

The federal government is not the repository of a general police power. Therefore, Congress needs an enumerated power to legislate. Generally, the Commerce Clause is invoked to justify environmental legislation.[37] The Clean Water Act ("CWA")[38] is one such law. In *Solid Waste Agency of Northern Cook County v. United States Army Corps. of Engineers*,[39] ["Solid Waste"], the Supreme Court was asked to consider whether a rule the Corps of Engineers promulgated under the CWA went beyond what the Commerce Clause authorizes. The Supreme Court, however, finessed the issue: it invalidated the regulation as not being within Congress's statutory grant of authority to the Corps. Five members of the Court joined the decision, with four Justices dissenting.

A. *Background of the Case*

1. Regulatory and Factual Milieu

In 1972, Congress significantly revamped the CWA. One provision, Section 404(a),[40] gives the Corps of Engineers the authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[41] The purpose of this provision, as well as the entire Act, was to create a comprehensive response to problems of water pollution.[42] The reach of the regulatory program is connected to the scope of the words "navigable waters."[43] Congress included a definition of this crucial phrase in the CWA; "navigable waters" are "the waters of the United States, including the territorial seas."[44] The Solid Waste Agency of Northern Cook County ("SWANCC") ran into the regulatory arena of the Corps when it sought to develop a site as a landfill.

The SWANCC is a governmental corporation comprised of a consortium of municipalities seeking a landfill site. The SWANCC acquired a 533-acre parcel on which to place a "balefill" trash repository.[45] The Supreme Court described the area in a perfunctory manner as "an abandoned sand and gravel pit in northern Illinois which provides habitat for

37. Some legislation may be authorized by other provisions, such as the Property Clause (U.S. Const. art. IV, § 3, cl. 2) or the Spending power (U.S.Const. art. I, § 8, cl. 1).

38. 33 U.S.C. §§ 1251-1387 (1994).

39. 531 U.S. 159 (2001).

40. 33 U.S.C. § 1344(a) (1994).

41. *Id.*

42. The CWA's avowed purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1994).

43. Naturally, questions about reach of the CWA and the definition of "navigable waters" are not isolated to the dredge and fill permit program. The basic requirement to have a permit before the discharge of a pollutant is predicated on the discharge being into navigable waters. 33 U.S.C. § 1344 (1994).

44. 33 U.S.C. § 1362(7) (1994).

45. A balefill landfill has the trash formed into bales before it is deposited.

migratory birds."[46] Given this decidedly non-rhapsodic description, one might discount any "natural" delights in the area. The words of the Seventh Circuit Court of Appeals, however, evoke a seemingly different locale:

> Approximately 298 acres of the proposed balefill site [which is 410 acres] is what is known as an early successional stage forest. At one time, it was a strip mine, but when the mining operation shut down approximately fifty years ago, a labyrinth of trenches and other depressions remained behind. Over time, the land evolved into an attractive woodland vegetated by approximately 170 different species of plants. What were once gravel pits are now over 200 permanent and seasonal ponds. These ponds range from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth. The forest is also home to a variety of small animals. Most important for our purposes are the 100-plus species of birds that have been observed there. These include many endangered, water-dependent, and migratory birds. Among the species that have been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp swallows, redwinged blackbirds, tree swallows, and several varieties of herons. Most notably, the site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993.[47]

Before the "balefill" could open on this land, however, approximately 17.6 acres of ponds and small lakes had to be filled in. The SWANCC therefore contacted the Corps of Engineers, both about its originally owned land and a second time about additional acreage it had purchased.

The first two times, the Corps of Engineers responded that it did not have jurisdiction over the area. Each time, the Corps based its decision on the fact that there were no "wetlands or lakes" as defined in its regulations.[48] On July 8, 1987, there was a third request that the Corps examine its jurisdiction. The Illinois Nature Preserves Commission, a state agency, wrote to the Corps detailing use of the property by four different migratory species.[49] This necessitated a reassessment of whether SWANCC would need a permit for its fill. The Corps concluded that it did, employing a dif-

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46. *Solid Waste*, 531 U.S. at 162. Chief Justice Rehnquist also gave a more lengthy description: "Long since abandoned, the old mining site eventually gave way to a successional stage forest, with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet)." *Id.* at 163.

47. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engrs.*, 191 F.3d 845, 848 (7th Cir. 1999), *rev'd*, 531 U.S. 159 (2001).

48. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engrs.*, 998 F. Supp. 946, 948 (N.D. Ill. 1998), *aff'd*, 191 F.3d 845, 848 (7th Cir. 1999), *rev'd*, 531 U.S. 159 (2001). Wetlands are lands "that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b) (2001).

49. *Solid Waste*, 998 F. Supp. at 948-49.

ferent analysis of jurisdiction. The prior examinations centered on whether or not the area was a "wetland," one potential source of jurisdiction. The Corps now concentrated on another aspect of its definition of "waters of the United States."

In 1977, the Corps finalized regulations defining the term "waters of the United States" to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ."[50] Naturally, this regulation itself was not crystal-clear, especially in determining what "could affect interstate or foreign commerce." In a preamble to re-codification of the regulation, the Corps provided some guidance, declaring that its jurisdiction would extend to intrastate waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species; or
>
> d. Used to irrigate crops sold in interstate commerce.[51]

This last guidance is colloquially referred to as the "Migratory Bird Rule."[52] As a result of its consideration of the evidence, the Corps then required the SWANCC to apply for a Section 404 permit. The two applications it submitted for approval were denied.[53]

2. Lower Court Dispositions

In the District Court suit that followed, the SWANCC attacked the denial of the permit both in the particular and the abstract. The particular argument was that the denial was arbitrary and capricious. District Judge Lindberg, however, disagreed, finding that the evidence was sufficient in the administrative record, which included two environmental impact reports. The crucial determination was that the land was suitable habitat for

50. 33 C.F.R. § 328.3(a)(3) (2001).

51. 51 Fed. Reg. 41217 (Nov. 13, 1986).

52. The Corps considered the rule to be an interpretive rule, which simply gave examples of what might be "intrastate water" that could affect interstate or foreign commerce. Therefore, it was not promulgated with notice-and-comment. The District Court concurred with this analysis. *Solid Waste*, 998 F. Supp. at 955-57. The Seventh Circuit concurred. *Solid Waste*, 191 F.3d at 852. This issue was not included in the grant of *certiorari*. The Fourth Circuit had held the opposite and found that the Corps had not properly promulgated the rule. *Tabb Lakes, Ltd v. U.S.*, 715 F. Supp. 726, 728-29 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (*per curiam*).

53. *Solid Waste*, 998 F. Supp. at 949.

migratory birds.[54] The more general or abstract arguments were that the Migratory Bird Rule should not be applied because it was 1) beyond the scope of the authority authorized by the CWA, 2) even if so authorized, beyond the scope of the Commerce Clause, and 3) invalid for not having been promulgated with notice and comment as the Administrative Procedure Act[55] requires. The District Court opinion rejected all the arguments.[56]

In an opinion by Judge Wood, a unanimous panel of the Seventh Circuit affirmed. The opinion first considered whether the Commerce Clause was sufficiently broad to confer jurisdiction on intrastate waters based on the presence of migratory birds. The court quickly assessed the pre-*Lopez* jurisprudence as allowing such an assertion of jurisdiction.[57] It then noted that *Lopez* repeated the premise that Commerce Clause jurisdiction extended to three areas: "(1) regulation of the channels of interstate commerce; (2) regulation or protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce; or (3) regulation of activities that 'substantially affect' interstate commerce."[58] The *Lopez* case invalidated a federal statute that made it a crime to possess a gun in a school zone.[59] This Act, according to the Supreme Court, could only in theory be justified under the third category of Commerce Clause power.[60] If valid, the Migratory Bird Rule would have to take this same avenue.

The Seventh Circuit concluded that the Migratory Bird Rule could navigate this road successfully. Unlike the Gun Free School Zone Act, the Migratory Bird Rule could rely on aggregating the affect on interstate commerce of the numerous intrastate waters that could support migratory birds. As the court stated, "The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires."[61] Migratory birds generated huge expenditures by those who de-

54. *Id.* at 953. The Corps could examine the whole area, not just the 17.6 acres of water. *Id.* at 953. The factual conclusion was not appealed.

55. *See* 5 U.S.C. § 553 (1994).

56. The court first considered the Commerce Clause issue. Precedent finding the Migratory Bird rule constitutional existed. *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993). The judge did not consider the answer modified by the holding of *U.S. v. Lopez*, 514 U.S. 549 (1995), which emphasized that activity regulated under the Commerce Clause must have a substantial affect on interstate commerce. *See Solid Waste*, 998 F. Supp. at 949-52. On the issue of statutory interpretation, the judge concluded that the CWA was intended to reach all waters reachable under the Commerce Clause. *Id.* at 954-55.

57. *Solid Waste*, 191 F.3d at 849 (citing *Rueth v. EPA*, 13 F.3d 227, 231 (7th Cir. 1993); *Leslie Salt Co. v. U.S.*, 896 F.2d 354, 360 (9th Cir. 1990)).

58. *Id.* (citing *Lopez*, 514 U.S. at 558-59).

59. Gun Free School Zone Act of 1990 (18 U.S.C. § 922(q)(2) (1994)).

60. The statute had difficulties crossing the "substantially affects interstate commerce" threshold for three reasons. First, it was a criminal statue and therefore was not directly related to commercial activity. Second, the statute did not require any firearm in question to have affected interstate commerce. Third, the Court believed that Congress offered no legislative findings sufficient to show that possessing a gun in a school zone affected interstate commerce. *Lopez*, 514 U.S. at 559-62.

61. *Solid Waste*, 191 F.3d. at 850.

sire to hunt, photograph or simply observe them. Many persons travel across state lines to indulge in these pastimes.[62] The Court also nimbly rejected the "boogeyman" argument about allowing jurisdiction over intrastate waters under the rule: it would not allow the Corps to regulate every puddle into which a migratory bird inserted a foot. The wording of the Migratory Bird Rule refers to waters "which are or would be used as habitat" for such birds:[63]

> A habitat is not simply a place where a bird might alight for a few minutes, as SWANCC suggests, but rather 'the place where a plant or animal species naturally lives or grows.' Before the Corps may assert jurisdiction under the migratory bird rule, it must first make a factual determination that a particular body of water provides a habitat for migratory birds, which it has done here.[64]

A jurisdictional threshold will have to be crossed in each factual situation. Moreover, the court concluded that the regulation of waters that could adversely impact on such habitat was not a "local" concern. The court concentrated not on land use regulation, but on the fact that migratory birds are of national and international importance, as numerous treaties on the topic evidence.[65] Therefore, regulation of the intrastate waters pursuant to the Migratory Bird Rule did not provide any of the offense found in *Lopez*. The court concluded without discussion that "[e]ven less persuasive [than the argument that migratory birds are 'local' concerns] is SWANCC's suggestion that giving a federal agency (here, the Corps) the power to override decisions by local land use and zoning boards to permit the filling of local waters conflicts with notions of state sovereignty."[66]

Additionally, the court addressed the issue of whether the CWA authorized the Migratory Bird Rule. To do so, the court employed the so-called *Chevron* test, which requires a two-part analysis.[67] The first is to ascertain if Congress was clear on the point. If it was, the inquiry ends. If Congress, however, provided ambiguity or was silent, the reviewing court should defer to the agency with expertise, so long as the agency interpretation is found to be reasonable. The particular interpretation challenged

62. The statistics the court cited included that "approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds in 1996, and that about 11 percent of them traveled across state lines to do so. Fish & Wildlife Service et al., *1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* 25 (U.S. Govt. 1997). Another 17.7 million people spent time observing birds in states other than their states of residence; 14.3 million of these took trips specifically for this purpose; and approximately 9.5 million traveled for the purpose of observing shorebirds, such as herons. *Id.* at 45; *Solid Waste*, 191 F.3d at 850. It also noted its own prior consideration of the issue, *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993).

63. 51 Fed. Reg. 41217 (Nov. 13, 1986).

64. *Solid Waste*, 191 F.3d. at 850.

65. *Id.* at 850-51.

66. *Id.* at 851.

67. *See Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

was not the general regulation asserting jurisdiction over intrastate waters that "could affect interstate or foreign commerce," but a particular application of it, namely, jurisdiction based on the presence of migratory birds.[68] This precision allowed the court to easily distinguish a contrary holding in *United States v. Wilson*.[69] The Seventh Circuit characterized its sister court's opinion as concerned with jurisdiction based on activity that "could" impact on interstate commerce.[70] By contrast, the *Solid Waste* situation was different: "[T]he unchallenged facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat. Thus, we need not, and do not, reach the question of the Corps' jurisdiction over areas that are only potential habitats."[71]

Because of its earlier analysis of the constitutional issue, the Seventh Circuit, therefore, found little difficulty in aligning itself with courts that had previously concluded that the scope of CWA jurisdiction is commensurate with the scope of jurisdiction granted by the Commerce Power.[72] The Migratory Bird Rule was thus upheld. In so doing, the court rejected an argument that the rule was unreasonable because its focus was wildlife preservation, not water quality: "This point overlooks the fact that the Act's stated purpose is 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[73]

The SWANCC then sought a writ of *certiorari* from the Supreme Court.

B. The Supreme Court and the Commerce Clause

1. The Majority's Non-Decision

The Supreme Court granted *certiorari*.[74] The resulting decision resulted in two opposing opinions, with a familiar five to four split. Chief Justice Rehnquist authored the majority opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justice Stevens filed a dissenting opinion, which was joined by Justices Souter, Ginsburg, and Breyer. The majority opinion purported to not broach the constitutional issue because it decided the CWA did not authorize the Migratory Bird Rule.[75] Nevertheless, the opinion did provide some hint of its author's predilection. The dissenting opinion directly confronted the issue and

68. *Solid Waste*, 191 F.3d at 851-52.
69. 133 F.3d 251 (4th Cir. 1997).
70. *Solid Waste*, 191 F.3d at 851-52.
71. *Id.* at 852.
72. *Solid Waste*, 191 F.3d at 851 (citing *Rueth*, 13 F.3d at 231; *U.S. v. Huebner*, 752 F.2d 1235, 1239 (7th Cir. 1985); *U.S. v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979)).
73. *Id.* at 852 (citing 33 U.S.C. § 1251(a) (1994)).
74. 529 U.S. 1129 (2000).
75. *Solid Waste*, 531 U.S. at 162.

agreed with the Seventh Circuit.[76]

Chief Justice Rehnquist, however, did not squarely reverse the Seventh Circuit, but he did echo his frequent concerns about federalism. He justifies his conclusion that the agency is not due *Chevron* deference because its interpretation had "invoke[d] the outer limits of Congress' power,"[77] a situation which required Congress to be very clear that it intended to so stretch its authority[78] In this situation, a court does not determine whether a regulation under a statute violates constitutional norms, but delineates the reasons why the regulation raises constitutional concerns and attempts to interpret the statutue to eliminate these questions. The use of the canon provides hints as to what circumstances engender Commerce Clause difficulties for those joining the majority decision.

First, Chief Justice Rehnquist notes that to engage in a commerce clause analysis, the court would have to determine what "object or activity that, in the aggregate, substantially affects interstate commerce."[79] Although he cites to the evidence detailing the money those interested in migratory birds spent in interstate commerce, according to Chief Justice Rehnquist, the alleged jurisdictional "hook" might not be the migratory birds' use of waters because the government's brief refers to the commercial nature of the landfill.[80] To the Justice, "this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."[81]

Nevertheless, Chief Justice Rehnquist' largest problem might not be distinguishing what is being regulated and thus purportedly could substantially affect interstate commerce. The crux of his concern is that he identifies the Corps'decisions as being land use regulation, not wildlife protection or environmental regulation. This characterization immediately acts as a red flag: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule would result in a significant impingement of the States' traditional and primary power over land and water use."[82] Chief Justice Rehnquist declares that, in enacting the CWA, Congress sought to act in the opposite manner. Pointing to other sections of the CWA, he found Congress carefully preserves the federal-state balance.[83] To Chief Justice Rehnquist, these constitutional and

76. *Id.* at 192-97 (Stevens, J., dissenting).
77. *Id.* at 172.
78. This interpretive mode employs the "avoidance canon." *See* Sunstein, *infra* n. 215, at 330.
79. *Solid Waste*, 531 U.S. at 173.
80. *Id.*
81. *Id.*
82. *Id.* at 174.
83. *Id.* ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water re-

federalism issues negated any maxim that would have required the Court to defer to the agency rule. The canon of avoidance of constitutional questions trumped *Chevron*.

2. The Dissent's Defense of Commerce Clause Jurisdiction

The dissent disagreed not only on whether the CWA authorized the Migratory Bird Rule, but also on whether the Rule seriously challenged the boundaries of the Commerce Clause. First, Justice Stevens had no difficulty in identifying the activity that was jurisdictional: discharging fill in to waters that serve as migratory bird habitat.[84] As he notes, the waters or land itself were not being regulated; only if fill was to be added to the waters would the Corps intrude. Discharging fill into such habit would definitely have an aggregate affect on migratory bird populations. In addition to the intrinsic value of migratory birds, Justice Stevens noted that "it is undisputed that literally millions of people regularly participate in bird-watching and hunting and that those activities generate a host of commercial activities of great value."[85] Therefore, there was a direct, as opposed to attenuated, relationship between the activity being regulated and the substantial effect on interstate commerce; filled-in habit would quickly lead to the demise of commercial activities dependent on migratory birds.[86]

Similarly, there was no doubt on Justice Stevens's part that the regulated activity was of national, not local concern. Citing Justice Holmes, the dissenting opinion finds protection of migratory birds is a classic national problem.[87] The cost of filling in habitat will often fall not on the state in which the habitat is lost, but in other areas that will no longer be able to benefit from stable migratory bird populations. Therefore, interstate externalities exist and states might enter into a "race to the bottom" in order to foster local growth at the expense of the environment elsewhere. The "cost," namely having fewer migratory birds, is dispersed. To Justice Stevens, only at the national level could migratory birds, which are transitory in nature, ever be truly protected. Protecting migratory bird habitat from fill was an exercise of core Commerce Clause power, not at the fringe of power: "The power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce."[88] Whether or not the Corps should allow the particular waters to be filled was not at issue. Congress, however, clearly had the authority to require a permit before activities began that

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sources . . . . 33 U.S.C. § 1251(b).").

84. *Id.* at 193 (Stevens, J., dissenting).

85. *Solid Waste*, 521 U.S. at 194-95 (Stevens, J., dissenting).

86. *Id.*

87. *Id.* at 195 (Stevens, J., dissenting) (citing *Mo. v. Holland*, 252 U.S. 382, 435 (1920), "It is not sufficient to rely upon the States [to protect migratory birds]. The reliance is vain . . . .").

88. *Id.* at 196 (Stevens, J., dissenting).

could affect environmental quality across state lines.

Justice Stevens also countered Chief Justice Rehnquist's assertion that the Migratory Bird Rule would encroach on "traditional state power."[89] He re-iterated the distinction laid down in *California Coastal Commision v. Granite Rock Company*,[90] namely that "[l]and use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."[91] According to Justice Stevens, the CWA was a "paradigm" environmental protection statute and well within the Commerce Clause.[92] He also saw an irony in finding federalism concerns in a statutory regime that had provided for state permitting if the state chose to issue section 404 permits for these types of waters.[93] Illinois had not taken advantage of the opportunity.[94] The "federalism" specter, therefore, should not have been invoked to take away *Chevron* deference.

The majority and dissenting opinions display very different Rorschach test reactions. The same image provokes divergent world-view responses. Even without Chief Justice Rehnquist fully developing his Commerce Clause argument, this is apparent.

C. *Supreme Court and Statutory Interpretation*

1. The Majority Narrows the CWA

The dissent and the majority opinions both fully develop their arguments in respect to statutory interpretation. Again, the disagreements are distinct. In fact, the two opinions appear to be describing different statutes, different cases, and different legislative activities. The majority found that a "clear" Congressional pronouncement negated the Migratory Bird Rule.[95] The dissenters, meanwhile, found it appropriate to defer to the long-standing administrative interpretation.

Chief Justice Rehnquist wrote for the majority. His opinion is, to a certain extent, terse. In the first substantive paragraph, what he emphasizes about the purposes of the Clean Water Act signals his result. Naturally, he notes the environmental purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[96]

89. *Id.* at 191 (Stevens, J., dissenting).
90. 480 U.S. 572 (1987).
91. *Solid Waste*, 531 U.S. at 191 (Stevens, J., dissenting) (citing *Cal. Coastal Commn. v. Granite Rock Co.*, 480 U.S. at 587 (1987)).
92. *Id.* (citing *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 282 (1981)).
93. Section 404(g) of the CWA authorizes state regulatory programs.
94. *Solid Waste*, 531 U.S. at 192 (Stevens, J., dissenting).
95. *Id.* at 172.
96. *Id.* (citing 33 U.S.C. § 1251(a) (1994)).

Immediately after this, however, he subtly raises his federalism concerns by next quoting provision in which Congress declares that the CWA is to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."[97] Ultimately, these federalism concerns will drive his statutory construction.

The statutory question is whether the Corps had jurisdiction over "ponds that are not adjacent to open water"[98] under § 401 of the CWA. The response entails construing the meaning of the term "navigable waters," which is defined in the CWA as "the waters of the United States, including the territorial seas."[99] The Supreme Court had previously looked at this statute in *United States v. Riverside Bayview Homes, Inc.*[100] The unanimous Court in *Riverside Bayview Homes* upheld the Corps in its assertion of jurisdiction over wetlands adjacent to waters that were in fact navigable. Chief Justice Rehnquist confines the case to its facts, noting that the case itself "did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . .'"[101] He further explicated the earlier ruling.

According to Chief Justice Rehnquist, two concerns motivated the *Riverside Bayview Homes* Court. First, Congress displayed an "unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters."[102] Second, there was a "nexus" between the navigable waters and the wetlands so that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the 'waters' of the United States."[103] Hence, Chief Justice Rehnquist acknowledged that the prior case held that "the term 'navigable' is of 'limited import' and that Congress evidenced its intent to 'regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term,'"[104] but Chief Justice Rehnquist looked for the meaning of Congress as to these particular waters when Congress initially

97. *Id.* (citing 33 U.S.C. § 1251(b) (1994)).
98. *Id.* at 167.
99. 33 U.S.C. § 1362(7) (1994). The Corps has authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Section 404(a) of the CWA, 33 U.S.C. § 1344(a) (1994).
100. 474 U.S. 121 (1985).
101. *Solid Waste*, 531 U.S. at 167 (quoting *Riverside Bayview Homes*, 474 U.S. at 131-32 n. 8). As Justice Stevens correctly points out, the current case does not involve wetlands, but so-called "isolated waters," waters not directly connected to any navigable system. *Id.* at 191-94 (Stevens, J., dissenting).
102. *Id.* at 167 (citing *Riverside Bayview Homes*, 474 U.S. at 135-39).
103. *Id.* (quoting *Riverside Bayview Homes*, 474 U.S. at 134).
104. *Id.* (quoting *Riverside Bayview Homes*, 474 U.S. at 133).

passed the CWA in 1972 and when it reconsidered the issue in 1977.

The Court quickly disposed of the suggestion that Congress could have meant the term to have an expansive meaning, which could include waters that impact on interstate commerce because they are migratory bird habitat. The opinion simply cites the initial Corps interpretation:

> Its 1974 regulations defined § 404(a)'s "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR § 209.120(d)(1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." § 209.260(e)(1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.[105]

The initial agency interpretation is authoritative to Chief Justice Rehnquist. In a footnote, he dismisses the legislative history as being inconclusive, soft-pedaling the oft-cited Senate Conference Report comment that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation."[106]

Chief Justice Rehnquist then turned to subsequent legislative history. In 1977, the Corps had finalized its revised regulations, asserting jurisdiction over "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."[107] This regulatory interpretation sparked legislative attempts to overturn it.[108] Although acknowledging that occasionally subsequent legislative inactivity can aid in interpreting what the initial legislation meant, he cautions that such activity might not be enlightening: "A bill can be proposed for any number of reasons, and it can be rejected for just as many others. The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing § 404(a) is also considerably attenuated."[109] Chief Justice Rehnquist, therefore, did not conclude that the failure of Congress to over-rule this part of the Corps regulations meant acquiescence in it.[110] Chief Justice Rehnquist emphasized that the hearings in Congress centered on whether or not *wetlands* could be regulated, not

105. *Id.* at 168.
106. *Id.* at 168 n. 3 (quoting S. Con. Rpt. No. 92-1236, 144 (1972) (reprinted in 1972 U.S.C.C.A.N. 3668, 3822)).
107. *Solid Waste*, 521 U.S. at 168-69 (quoting 33 C.F.R. § 323.2(a)(5) (1978).
108. Failed House bill, H.R. 3199, would have defined "navigable waters" as "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. 123 Cong. Rec. 10420, 10434 (1977)." *Id.* at 169.
109. *Id.* at 170.
110. *Id.* at 171.

whether or not so-called "isolated" waters could be subject to the permitting requirement.[111] Although there was some awareness of the latter question,[112] Chief Justice Rehnquist emphasized "the same report reiterated that 'the committee amendment does not redefine navigable waters.'"[113]

Chief Justice Rehnquist similarly found no guidance in how to define "navigable waters" from the fact that Congress did pass an amendment to section 404 in 1977. The Amendment included a new section, section 404(g), which authorized the States to administer their own permit programs over certain "other" nonnavigable waters.[114] Chief Justice Rehnquist noted:

> In *Riverside Bayview Homes* we recognized that Congress intended the phrase "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." But § 404(g) gives no intimation of what those waters might be; it simply refers to them as "other . . . waters." Respondents conjecture that "other . . . waters" must incorporate the Corps' 1977 regulations, but it is also plausible, as petitioner contends, that Congress simply wanted to include all waters adjacent to "navigable waters," such as nonnavigable tributaries and streams.[115]

The Court, therefore, refused to move the CWA definition of "navigable waters" as far as requested.

In fact, the majority opinion kept the definition close to the traditional definition of navigable waters, that is, "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."[116] Chief Justice Rehnquist concluded:

> We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes*

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111. *Id.* at 170.

112. *See id.* at 170 n. 6 (citing S. Rpt. 95-370, 75 (1977) (reprinted in 1977 U.S.C.C.A.N. 4326, 4400)).

113. *Id.*

114. Section 404(g)(1) provides, in relevant part:

> The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . ., including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

33 U.S.C. § 1344(g)(1) (1994). *Id.* at 188 (Stevens, J., dissenting).

115. *Solid Waste*, 531 U.S. at 171 (citing *Riverside Bayview Homes*, 474 U.S. at 133).

116. *Id.* at 188 (Stevens, J., dissenting). This is the definition of waters over which states could *not* assume jurisdiction, which is found in the parenthetical in section 404(g). *See supra* n. 114.

> that the word "navigable" in the statute was of "limited effect" and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[117]

Therefore, the definition of navigable waters as "waters of the United States" apparently only goes as far as traditional navigable waters, tributary waters, and wetlands adjacent to either type of water.[118]

To Chief Justice Rehnquist, the meaning of the Corps jurisdictional grant in 404(a) was clear.[119] Under the Supreme Court's *Chevron* doctrine of administrative review, the analysis ends. Therefore, no deference to agency interpretation would be due.[120] Chief Justice Rehnquist, however, also notes that even if the statute were not clear, *Chevron* deference would not be appropriate because the agency interpretation was pushing at the boundaries of Congress' constitutional power.[121] The Corps interpretation was thus rejected as not only being contrary to the plain meaning of the statute, but also because it would raise constitutional questions. The Supreme Court only directly held as follows: "33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' exceeds the authority granted to respondents under § 404(a) of the CWA."[122] The dissent would disagree.

2. The Dissent Retains Broad CWA Jurisdiction

The disagreement in Justice Stevens' dissent is on a foundational level, and obvious from the first note he struck. In contrast to Chief Justice Rehnquist's early invocation of federalism concerns, Justice Stevens' first words resound with the environmental issue: "In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire."[123] Justice Stevens reads the CWA as a comprehensive response to a comprehensive problem. Therefore, he disagrees with the narrow jurisdictional scope the majority embraced.

The dissent introduces two main points immediately, namely that a prior statute had a narrower jurisdiction than the CWA and that the earlier Supreme Court case of *Riverside Bayview Homes* endorsed a broader interpretation of the CWA than the majority acknowledged. Under § 13 of

117. *Id.* at 172.
118. *Id.* at 168 n. 3.
119. *Id.* 172. *See* the reference to the plain text and import of section 404(a). *Id.* at 170.
120. *Id.* at 172.
121. *Solid Waste*, 531 U.S. at 172-73.
122. *Id.* at 174.
123. *Id.* (Stevens, J., dissenting).

the Rivers and Harbors Appropriation Act of 1899("RHA"),[124] the scope of the Corps concern was navigation in interstate or foreign commerce, but the enlarged environmental role foreseen in the CWA necessitated the definition of "navigable waters" to become "waters of the United States, including the territorial seas."[125] To Stevens, "[t]hat definition requires neither actual nor potential navigability."[126] Moreover, Justice Stevens emphasized that the actual wetland at issue in *Riverside Bayview Homes* was "not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but which was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek."[127] With this introduction, Justice Stevens then musters his arguments.

First, the dissenting opinion details what he sees as being an important backdrop for the Amendments; that is, the history of federal interest in regulating water. Water regulation in the United States began with a strong emphasis on protecting navigation. By 1899, Congress passed the RHA,[128] described by Justice Stevens as follows: "Section 13 of the 1899 RHA, commonly known as the Refuse Act, prohibited the discharge of 'refuse' into any 'navigable water' or its tributaries, as well as the deposit of 'refuse' on the bank of a navigable water 'whereby navigation shall or may be impeded or obstructed' without first obtaining a permit from the Secretary of the Army."[129] When interest in preventing environmental degradation grew this statute became a tool to prevent industrial pollution, with some success,[130] until a district court invalidated a general pollution control permit system based on Section 13.[131] Justice Stevens also notes a parallel development of the Federal Water Pollution Control Act ("FWPCA") from 1948 until the 1972 Amendments.[132] Of interest for jurisdiction, the FWPCA had two different jurisdictional hooks before 1972. First, it referred only to "interstate waters." Congress then harmonized it with the RHA and it encompassed "navigable waters."[133] To Justice Stevens, it was important that none of the acts before 1972 were deemed "comprehen-

124. 33 U.S.C. § 407 (1994).
125. 33 U.S.C. § 1362(7) (1994).
126. *Solid Waste*, 531 U.S. at 175 (Stevens, J., dissenting).
127. *Id.* at 176 (Stevens, J., dissenting). The disagreement on the meaning of *Riverside Bayview Homes* goes even to how the two justices refer to the case: Chief Justice Rehnquist uses the *Riverside Bayview Homes* appellation, while Justice Stevens employs the shorthand *Riverside Bayview*.
128. 31 Stat. 1152 (1899), as amended, 33 U.S.C. § 407 (1994). Justice Stevens also references *The Rivers and Harbors Appropriations Act of 1896*, 29 Stat. 234; *River and Harbor Act of 1894*, 28 Stat. 363; *River and Harbor Appropriations Act of 1890*, 26 Stat. 426; and *The River and Harbor Appropriations Act of 1886*, 24 Stat. 329. *See Solid Waste*, 531 U.S. at 177 n. 3 (Stevens, J., dissenting).
129. *Solid Waste*, 531 U.S. at 177 (Stevens, J., dissenting).
130. *Id.* at 178 (Stevens, J., dissenting) (citing *U.S. v. Rep. Steel Corp., 362 U.S.*, 482, 490-91 (1960)).
131. *Id.* at 178 n. 4 (citing *Kalur v. Resor*, 335 F. Supp. 1, 9 (D.C. 1971)).
132. *Id.* at 179. The 1972 Amendments initiated the "Clean Water Act" appellation.
133. *See id.* at 178 n. 5 (Stevens, J., dissenting).

sive."[134]

However, the 1972 Amendments, which ushered in the Clean Water Act ("CWA") appellation, were creating a "comprehensive" program. Justice Stevens details the numerous references to the CWA being "comprehensive," including that of Chief Justice Rehnquist in *Milwaukee v. Illinois*.[135] The divergent goals of the CWA and the RHA underscore the "comprehensive" nature of the CWA:

> Section 404 of the CWA resembles § 13 of the RHA, but, unlike the earlier statute, the primary purpose of which is the maintenance of navigability, § 404 was principally intended as a pollution control measure. A comparison of the contents of the RHA and the 1972 Act vividly illustrates the fundamental difference between the purposes of the two provisions.[136]

The RHA is replete with funding for navigational projects, while the CWA provided funding for research on pollution and its prevention.[137] The result of the changed mandate was clear to Justice Stevens: "Because of the statute's ambitious and comprehensive goals, it was, of course, necessary to expand its jurisdictional scope."[138] Justice Stevens then examines the legislative history of the CWA in regard to this issue.

Through examination of the course of the Act through the House, Senate, and Conference, Justice Stevens concludes that the narrow definition of the majority opinion was neither the intended, nor clear, meaning of the statute. The CWA amendments began with the old term "navigable waters," which had been used previously, but added a definition. "Navigable waters" would mean "the waters of the United States, including the territorial seas."[139] The failure to include "navigable" in the definition was meaningful: "Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the word 'navigable' from the definition that had originally appeared in the House version of the Act. The majority today undoes that deletion."[140] The dissent cautions that it is the statutory definition that takes precedent in interpreting a statute, not any other definition that might exist.[141]

Justice Stevens bolsters his reading of what the removal of the word "navigable" meant by reference to the Conference Report, which stated that the definition in the CWA was intended to "be given the broadest possible

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134. *Id.*
135. 451 U.S. 304 (1981).
136. *Id.*
137. *Id.* at 179-80 (Stevens, J., dissenting) ("Strikingly absent from its [the CWA's] declaration of 'goals and policy' is any reference to avoiding or removing obstructions to navigation. Instead, the principal objective of the Act, as stated by Congress in § 101, was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(1994).").
138. *Id.* at 180 (Stevens, J., dissenting).
139. 33 U.S.C. § 1362(7) (1994).
140. *Id.* at 180-81 (Stevens, J., dissenting).
141. *Id.* at 182 (Stevens, J., dissenting) (citing *Babbitt v. Sweet Home Chapter of Communities for Great Or.*, 515 U.S. 687, 697-98 n. 10 (1995)).

constitutional interpretation."[142] To Justice Stevens, if all that was intended was to assert authority over navigation, this comment and the definition would have been meaningless; Congress's jurisdiction over such matters was clear.[143] Moreover, to so limit jurisdiction would run counter to the purpose of the CWA:

> As we recognized in *Riverside Bayview*, the interests served by the statute embrace the protection of "'significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites'" for various species of aquatic wildlife. For wetlands and "isolated" inland lakes, that interest is equally powerful, regardless of the proximity of the swamp or the water to a navigable stream.[144]

Justice Stevens concluded the following about the 1972 legislation: "Viewed in light of the history of federal water regulation, the broad § 502(7) definition, and Congress' unambiguous instructions in the Conference Report, it is clear that the term 'navigable waters' operates in the statute as a shorthand for 'waters over which federal authority may properly be asserted.'"[145] In addition to the initial 1972 statute, there have also been administrative interpretations and Congressional responses that Justice Stevens marshals to support his interpretation.

On the administrative side, the Corps of Engineers initially promulgated regulations that would have limited its jurisdiction under the CWA to the same jurisdiction it had under the RHA. Contrary to the majority's assertion that there were no indications that the Corps was incorrect in these 1974 regulations,[146] Justice Stevens consumes an entire page of his opinion with footnotes citing court, EPA, and Congressional protests of the Corps' interpretation.[147] Moreover, the Corps then changed its opinion. By 1975, it concluded that the CWA mandated protection of waters to the extent of the Commerce Clause jurisdiction.[148] Justice Stevens appears frustrated that the majority so emphasizes the initial reaction of the Corps and fails to respond to the position held since 1975.[149] Justice Stevens also

142. *Id.* at 181 (Stevens, J., dissenting) (quoting S. Con. Rpt. 92-1236, 144 (1972) (reprinted in 1972 U.S.C.C.A.N. 3668, 3822)).

143. *Id.* at 181 (Stevens, J., dissenting) ("The majority's reading drains all meaning from the conference amendment.").

144. *Id.* at 181-82 (citation omitted) (Stevens, J., dissenting).

145. *Id.* at 182 (Stevens, J., dissenting) ("[n]othing in the text, the stated purposes, or the legislative history of the CWA supports the conclusion that in 1972 Congress contemplated–much less commanded–the odd jurisdictional line that the Court has drawn today. The majority accuses respondents of reading the term "navigable" out of the statute. But that was accomplished by Congress when it deleted the word from the § 502(7) definition.").

146. *Id.* at 168. ("Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.").

147. *Id.* at 183 nn. 9-11. (Stevens, J., dissenting).

148. 40 Fed. Reg. 31320 (July 25, 1975).

149. *Solid Waste*, 531 U.S. at 183 n. 8 (Stevens, J., dissenting). He also noted that the jurisdiction the majority adopted was broader than that acknowledged in the 1974 regulations because it includes jurisdiction over nonnavigable tributaries and adjacent wetlands.

judges the Congressional response in 1977 to the Corps finalized regulations[150] differently than the majority.

Justice Stevens concludes that the actions of Congress in 1977 evidenced approval of the Corps' assertion of broad jurisdiction. Because the jurisdiction the Corps claimed disturbed some members of Congress, bills were introduced to pare back the scope of the CWA to traditional "navigable" waters, that is, waters that are used, or by reasonable improvement could be used, as a means of transport in interstate or foreign commerce and wetlands adjacent to such waters.[151] Only the House of Representatives passed such a bill. The issue was, however, extensively debated. After recounting the *Riverside Bayview Homes* review of the debates, Justice Stevens concludes:

> The net result of that extensive debate was a congressional endorsement of the position that the Corps maintains today. We explained in *Riverside Bayview*: 'The scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.' Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' s attention through legislation specifically designed to supplant it."[152]

The dissent chided the majority for not accepting that *Riverside Bayview Homes* found that Congress had acquiesced in the Corps regulatory definition.[153] Moreover, Justice Stevens finds not only what Congress did not do in 1977 important, but finds what it did do to be even more important.[154]

Congress did not directly modify the meaning of "navigable waters" in

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Id.

150. *Id.* at 184-85 (Stevens, J., dissenting) (citing 42 Fed. Reg. 37127 (July 19, 1977), as amended, 33 C.F.R. § 328.3(a)(3) (1977), which clearly asserted jurisdiction over "isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.").

151. H.R. 3199, 95th Cong. § 16(f) (1977).

152. *Solid Waste*, 531 U.S. at 186 (Stevens, J., dissenting) (quoting *Riverside Bayview Homes*, 474 U.S. at 137).

153. *Id.* at 186-87 (Stevens, J., dissenting) ("Having already concluded that Congress acquiesced in the Corps' regulatory definition of its jurisdiction, the Court is wrong to reverse course today."). Justice Stevens cites an opinion written by Chief Justice Rehnquist for this proposition. *Dickerson v. U.S.*, 530 U.S. 428, 443 (2000) ("[T]he doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification" (citations and quotations omitted)). Both Chief Justice Rehnquist and Justice Stevens had joined the unanimous opinion of the *Riverside Bayview Homes* case. Justice White authored the opinion. A total of three justices from the earlier court are currently on the bench. Chief Justice Rehnquist and Justice O'Connor joined the majority in *Solid Waste*.

154. *Solid Waste*, 531 U.S. at 187 (Stevens, J., dissenting).

1977.[155] It did, however, amend section 404 of the CWA in ways that Justice Stevens hails as confirming the broad view of jurisdiction. First, the amendments excluded certain activities from the need for a Corps' permit.[156] Included activities impacted on isolated waters.[157] To Justice Stevens, "[t]he specific exemption of these waters from the Corps' jurisdiction indicates that the 1977 Congress recognized that similarly 'isolated' waters *not* covered by the exceptions would fall within the statute's outer limits."[158] Moreover, the amendments included another provision that apparently was tracking the Corps regulatory program.

The Corps' interim regulations of 1975 had referred to three "phases" of implementation.[159] The first phase covered traditionally navigable waters. Phase two covered nonnavigable tributaries, freshwater wetlands adjacent to primary navigable waters, and lakes. Finally, the third phase would require permits for other waters that the CWA covers, but which were not included in the previous two phases. Examples were "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters" that "the District Engineer determines necessitate regulation for the protection of water quality."[160] These three phases appear directly in the 1977 legislative history and indirectly in a statutory amendment.

Justice Stevens finds it significant that the 1977 Congress amended the federal permit system to allow states to implement their own permit system for discharges into certain non-navigable waters. Specifically, the following was added to the statute:

> The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . ., including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate

155. Justice Stevens noted that if the status quo was the Corps regulatory definition, this comment in the legislative history of the 1977 Amendments means that the inclusive definition reigns. *See id.* at 190 n. 14, (Stevens, J., dissenting) (discussing S. Rpt. No. 95-370, at 75 (1977) (reprinted in 1977 U.S.C.C.A.N. 4326, 4400)).

156. 33 U.S.C. § 1344(f) (1994).

157. The 1977 amendments expressly exempt the discharge of fill material "for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches," and "for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters." *Solid Waste*, 531 U.S. at 188 (Stevens, J., dissenting) (quoting 33 U.S.C. § 1344(f)(10(C)-(D) (1994)).

158. *Id.*

159. 40 Fed. Reg. 31325-31326 (July 25, 1975).

160. *Id.*

compact.[161]

Justice Stevens argues that allowing the states jurisdiction over waters *other* than those that are traditionally deemed navigable implies that *more* than those waters are subject to the CWA.[162] The legislative history of the provision illuminates just what those "other waters" might be.

In the legislative history, Justice Stevens finds reference to the Corps interim regulations, which provide guidance on Congress's meaning:

> The Conference Report discussing the 1977 amendments, for example, states that § 404(g) "establishes a process to allow the Governor of any State to administer an individual and general permit program for the discharge of dredged or fill material into phase 2 and 3 waters after the approval of a program by the Administrator." Similarly, a Senate Report discussing the 1977 amendments explains that, under § 404(g), "the Corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.[163]

Congress was, therefore, allowing the states to administer a program to protect nonnavigable tributaries, freshwater wetlands adjacent to primary navigable waters, lakes, and other isolated waters or wetlands deemed important.[164] The relevant conclusion was that "[t]he legislative history of the 1977 amendments therefore plainly establishes that, when it enacted § 404(g), Congress believed—and desired—the Corps' jurisdiction to extend beyond just navigable waters, their tributaries, and the wetlands adjacent to each."[165]

Justice Stevens, before dismissing the majority's federalism concerns,[166] made a passing shot at the statutory construction the majority employed. He characterized it as being "unfaithful to both *Riverside Bayview* and *Chevron*:"[167]

Although it might have appeared problematic on a "linguistic" level for the

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161. 33 U.S.C. § 1344(g)(1) (1994).

162. *Solid Waste*, 531 U.S. at 188-89 (Stevens, J., dissenting).

163. *Id.* at 189 (citations omitted).

164. *Id.* ("'[P]hase 3' waters are all other waters covered by the statute, and can include such 'isolated' waters as 'intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters.'").

165. *Id.* at 189-90. Justice Stevens then chided the majority for over-relying on the comment in the legislative history that there was no intent to change the meaning of the term "navigable waters." *See supra* n. 113. In addition to noting the relevant status quo was the broad Corps definition, Justice Stevens also points out the following:

> [T]he language appears in the course of an explanation of the Senate's refusal to go along with House efforts to narrow the scope of the Corps' CWA jurisdiction to traditionally navigable waters. Thus, the immediately preceding sentence warns that '[t]o limit the jurisdiction of the [FWPCA] with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives.' The Court would do well to heed that warning.

Id.

166. *See supra* n. 89.

167. *Solid Waste*, 531 U.S. at 191 (Stevens, J., dissenting).

> Corps to classify "lands" as "waters" in *Riverside Bayview*, we squarely held that the agency's construction of the statute that it was charged with enforcing was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* Today, however, the majority refuses to extend such deference to the same agency's construction of the same statute. This refusal is unfaithful to both *Riverside Bayview* and *Chevron*. For it is the majority's reading, not the agency's, that does violence to the scheme Congress chose to put into place.

The disagreement with the majority runs deep.

D. Solid Waste in Perspective

1. Statutory Interpretation: Methods, Modes, and Camouflaged Activism

Naturally, whenever there is a majority and a dissenting opinion, the judges could not bridge a disagreement. However, some divisions are more stark than others. The decisions in *Solid Waste* portray black and white vistas. This section considers one question: whether the Clean Water Act as a statute authorized assertion of jurisdiction over isolated waters that had an effect on interstate commerce, more particularly, an impact on interstate commerce because of being habitat for migratory birds. In other words, the issue is, could the statute be interpreted in this manner? The two opinions provide archetypes: they epitomize two distinct methods of statutory interpretation and the two opinions reveal different visions of the relationship between the judiciary and agency decision-makers. Chief Justice Rehnquist asserted judicial primacy, ignoring both agency, legislative, and judicial precedents. By contrast, Justice Stevens aligned himself with a more conventional reading of the CWA and, in so doing, deferred to the agency. The opinions, therefore, provide textbooks in judicial temperament and ideology.

The most obvious division between the authors is the split between textualism and intentionalism, which are two schools of statutory construction.[168] Chief Justice Rehnquist, writing for the majority, is the textualist. As he stated, the majority could not extend Corps jurisdiction to the ponds because "we conclude that the *text* of the statute will not allow

168. *See generally* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 Hastings L.J. 255, 264-74 (2000). Neither opinion reflects a third strain of interpretation, namely "dynamic interpretation." Proponents of such a method urge that judges may "update" statutes by interpreting them not only in light of intentions and purpose when passed, but also in view of current needs, social trends, and beliefs. *See e.g.* G. Calabresi, *A Common Law for the Age of Statutes* (Harv. U. Press 1982) (arguing that judges could invalidate outdated statutes as they interpret them dynamically); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987) (statutory interpretation should not be limited to text and historical context, but should also consider present societal, political, and legal context).

this."[169] To a textualist, the words of the statute take precedent over any legislative history or other indications of intent.[170] The relationship of the statute's wording to other parts of the statute would also be guideposts. The presence of the word "navigable" in the CWA was, therefore, of prime importance.[171] It lead Chief Justice Rehnquist to conclude that Congress only had in mind its power over navigation in giving the Corps jurisdiction.[172]

To a textualist, legislative history is of less importance, primarily because the statements contained in reports are not enacted into legislation and legislators may not have read reports.[173] Additionally, because Congress is a collective body, it cannot have any true "intent" behind its actions; with "logrolling" and compromises, many different rationales may color an individual legislator's vote, and hence, make it impossible to come up with one true Congressional "intent."[174] This explains Chief Justice Rehnquist's short-shrift of legislative history and subsequent legislative action. Therefore, if a textualist needs to "interpret" a statute to get to its "clear meaning," the judge will often employ dictionaries and lay definitions of words.[175] Also of import would be judicial canons of construction.[176]

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169. *Solid Waste*, 531 U.S. at 168 (emphasis added).

170. *Pa. v. Union Gas Co.*, 491 U.S. 1, 29 (Scalia, J., concurring in part and dissenting in part) (Congress enacts texts, not intentions).

171. This led to Chief Justice Rehnquist's declaration that "it is one thing to give a word limited effect and quite another to give it no effect whatever." *Solid Waste*, 531 U.S. at 172. *Compare* to the dissent of Justice Scalia, which Chief Justice Rehnquist and Justice Thomas joined, in *Sweet Home*, 515 U.S. 687, 719 (1995) (the dissent criticized the Court's statutory construction of the word "harm" and argued that the nine words surrounding "harm" required "conduct . . . which [is] direct immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidently cause an injury to a population of animal." (Scalia, J., dissenting)).

172. "The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Solid Waste*, 531 U.S. at 172.

173. Naturally, in addition to formal House, Senate, and Conference Reports, individual legislators can insert comments in the Congressional Record that may or may not have been actually made on the floor and heard by others. Many reasons exist for such comments; legislators may want to speak to constituents, influence an agency interpretation, or to "hoodwink" the judiciary. Noah, *supra* n. 168, at 271. There is a traditional hierarchy to assess the reliability of legislative history, which place the official reports and comments of floor managers of a bill above other sources. *Id.* at 274.

174 Zellmer, *infra* n. 206, at 993-94.

175. For example, Justice Scalia employed six definitions of the word "take," definitions he drew from dictionaries, common law, and international treaties; he then found a core traditional meaning of the term at variance with the majority's reading of the word in the Endangered Species Act. *Sweet Home*, 515 U.S. at 718 (Scalia, J., dissenting).

176. "What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley v. U.S.*, 490 U.S. 545, 556 (1989) (Scalia, J.) *But see* Mark Siedenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 Tex. L. Rev. 83, 114 (1994) (legislators only know such canons to the extent they reflect common sense and general linguistics); Abner J. Mikva, *Reading and Writing Statutes*, 48 U. Pitt. L. Rev. 627, 629 (1987) (asserting his lack of knowledge of canons as a legislator).

The use of particular words have particular meanings.[177]

An intentionalist might also find a clear meaning in a statute. However, the relevant information such a judge would consider is broader. Justice Stevens, therefore, displays a greater interest in legislative history. Not only does he give credence to language in the Conference Report for the 1972 CWA amendments,[178] he also looked at the general intent of Congress in passing a "comprehensive" act.[179] Moreover, subsequent legislative history and statutory enactments were deemed relevant. Justice Stevens does not quite say that the meaning of "navigable waters" in the CWA for § 404 permitting authority is "clear." He refers to prior deference to the Corps' interpretation by the Court in *Riverside Bayview Homes*,[180] and urges the same result in *Solid Waste*.

The differing interpretative techniques not only arrive at differing views of the clarity of the statute, but also re-align the relationship between the judiciary and the executive, as well as the legislature. Judicial review of an agency regulation or other interpretation of law is theoretically governed by the *Chevron* process. This two-step process ascertains if Congress has clearly spoken on an issue and, if not, whether the agency interpretation is reasonable.[181] When ambiguity is found, then Congress has impliedly given the agency additional power to interpret the statute.[182] This brings decision-making to a branch with some accountability.[183] Un-

177. Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum. L. Rev. 749, 752 (1995) (criticizing what he calls "hypertextualism," defined as "finding linguistic precision where it does not exist, and relying exclusively on the abstract meaning of a word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage."). *See* Noah, *supra* n. 168, at 272 ("Naive textualism may demand the impossible of Congress, and, thereby, actually work to undermine the legislative power relative to the other branches of government.").

178. *See supra* n. 145.

179. He concluded:

> Congress' choice to employ the term 'navigable waters' in the 1972 Clean Water Act simply continued nearly a century of usage. Viewed in light of the history of federal water regulation, the broad § 502(7) definition, and Congress' unambiguous instructions in the Conference Report, it is clear that the term 'navigable waters' operates in the statute as a shorthand for 'waters over which federal authority may properly be asserted.'

Solid Waste, 531 U.S. at 182 (Stevens, J., dissenting).

180. *Id.* at 191 (Stevens, J., dissenting) ("[I]n *Riverside Bayview*, 474 U.S. at 131-132, we squarely held that the agency's construction of the statute that it was charged with enforcing was entitled to deference under *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).").

181. *Chevron*, 467 U.S. at 842-43.

182. Deference as a default principle fits into a democracy-enhancing model of law by presuming that Congress delegated the decision-making after ambiguity to the agency. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 978-79 (1972).

183. Additionally, if it is true that there is no perfect way to understand the collective congressional intent in passing a statute, resolution of the statute's meaning would require a factual understanding and involve policy choice. Therefore, *Chevron* rationally places the decision point in the agency. Cass R. Sunstein, *Law and Administration after Chevron*, 90 Colum. L. Rev. 2071, 2086-87 (1990).

der this framework, a textualist, who seeks clear meaning, would, if such a meaning were found, have no need to defer to agency interpretations: the *Chevron* test for judicial review ends upon the finding of a clear meaning for the statute.[184] Justice Scalia, the epitome of an textualist, acknowledged that he would be less likely to have to defer to an agency interpretation.[185] Such a tendency elevates the judicial role to the point of potential activism.[186]

The interpretive mode Chief Justice Rehnquist adopts contains an element of hubris, which is apparent in reading his account of the CWA's jurisdictional reach. Almost no one who had looked at the words of the statute, other than the writers of the Corps' initial regulations, had come to the majority's conclusion.[187] After 1974, the Corps of Engineers consistently had asserted that Congress intended the CWA to reach as far as the Commerce Clause would allow. Its regulations since 1975 have required permits for discharge of fill into waters that were in no way navigable but were capable of affecting interstate commerce.[188] The terminology chosen in the regulations, namely "affecting interstate commerce," was chosen to mirror Supreme Court jurisprudence on the scope of the Commerce Clause power.[189] Moreover, the particular peculiarity at issue in *Solid Waste*, the Migratory Bird Rule, was presented as an example of such an interstate impact in 1986. Additionally, the EPA concurred in the Corps of Engineers' interpretation of the scope of the CWA.[190] Therefore, administrative interpretation has been consistent.[191] However, a judge who is capable of finding "clear meaning" could find the long-term consistency immaterial.[192]

The executive branch, however, was not the only branch of govern-

184. *Chevron*, 467 U.S. at 842-43. *See* Merrill, *supra* n. 182, at 990-91 (noting that the first *Chevron* inquiry began, in 1988, to no longer refer to finding the specific intention of Congress, but focused on whether the statute is unclear or ambiguous, thus reflecting the search for "plain meaning" under the "new textualism" of Justices Scalia and Kennedy).

185. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 521 ("One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists."). Of course, other judges have the opposite predilection. *U.A.W. v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 976 (1987) ("[S]ome will find ambiguity in a 'No Smoking' sign. . . .").

186. *See* Merrill, *supra* n. 182, at 970 (1992) ("[I]nstead of functioning as a 'counter-*Marbury*,' there are signs that *Chevron* is being transformed by the Court into a new judicial mandate 'to say what the law is.'").

187. *See* Robin Kundis Craig, *Navigating Federalism: The Missing Statutory Analysis in Solid Waste Agency*, 31 Envtl. L. Rep. 10508 (2001) (noting the "pervasive view that CWA jurisdiction extends to the limits of the federal government's Commerce Clause power").

188. Interim regulations, 40 Fed. Reg. 31320 (July 25, 1975).

189. *See infra* nn. 228-234.

190. 40 C.F.R. § 230.3(s) (1993).

191. This strengthens the argument for deference. *Cal. v. FERC*, 110 S. Ct. 2024, 2029 (1990) (referring to "the deference this Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes.").

192. Scalia, *supra* n. 185, at 521 (under *Chevron*, "there is no longer any justification for giving 'special' deference to 'longstanding and consistent' agency interpretations of law.").

ment to examine what the statute might have meant. Numerous courts also weighed in. Although not always considering the same exact issue as in *Solid Waste*, courts have almost uniformly found that the CWA definition was intended to go to the farthest reach of the Commerce Clause.[193] Therefore, jurisdiction was found over intrastate waters used in agriculture.[194] More pertinently, some courts also found the Migratory Bird Rule delineated "waters" within the scope of Congress's definition.[195] Even ignoring lower court precedent, the Supreme Court itself has acknowledged the cornerstones of the Corps argument, namely, that there is no unitary definition of the word "navigable" and jurisdiction over water under the Commerce Clause does not hinge on a finding of navigability.[196] More specifically, the Supreme Court considered the scope of the Corps' § 404 jurisdiction in *Riverside Bayview Homes*.[197] Although primarily concerned with whether the Corps had jurisdiction over wetlands adjacent to navigable waters, one natural reading of the decision is that Congress asserted a quite broad reach in light of Congress's over-arching concerns with aquatic environments.[198] Therefore, prior courts have held or intimated that what Congress meant to say in the CWA was clearly the *opposite* of Chief Justice Rehnquist's clarity.

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193. *Nat. Resources Def. Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C 1975) (in a suit objecting to the Corps' failure to assert jurisdiction over wetlands, the court held that Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution."). No appeal was taken. In *U.S. v. Wilson*, 133 F.3d 251 (4th Cir. 1997), the Fourth Circuit found that the Commerce Clause was more limiting than the Corps of Engineers had asserted in a regulation controlling wetlands that "could affect" interstate commerce. *Id.* at 257. The Fourth Circuit's conclusion, therefore, is consistent with the earlier assessment of the CWA's jurisdiction because the court acknowledged that jurisdiction goes as far as the Commerce Clause may properly extend.

194. *Residents Against Indus. Landfill Expansion v. Diversified Sys., Inc*, 804 F. Supp. 1036, 1039 (E.D. Tenn. 1992) (two intrastate creeks were within Commerce Clause jurisdiction because cattle drank from them and therefore there might be an affect on interstate commerce); *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374-75 (10th Cir. 1979) (intrastate stream subject to CWA because crops irrigated by its waters were sold in interstate commerce).

It is noteworthy that even after *Solid Waste*, courts have continued to find such waters subject to regulation. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation canals were "waters of the United States" because they were "tributary to" intrastate waters which affect or could affect interstate or foreign commerce); *U.S. v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001).

195. *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993), *replacing prior opinion*, 961 F.2d 1310 (7th Cir. 1992); *Leslie Salt Co. v. U.S.*, 896 F.2d 354, 360 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991), *on remand*, 820 F. Supp. 478 (N.D. Cal. 1992), *appeal after remand*, 55 F.3d 1388 (9th Cir. 1995), *cert denied sub nom., Cargill, Inc., v. U.S.*, 516 U.S. 955 (1995). Later cases found the regulation not within the CWA definition. *See U.S. v. Wilson*, 133 F.3d 251 (4th Cir. 1997); *Tabb Lakes, Ltd v. U.S.*, 715 F. Supp. 726, 728-29 (E.D. Va. 1988), *aff'd per curiam*, 885 F.2d 866 (4th Cir. 1989) (holding that the Migratory Bird Rule was not properly promulgated and, in *dicta*, noted that even if had been, there was a question as to whether the Commerce Clause allowed it to apply to the isolated wetland involved in the case).

196. *Kaiser Aetna v. U.S.*, 444 U.S. 164, 173-74 (1979).

197. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

198. *See Solid Waste*, 531 U.S. at 181 (Stevens, J., dissenting).

In addition to administrative and judicial interpretations, Congressional committees also have repeatedly said that the scope of the meaning of "waters of the United States" was meant to stretch beyond jurisdiction over navigation.[199] Indeed, Congress in 1977 considered the problem of whether the Corps exceeded the bounds set for it. Because of this, Justice Stevens found that Congress acquiesced in the Corps' definition when it failed to pass a limiting amendment and instead drafted explicit exceptions.[200] In fact, Justice Stevens read *Riverside Bayview Homes* as also so holding.[201] In considering whether or not Congress has indicated approbation of an existing regulatory scheme through deliberative inaction,[202] Chief Justice Rehnquist notes that the Court is hesitant to read too much into inaction.[203] It is true that the cases do not all point in the same direction.[204] Because the Congress is not a static body but changes composition every two years,[205] divining intent of one Congress from the actions of another is reading tea leaves from two separate cups. Recognition of the nature of Congress also cautions against over-reliance on inaction's significance. Inaction in Congress is more the norm than action because of the basic forces of inertia and other institutional problems in legislating.[206]

Nevertheless, if a distinct rejection of an agency interpretation is presented to Congress and the proposal is the subject of hearings that result in a differing piece of legislation, this provides a "new" legislative intent and a new statute that can be interpreted. That is, the amending language and its inter-relationship to the previously enacted wording must be looked at anew. Moreover, if Congress is looking at an agency interpretation that goes to the heart of regulatory authority, the lack of reversal is more important than if the issue was peripheral.[207] In this instance, interpreting "wa-

199. *See id.* at 186 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

200. *Id.*

201. *Id.*

202. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 69 (1988), in which he identifies three scenarios in which meaning is sometimes attached to the fact that Congress did not act: "(1) the 'acquiescence rule, positing that if Congress does not overturn a judicial or administrative interpretation it probably acquiesces in it; (2) the 'reenactment rule,' which posits that a reenactment of the statute incorporates any settled interpretations of the statute by courts or agencies; and (3) the 'rejected proposal rule,' which posits that proposals rejected by Congress are an indication that the statue cannot be interpreted to resemble the rejected proposals." Congressional activities in 1977 fall into both category 1 and 2. Moreover, the resulting legislation also must be compared to the proposal.

203. *Solid Waste*, 531 U.S. at 170.

204. *See* Eskridge, *supra* n. 202 (arguing that for every case praising use of subsequent history, there are others condemning it).

205. *Id.* at 93-94, 99.

206. *Id.* at 105; George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 Const. Commentary 79, 96-97 (2000); Sandra B. Zellmer, *The Devil, The Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 Ariz. St. L.J. 941, 993 (2000).

207. *Cf.* Eskridge, *supra* n. 202, at 111 (presume Congressional intent to continue "building block interpretations," which are "authoritative and settled" and upon which parties have probably relied and public decisionmakers have apparently relied in developing fur-

ters of the United States" to include waters that affected interstate commerce was central to the § 404 permit program. Whether this interpretation was praised or damned, it was known in 1977, and remained known until 2001. Social scientists tell us that legislators and regulators often respond to interest groups that are organized and funded.[208] Courts, therefore, might be leery of reading inaction to disadvantage the disenfranchised. However, the Corps' rules affect real estate developers and landowners;[209] these are not powerless groups. Not only has Congress not over-ruled the agency, but the regulatory interpretation has lasted since 1975; a time frame in which both Democratic and Republican hands controlled the administrative agency itself.[210] There have been opportunities to change the interpretation both administratively or legislatively. Nevertheless, no one read the statute as "clearly" tying jurisdiction to some connection with traditional navigable waters until the majority opinion in *Solid Waste.*

To bolster his conclusion that the statute was clear, Chief Justice Rehnquist applied a canon of construction. Judges employ canons when the words of a statute cannot be construed without some aid. Therefore, on one level, this might be an admission that Congress was not clear and therefore require *Chevron* deference to an agency interpretation.[211] Textualists, however, tend to assume, rightly or wrongly, that legislators incorporate these canons into their drafting process.[212] They also assume that minute wording changes indicate conscious policy choices, belying the fact that legislators do not always even read the statute as passed and fewer yet ponder the results that would emerge from minor linguistic changes.[213] Employing canons of construction is one way a judge can "clearly" point an interpretation in a desired direction.

Canons can reflect ideological views. Some can be used to arrive at contrary results in interpreting the same statute. For example, the "liberal construction rule," or the canon that "remedial statutes are to be liberally construed," could have been employed to broaden the reach of the CWA.[214] Chief Justice Rehnquist, however, chose to use the canon that agencies

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ther legal rules).

208. *Id.* at 105.

209. *See* discussion about whether not activities in dredging and filling isolated waters or wetlands tend to be "commercial", *infra* nn. 266-291.

210. The rules were promulgated under a Republican administration. Counting up to January of 2001, there were Republican administrations in approximately 13 of the 25 years.

211. Merrill, *supra* n. 182, at 988.

212. *Id.*

213. Noah, *supra* n. 168, at 271.

214. *See* Joel A. Mintz, *Can You Reach New "Greens" if You Swing Old "Clubs"? Underutilized Principles of Statutory Interpretation and Their Potential Applicability in Environmental Cases*, 7 Envtl. Law. 295, 302-08 (2001). Justice Scalia denigrates these particular canons. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581 (1990).

cannot construe statutes in a way that raises serious constitutional questions unless Congress gave a clear direction.[215] Justice Stevens would not have used this particular canon here; he thought both that Congress was clear in its intention to stretch the Commerce Clause and also that the Migratory Bird Rule was constitutional. The canon, however, is used sporadically even when constitutional issues are acknowledged. An example of a failure to use the canon is *Rust v. Sullivan*,[216] in which Chief Justice Rehnquist himself declares that the constitutional arguments about limiting free speech by the so-called "gag" rule forbidding mention of abortion are "not without some force," but were not enough to "carry the day."[217] In this instance, the canon was ignored; the majority deferred to agency interpretation of a statute. Canon use is selective and subject to manipulation.[218] It therefore can undercut *Chevron* and elevate the judiciary above the agency.[219]

On all grounds, therefore, the statutory analysis in *Solid Waste* comes across as strained and forced. The analysis differs from the earlier unanimous opinion in *Bayside Riverview Homes*, which Justice O'Connor and Chief Justice Rehnquist had joined. The prior case devoted several early pages to explaining why it was wrong to insist on reading a statute or regulation narrowly in order to avoid the possibility of creating a taking,[220] while the *Solid Waste* majority curtly states that there will be no *Chevron* deference to the Corps of Engineers because the majority, including O'Connor and Rehnquist, does not want to raise the spectre of constitutional questions. *Bayside Riverview Homes* extensively reviews legislative history, while *Solid Waste* almost ignores it. In sum, *Solid Waste* does not do a convincing job of statutory interpretation. Entering the hazardous realm of mind reading, it seems that the majority found something "foul" about the Migratory Bird Rule, but could not muster the votes to find that

215. *Solid Waste*, 531 U.S. at 172. *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 316 (2000); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568 (1988) (court allowed the canon of construing to avoid constitutional issues trumped the result of *Chevron*).

216. 500 U.S. 173 (1991).

217. *Rust*, 500 U.S. at 191. *See* Siedenfeld, *supra* n. 176, at 103 (arguing the case embodies a pluralistic view of *Chevron* as it openly approved of an interpretation of statute that was blatantly political).

218. *Rust*, 500 U.S. at 204 (Blackmun, J., dissenting) (stating that while the majority does not dispute this canon of construction, it refuses to apply it).

219. William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L. Rev. 831, 866 (2001) (avoidance doctrine constrains *Chevron* and thus interferes with the role of the Executive). The tactic may also denigrate the legislative branch. Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 Wm. & Mary L. Rev. 827, 840 (1991) ("A court that sustains and applies a statute interpreted by reference to the [avoidance] canon shows no greater solicitude for legislative preferences that does a court that attempts to understand what was meant and then engages in a serious constitutional analysis of the validity of the statute."). In fact, whenever judges choose to say "what the law is" pursuant to the first step of *Chevron*, there is the tendency to elevate the judiciary.

220. *Bayview Riverside*, 474 U.S. at 126-29.

it violated the Commerce Clause. Therefore, it ruled on statutory, not constitutional grounds.

2. Commerce Clause: Preserving Battle Lines

The majority in *Solid Waste* refused to determine whether or not the Migratory Bird Rule exceeded Congress's authority under the Commerce Clause and thus was invalid. Justice Stevens, however, argued that the assertion of authority was constitutional.[221] Prior to *United States v. Lopez*,[222] most would have concurred with Justice Stevens.[223] The *Lopez* decision heralded a potential change in attitude toward Commerce Clause jurisdiction. This happenstance strengthened the argument that the Commerce Clause did not authorize federal regulation of an intra-state water simply because it actually, or potentially, was a habit for migratory birds. Therefore, if the majority had invalidated the regulation on constitutional grounds, the *Solid Waste* decision would have been more intellectually honest, albeit more damaging for federal enforcement of environmental law and an opinion, which would have ignored years of precedent. The Supreme Court had allowed federal action under the Commerce Power in a myriad of similar situations.

The Court signaled the power's breadth early in *Gibbons v. Ogden*.[224] The State of New York had granted Robert Livingston and Robert Fulton the exclusive right to operate steamboats. These men in turn assigned Ogden an exclusive territory, which included trips to New Jersey. Gibbons also desired to provide steamboat service between New York and New Jersey and received a license from the United States government, enabling him to conduct coastal trade. Before New York courts, Gibbons lost out to the New York exclusive right. However, the Supreme Court reversed. In so doing, the Court, in an opinion authored by Justice Marshall, first had to define "commerce" in the grant of power to Congress to regulate interstate commerce. The Court noted that commerce was more than "buying and selling." As the Court put it, "Commerce undoubtedly is traffic, but it is something more; it is intercourse." More particularly, the constitutional provision applies "to those internal concerns which affect the states in general; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of government."[225]

221. Some believe the presence of the argument in a dissent does not bode well. Christy H. Dral & Jerry J. Phillips, *Commerce By another Name: Lopez, Morrison, SWANCC and Gibbs*, 31 Envtl. L. Rep. 10413, 10428 n. 141 (2001) (arguing that finding the eloquent commerce clause defense in the dissent of *Solid Waste* "may be worse for the future of environmental laws than not finding the arguments in the decision at all.").
222. 514 U.S. 549 (1995).
223. *Solid Waste*, 191 F.3d at 849 (citing *Rueth v. EPA*, 13 F.3d 227, 231 (7th Cir. 1993); *Leslie Salt Co. v. U.S.*, 896 F.2d 354, 360 (9th Cir. 1990)).
224. 22 U.S. 1 (1824).
225. *Id.* at 195.

Steamboat service between two states, therefore, obviously would come within this view of "commerce."

By 1937, the Supreme Court recognized that "direct" contact with interstate commerce was not necessary. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,[226] the Court turned to examining whether there was a rational basis to believe there would be such contact. The Court found that Congress could regulate intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."[227] Because the case involved a large, integrated steel company, the stretch to include the activity in the federal interstate commerce power was not too great. However, when the Court decided in *Wickard v. Filburn*[228] to allow for aggregation of impacts, what might be trivial in individual effect on interstate commerce became subject to regulation when the total of the potential effects are added together.[229] Indeed, the Commerce Clause extended to Congress's desire to right the moral wrongs of segregation, so long as the activities regulated had a real and substantial relation to interstate commerce. [230] Therefore, the power could be invoked to regulate a restaurant selling food locally if some of the food traveled in interstate commerce.[231] Because the economy is so much more "national"-if not "global"-than the founders of the nation could ever anticipate, the growth of the Commerce Clause is not surprising.[232]

The extension of federal authority under the Commerce Clause, however, was not to the liking of everyone. In a concurrence, Chief Justice Rehnquist once stated that:

> [O]ne of the greatest 'fictions' of our federal system is that Congress exercises only those powers delegated to it, while the remainder are reserved to the States or the people. The manner in which this Court has construed the Commerce Clause amply illustrates this fiction . . . one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of the Congress.[233]

Nevertheless, it was clear by 1995 that Commerce Clause jurisdiction ex-

226. 301 U.S. 1 (1937) (upholding National Labor Relations Act).
227. *Id.* at 37.
228. 317 U.S. 111 (1942) (upholding the application of the Agricultural Adjustment Act to the growing of wheat for home consumption).
229. Some argued this meant that just about anything could pass the test. Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167, 173 (1996) (*Wickard* test "facilitated unlimited expansion of the scope of the commerce power."). *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. Chi. L. Rev. 1089, 1150 (2000) (decision in *Wickard* abandoning judicially enforced limitations on the commerce clause representing assuming a posture more related to the age).
230. *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964).
231. *Katzenbach v. McClung*, 379 U.S. 304, 304-05 (1964).
232. It would, of course, be distressing to those who desire to follow either the original linguistic meaning of the Constitution or the original intent of the drafters as founders of the government. *See* Barnett, *infra* n. 254.
233. *Hodel*, 452 U.S. at 307-08 (Rehnquist, J., concurring).

tended to three areas: "(1) regulation of the channels of interstate commerce; (2) regulation or protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce; or (3) regulation of activities that "substantially affect" interstate commerce."[234] The last element was critically examined in the *Lopez* case.

In *Lopez*, the Supreme Court reviewed a statute that made it a federal crime to possess a firearm in a school zone. The statute had difficulties crossing the "substantially affects interstate commerce" threshold for three reasons. First, it was a criminal statue and therefore was not directly related to commercial activity. Second, the statute did not require any firearm in question to have affected interstate commerce. Third, the Court believed that Congress offered no legislative findings sufficient to show that possessing a gun in a school zone affected interstate commerce.[235] Additionally, the *Lopez* Court, like Chief Justice Rehnquist in *Hodel v. Virginia Surface Mining Association*,[236] emphasized that the impact on interstate commerce must be "substantial," not merely *an* impact on interstate commerce.[237] Some courts which had previously upheld the Migratory Bird Rule as constitutional did so because they believed that the government need only show destruction of an isolated wetland would have "some minimal, potential effect on interstate commerce" to assert jurisdiction and the minimal potential effect was shown by proof that the subject wetland provided suitable habitat for migratory birds.[238] Passing a test requiring a minimal "substantial" impact is not necessarily the same as passing a rigidly imposed substantial impact test.[239] Nevertheless, the Migratory Bird Rule could meet the test through aggregation. Each habitat alone might not be crucial to the survival of a species, but removal of habitats one by one may lead to a death by a thousand cuts.[240]

Cases since *Lopez* have examined the Rule and grappled with the is-

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

235. *Id.* at 559-62.

236. *Hodel*, 452 U.S. 264.

237. *Compare id. at 310-11*:

> Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce. . . . Moreover, simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Congress' findings must be supported by a "rational basis" and are reviewable by the courts.

(Rehnquist, C.J., concurring), *with Lopez*, 514 U.S. at 564-67.

238. *Hoffman Homes*, 999 F.2d 256, 259 (7th Cir. 1993).

239. *Compare* the problem of changed standards with Justice Souter's belief that the statute struck down in *U.S. v. Morrison* would have passed muster at anytime after *Wickard* and before *Lopez*. *U.S. v. Morrison*, 120 S. Ct. 1740, 1764 (2000) (arguing the majorities in *Lopez* and *Morrison* maintained only a nominal adherence to the substantial effects test).

240. *See U.S. v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) (need no individual, site specific impact on interstate commerce; adjacent wetlands, as a class, have substantial impact on interstate commerce). Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 Duke Envtl. L. & Policy 321, 352 (1997) (aggregation will allow the Rule to reach the substantial threshold).

sue of substantiality. One post-*Lopez* case did not change its prior ruling that the Migratory Bird Rule passed muster.[241] Justice Thomas, however, in dissenting from a denial of *certiorari* in the case, expressed his belief that the Rule might not remain viable: "The point of *Lopez* was to explain that the activity on the land to be regulated must substantially affect interstate commerce before Congress can regulate it pursuant to its Commerce Clause Power."[242] Moreover, he questioned whether the relationship to commerce was sufficient, suggesting the fact "that substantial interstate commerce depends on the continued existence of migratory birds does not give the Corps carte blanc authority to regulate every property migratory birds could use as habitat."[243]

Some people have difficulty recognizing that habitat control is related to interstate commerce because they believe that the birds are not in commerce until they are photographed or shot at. Essentially, they argue that people, not birds, are engaged in commerce.[244] To a certain extent, this is a truism. But requiring people to be in the picture does not end the analysis. People travel to bird watch or hunt only if there is a possibility that they will be able to indulge in their avocation. If all habitat is destroyed, there will be no migratory birds and thus no *opportunity* to pursue the interstate commerce. Although people may be necessary to have commerce,[245] the habitat of the birds is a part of that commercial setting even before a person sees a particular bird.[246] Migratory birds, by definition, need habitat in places along their routes. Placing a bag limit on hunters is meaningless if there are no ducks. Moreover, because the loss of habitat in one place endangers the ability of the birds to make it to another state,

241. *Leslie Salt Co. v. U.S.*, 55 F.3d 1388 (9th Cir. 1995), *cert denied sub nom., Cargill, Inc. v. U.S.*, 516 U.S. 955 (1995).

242. *Cargill Inc., v. U.S.*, 516 U.S. 955 (denial of certiorari) (Thomas, J., dissenting).

243. *Id. See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 38 (1999) ("The particular activities—hunting, bird watching, and so on—may, at times, be subject to federal authority, but that does not place every environment upon which these activities rely, or in which they may occur, within federal jurisdiction.").

244. The Plaintiffs made this point when they argued that because the area was closed to the public, it could not affect commerce, and was discussed in *Solid Waste*, 998 F. Supp. at 949. *See* discussion in *Hoffman Homes*, 961 F.2d 1310, 1320 (7th Cir. 1992)(Manion, J.) and picked up in a later concurrence in the case, 999 F.2d at 262; *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 285-86 (1977) (holding that the Commerce Clause authorizes regulation of taking of fish in state waters, but analyzed the interstate commerce aspect as not being that fish naturally moved, but that fishing boats and fish to be processed after capture crossed state lines).

245. Especially if one views "commerce" as being limited to "buying and selling" and not all engagement in economic activity. Justice Thomas takes the former view. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 101-02 (2001).

246. *Palila v. Haw. Dept. of Land and Nat. Resources*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981). *See* Julia A. Olson, *The Environmental Takings Doctrine, Lopez's Return to State Power, and Impacts on Environmental Protection: A Look at Isolated Wetlands Regulation*, 4 Hastings W.-N.W. J. Envtl. L. & Policy 187, 192-93 (1998).

concerted federal protection is appropriate.[247] The need to preserve habitat, however, creates another barrier to federal jurisdiction in some minds.

Chief Justice Rehnquist identifies the Corps' decisions as being land use regulation, not wildlife protection or environmental regulation. Therefore, he voices concern that federal regulation under the Migratory Bird Rule "would result in a significant impingement of the States' traditional and primary power over land and water use."[248] The *Lopez* case, and its successor, *United States v. Morrison*,[249] talk of preserving traditional state functions to the state.[250] If land use regulation is such a state function, defining it is crucial. The Supreme Court has attempted to distinguish land use decision making from environmental protection:

> The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. [251]

It is not clear that requiring a permit, which could create a modification of the planned development in certain ways, is anything but environmental regulation under this definition. Apparently, Chief Justice Rehnquist is concerned with the ability of the Corps to veto development plans, which arguably would determine what particular use could be made of the land.[252]

Accepting, *arguendo*, both that § 404 permitting equals land use planning and that land use is a "traditional state function," the federal system in the CWA exempts many activities from the need to obtain a permit. These exempted activities include "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products or upland soil

247. *But see* Adler, *supra* n. 243 (arguing that there will be no "race to the bottom" by the states; state regulation will not sacrifice wetlands in the state in favor of development); Ruhl, *supra* n. 11, at 1474-88 (arguing against the expanded commerce clause and contracted nondelegation doctrine in favor of state led experiments with environmental law enforcement). States are, however, allowed to implement their own programs in regard to fill of most waters that are not navigable. 33 U.S.C. §§ 1344(f)(1)(A), 404(f)(1)(A) (1994).

248. *Solid Waste*, 531 U.S. at 174.

249. 120 S. Ct. 1740 (2000) (invalidating § 13981 of the Violence Against Women Act, which allowed for civil federal suit against sexual assaulters).

250. *See generally id.*; *Lopez*, 514 U.S at 567-68; Adler, *supra* n. 243, at 17 (for criminal laws, states do not have an impetus to lessen the strength of laws).

251. *Cal. Coastal*, 480 U.S. at 587.

252. *Cf.* Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 Iowa L. Rev. 407 (1995) (mere requirement of permit changes the balance and makes a landowner into a supplicant; requirement of a permit is like an injunction before harm is shown and hence is illegitimate).

and water conservation practices"[253] as well as "maintenance. . . of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures."[254] Moreover, there is an exemption for any activity for which a state has a area-wide waste treatment plan.[255] Therefore, the CWA expressly exempts many land-use type decisions from federal hands.[256] Moreover, as Justice Stevens notes, it is hard to fault a statute on federalism grounds when the statute allows a state to assume jurisdiction over the questioned activities if it so chooses.[257]

Moreover, whatever might have at one point supported the conclusion that land use is a "traditional state function," the view is out of date, just as the elusive search for traditional state functions has been discredited. Land use very well may be a federal venue in reality. As Justice Powell noted earlier:

> The Surface Mining Act mandates an extraordinarily intrusive program of federal regulation and control of land use and land reclamation, activities normally left to state and local governments. But the decisions of this Court over many years make clear that, under the Commerce Clause, Congress has the power to enact this legislation.[258]

As knowledge of ecology increases, the recognition that purportedly "local" activities are inter-connected grows. An isolated wetland or water is not truly "isolated" if it is part of a system that is linked and used in concert with other lands. Land use, just like air and water pollution, has the potential to create impacts that are interstate in character. Moreover, if states or local governments devalue the natural resource over other values, the loss is distributed on those who have had no participation in the decision. Both in legal and scientific reality, therefore, the rhetoric that land use is of peculiarly local concern should remain rhetoric.

There is an additional problem with curbing federal commerce clause jurisdiction because it might encroach on matters that are traditionally within the province of states. The United States is a federal system, with two levels of government. The wording of this gloss on Commerce Clause jurisdiction is reminiscent of the debate on the limitations the Tenth Amendment places on federal jurisdiction. In a Tenth Amendment challenge, a pair of cases considered whether the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) applied to state enterprises. In the first, *National League of Cities v. Usery*,[259] the Supreme Court found Congress could not impose these regulations against the

253. 33 U.S.C. §§ 1344(f)(1)(A), 404(f)(1)(A) (1994).
254. 33 U.S.C. § 1344(f)(1)(B) (1994).
255. 33 U.S.C. § 1344(f)(1)(F) (1994).
256. Craig, *supra* n. 187.
257. *Solid Waste*, 531 U.S. at 192 (Stevens, J., dissenting).
258. *Hodel*, 452 U.S. at 305 (Powell, J., concurring).
259. 426 U.S. 833 (1976).

States because the Tenth Amendment limited Congress's ability when the federal legislation could "displace the States' freedom. . . in areas of traditional governmental functions."[260] The Court did not offer a general explanation of how a "traditional" function is to be distinguished from a "non-traditional" one. In the second case considering the issue, the Supreme Court backed off of this test.[261] It found that attempting to define state sovereignty in a search for traditional governmental functions lead to an abyss. Instead, it relied on a structural mechanism to avoid federal intrusions by general laws on state functions.[262] Justices Burger, Powell, Rehnquist, and O'Connor dissented from the later case. Therefore, it is not necessarily surprising to hear the echoes of this abandoned theory in the more recent Commerce Clause cases.[263]

Another theme running through the recent Commerce Clause cases is the distinction between commercial and non-commercial activity. Supposedly, simply possessing a gun is not a commercial or economic activity;[264] nor is gender-based violence.[265] Chief Justice Rehnquist noted that there might have been some confusion over what was being regulated in *Solid Waste* because of some references to the activity being a landfill.[266] Although Chief Justice Rehnquist did not expressly make the commercial/non-commercial or economic/non-economic distinction in *Solid Waste*, some commentators emphasize that many people required to get § 404 permits are not engaged in "commercial" activities, but are seeking to do something such as improve a house.[267] Although an individual derives personal pleasure from a home, the improved house will also become an asset that may be the basis of a loan or other commercial activity. The house will, of course, be sold at some time. It is very rare that a land use regulation totally destroys a life-long dream with no financial implications.[268] Because of the central part that land and its development plays in

260. *Id.* at 852.

261. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

262. *Id.*

263. In *N.Y. v. U.S.*, 505 U.S. 144 (1992). Justice O'Connor stated that Commerce Clause jurisdiction and the Tenth Amendment limitation on it may simply be two sides of one argument: "In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment." *Id.* at 159.

264. *Lopez*, 514 U.S. at 562-65. *See* Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 Duke Envtl. L. & Policy Forum 321, 341 (1997) (*Lopez* requires two findings: activity is "economic" and the regulated activity substantially affects interstate commerce).

265. *Morrison*, 120 S. Ct. at 1751 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity").

266. *Solid Waste*, 531 U.S. at 173.

267. *See e.g.* Adler, *supra* n. 243, at 34.

268. *But see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (widow unable to build retirement home that she and dead husband had planned for years due to environmental restrictions).

wealth accumulation, it is not an untoward stretch to view all land development as commercial. Justice Breyer warns that the commercial/noncommercial distinction is subject to manipulation,[269] which might be the case with the argument that any person's home is also "commercial" or "economic." The distinction between types of land development, however, is artificial and could lead to irrational results.[270] Nevertheless, the majority in *Morrison*, which was the same majority as in *Solid Waste* and *Lopez*, implies that there could be an import in the distinction: "While we need not adopt a categorical rule against aggregating the effects of an noneconomic activity in order to decide these cases, 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."[271] Therefore, whether or not the regulation is viewed as commercial or economic will influence how "substantial" the impact on interstate commerce habitat destruction will have.

Based on current precedent and predilections of the Justices,[272] there is a plausible argument that the Migratory Bird Rule goes beyond Congress's authority under the Commerce Clause, and thus could not be promulgated by the Corps of Engineers. This argument, however, can also be more than plausibly rebutted. The fact that Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas did *not* invalidate the regulation on constitutional grounds may indicate some hesitancy in the coalition to directly dismantle either the basic framework of environmental laws or their more seemingly attenuated applications. The Supreme Court has also denied *certiorari* to review two cases arising under the Endangered Species Act ("ESA").[273] One of the cases had presented enticing facts for a Commerce Clause attack on the particular application of the ESA: the case dealt with a fly native to only California that blocked improvements at a hospital.[274] In both this case and the other unreviewed circuit court case,[275] the judges had vigorously argued the interstate commerce aspects of species protection and upheld the use of the statute's

269. *Lopez*, 514 U.S. at 627-30 (Breyer, J., dissenting).

270. For example, it might be appropriate to make a federal crime out of arson of an apartment building, but not of a house. *See generally* Dral & Phillips, *supra* n. 221 (citing *Jones v. U.S.*, 120 S. Ct. 1904 (2000)).

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

272. Justice Thomas joined majority in *Morrison* and also wrote a concurrence in which he expressed the opinion that the "substantial effect" on interstate commerce test goes beyond the original meaning of the framers, namely that commerce means "buying and selling." Therefore, the Justices should trim back Commerce Clause authority even more. *Id.* at 1759 (Thomas, J., concurring). He also expressed this opinion in *Lopez*, 514 U.S. at 586((Thomas, J., concurring). *See* Barnett, *supra* n. 245.

273. 16 U.S.C. §§ 1531-1543 (1994).

274. *Nat. Assn. of Home Bldrs. v. Babbitt*, 130 F.3d 1041, 1041-57 (D.C. Cir. 1997) (ESA "take" provision as applied to an endangered fly found only in California was within Commerce Clause), *cert. denied*, 524 U.S. 937 (1998).

275. *Gibbs v. Babbitt*, 214 F.3d 483, 492-94 (4th Cir. 2000) (prohibition of acts on private property that would "take" a red wolf even if the same were re-introduced to historic range was valid), *cert. denied sub nom., Gibbs v. Norton*, 531 U.S. 1145 (2001).

"take" provisions to deter activity on private lands. The Supreme Court has not over-ruled this precedent, but simply continues to pull at some dangling threads from its prior Commerce Clause jurisprudence.

IV. NONDELEGATION AND JUDICIAL REVIEW: *AMERICAN TRUCKING*

The Supreme Court looked at a second question, which is related to the Commerce Clause issue of whether the federal government can regulate private activity. The second question is whether Congress may regulate in the manner it chose. The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States."[276] In *Whitman v. American Trucking Association, Inc.*,[277] the Court considered if Congress could regulate air pollution by delegating standard setting to the Environmental Protection Agency in the manner it did. No one questioned that the Commerce Clause authorized Congress to act in response to air pollution.

A. Background of the Case

1. Factual and Regulatory Predicate

The factual predicate for the decision was that the Environmental Protection Agency ("EPA") had revamped the National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM"). Under the Clean Air Act ("CAA"), the EPA sets standards that delineate how much of a pollutant will be allowed in the outdoor air.[278] The EPA is therefore looking at pollution's effects, because it is seeking to attain a certain environmental quality for the air. The NAAQS look to the *receiving* medium—the air. For example, a standard may read "no more than x parts of the pollutant per million parts of air." Once the standards are set, someone must determine how to get to the standards, that is, how to remove pollutants from the air if the amount currently emitted exceeds the NAAQS. The Clean Air Act implements the standards by allowing states to tell polluters how to reach the goal.[279] The Act also envisions that the EPA will re-examine the NAAQS every five years to see if they need revision.[280]

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276. U.S. Const. art. I, § 1.

277. 531 U.S. 457 (2001).

278. 42 U.S.C. § 7409(a) (1994). *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 314 (1999); Scott R. Humphrey, *Drawing Lines: The D.C. Circuit Forces the EPA and Congress to Clean Up the Process of Setting Air Quality Standards in American Trucking*, 37 Hous. L. Rev. 859, 863-865 (2000).

279. The Clean Air Act ("CAA") envisions that states will come up with a State Implementation Plan (or "SIP") for each conventional pollutant. The SIP tells polluters how to cut down on the regulated pollutant. The SIP includes "emission limitations, schedules, and timetables." The SIP should enable the state to attain (which is a word of art under the statute) compliance with the standards. Obviously, the time patterns Congress initially set did not work; the 1970 Act anticipated standards being attained within three years of making a SIP. *See generally Train v. Nat. Resources Def. Council, Inc.*, 421 U.S. 60 (1975).

280. 42 U.S.C. § 7409(d)(1) discussed in Sunstein, *supra* n. 278, at 321-22.

The EPA did the same in regard to ozone[281] and PM[282] on July 17, 1997. Both these pollutants are non-threshold pollutants, that is, scientists do not believe there is any level that would be a "safe" exposure level.[283] Therefore, the only standard that would completely protect human health would be one that refused to allow any of the pollutant in the ambient air. The EPA did not set the NAAQS at zero. For ozone, it set the level at 0.08ppm, or parts per million, which was down from 0.09 ppm.[284] The CAA requires the standard to be set, both initially and upon revision, at the level "requisite to protect the public health" with an "adequate margin of safety."[285] It is this portion of the CAA that the Court of Appeals found violated the principles of nondelegation.

2. The D.C. Circuit's "Bombshell" on Delegation

The Court of Appeals, in an opinion authored by Judge Williams, also looked at the factors the EPA considered in setting the standard at a level other than the risk-free zero. These are "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed."[286] Judge Williams had no problem with the factors in and of themselves. In line with a prior case of the Circuit,[287] *American Trucking I* held that the factors were appropriate and, most importantly, consideration of the cost to meet them was not appropriate. What created the difficulty was that the EPA did not specify how it would determine the degree to which residual harm would be acceptable:

> For EPA to pick any non-zero level it must explain the degree of imperfection permitted. The factors EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much.[288]

In other words, the EPA determined that it would make the cut based on height, but never answered how tall was tall?[289]

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281. NAAQS for Ozone, 62 Fed. Reg. 38856 (codified in 40 C.F.R. §§ 50.9, 50.10 (2001)).

282. NAAQS for Particulate Matter, 62 Fed. Reg. 38652 (codified in 40 C.F.R. 50.7 (2001)).

283. There is some scientific indeterminancy for particulate matter, but the D.C. Circuit Court of Appeals believed that this distinction was immaterial for either its analysis or that of the EPA. *Am. Trucking Assns., Inc. v. U.S. Envtl. Protection Agency*, 175 F.3d at 1034, *on rehearing*, 195 F.3d 4, *aff'd in part and rev'd in part*, 121 S. Ct. 903. On the administrative record for these particular standards, *see* Sunstein, *supra* n. 278, at 324-330.

284. *See* Patricia Ross McCubbin, *The D.C. Circuit Gives New Life and New Meaning to the Nondelegation Doctrine in American Trucking Ass'ns. v. EPA*, 19 Va. Entl. L.J. 57, 65-66 (2000). Issues specific to the particulate matter standard were not included on *certiorari*.

285. 42 U.S.C. § 7409(b)(1) (1994).

286. *Am. Trucking*, 175 F.3d at 1033-34 (quoting the Ozone Final Rule, 62 Fed Reg. 8818, 8832 (Feb. 26, 1997)).

287. *Lead Indus. Assn. v. EPA*, 647 F.2d 1130, 1161 (D.C. Cir. 1980).

288. *Am. Trucking*, 175 F.3d at 1033.

289. *Id.* at 1033-35.

This lack of determinate guidance in either the statute or the implementing agency criteria violated the prohibition against delegating legislative power to agencies. Judge Williams did not find the EPA's explanation that more people would be protected at the lower standard sufficient; the argument could just as easily apply to an even lower standard.[290] Without an "intelligible principle" to guide an agency, the agency could not simply say that it could set the standard within a reasonable range based on "policy."[291] According to Judge Williams, the EPA would have the discretion to set the standard from zero to just below the concentration that led to the London killer fog.[292]

The remedy for this violation was not invalidation of the CAA provision. According to Judge Williams, the court should remand to the agency so that it could attempt to interpret the statute in a manner that will pass constitutional muster:

> Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard.[293]

This would curb possible arbitrary agency action because its interpretation on remand would bind the agency in the future.[294] Additionally, according to Judge Williams, the interpretation would facilitate judicial review. Curbing arbitrary action and enabling judicial review are two goals of the nondelegation doctrine.[295]

In remanding to the agency, the circuit court opinion rejects a "strong" nondelegation principle, which would have required the statute to be struck down. In the opinion on rehearing, the rationale for rejecting this course of action is elaborated. In a prior Supreme Court case, known as the *Benzene* case,[296] the Supreme Court's plurality expounded that the court itself should ascertain the "intelligible principle" of a questioned statute from the purpose of the statute, its background and the statutory context of the language being examined [297] The D.C. Circuit of Appeals, however, believed that the "approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous

290. *Id.* at 1035-37.
291. *Id.* at 1037 ("The latter phrase [,policy judgment,] is not, after all, a self-sufficient justification for every refusal to define limits.").
292. *Id.* at 1037.
293. *Id.* at 1038.
294. Cass Sunstein describes this as a true new doctrine, which would require an agency to place "floors" and "ceilings" on its discretion. Sunstein, *supra* n. 278, at 348-49.
295. *Am. Trucking*, 175 F.3d at 1038. Judge Williams acknowledges a third goal would not be met, namely, requiring Congress to make any policy choices.
296. *Indus. Union Dept. v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).
297. *Id.* at 642, 646 (Stevens, J., plurality).

statute has given way to the approach of *Chevron*."[298] The *Chevron* case held that when a statute is ambiguous, it is up to the agency to make the relevant policy choices, so long as its reading of the statute is reasonable.[299] Therefore, the agency itself must provide a binding interpretation of what the statute requires of it in setting the NAAQS.

On rehearing, the EPA said that the Act required them to do what was "necessary", no more or less, and that a standard 95 percent confidence interval separates health effects that could be the product of chance from health effects a regulated pollutant caused.[300] The panel, however, continued the remand for the EPA to apply the purported standard.[301] The D.C. Circuit panel also modified the statement of its ruling on the EPA's interpretation of how to implement the new standards in areas that have not attained the revised standard, so-called nonattainment areas. The portion of the CAA that dealt with implementation plans for nonattainment areas had two subparts. At issue was which one applied: either Subpart 1 or Subpart 2.[302] The court revised its conclusion to read: "In sum, because the reference to § 107(d) in § 181(a)1) includes the designation of an area as nonattainment for ozone under a revised ozone NAAQS, that is, under § 107(d)(1), the EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2."[303] Specialized schedules for compliance with the standard would be applicable; these would grant potentially more time for attainment than the general schedule of Subpart 1. The panel also reinforced its ruling that the beneficent impacts of ozone should be considered in setting the standard.[304] The D.C. Circuit refused to hear the case *en banc*.[305]

B. *Supreme Court and the Nondelegation Doctrine*

The questions raised on *certiorari* were four-fold.[306] First, did the CAA

298. *Am. Trucking*, 195 F.3d at 8 (referring to *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837 (1984)).

299. *Chevron*, 467 U.S. at 866.

300. *Am. Trucking*, 195 F.3d at 6 n. 1.

301. *Id.* at 7.

302. The references in the cases to "Subpart 1 and Subpart 2" can be confusing without an understanding of the structure of The Clean Air Act (42 U.S.C. §§ 7401 to 7671(q) (1994)). The first division of the Act is into seven subchapters: Subchapter I - Programs and Activities; Subchapter II - Emission Standards for Moving Sources; Subchapter III- General Provisions; Subchapter IV - Noise Pollution; Subchapter IV-A - Acid Disposition; Subchapter V- Permits; and Subchapter VI - Stratospheric Ozone Protection. These Subchapters are also referred to as "Titles" and some of them are further divided into Parts. For example, Subchapter or Title I, which is at issue in the case, is divided into 4 parts. Part D is entitled "Plan Requirements for Nonattainment Areas." Part D contains 6 subparts, which include subparts 1 and 2. Subpart 1 is entitled "Nonattainment Areas in General" and Subpart 2 is entitled "Additional Provisions for Ozone Nonattainment Areas." 43 USC §§ 7501-7509(a), 7511-7511(f) (1994).

303. *Am. Trucking*, 195 F.3d at 10.

304. *Id.*

305. *Id.* at 14.

306. *See Am. Trucking*, 121 S. Ct. at 907.

in § 109(b)(1) delegate legislative power to the EPA? Second, whether the EPA may consider costs in setting the NAAQS? Third, whether there was jurisdiction to review the EPA's interpretation of Part D in regard to implementing the revised ozone NAAQS? And finally, if there was jurisdiction, whether the EPA's interpretation of the statute was reasonable? The first two questions could have been explosive if answered positively. In these major constitutional and environmental law interpretations, however, the Supreme Court continued the status quo. The Court unanimously found that the CAA did not require nor allow the costs of implementation to be considered in setting the NAAQS.[307] It had a similar response to the delegation issue.

The Supreme Court disagreed with the D.C. Circuit's finding that the EPA's interpretation of § 109(b)(1) of the CAA violated the nondelegation doctrine because it did not provide an "intelligible principle," namely, a determinate method to "draw lines."[308] Justice Scalia, speaking for seven justices including himself,[309] emphasized that the D.C. Circuit invalidated not the statute, but the agency interpretation.[310] The statute, of course, instructs the EPA to "set ambient air quality standards which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety are requisite to protect the public health."[311]

The Court quickly rejected the "new" brand of nondelegation the D.C. Circuit forwarded, which focuses on an agency interpretation, rather than a statute. Justice Scalia noted that the Supreme Court had never allowed an agency to cure an unlawful delegation of legislative power to itself by the agency limiting its own discretion:

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307. There was a disagreement on why this was so. All the justices but Justice Breyer joined in Justice Scalia's discussion of the matter. Justice Scalia found the words "public health," protection of which is the goal of the NAAQS, to mean the "health of the public." *Am. Trucking*, 121 S. Ct. at 909. Because the CAA directly imposes the requirement to consider costs in other portions of the CAA, Justice Scalia held that to require cost-consideration on the NAAQS-setting process would require a "textual commitment of authority to the EPA . . . [which] must be a clear one." *Id.* at 909-10. The Court did not find such a commitment. Justice Breyer agreed with the result, but not the reasoning. He would find silence in a statute about whether the important policy question of whether costs could be considered to indicate, all other things being equal, that the agency could decide whether or not to include such a factor as part of "rational regulation." *Id.* at 921 (Breyer, J., concurring.). However, he believed that legislative history and the CAA's structure, showed a congressional decision to not allow cost consideration. For example, the history is clear that Congress meant the Act to be "technology forcing." *Id.* at 922. Moreover, the CAA did not require regulation to the point of destroying industrialization because the statute does not require elimination of all risk and provides for discretion. *Id.* at 923-24. For a contrary argument, *see* C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 Tex. Rev. L. & Policy 1, 28-37 (2000).

308. *Am. Trucking*, 121 S. Ct. at 912.

309. Justice Stevens wrote a separate opinion concurring in the judgment, but with a different rationale. Justice Souter joined with him. Justice Thomas joined in Justice Scalia's opinion and also wrote a special concurrence.

310. *Am. Trucking*, 121 S. Ct. at 912.

311. 42 U.S.C. § 7409(b)(1) (1994).

> The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise that is to say, the prescription of the standard Congress omitted would *itself* - be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, an agency's voluntary self-denial has no bearing upon the answer.[312]

In Justice Scalia's opinion, it was crucial to determine whether the statute granted legislative power to the agency or not.[313] He reads Article I, § 1 as being exclusive when it vests "[all legislative powers herein granted . . . in a Congress of the United States." Therefore, the Court had to determine what constituted legislation.

Justice Scalia returns to the idea that if Congress, in the statute, supplies an "intelligible principle" for the agency, then it is Congress, not the agency, that is legislating. Such an intelligible principle had been found in the past when Congress required an agency to make certain that holding companies are not "unduly or unnecessarily complicate[d]"[314] or required agencies to regulate in the "public interest."[315] Therefore, the delegation to the EPA was not of legislative power; the guidance given it was within the parameters of what had been approved in the past. The statute instructs the EPA to set the standards at a level that is "requisite" to protect the public health with an adequate margin of safety. The Court interpreted "requisite" to mean "not lower or higher than is necessary."[316] This guidance was similar to instructing the Attorney General in a criminal setting to designate a drug as a controlled substance if "necessary to avoid an imminent hazard to the public safety."[317] Moreover, the statutory wording also resembled the standard for the Occupational Safety and Health Act, which was litigated in the *Benzene* case.[318] Justice Scalia noted that the only justice hearing the *Benzene* case who objected to the statute on nondelegation grounds would not have done so if OSHA did not have discretion to consider costs in setting standards. In the CAA, the EPA was not given such discretion[319] Therefore, the discretion afforded the EPA in *American Trucking* was deemed acceptable and not legislative power.

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312. *Am. Trucking*, 121 S. Ct. at 912.

313. *Id.*

314. *Id.* (citing *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)) (upholding the Public Utility Holding Company Act of 1935).

315. *Id.* (citing *Nat. Broad. Co. v. U.S.*, 319 U.S. 190, 225-226 (1943) (regulation of airwaves), *N.Y. Cent. Sec. Corp. v. U.S.*, 287 U.S. 12, 24-25 (1932) (approval of railroad mergers).

316. *Id.* at 914.

317. *Id.* at 912 (quoting statute at issue in *Touby v. U.S.*, 500 U.S. 160, 163 (1991)).

318. *Am. Trucking*, 121 S. Ct. at 912 (quoting the statute at issue in *Indus. Union Dept. AFL-CIO v. Am. Petroleum Inst.*, 448 U.S.607, 646 (1980) (instructing OSHA to set the standard "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health")).

319. *Id.* (citing to *Indus. Union*, 448 U.S. at 671 (Rehnquist, J., concurring) and *Am. Textile Mfr. Inst., Inc., v. Donovan*, 452, U.S. 490, 545 (1981) (Rehnquist, J., dissenting)).

Justice Scalia found no need for "determinant criterion:"

> But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.' In *Touby*, for example, we did not require the statute to decree how 'imminent' was too imminent, or how 'necessary' was necessary enough, or even—most relevant here—how 'hazardous' was too hazardous.[320]

The majority opinion, therefore, made no startling developments in non-delegation law precedents.

The only potential "quirk" the decision places in constitutional law is the acknowledgment that "the degree of agency discretion that is acceptable varies according to the to the scope of the power congressionally conferred."[321] Justice Scalia, by way of illustration, notes that Congress need give no direction for the EPA to define "country elevators" exempt from some requirements, but Congress would have to give more guidance on "setting air standards that affect the entire national economy."[322] Thus, Justice Scalia seems to make distinctions on how much discretion is appropriate based on the impact of the regulation.[323] The two concurring opinions, however, called for more linguistic honesty, yet arrived at diametrically opposed conclusions.

In one concurrence, Justice Stevens, joined by Justice Souter, called for acknowledging that agency rule-making is delegation of legislative authority, but is not unconstitutional if an "intelligible principle" is provided.[324] Justice Stevens noted that the EPA set prospectively binding standards. If Congress had enacted the rules, its activity would definitely be deemed legislative; the characterization of the activity should not vary with the player. The fiction of stating that what agencies do is not legislation arises from the erroneous belief that Article I, section 1 of the Constitution (which states that "all legislative Powers" are vested in Congress) precludes delegation of the power. These justices would therefore prefer that the law be more straightforward and honest about what is being done, both pragmatically and in regard to constitutional theory.[325]

Justice Thomas, in his concurrence, also seemed to promote linguistic purity, but with an opposite conclusion. At some point, he believes that agency rule making is legislation and therefore constitutionally suspect even with an "intelligible principle:" "I believe that there are cases in which

320. *Id.* at 913.
321. *Id.*
322. *Id.*
323. Others have suggested that differing amounts of discretion without running afoul of delegation norms is tied to whether or not the Executive has independent power to deal with the issue. *See e.g.* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1260-61 (1985).
324. *Am. Trucking*, 121 S. Ct. at 920 (Stevens, J., concurring).
325. *Id.*

the principle is intelligible, yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"[326] He emphasizes the "All" in Article I, § 1 of the Constitution; to him this precludes any delegation of "true" legislative authority.[327] Because the parties to this case had not attacked the precedents allowing an "intelligible principle" to govern whether or not legislative authority was delegated, this question was not broached. As with the majority, Justice Thomas appears to consider the problem of assigning responsibility to be one of degree in order to ascertain the boundaries of constitutional separation of powers.

C. *Supreme Court and Judicial Review*

The Court also looked at questions of administrative law and was unanimous in the response to the question of whether the EPA correctly assessed its authority to implement the revised ozone NAAQS in areas in which the ozone levels exceed the maximum amount allowed by the standard. First, the Court determined both that there had been final agency action and that it was ripe for judicial review.[328] The Court then had to ascertain if the EPA's interpretation was correct. The EPA stated that subpart 1 of Part D—"Nonattainment Areas in General"[329]—would apply immediately to the new hour-hour ozone standards. Subpart 2—"Additional Provisions for Ozone Nonattainment Areas"[330]—would continue to apply to those areas until the old one-hour standard is met. When that standard is attained, then Subpart 2 would no longer apply.[331]

The Supreme Court disagreed with both the Court of Appeals and the EPA. The Court of Appeals had held that the statute was clear and Subpart 2 controlled the implementation of the revised ozone standard.[332] However, the Supreme Court, in employing the two-step review process of *Chevron*,[333] found that Congress had not spoken clearly on the matter. It

326. *Id.* at 920 (Thomas, J., concurring).

327. *Id.*

328. *Id.* at 914-16. Section 397(b)(1) of the CAA provides for jurisdiction in the Court of Appeals for the D.C. Circuit for review of "any. . . nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. § 7607(b)(1) (1994). The Court found "final action" because the agency had promulgated a proposed Interim Implementation Policy, the White House published a Memorandum on the subject, and the EPA responded to comments and published a reconsidered interpretation in the Preamble to the final ozone standard. Looking at practicalities, the court found that "[t]hough the agency had not dressed its decision with the conventional accoutrements [sic - accouterments] of finality, its own behavior thus belies the claim that its interpretation is not final." *Id.* at 915. The policy was ripe for review because the CAA allows for pre-enforcement review of regulations and also because the States must comply with the policy in coming up with their State Implementation Plans, which require lengthy processes.

329. 43 U.S.C. §§ 7501-7509(a) (1994).

330. 43 U.S.C §§ 7511-7511(f) (1994).

331. *See Am. Trucking*, 121 S. Ct. at 915 (citing the Federal Register publication at 62 Fed. Reg. 38856, 38884-85 (1997)).

332. *Am. Trucking*, 175 F.3d at 1048-50.

333. *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

found that the language of Subpart 1 noted that if another section applies, then it should have precedence. The crux of the difficulty is that while the scope of Subpart 2 might not be limited solely to areas that were not in attainment of the 1989 standard, the subpart does not clearly state what it covers. Moreover, some gaps in coverage would occur if Subpart 2 alone applied to the new standard because of the specificity of the subpart.[334] Therefore, in reviewing the agency interpretation, the Supreme Court moved to the second prong of the *Chevron* test, namely, asking if the agency interpretation of the statute is reasonable.

Although the *Chevron* doctrine is often viewed as a deferential one,[335] the Court did not defer to the EPA's interpretation. The Supreme Court noted that Subpart 2 had provisions that were intended to apply into the future.[336] Therefore, it found that the EPA's intent to make Subpart 2 "abruptly obsolete,"[337] was unreasonable. The Court agreed with the EPA that Subpart 1 had some applicability to the revised standards, but not the sweeping applicability that the EPA granted it. In other words, Congress was not clear on which provisions should apply to revised ozone standards, but had worked hard on some provisions and classifications which apparently were designed to bind the EPA. Therefore, the EPA could not erase Subpart 2 in favor of the more highly discretionary subpart 1. This refusal to defer to the EPA, while slightly unusual for a situation where ambiguity was found in a statute, did not result in an upheaval of long held beliefs and interpretations.

As will be detailed below, the *American Trucking* decision is more noteworthy for what it could have done and did not do than for what it did.

D. American Trucking in Perspective

1. Supreme Court Precedent on Delegation

The decision in *American Trucking* is not surprising in light of Supreme Court precedents. There have only been two situations in which the Supreme Court has invalidated a law because Congress invalidly delegated legislative power.[338] Despite this, the Supreme Court has discussed the possibility from an early date. The origins of the nondelegation principle lie in separation of powers doctrine.

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334. *Am. Trucking*, 121 U.S. at 918.

335. *See* Chief Justice Rehnquist's reference to "*Chevron* deference" in *Solid Waste*, 531 U.S. at 172.

336. *Am. Trucking*, 121 U.S. at 919.

337. *Id.*

338. As Cass Sunstein put it, there was only one "good year" for the nondelegation doctrine, namely 1935. Sunstein, *supra* n. 215, at 318. *But see U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), which did not involve Congress and the Executive. In this case, the Court invalidated a statute that made it a crime to charge "unjust or unreasonable" prices for "any necessaries" as unconstitutional because it delegated legislative power to courts and juries.

The doctrine's constitutional predicate resides in the fact that the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States."[339] One relatively early case, *Field v. Clark*, stated the proposition as follows:[340]

> That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution . . . "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."[341]

Despite this statement of the distinction between legislating and executing, which might be a tautology, the Supreme Court found a way to uphold the statute at issue in *Field*, which gave the Executive the authority to suspend certain duty-free provisions of the McKinley Tariff Act of 1890 if he determined that the importing country's tariffs were "reciprocally unequal."[342] The statute gave what may be classified as conditional or contingency power. If a certain foundation is laid, then the Executive has an obligation to act in a designated way.[343] Other such statutes have been upheld.[344] In essence, in this type of binary legislation, the executive was merely "executing" the Congressional policy. The finding that a fact does or does not exist is not a core legislative function.

In a second set of cases, the Supreme Court also found no legislation by the executive if the executive was simply "filling up the details" of the law Congress declared. The Supreme Court used this very language in *United States v. Grimaud*.[345] The case involved whether or not the Secretary of Agriculture could designate grazing in a forest reserve without a license as a misdemeanor. The Supreme Court analyzed the Organic Act of 1897,[346] which provided criminal sanctions for violations of rules the Secretary established. These rules were to "insure the objects" of the national forest reserves by regulating "their occupancy and use" so as to protect the resources. According to the Court, Congress did the legislating, setting forth purposes and sufficient detail to guide the Secretary of Agriculture in

339. U.S. Const. art. I, § 1.
340. 143 U.S. 649 (1892).
341. *Id.* at 692-94 (quoting Ohio Supreme Court Judge Ranney's opinion in *Cincinnati, Wilmington & Zanesville R.R. Co. v. Commrs.*, 1 Ohio St. 77, 88 (1852)).
342. *Id.*
343. *See e.g.* Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More than "A Dime's Worth of Difference,"* 49 Cath. U. L. Rev. 337, 342-43 (2000).
344. *See Cargo of the Brig Aurora v. U.S.*, 11 U.S. 382, 387-88 (1813) (allowing the President to revive a trade law if a certain factual predicate was met).
345. 220 U.S. 506 (1911).
346. Currently codified at 16 U.S.C. § 478 (1994).

filling in details.[347] Similarly, the Supreme Court had earlier upheld a delegation to "establish uniform standards" for importing tea; Congress had gone as far as it could go.[348]

In these two situations, interstitial and conditional "administration," the Supreme Court declared that no legislation was taking place.[349] A third method of allowing delegation of some discretion was posited in *J.H. Hampton & Co. v. United States*.[350] To a certain extent, the test enunciated was simply a synthesis of the earlier phraseology.[351] The Court in *Hampton* upheld the Flexible Tariff Act of 1922, which authorized the President to adjust import tariffs to protect domestic companies. The Supreme Court found the President merely fills in details and looks to contingencies: "If Congress shall lay down by legislative act an intelligible principle [to govern exercise of the delegated power], such legislative action is not a forbidden delegation of legislative power."[352]

Using these tools, the Supreme Court found almost all statutes that came before it passed muster.[353] The two exceptions came in cases in 1935, both reviewing parts of the National Industrial Recovery Act ("NIRA").[354] In one case, *Schecter Poultry Corp. v. United States*, [355] the disallowed delegation allowed private companies to accede to "codes of fair competition," with the President enabled to enforce these privately-drawn agreements so long as they were not creating monopolies. The element of private "law-making" therefore muddied the waters.[356] The second case that found an improper delegation also involved some intermediary in rule-making. The Court invalidated a provision of the NIRA that enabled the

347. *Grimaud*, 220 U.S. at 517 (authority may be given "to fill up the details" to those who are to act under a general legislative mandate).

348. *Buttfield v. Stranahan*, 192 U.S. 470 (1904) (upheld act allowing Treasury Secretary to establish uniform standards of purity, fitness and quality for imported tea). The Court here maintained that "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute." *Id.* at 496.

349. *But see* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 483 (1989), where she argues that there was a change in analysis in *Grimaud* from the definition of legislation in *Field*. The earlier definition emphasized that legislation encompassed the presence of discretion to determine what is wise or expedient. Therefore, "[u]nder the pressure of the broader statutory delegation in *Grimaud*, the early formalistic analysis began to shift. Nondelegability was coming to turn not simply on the nature, but also on the extent, of the power delegated."

350. 276 U.S. 394 (1928).

351. Huefner, *supra* n. 343, at 348-49 (identified *Buttfield* as combining interstitial and contingency authority to get to policy guidance).

352. *Hampton*, 176 U.S. at 406-07.

353. *See e.g. Fed. Radio Commn. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) (finding the "public convenience, interest, or necessity" standard to be not so indefinite as to confer an "unlimited power" when interpreted in context).

354. National Industrial Recovery Act, June 16, 1933, 48 Stat. 195, as amended by Act of June 14, 1935, 49 Stat. 375.

355. 295 U.S. 495 (1935) (reviewing NIRA § 3, 48 Stat. 196 (1933)).

356. *See* Carter *v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (due process violated when majority of miners empowered to set minimum wages and hours in an "obnoxious" form of delegation).

President to prohibit interstate transportation of petroleum produced in violation of state conservation laws. According to the *Panama Refining Co. v. Ryan*,[357] general delegation principles were violated. The purposes of the Act were so broad, namely general desires to "rehabilitate" and "correct" economic woes, that the President had in effect been given "unlimited authority to determine the policy and to lay down the prohibition . . . as he may see fit."[358] These two cases were the last in which a majority of the Court found delegation to be a problem; the New Deal was rescued as pressure mounted and the Court reversed positions.[359]

The Court then resumed its approval of arrangements whereby the executive could exercise considerable discretion.[360] The inquiry became one of whether sufficient policing of Congress's delegee could come to pass:

> The standards prescribed by the present Act, with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Hence we are unable to find in them an unauthorized delegation of legislative power.[361]

The focus of review began to move from whether or not a particular action was legislative in character to whether there was sufficient process to protect the governed and the governing.[362]

The role judicial review and other administrative process may play in approving a delegation of discretion to the executive became more pronounced in time. The Administrative Procedures Act was passed in 1946[363] and greatly clarified controls on agency activity, providing for a presumption that judicial review would be available[364] and for participation

357. 293 U.S. 388 (1935).

358. *Id.* at 415.

359. *See W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Zellmer, *supra* n. 206, at 960 (describes the retreat from court-packing when, in *West Coast Hotel Co. v. Parrish*, Justice Owen Roberts, a Hoover appointee, changed his vote and found the Washington State minimum wage law valid).

360. *See e.g. Nat. Broadcasting Co. v. U.S.*, 319 U.S. 190, 225-26 (1943) (upholding the standard for regulation of broadcast licenses, namely, "public convenience, interest, or necessity").

361. *Yakus v. U.S.*, 312 U.S. 414, 426 (1944). *See* Farina, *supra* n. 349, at 486 (1989) ("The constitutionally relevant inquiry is no longer whether Congress resolved certain types of issues, but whether it supplied enough policy structure that someone can police what its delegee is doing.") Cass Sunstein notes that even in *Schecter* the Supreme Court recognized the importance of procedural guidelines; it contrasted the statute it invalidated with that governing the FTC, noting with approval that the latter had procedural guarantees to limit arbitrary agency action. Sunstein, *supra* n. 278, at 344 (citing *Schecter Poultry*, 295 U.S. at 533).

362. *Cf. Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (*En banc*) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits.")

363. 5 U.S.C. §§ 551-559 (1994 & Supp. IV 1998).

364. *Id.*; 5 U.S.C. § 701 (1994). *See Ariz. v. Cal.*, 373 U.S. 546, 583-85 (1963) (upholding delegation to Secretary of Interior where Secretary's power to apportion the waters of the

in rule making.[365] The Court noted this in *American Power & Light Co. v. SEC*:[366] "[It is] constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."[367] In fact, the accent on procedural safeguards led the author of a premier administrative law commentary, Kenneth Culp Davis, to propose that the nondelegation doctrine be refocused to account for the desire to constrain arbitrary administrative action, thus concentrating on "legislative and administrative standards and procedural requirements to determine whether administrative discretion has been confined to the greatest degree practicable."[368] Traditional, strong non-delegation doctrine, which would invalidate a statute for crossing the line between legislative and executive function, appeared moribund.[369]

In fact, the most intriguing discussion of the possibility of nondelegation being "alive" came in the oft-cited Rehnquist concurrence in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*.[370] Chief Justice Rehnquist acknowledged that the doctrine was not an absolute bar to executive decision-making: "The rule against delegation of legislative power is not, however, so cardinal of principle as to allow for no exception. The Framers of the Constitution were practical statesmen, who saw that the doctrine of separation of powers was a two-sided coin."[371] However, when granting the Occupational Safety and Health Administration authority to set standards to protect workers from toxic substances,[372] Justice Rhenquist argued that Congress gave insufficient guidance in all of the sources

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Colorado River was subject to judicial review).

365. *Id.* at § 553.

366. 329 U.S. 90, 105-09 (1946).

367. *Id.* at 105. Lower courts followed suit. *See e.g. Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746-47 (D.C.C. 1971) (Levanthal, J., for three-judge panel) (broad delegation upheld, noting the availability of procedures under the APA to rein in discretion).

368. Kenneth Culp Davis, *Administrative Law Treatise* § 3:15, 211 (2d ed., K.C. Davis 1978) [hereinafter *Treastise*]. *See* Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 50 (1969) (arguing emphasis should be on administrative clarification, not Congressional wording); Kenneth Culp Davis, *"A New Approach to Delegation,"* 36 U. Chi. L. Rev, 713, 713 (1969) [hereinafter Davis, *New Approach*] ("The key should no longer be statutory words; it should be the protections that administrators in fact provide, irrespective of what the statutes say or fail to say.") *See* discussions in Zellmer, *supra* n. 206, at 964; Sunstein, *supra* n. 278, at 340-41.

369. Davis, *New Approach*, *supra* n. 368, at 713.

370. 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

371. *Id.* at 673.

372. At issue in *Indus. Union* was the interplay of 29 U.S.C. § 652 (1994), which defines an "occupational safety and health standard," with 29 U.S.C. § 655(b)(5) (1994), which states that for toxic substances, "The Secretary . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."

generally employed to locate the "intelligible principle," namely, the wording of the statute, the statute as a whole, Congressional purpose, or legislative history:

> Read literally, the relevant portion of § 6(b)(5) is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot. In the case of a hazardous substance for which a "safe" level is either unknown or impractical, the language of § 6(b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Especially in light of the importance of the interests at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power. For me the remaining question, then, is whether additional standards are ascertainable from the legislative history or statutory context of § 6(b)(5) or, if not, whether such a standardless delegation was justifiable in light of the "inherent necessities" of the situation.[373]

Chief Justice Rehnquist found the statue wanting, even with the interpretive aids.

The plurality opinion, however, disagreed. It read the statute so as to skirt the delegation question: "A construction of the statute that avoids this kind of open-ended grant should certainly be favored."[374] It therefore ruled that the definition of a "standard" applied to setting standards for toxic substances.[375] The definition required a "standard" be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment"[376] By this method of statutory interpretation, the delegation to the Secretary of Labor had a sufficient "intelligible principle" to avoid being an improper delegation of legislative power.

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373. *Id.* at 675. It is in this opinion that Chief Justice Rehnquist refers to the inconclusive legislative history of the Act as follow: "far from shedding light on what important policy choices Congress was making in the statute, [it] gives one the feeling of viewing the congressional purpose 'by dawn's early light.'" *Id.* at 676. Although Chief Justice Rehnquist used the phrase to impart a sense of murkiness, it is used in the title of this article as embodying a sense of miraculous or reassuring survival, such as that felt by Francis Scott Key in penning a song about the Star-Spangled Banner still standing despite bombardment.

374. *Id.* at 646 (plurality opinion).

375. The opinion found that the statute thereby limited the discretion of OSHA:

> By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. . . .
>
> Therefore, before he can promulgate any permanent health or safety standard, the Secretary is required to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices. This requirement applies to permanent standards promulgated pursuant to § 6(b)(5), as well as to other types of permanent standards. For there is no reason why § 3(8)'s definition of a standard should not be deemed incorporated by reference into § 6(b)(5). . . .

Id. at 642.

376. 29 U.S.C. § 652(8) (1994).

It is this active judicial interpretive role that Judge Williams rejected in *American Trucking* in favor of remanding the case to the agency to come up with a binding statutory interpretation that would pass constitutional muster.[377] Although some applauded the move as serving some of the functions of the nondelegation doctrine,[378] it was not strongly intimated in more recent United States Supreme Court cases. Rather than remanding, the Supreme Court appeared to adopt two strategies in regard to the doctrine: it either upheld a statute as not violating nondelegation principles or it invalidated the statute on independent grounds. An example of the first technique is *Mistretta v. United States*,[379] which rejected finding a delegation problem in the procedure to establish federal sentencing guidelines. An example of the second technique, skirting the issue, is *Clinton v. New York*.[380] The Court invalidated the Line Item Veto Act[381] because it violated the Presentment clause of the Constitution, that is, the "finely wrought" process in which legislation is only made by votes of both houses of Congress with the opportunity for the President to veto the same. The Court did not decide the delegation issue, although Justice Scalia opined that there is greater flexibility in delegating budgetary matters to the Executive.[382]

In two additional recent cases before *American Trucking*, the Supreme Court avoided the delegation issue by resorting to administrative law, rather than constitutional law. The Supreme Court found questioned regulations unauthorized as a matter of statutory interpretation. In *FDA v. Brown and Williamson Tobacco Corporation*, the Court employed the first analytical step of the *Chevron* test and found that Congress was clear and did not give control over cigarettes to the Federal Drug Administration.[383] In *AT& T Corp. v. Iowa Utilities Board*,[384] a regulation was invalidated by using step two of *Chevron*, namely, finding the regulation an unreasonable interpretation of the statute. In light of these alternative modes of resolving regulatory disagreements, many believed it was unlikely that the Supreme Court would either reactivate a strong non-delegation doctrine, which would invalidate a statute, nor the "weak" doctrine of *American*

377. *Am. Trucking*, 175 F.3d at 1038.
378. Lisa Schultz Bressman, *Shecter Poultry at the Millenium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1406-42 (2000) (arguing remand to the agency would curb abuses of discretion while exercising deference to agency expertise).
379. 488 U.S. 361 (1989).
380. 524 U.S. 417 (1998).
381. 110 Stat. 1200, 2 U.S.C. § 691 *et seq.* (1994), described in *Clinton*, 524 U.S. at 436. The Act enabled the President, upon following precise procedures and making requisite findings, to "cancel in whole" certain types of provisions that had been enacted into law. These included "(1) any dollar amount of discretionary spending; (2) any item of new direct spending; or (3) any limited tax benefit." 2 U.S.C. § 691(a) (1994).
382. *Clinton*, 524 U.S. at 466-68.
383. 120 S. Ct. 1291 (2000).
384. 525 U.S. 366, 392-93 (1999).

Trucking I.[385]

Therefore, the failure of the Supreme Court to adopt either of these postures is not surprising. The Supreme Court did make one statement that should be expanded upon in light of precedent. Justice Scalia, in acknowledging that an agency may get discretion, notes that "[i]t is true enough that the degree of the agency discretion acceptable varies according to the scope of the power congressionally conferred."[386] In context, Justice Scalia then discusses the impact of the conferred power on the public, contrasting the power to define a "country elevator" for a regulatory exemption with the power to effect the economy as a whole.[387] The cases he cites, however, point to another way to distinguish the extent of discretion that may be delegated.

In the first case Justice Scalia cites, *Loving v. United States*,[388] Congress delegated the duty to define aggravating factors, the presence of which would determine when a sentence of capital punishment could be imposed in a court martial. The pragmatic answer may be that the delegation was to the President, who was acting as Commander-in-Chief. Therefore, the Court found less explicit guidance was necessary.[389] The second cited case has a similar theme. In *United States v. Mazurie*,[390] Congress delegated to Indian tribes the ability to regulate use of alcoholic beverages; the tribe's independent authority over its members and territory enhanced Congress's ability to delegate.[391] These two cases recognize that greater discretion—and hence delegation—may be granted when the delegatee has pre-existing power over the subject matter.[392] In essence, there is shared jurisdiction.

Still one additional gloss could be put on Justice Scalia's statement about degrees of allowable delegation. Chief Justice Rehnquist also acknowledged a situation rooted in practicality: greater discretion also may be given where it would be "unreasonable and impracticable to compel Congress to prescribe detailed rules."[393] This might be construed to cover instances of scientific uncertainty. Chief Justice Rehnquist, however, rejected allowing discretion when scientific uncertainty was at issue, demanding instead that Congress set policy guidelines in such a situation, or

385. Zellmer, *supra* n. 206, at 1012 ("The Court's decisions in both . . . indicate that it has no interest in reviving the nondelegation doctrine as a constitutional ground for invalidating congressional enactments.").
386. *Am. Trucking*, 121 S. Ct. at 913.
387. *Id.*
388. 517 U.S. 748, 772-73 (1996).
389. *Id.* at 772 ("Perhaps more explicit guidance would be necessary if delegation were made to a newly created entity without independent authority in the area.").
390. 419 U.S. 544, 556-57 (1975).
391. *Id.* at 557 ("[I]t is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty . . . .").
392. *See* Schoenbrod, *supra* n. 323, at 1260-61; Zellmer, *supra* n. 206, at 1014.
393. *Am. Petroleum Inst.*, 448 U.S. at 683 (Rehnquist, J., concurring).

at least preclude cost consideration.[394] Nevertheless, the situation of scientific uncertainty may trigger additional discretionary lee-way.

2. Why Justice Thomas Stands Alone: The Pros and Cons of a "Strong" Non-Delegation Doctrine

One question that some champions of lesser government intrusion may raise is why the Supreme Court did not make more of an explosion with *American Trucking*? In other words, why did only Justice Thomas raise the question of re-examining precedent to see if there should be more than an "intelligible principle" before a statute escapes nondelegation scrutiny?[395] The ability to allow agencies to implement policy through regulation and adjudication is central to the administrative state.[396] Environmental regulation requires both good science and good economic data. Often neither discipline can give strict "answers." Policy choices will be necessary even within the policy guidelines Congress might provide. Regulation, which by definition includes prescribing future conduct, is legislative in character and goes beyond mere fact-finding.[397] Nevertheless, the basis for all federal government is the Constitution, which has been construed to require Congress to pass all legislation.

Proponents of a "strong" nondelegation doctrine, which would invalidate statutes allowing "legislation" by agencies, often cite not only the words of the Constitution, but those of James Madison in the Federalist[398] and John Locke, who said that "[t]he legislative cannot transfer the power of making laws to any other hands. . . nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and au-

394. *Id.*

395. *See Am. Trucking*, 121 S. Ct. at 919-20 (Thomas, J., concurring). His opinion is not without academic support. *See e.g.* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of Second Best*, 80 Cornell L. Rev. 1, 30 (1994); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731 (1999) (cannot leave to Congress the "policy" choice of which parts of the constitution are to be enforced).

396. Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 Notre Dame L. Rev. 1, 2 (2000) (asserting that benefits of new nondelegation doctrine in promoting values underlying rule of law not commensurate with doctrine's impact on agencies' abilities to address particularities of problems they are to remedy).

397. The Administrative Procedure Act ("APA") defines rule in part as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4) (1994). *See Albertson's, Inc. v. Kirkingburg*, 119 S. Ct. 2162, 2171 (1991) (Department of Transportation's rule specifying visual requirement for truck drivers "have the force of law"). Even before the APA, judges recognized the effect of a rule. *Ariz. Grocery Co. v. Athchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 386 (1932) (a rulemaking agency "speaks as the legislature, and its pronouncement has the force of a statute").

398. *The Federalist* No. 47, 303 (James Madison) (Clinton Rositer ed., N.Y. New Am. Library 1961), cited e.g. by Sunstein, *supra* n. 215, at 320 (discussing arguments of proponents), and Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More than "A Dime's Worth of Difference,"* 49 Cath. U. L. Rev. 337, 342 (2000).

thorized to make laws for them."[399] In this light, the nondelegation doctrine is a pillar of separation of powers. To some, therefore, a *sharing* of legislative power would simply be unconstitutional.[400]

Practicality quickly made the purity of this linguistic and philosophical premise murky. Early in the nation's history, Congress passed acts delegating authority to the Executive. Congress in 1794 authorized the president to embargo ports or vessels "whenever, in his opinion, the public safety so require."[401] Similarly, Congress allowed the President "to remit and discontinue" the prohibitions of an act forbidding trade with France "if he should deem it expedient and consistent" with the interest of the United States.[402] Those close to the drafters (indeed, some of them as legislators) did not view the Constitution as prohibiting Congress from delegating to the executive policy decision-making, which is akin to legislation.

Opponents of delegation, however, forward an argument that is related to the Constitutional separation of powers argument, namely, that nondelegation protects individual liberty by requiring Congress to go through the rather burdensome method of enacting legislation before passing rules that impact on individuals. Legislation is supposed to be difficult.[403] That is the reason why Article I requires both houses of Congress to pass a bill in addition to presentment to the President. The checks and balances inherent in the process control improvident action, dampen factionalism, and preserve liberty. Therefore, Congress should have to come to more exacting resolution of an issue, rather than passing the job on to an administrative agency, which is not elected.

This argument, however, may be countered by the realization that Congress may not be able to resolve the issues legislatively. Although public choice analysis may say that Congress delegates in order to not appear on the radar screen of interested parties on a particular issue,[404] some of the reasons that Congress delegates are not cynical or rooted in self-

399. John Locke, *Second Treatise of Government* 74-75 (C.B. Macpherson ed., Hackett Publblishing Co. 1980) (1690), cited in Ernest Gelhorn, *Returning to First Principles*, 36, Am. U. L. Rev. 345, 347-48 (1987); Sunstein, *supra* n. 215, at 320 (discussing arguments of proponents).

400. *Am. Trucking*, 121 S. Ct. at 920 (Thomas, J., concurring); McCutchen, *supra* n. 395, at 30.

401. Act of June 4, 1794 Ch. 41 § 1, 1 Stat. 372, 372. This was, however, limited to periods when Congress was not in session and the closure was to be terminated fifteen days after Congress was next in session. *Id.* at §§ 1-2.

402. Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 613, 615. *See* Sunstein, *supra* n. 215, at 321 (detailing early delegations to the President on military pensions and for Indian trading).

403. Sunstein, *supra* n. 215, at 320 (detailing arguments); Schoenbrod, *supra* n. 395, at 1283 (purpose behind reinvigorating delegation rules is not only accountability and review, but also the "protection of private persons' liberty and property").

404. Donald A. Dripps, *Delegation and Due Process*, 1988 Duke L.J. 657, 668; David B. Spense & Frank Cross, *A Public Choice Case for the Administrative State*, 89 Geo. L. Rev. 97 (2000) (public choice (i.e. rational maximizing) analysis can show that delegation to nonmajoritarian agency experts may be the desired outcome of voters); Eskridge, *supra* n. 202, at 105 (confronted with the 'dilemma of the ungrateful electorate,' legislators try to avoid conflicts).

preservation. Especially in the area of environmental regulation, Congress may not have the expertise nor the time to devote to solving scientific dilemmas.[405] Moreover, there are institutional barriers to collective action[406] such as committee turf wars.[407] Policy, as well as scientific conclusions, may be impossible to resolve. Delegation is therefore responsible action.[408]

Nevertheless, one of the most resilient arguments for refusing to allow Congress to delegate legislative power, especially as to policy, is that accountable parties should make such decisions.[409] Representatives, Senators, and the President are elected and thus responsive to the voters. To move policy making or other legislative activity to an unelected body undermines democracy. Indeed, some argue that to enact appropriate legislation, Congress should not simply state its policy preference and allow the agency to determine how to arrive at the desired end; in regulating private conduct, Congress itself should determine the rules, that is, what behavior is or is not allowed.[410]

Delegation, however, does not remove either Congress or the public from the legislative arena. Agency rule making procedures are perhaps more participatory than the legislative process. Both venues, however, can be subject to pressure from well-financed lobbies. Wherever discretion lies, it will be lobbied. But an agency must respond to comments publicly, in both rule making[411] and other settings.[412] Moreover, the agency must account to Congress: the power of the purse strings through appropriations can be quite persuasive.[413] More directly, agencies are responsible to the President, who is an elected official.[414] In fact, if the D.C. Circuit's brand of

405. Sunstein, *supra* n. 215, at 323-24.

406. 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, 80 (2000); Siedenfeld, *supra* n. 176, at 98-99 (with inherent difficulties of legislating, Congress cannot generate sufficient laws to satisfy demands of interest groups).

407. Zellmer, *supra* n. 206, at 993; Eskridge, *supra* n. 202, at 105 (institutional process theorists conclude subgovernments tend to pander to special viewpoints and are not necessarily broadly representative.)

408. *But see* Schoenbrod, *supra* n. 323, at 1226 (delegates are often less capable than Congress to resolve the political conflicts in an issue).

409. Schoenbrod, *supra* n. 395 (delegation undermines democracy because it removes responsibility; it is also simply unconstitutional).

410. Schoenbrod, *supra* n. 323, at 1227.

411. 5 U.S.C. § 553 (1994).

412. *See e.g.* the National Environmental Policy Act, which requires an Environmental Statement for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c) (1994).

413. Sunstein, *supra* n. 215, at 324. *But see* Schoenbrod, *supra* n. 323, at 1243-46 (1985) (arguing that alternative accountability by Congressional oversight, ability to amend statute is responsive and not initial lawmaking and would require Congress to fight inertia, which was not what the Framers anticipated).

414. Pierce, *supra* n. 406, at 68-69 (explaining that the discretion of EPA in the ozone setting was not between a tad less than the killer fog and zero; the killer fog was fifty times current standard and would produce 3,900 deaths per week, which no agency nor court would accept, and no president would allow a standard set at zero because it would be unattainable and political suicide).

nondelegation doctrine was adopted, an agency is made a binding interpretation of the law *before* issuing a particular application could render the election of a new President meaningless.[415] Political reality means that agencies are not ivory towers unto themselves that are allowed to regulate in isolation without accountability. In fact, there is perhaps more oversight over agency action than any other portion of the federal government. Every other part of the government is involved: higher executives, judges, and Congress.[416]

Requiring more specificity from Congress, moreover, may make legislation more removed from the electorate. Often, statutes are passed in aspirational terms because this is the only way to arrive at a compromise; a compromise that will at least get the ball rolling toward solving a problem. The alternate route, specificity, at times results from the concerted effort of special interests. Additionally, specificity in a bill might not represent the true considered opinion of a legislator. In order to pass legislation, logrolling can replace true assent by the legislators to a particular bill, as could inclusion of substantive matters in amendments to unrelated bills and appropriation riders.[417] Specificity has not been shown to necessarily improve agency performance or conformity with social welfare.[418] Moreover, if judges must determine how specific is specific enough, it is the unelected judiciary who resolve the policy determination.[419]

Nevertheless, perhaps paradoxically, more specific standards from Congress have been touted as enhancing judicial review. Hand-in hand with this justification for the prohibition against delegation is that it prevents arbitrary and capricious agency action. Greater detail in legislation, however, is not necessarily required to foreclose such activity. Since 1946 and the development of the APA, it is presumed that agency action is subject to judicial review.[420] Agencies must explain their decision-making. If they do not, judges impose remand as an oft-implemented remedy. Transparency requirements force rationality and serve some of the values of separation of power, such as protecting individuals from actions bordering on despotism.[421] In addition, numerous statutes delineate procedural re-

415. *Id.* at 92-93.

416. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775, 783-84 (1999) (rule of law served because there are many "watchdogs with sharp, penetrating teeth" on agency). *But see* Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, Am. U. L. Rev. 195, 296 (1986) ("[D]elegation of broad and undefined discretionary power from the legislature to the executive brand deranges virtually all constitutional relationships and prevents attainment of the constitutional goals of limitation on power, substantive calculability, and procedural calculability.").

417. Lovell, *supra* n. 206, at 96-97 (alternative way to compromise if vague language not allowed).

418. Sunstein, *supra* n. 278, at 338-39.

419. Sunstein, *supra* n. 215, at 321; Schuck, *supra* n. 416, at 790.

420. 5 U.S.C. § 701 (1994).

421. *See* Sidney A Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons fo Agency Decisions*, 1987

quirements for agencies. These also assist in judicial review and in reining in arbitrary action.[422]

All told, allowing agencies to exercise discretion, which includes the legislative function of prescribing future action, does not do injustice to American ideals of accountability and individual liberty. The "intelligible principle" rationale the Supreme Court developed over time need not be re-examined, as Justice Thomas might desire. It has allowed for a flexible government, which must, of course, be one of practical people.[423] The doctrine, whether entirely kosher or not, has become part of our law.[424] To disturb it would greatly disrupt the current statutory framework, because many statutes have less detailed guidance than the Clean Air Act.[425]

Moreover, this arrangement of responsibility does not violate the Constitution. The provision of the Constitution that vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States"[426] means that the executive and the judiciary cannot usurp the same, not that Congress cannot decide to give some legislative power to another if necessary. The decision as to how much discretion an agency is to have in implementing policy is an important legislative policy decision in and of itself.[427] Conferring the discretion may be the most telling decision of all. Congress can specifically limit discretion to foreclose some policy "play" by the agency or it can defer to the agency for delineation. By way of example, the Clean Air Act initially allowed the agency to determine what substances would be regulated as toxic; in the 1990 Amendments to the Act Congress listed substances to be regulated.[428] Similarly, Justice Scalia, in *American Trucking*, determined that Congress decided to circumscribe EPA discretion on how to implement ozone standards.[429] Movement in a legislative stance toward specificity could reflect several happenings, such as a distrust of

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Duke L.J. 387(adequate reasons requirement of judicial review related to separation of powers doctrine).

422. Zellmer, *supra* n. 206, at 964; Lowi, *supra* n. 416, at 306-07 (recognizing the efficacy of procedure but considering a palliative for unconstitutional vagueness).

423. Government is for practical people, to paraphrase an earlier court, which found that government is of "practical men." *U.S. v. Midwest Oil Co.*, 236 U.S 459 (1915); Lovell, supra n. 206, at 112 (Constitution establishes a loose framework that has accommodated many different choices about important factors; the United States has experienced numerous successive democratic systems within the same constitutional framework).

424. *Compare* McCutchen, *supra* n. 395, at 37 (delegation is so entrenched it is like intellectual adverse possession), *with* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 98 Yale L.J. 1013, 1053-55 (1984) (structural changes and acquiescence amount to a Constitutional amendment).

425. Zellmer, *supra* n. 206, at 982-83 (by some accounts, ninety-nine percent of the regulatory statutes found in the United States Code could be struck down)(citing Lovell, *supra* n. 206, at 86 (citing Richard J. Pierce, Jr, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 Am. U. L. Rev. 391, 401 (1987)).

426. U.S. Const. art. I, § 1.

427. Schuck, *supra* n. 416, at 781. *But see* McCutchen, *supra* n. 395, at 2 (arguing that delegation to agencies of legislative power is unconstitutional, but the administrative state cannot be dismantled, so the legislative veto of rules should be allowed).

428. 42 U.S.C. § 7409 (1994).

429. *Am. Trucking*, 121 S. Ct. at 919.

the agency, or a coalescence of either scientific information or policy initiative.

Giving Congress the option of conferring an agency with an implementing role that includes the ability to exercise some policy choice is not only practical, but necessary, for two reasons. The first is that requiring either Congress or an agency to develop determinant criteria may be asking for the impossible. For example, in toxic regulation, it might be impossible to determine what level of exposure will cause either no harm or a specific level of acceptable harm.[430] Economics also cannot give conclusive answers as to either how people will react to incentives or whether a proposed activity is cost justified. Cost-benefit analysis can at best give ranges of costs and benefits. The analyses can differ greatly based on the subjective evaluation of what various lives or limitations on lifestyle may be "worth."[431] Therefore, although Congress should decide the general direction of regulatory activity, an agency must be able to have some discretionary lee-way or there will be an inability to change the status quo.[432]

The reality of governmental structure requires agencies to do what approaches legislation, but also enables the exercise to be restrained. Only at the pinnacle of government can the judiciary, executive, and legislative powers even resemble strict separation.[433] Agencies are hybrids, and all three branches of the federal government control them. This control provides the necessary checks and balances to prevent the arising of the tyranny so feared by the drafters of the Constitution.[434] The majority of the Supreme Court appears to recognize and accept this. They also rejected the intermediary step, remand to the agency for binding line-drawing. Although some had praised Judge Williams' construct as enabling some form of accountability,[435] it is Congress which must give at least a signpost to the agency telling it where to go with the legislative construct, which in-

430. Pierce, *supra* n. 406, at 73-77; Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613 (1995).

431. Pierce, *supra* n. 406, at 81; Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 Yale L.J. 1981 (1998) (arguing outcomes of CBAs can vary significantly depending on which estimates are used by entity conducting CBA).

432. *See Indus. Union Dept. v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (Marshal, J., dissenting); and Sunstein, *supra* n. 278, at 340-41 (arguing scientific uncertainty militates against a successful change of standards if judicial review requires certainty).

433. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 579 (1984).

434. *Id.* at 579 (an agency is neither Congress, executive, nor court, but an inferior part of government and the agency's relationships to the three is what keeps its power in check and thus serves the purposes of separation of powers). *But see* Lowi, *supra* n. 416, at 297-98 (arguing that delegation is risky because the constitutional interest balancing mechanisms are not available at the agency point of discretion).

435. Michael Richard Dimino, *D.C. Circuit Revives Nondelegation Doctrine . . .* Or Does It?, 23 Harv. J. L. & Pub. Policy 581, 592-93 (2000) (calling the case an "admirable attempt to ensure that a semi-accountable governmental body divines an intelligible principle" but ultimately rejecting it); Gabriel Clark, *The Weak Nondelegation Doctrine and American Trucking Associations v. EPA*, 2000 B.Y.U. L. Rev, 627, 651-53 (arguments in support of weak nondelegation include that it is more judicially manageable, more politically feasible, and forwards the goals of accountability).

cludes the statute and the regulation. The agency need not determine *before* it regulates *how* it will regulate.[436] It simply should regulate pursuant to the statute. Judicial, congressional, and political review will then control the agency.

4. American Trucking and the *Chevron* Doctrine

The Supreme Court did perform a judicial review of the EPA regulation implementing the new ozone standard. In so doing, the Court used the *Chevron* test, with its two-part analysis.[437] The test is deemed to be a deferential one. Indeed, the Supreme Court, when it refused to employ *Chevron* in *Solid Waste*, stated it "would not extend *Chevron* deference."[438] The story was different in *American Trucking*, but the result was the same; the Court overturned the agency rule. Nevertheless, the decision does not have major impact.

The decision is slightly unusual because the Court invalidated the rule under the second prong of *Chevron*. This means that the court first ascertained that Congress was not clear on the interrelationship of the two Subparts for implementation of the new ozone standard. Therefore, in the face of this ambiguity, the reviewing court generally defers to the agency with expertise, so long as the agency interpretation is found to be reasonable.[439] Because a court has already found that a statute is not clear, it becomes difficult to determine on what rationale the agency interpretation could be found to be unreasonable.[440]

The Court in *American Trucking*, however, had an explanation: the agency interpretation could not be made to correspond with the statute and Congressional intentions.[441] Although Congress was less than clear, it seemed to mean something and the agency interpretation tried to "wipe out" the effectiveness of a particular statute that had been intended to govern the future. The EPA's reading appeared to go beyond the discretion granted.[442] The Supreme Court did not attempt to substitute a particular

436. Seidenfeld & Rossi, *supra* n. 396, at 4 ("American Trucking can be interpreted as a judicial effort to require agencies to self-impose ex ante constraints on their discretion, rather than as a traditional application of ex post judicial review); Sunstein, *supra* n. 278, at 311 ("new" nondelegation is not nondelegation at all and improved judicial review would better serve purposes).

437. *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Because notice and comment rule-making was involved, the Court did not discuss whether *Chevron* provided the proper standards of review. The Supreme Court has given quidance on when *Cheveron* might apply in tweo recent cases. *See U.S. v. Mead*, 121 S. Ct. 2164 (2001) (custom service's ruling letter not entitled to *Chevron* deference, but is subject to *Skidmore* deference); *Christiansen v. Harris County*, 529 U.S. 576 (2000).

438. *Solid Waste*, 513 U.S. at 172.

439. *Continental Air Lines, Inc. v. Dept. of Transp.*, 843 F.2d 144, 1453 (D.C. Cir. 1988) (only reverse agency determination if it actually frustrates Congressional policies).

440. Gray, *supra* n. 307, at 18 (arguing that the reasonableness test of the second step of Chevron is both poorly defined and circular).

441. *Am. Trucking*, 531 U.S. at 485.

442. An agency desiring to change the meaning of words is not new. *See U.S. v. Symond*,

manner of interpretation. It simply said that this one was incorrect. The unanimity of the decision shows that at least nine reasonable persons recognize an unreasonable interpretation when they see it.

American Trucking is part of a trend in which the Supreme Court is more ready to invalidate regulations based on their unreasonableness.[443] Although unremarkable in this setting, the opinion could allow for more active judicial intervention in the administrative state.

V. FIFTH AMENDMENT TAKINGS: *PALAZZOLO*

A. *Background of the Case*

1. Facts

The town of Westerly, Rhode Island[444] is the setting for this term's takings saga. The story, however, began in 1959, when Mr. Palazzolo invested in three undeveloped tracts that bordered on a street and a popular "pond." He and other investors formed Shore Gardens, Inc. (SGI) to hold the property. In 1960, Mr. Palazzolo became the sole shareholder of SGI. Therefore, when SGI's corporate charter was revoked in 1978, ownership of the property devolved to Mr. Palazzolo individually. He is the case's plaintiff.

Potential development schemes for the parcels, however, began long before the case was filed. For example, in 1959, SGI submitted a plat to the town. The plat subdivided the entire property into eighty lots; between 1959 and 1961, SGI sold eleven of the lots to various grantees, who were able to build in these upland sections with little alteration to the land.[445] The remaining lots encompassed about twenty acres. The Rhode Island Supreme Court described the land as follows:

> The property consists primarily of coastal wetlands and marshlands. Some of the lots laid out in the subdivision plat include a substantial amount of land that is under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and "ponding" in small pools occurs throughout the wetlands. The area serves as a refuge and feeding ground for fish, shellfish, and birds,

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120 U.S. 46, 48-49 (1887) (Secretary of Navy cannot do what is contrary to statute; cannot declare a training mission to not be "at sea" so as to affect naval officers' pay.).

443. *See AT & T Corp. v. Iowa Util. Bd*, 525 U.S. 366, 392-93 (1999); *NLRB v. Ky. River Community Care Ctr.*, Inc., 121 S. Ct. 1861 (2001).

444. Justice Kennedy provides a historical paean to the town in his majority opinion. *Palazzolo v. R.I.*, 121 S. Ct. 2448, 2454-55 (2001). He also notes that the petitioner was "a lifelong Westerly resident." *Id.* at 2455. What relevance this detail has can only be guessed at; possibly, Justice Kennedy was portraying both Mr.Palazzolo and the seaside town as the salt of the earth and embodiments of Yankee tradition.

445. *Palazzolo v. R.I.*, 746 A.2d 707, 710 (R.I. 2000). Arguably, the return SGI gained from the property might have foreclosed it from claiming the subsequent regulation interfered with the corporation's investment backed expectations.

> provides a buffer for flooding, and absorbs and filters run-off into the pond.[446]

A considerable amount of fill would have to precede building any significant structure on the wetland portions of the land.

Mr. Palazzolo filed several applications to fill the property over the years, but the proposals could be characterized as poorly thought out or not serious. The first proposal sought to dredge from Winnapaug Pond and fill the entire property. This incomplete application was denied. The second proposal was similar and, while it was pending, SGI submitted its third proposal in 1966. This proposal did not seek a complete fill, but a more limited filling, with the end result to be a private beach club. The Rhode Island Department of Natural Resources in April of 1971 initially approved these applications, but this approval was withdrawn on November 17, 1971. SGI did not appeal.[447] Applications to develop ceased for more than ten years.

In the interim, the regulatory regime in regard to wetlands and coastal areas evolved. First, Rhode Island enacted legislation in 1971 that created the Coastal Resources Management Council ("CRMC"), which assumed the duty of protecting the coastal properties in Rhode Island.[448] In 1977, the CRMC promulgated a set of regulations that prohibited the filling of coastal wetlands without a special exception from the CRMC.[449] To obtain a special exception, a fill must forward "a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests."[450] The regulations covered SGI's lands, which Mr. Palazzolo became the owner of in 1978.

In 1983, Mr. Palazzolo again sought to develop the property. This proposal mirrored the 1962 application, and simply sought to build a wooden bulkhead along the shore of Winnapaug Pond and to fill the entire marsh area. The rejection of this application noted that it "was 'vague and inadequate for a project of this size and nature.'"[451] There was no appeal of this refusal, but another proposal was submitted in1985. This one recycled the 1966 proposal to build a private beach club. The Supreme Court described this plan succinctly: "The details do not tend to inspire the reader with an idyllic coastal image, for the proposal was to fill 11 acres of the property with gravel to accommodate '50 cars with boat trailers, a

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446. *Id.*

447. *Id.* at 710. *See Palazzolo*, 121 S. Ct. at 2455-56. The review of the proposals was pursuant to 1965 Rhode Island legislation on inter-tidal wetlands protection that authorized restrictions on filling in coastal wetlands. 1965 R.I. Pub. Laws, ch. 140, § 1, codified as G.L. 1956 §§ 2-1-13 through 2-1-17, repealed P.L. 1990, ch. 461, § 9 (1990).

448. 1971 R.I. Pub. Laws, ch. 279, § 1 *et seq.*, codified as G.L. 1956 chapter 23 of title 46.

449. Rhode Island Coastal Resources Management Program ("CRMP") § 210.3 (as amended, June 28, 1983).

450. CRMP § 130A(1) (1983).

451. *Palazzolo*, 121 S. Ct. at 2456 (citing the record. The rejection also noted potential environmental harm.).

landowner is known.[463] To this end, the landowner must have presented a rational plan that the regulating agency could examine so as to determine what could appropriately be allowed to proceed on the land. One grandiose plan would not be enough if a more tempered approach could be approved.[464] The court had two problems with the case as currently postured.

The two difficulties revolved around the scope of the projects proposed and rejected.[465] First, damages were based on a plan for a 74-plot residential development, which was never analyzed by the CRMC. This plan, however, would probably, like the total fill proposal that was never fleshed out, be categorized as a grandiose plan. The court notes that a submitting a "grandiose" plan would not be sufficient, because a lesser plan might have been approved. Therefore, the second objection was that there had been no final decision on what could have been allowed on the property. Although there were numerous applications for development, there were only two different proposals: a total fill (for unspecified purposes)[466] or a partial fill for an unaesthetic and unfunctional beach club. There had been no requests to make a lesser fill or to develop the upland acres. To ascertain the dimensions of prohibited and allowable use requires different applications, not repeated requests to do the same thing.[467]

One reason why the court was insisting on additional proposals was the same reason that the court, in what might be *dicta*, rejected finding a "per se" or "categorical taking" under *Lucas*. For such a taking, there must have been a total deprivation of all economic value of the property. Here, however, there was evidence that the upland portion of the tract would accommodate at least one single family home; the specific words of the court found that "[t]here was undisputed evidence in the record that it would be possible to build at least one single- family home on the existing upland area, with no need for additional fill."[468] Therefore, value remained:

> There was undisputed evidence, however, that had he developed the upland portion of the land, its value would have been $200,000. Further, there was testimony that the wetlands would have value in the amount of $157,500 as an open-space gift.[469]

Because of the residual value, there was no deprivation of all beneficial value.

The court also opined that even if there had been a total deprivation, there would not have been a *Lucas* taking. The rule in *Lucas* acknowl-

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463. *Id.* at 713-14.
464. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986).
465. *Palazzolo*, 746 A.2d at 714.
466. The court noted that in the 1983 hearing, Mr. Palazzolo stated that he had no intention to build on the filled land. *Id.*
467. *Id.* at 714 n. 6.
468. *Id.*
469. *Id.* at 715.

dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles.'"[452] In addition, the "club" would not provide direct access either to the ocean or the pond from the filled property.[453] The Council found the proposal did not meet the standards for an exception and a Rhode Island court upheld the rejection.[454] While this case was pending, Mr. Palazzolo filed an additional suit, alleging that the denial of permission was a "taking" of his private property. He sought damages of $3,150,000, the alleged profits he would generate by filling the wetlands and selling the property as seventy-four lots for single-family homes. The trial judge found no taking and, therefore, no compensation was due.[455]

2. The Rhode Island Supreme Court Decision

The supreme court of Rhode Island concluded that the "case is not ripe for judicial review and that the trial justice did not err in granting judgment to the CRMC."[456] The court followed a "three-step process" to analyze the takings issue.[457] First, it assessed whether the claim was ripe.[458] Second, the court examined whether a categorical taking under *Lucas*[459] could have occurred; this would have required a total deprivation of the property's value. The third step was ascertaining whether or not a taking could have occurred under a *Penn Central*[460] analysis, which, among other criteria, examines whether there was too great an interference with a private party's reasonable investment backed expectations. Although the case could have been resolved at the first step, the court announced its appraisal of the second and third issues.[461]

The court's ripeness analysis concluded that the case was not yet ready for judicial review. Ripeness concerns arise from the need to prevent advisory opinions.[462] The court noted that in the takings venue, the basic question is whether or not the impact of the regulation on the particular

452. *Id.*
453. There would be a fifty-foot strip left unfilled between the filled area and the pond in each of the beach club proposals. *Palazzolo*, 746 A.2d at 714. *See Palazzolo*, 121 S. Ct. at 2473 n. 1 (Ginsburg, J., dissenting) ("to get to the club's water, i.e., Winnapaug Pond rather than the nearby Atlantic Ocean, 'you'd have to walk across the gravel fill, but then work your way through approximately 70, 75 feet of marsh land or conservation grasses'").
454. *Palazzolo v. Coastal Resources Mgt. Council*, 1995 WL 941370 (R.I. Super., Jan. 5, 1995) (C.A. No. 86-1496) (Israel, J.).
455. *Palazzolo*, 746 A.2d at 711.
456. *Id.* at 709.
457. *Id.* at 712-13.
458. *Williamson County Regl. Plan. Commn. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).
459. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).
460. *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).
461. The court stated that "the determination that the claim was not ripe is dispositive of the case, [but] we shall briefly discuss the merits of Palazzolo's claim." *Palazzolo*, 746 A.2d at 714.
462. *Id.* at 713.

edged that if the state was simply forbidding a development that was not part of the private party's property title to begin with, the state could enforce its regulation without paying compensation.[470] The court upheld the finding that Mr. Palazzolo obtained the property in 1978; up until that time title was in SGI. Despite the fact that he received the property by operation of law, the state of title so acquired is judged as of the date acquired. In 1978, the regulations required a special exception to develop the coastal wetlands. The court rejected Mr. Palazzolo's argument that the date of acquisition is irrelevant in a setting of total deprivation.[471]

The first of the court's reasons involved a straight-forward reading of *Lucas*:

> Not only is this argument unsupported by precedent, it is flawed. First, it violates the Supreme Court's dictate in *Lucas*, instructing reviewing courts to determine whether a landowner originally possessed the right to engage in a particular use. Here, when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired.[472]

Lucas requires examining the state of title when a party claiming a taking became an owner of the property to determine the rights of the private party. The court offered a second rationale for finding such an examination relevant. It maintained that to not do so would allow for strategic transfers of property; holding "the time of acquisition . . . irrelevant could lead to pernicious 'takings claims' based on speculative purchases in which an individual intentionally purchases land, the use of which is severely limited by environmental restrictions, and then seeks compensation from the state for that 'taking.'"[473] Additionally, to ignore the state of title at acquisition would put total regulatory takings on a different footing than physical takings, and the Court in *Lucas* judged the two situations to be equivalent. Therefore, "[r]egardless of whether the government physically takes property in the form of an easement or promulgates regulations restricting the property's use, all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner."[474] Mr. Palazzolo thus took title subject to the regulations, which limited development.

The court then turned to the third step of its process, namely, ascertaining whether there had been a taking under the *Penn Central* analysis.[475] The court concentrated on whether Mr. Palazzolo had any reason-

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470. *Id.* at 715 (quoting *Lucas*, 505 U.S. at 1027).
471. *Palazzolo*, 746 A.2d at 716.
472. *Id.*
473. *Id.*
474. *Id.* at 716-17.
475. This requires examining the following three elements: 1) the character of the government action; 2) the economic impact of the regulation on the claimant; and 3) the inter-

able investment-backed expectations of being able to develop the property. The court again looked to the status of regulations in 1978: "In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision."[476] With no reasonable expectations of unfettered filling, the court found no taking occurred even without examining the remaining *Penn Central* factors.

Faced with a finding that he was not owed compensation, Mr. Palazzolo sought *certiorari*. With a change of counsel, he received it. James S. Burling of the conservative Pacific Legal Foundation represented Mr. Palazzolo in front of the Supreme Court. Justice Ginsburg, in her dissent, commented that the change of counsel led to a change of tactics.[477]

B. *Supreme Court and the Takings Issue*

1. The Majority Opinion

The resulting decision in the Supreme Court is one of those in which a scorecard is needed to keep the players straight. The ultimate decision, remanding the case to the state courts, was concurred in by five justices, namely Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. Justice Kennedy wrote the majority opinion, which, with additional concurrences by Justices O'Connor and Justice Scalia, was embraced by only by five justices in its substantive discussion. Justice Stevens also concurred that the case was ripe for decision, but expressly dissented from the majority opinion's treatment of a purchaser who obtained property after the enactment of regulation, and dissented from the judgment of remand. Two completely dissenting opinions came, one from Justice Ginsburg and one from Justice Breyer. Both Justice Breyer and Justice Souter joined in the opinion of Justice Ginsburg. Therefore, on the "merits" of the case, the familiar five-four line-up emerges.

As noted, one major element of Justice Kennedy's majority opinion was its conclusion that the case was ripe for decision. His analysis started at the same place the state courts did, with a discussion of the *Williamson County* [478] case. According to the Court, *Williamson County* stands for the

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ference, if any, with investment-backed expectations. *Penn. Central*, 438 U.S. 104.

476. *Palazzolo*, 746 A.2d at 717.

477. *Palazzolo*, 121 S. Ct. at 2475 (Ginsburg, J., dissenting):

> This Court likely would not have granted *certiorari* to review the application of *MacDonald* and *Lucas* to the facts of Palazzolo's case. However, aided by new counsel, Palazzolo sought—and in the exercise of this Court's discretion obtained—review of two contentions he did not advance below. The first assertion is that the state regulations take the property under *Penn Central*. *See* Pet. for Cert. 20; Brief for Petitioner 47-50. The second argument is that the regulations amount to a taking under an expanded rendition of *Lucas* covering cases in which a landowner is left with property retaining only a "few crumbs of value."

Id.

478. *Williamson County Reg. Plan. Commn. v. Hamilton Bank of Johnson City*, 473 U.S.

proposition that "a takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'"[479] Agency review of permitted uses of the property is necessary to ascertain what impact the regulation truly had on the property owner's rights.[480] The majority of the Supreme Court, however, read the record differently than the state court.

Justice Kennedy found that there had been sufficient definition of the regulation's effect. Unlike the state court, he did not believe there had to be applications for a "less grandiose" project than the 74-lot subdivision; that is, there need not be successive applications until the threshold of allowable development is discovered. The key to his conclusion was the "unequivocal nature of the regulations."[481] They indicated that there would be no complete fill allowed and no filling of 11 acres for a beach club. The Court noted that the rejection of the beach club fill was not dependent on how many acres would be filled; on the type of wetlands present on Mr. Palazzolo's land, no fill would be authorized unless a special exemption was granted, and the CRMC would only grant one "where a 'compelling public purpose' is served."[482] As for the beach club, the activity itself was not a compelling public purpose.

Therefore, the size of the project was immaterial; there was no room to soften the impact of the regulation:

> While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. The case is quite unlike those upon which respondents place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted.[483]

The majority opinion concluded that the regulation would not allow *any* filling for "ordinary" land use.[484] Therefore, no more applications would be needed in regard to the wetlands.

Justice Kennedy still had to determine whether development potential for the upland portion of the land was unsettled sufficiently to make the

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172 (1985).

479. *Palazzolo*, 121 S. Ct. at 2458 (quoting *Williamson County*, 473 U.S. at 186).

480. *Id.* (quoting, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351(1986) ("These matters cannot be resolved in definitive terms until a court knows 'the extent of permitted development' on the land in question.").

481. *Palazzolo*, 121 S. Ct. at 2458.

482. *Id.* at 2459.

483. *Id.*

484. *Id.* at 2459 ("There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands.").

regulation's impact unknown.[485] The strict "compelling public purpose" test would not apply to this land.[486] The Court, however, concluded the issue of the upland's value was settled: "The trial court accepted uncontested testimony that an upland site located at the eastern end of the property would have an estimated value of $200,000 if developed."[487] Justice Kennedy downplays the wording of the state supreme court, which might have left open the question of how much development could take place on the property; that court had determined "it would be possible to build at least one single-family home on the upland portion of the parcel."[488] Justice Kennedy found it inappropriate to rely on this statement; "[t]he attempt to interject ambiguity as to the value or use of the uplands, however, comes too late in the day for purposes of litigation before this Court."[489] References to the $200,000 value were consistent. Moreover, Justice Kennedy sternly rejected the state of Rhode Island's claim that valuation had only been made for the purposes of refuting a claim under *Lucas* that the tract was left with *no* economic value. The evidence, the state claimed, would have been presently differently if the question was whether or not investment-backed expectations were disturbed under a *Penn Central* analysis. Justice Kennedy, however, determined that *Penn Central* was "discussed" at the trial level and the state should have addressed the factual issue.[490] Therefore, ripeness concerns did not require applications dealing with development of the upland portion.

Justice Kennedy then disposed of the final objection the state court had presented against ripeness. He found the court's concern irrelevant. It did not matter that Mr. Palazzolo had never applied for the particular 74-unit subdivision on which he based his claim for damages. According to Justice Kennedy, the state court had relied on *Williamson County* for its unripeness conclusion.[491] Under *Williamson*, the private party did not have to make meaningless proposals; the CRMC had made it known that it would not allow any filling. This is sufficient for "finality." Naturally, however, Justice Kennedy notes that "[t]he mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land use limitations."[492] When damages for a taking are computed, the market value of

485. *Id.* at 2460 (quoting, *Palazzolo*, 746 A.2d. at 714) (The State Supreme Court found petitioner's claim unripe for the further reason that he "has not sought permission for any . . . use of the property that would involve . . . development only of the upland portion of the parcel.").
486. *Id.*
487. *Id.*
488. *Id.* (quoting *Palazzolo*, 746 A.2d. at 714).
489. *Id.*
490. *Palazzolo*, 121 S. Ct. at 2461.
491. *Id.* at 2462. Other potential rationales could have been a state exhaustion of remedies argument or a state procedural requirement that zoning approval precede submission of a permit request to the CRMC. The Court did not have to discuss these issues.
492. *Id.* at 2461.

the property would be limited to what could have been its highest and best use consistent with other valid requirements, such as zoning and septic tank restrictions. This concern, however, was a different issue than whether the case was ripe for decision.

Justice Kennedy, therefore, proceeded to the next reason the state court rejected Mr. Palazzolo's claim, which goes to the merits.[493] The lower court found that the timing of his acquisition of the land was of crucial importance. Mr. Palazzolo acquired the land from the corporation in 1978, after the regulations detailing the permit system were in place. Therefore, the regulations were part of the "background principles of law" that limited his use of his property under a *Lucas* analysis and also destroyed any possibility of reasonable investment-backed expectations of development under a *Penn Central* balancing. As Justice Kennedy summarizes: "the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."[494]

Justice Kennedy rejects the idea that, because a state defines property rights, it could by legislation automatically redefine those rights and thereby deprive future landowners of any ability to object to restrictions:

> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause.[495]

Justice Kennedy asserts that future generations have the right to protest unreasonable regulation.[496]

Additionally, Justice Kennedy does not believe the notice argument should be conclusive. A pre-enactment owner may not be able to establish a taking because of ripeness requirements before the owner dies or otherwise needs to transfer title to another. Under the Rhode Island rule, the

493. This portion of the decision is Section II.B. Six justices either dissented from this part of the decision or attempted to clarify their understanding of it in concurring opinions.
494. *Palazzolo*, 121 S. Ct. at 2462.
495. *Id.* at 2462-63.
496. *Id.* at 2463.

new owner could not assert the takings claim. This would be unfair:

> The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.[497]

The vagaries of the age or resources of a landowner should not determine whether or not a regulation caused a taking. Justice Kennedy's problem is with a *per se* rule: "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."[498] In order to maintain this position, he needed to counter two arguments.

The first problem was to distinguish the regulatory takings situation from that of direct condemnation. To Justice Kennedy, it is justified to restrict compensation to the owner at the time of physical invasion or eminent domain proceedings because the extent of the impact on the private party is known immediately. A regulatory taking, however, must be made "ripe" by ascertaining the particular affect of the regulation on a particular tract of land: "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."[499]

Next, the opinion addressed the argument that the *Lucas* case modified the legal setting, increasing scrutiny of the title existing when the claimant took ownership. Before *Lucas*, the majority of the Court rejected a claim that notice of a restriction precluded a subsequent owner's taking claim in *Nollan v. California Coastal Commission*.[500] Justice Kennedy emphasized that the prior case held that "'[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them,' . . . 'the prior owners must be understood to have transferred their full property rights in conveying the lot.'"[501] Writing for a five-justice majority in *Palazzolo*, Justice Kennedy rejected the idea that *Lucas* completely limited the *Nollan* holding. He therefore disagreed with the assertion "that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment."[502]

Justice Kennedy's rejection of a *per se* rule that would integrate new regulations or legislation into background principles is nuanced. He acknowledged that the posture of the case did not lend itself to ascertaining

497. *Id.*
498. *Id.*
499. *Id.*
500. 483 U.S. 825 (1987).
501. *Palazzolo*, 121 S. Ct. at 2463-64 (quoting *Nollan*, 483 U.S. at 834 n. 2).
502. *Id.* at 2464.

when a regulatory pronouncement may become "inherent" in someone's land title, either generally or in particular.[503] A search for background principles looks for "common, shared understandings of permissible limitations derived from a State's legal tradition . . . [and] whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed."[504] He did not believe the principles should vary for different owners. Therefore, mere enactment of a rule does not prospectively limit only new owners on an automatic basis.

Justice Kennedy did agree with the Rhode Island state court in one respect: there had not been a total deprivation of the economic value of the property.[505] Although the $200,000 value for a residence is not the $3.15 million that Mr. Palazzolo claims the property is worth, the ability to build one residence on a twenty-acre plot is not a "token interest" and the property is not left "economically idle."[506] The Court refused to separate the upland and wetlands areas into distinct parcels to ascertain whether there was a total deprivation because the argument was not asserted in the lower courts. Therefore, the Court did not make any contribution to the dilemma of defining the "denominator" of the takings equation.[507]

The bottom line of the majority opinion was a remand. The state courts would have to examine the case on the merits. These courts would not, however, have to consider the "total taking" theory of *Lucas*; it was not a total taking. The taking analysis therefore would examine the *Penn Central* factors. In so doing, the courts could not conclude that mere passage of a regulation precluded any reasonable expectations for development.

2. The Concurrence of Justice O'Connor

Justice O'Connor wrote to expand on her understanding of how to implement part II-B of the majority opinion, which dealt with the importance of acquiring property after the date of the regulation.[508] She agreed with the conclusion that the "mere fact of enactment" should not preclude the possibility of a *Penn Central* taking for a landowner who acquired land

503. *Id.*
504. *Id.*
505. *Id.* at 2464-65.
506. *Id.* at 2465 (quoting the "economically idle" language from *Lucas*, 505 U.S. at 1019).
507. *Palazzolo*, 121 S. Ct. at 2465. The so-called "denominator" problem can be illustrated in this situation as follows. If the property is simply the eighteen acres of wetlands, the deprivation of development would be eighteen (numerator) over eighteen (denominator). This would be total. If, however, the denominator is the uplands combined with the wetlands, then the numerator would be eighteen and the denominator twenty. This would not be a total deprivation. In this case, no one clearly knew what the exact size of the tract would be if the uplands were included in the denominator. *See id.* at 2473 (Ginsburg, J., dissenting). As Justice Kennedy notes, the current legal rule is to not subdivide the property into various tracts and keep a "whole" denominator, although dictum has questioned this. *Id.* at 2465.
508. *Id.* at 2465-66 (O'Connor, J., concurring).

after the legislation or rule's promulgation. However, she gave insight on how a regulation or law could affect the takings equation.

To Justice O'Connor, the ultimate question is one of "fairness and justice."[509] The *Penn Central* test is not simply one that searches for interference with investment backed expectations. It is one that balances this study with the nature of the government act and the financial impact on the claimant. The nature of the governmental interest at stake is important: "The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis."[510] To O'Connor, it would be an error to make any of the factors conclusive.

Therefore, ruling that the passage of a limitation on land use is not material would be as mistaken as the sweeping rule the Rhode Island court posited:

> If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.[511]

The regulatory climate at acquisition would be an influence on the reasonableness of the private party's expectations.[512] She asserts that the *Palazzolo* opinion does not foreclose consideration of this climate.

3. Justice Scalia's Concurrence

Justice Scalia wrote to emphasize that his opinion of the meaning of Section II-B was *not* that of Justice O'Connor.[513] To Justice Scalia, if a statute or regulation not granting compensation is at any time an unconstitutional assertion of power, it will always be so. He chides Justice O'Connor for intimating that "it may in some (unspecified) circumstances be '[un]fai[r],' and produce unacceptable 'windfalls,' to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government."[514] Justice Scalia sees nothing reprehensible in the prospect of a potential gain for an

509. *Id.* at 2466 (quoting *Penn. Central*, 478 U.S. at 124 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).
510. *Id.*
511. *Id.* at 2467. Justice Scalia will respond to her categorization of some landowners reaping "windfalls." *See* Justice O'Connor's later statement: "The temptation to adopt what amount to per se rules in either direction must be resisted." *Id.* at 2467 (O'Connor, J., dissenting).
512. *Id.* at 2466. Justice O'Connor also notes that individual investment is not always required to protect a property interest. *Id.* at 1467 (citing *Hodel v. Irving*, 481 U.S. 704, 714-18 (1987)).
513. *Palazzolo*, 121 S. Ct. at 2467 (Scalia, J., concurring).
514. *Id.*

astute real estate speculator.

The speculator's gain is what Justice Scalia posits that Justice O'Connor disdains.[515] Justice Scalia, however, finds nothing wrong with a party buying land at a discount from a seller, who believes the land to be constitutionally restricted, and then reaping the benefits of a land value based on finding the restriction invalid. To him, this is nothing more than the gains an astute buyer of antiques could make by buying from an unknowledgeable seller or a savvy stock purchaser could make by purchasing from a risk-averse seller. Although Justice Scalia acknowledges some might argue it "fair" to give the seller some of the benefit or "windfall" gained, he could not ascertain any rationale to give any of the increased value to the government.[516]

In essence, if the government retained the restriction without giving compensation, the result, to Justice Scalia, would be assigning some of the non-restricted value of the property to the government. The government, however, was not an "innocent" party, as the hypothetical unknowledgeable seller might be. It was, according to Justice Scalia, the government who caused the problem by acting "unlawfully—indeed unconstitutionally."[517] He concluded that to allow the unconstitutional regulation to affect the property's value would be "rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the 'unjust' profit to the thief."[518]

Justice O'Connor took umbrage at her purported beneficence to a thief. She opined that Justice Scalia was conflating two inquiries: 1) whether the purpose behind the regulation was a valid exercise of the police power, and 2) whether the property owner seeking compensation was entitled to such.[519] The Supreme Court has repeatedly stated that the police power is very broad, but the question at hand was not the first issue according to Justice O'Connor. The timing of a regulation and the acquisition of the property goes to the second issue, namely, whether compensation is due to the particular claimant. If the regulatory setting at the time of acquisition is not considered for that particular claimant, this would rewrite the *Penn Central* factors.[520]

Naturally, Justice Scalia did not conclude without a rejoinder to Jus-

515. Or, how he phrases it: "the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naive landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated." *Id.* Justice Scalia here talks of invalidating the regulation, not that the transferee can receive compensation from the government. This is a difference, one which is central to Justice Stevens's dissent.
516. *Id.*
517. *Id.*
518. *Palazzolo*, 121 S. Ct. at 2467.
519. *Id.* at 2467 n. * (O'Connor, J., concurring).
520. *Id.*

tice O'Connor. He assured her that he understood the two issues and had not accused the government of wrongdoing in the form of exceeding its police power.[521] To him, the only restrictions that are of import in a *Lucas* analysis are those of "background principles of the State's law of property and nuisance,"[522] and these seemingly are not to include legislative or regulatory pronouncements. He also instructs that for an analysis of *Penn Central* reasonable expectations, the only regulations or statutes that are of import are valid ones: "The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional."[523] An unconstitutional taking is an unconstitutional taking to Justice Scalia; any subsequent transfer of title is immaterial.

4. The Concurrence and Dissent of Justice Stevens

Justice Stevens concurs in part, and dissents in part. His concurrence is in the finding that the case is ripe for decision, but the concurrence is limited to his reading that the Court found the taking occurred when the regulations were passed, not at a later date.[524] With the earlier dating of the taking, Mr. Palazzolo had no standing to seek monetary compensation. The partial concurrence, therefore, did not mean he would remand the case: he concluded that "the judgment of the Rhode Island Supreme Court should be affirmed in its entirety."[525] Moreover, he did not join in the Court's handling of the matters discussed in Part II-B, because he found "the Court has over- simplified a complex calculus and conflated two separate questions."[526] The two questions referred to involve what remedies may be available for a regulation that goes "too far" to be constitutional: compensation or injunction.

One remedy for a regulation that unconstitutionally restricts property development is to invalidate the regulation. Justice Stevens finds his first

521. *Palazzolo*, 121 S. Ct. at 2468 n. * (Scalia, J., concurring)
522. *Id.* at 2468 (quoting *Lucas*, 505 U.S. at 1029).
523. *Id.*
524. Justice Stevens stated:

> In the final analysis, the property interest at stake in this litigation is the right to fill the wetlands on the tract that petitioner owns. Whether either he or his predecessors in title ever owned such an interest, and if so, when it was acquired by the State, are questions of state law. If it is clear—as I think it is and as I think the Court's disposition of the ripeness issue assumes—that any such taking occurred before he became the owner of the property, he has no standing to seek compensation for that taking. On the other hand, if the only viable takings claim has a different predicate that arose later, that claim is not ripe and the discussion in Part II-B of the Court's opinion is superfluous dictum. In either event, the judgment of the Rhode Island Supreme Court should be affirmed in its entirety.

Id. at 2472 (Stevens, J., concurring in part and dissenting in part).
525. *Id.* If the taking occurred at a date later than the regulation's passage, then the case would not yet be ripe for decision. *Id.*
526. *Id.* at 2468.

proposition to be very clear: if a regulation has adversely affected a party individually, that party may seek to enjoin its application regardless of when the party acquired his or her property. The date property was acquired would be immaterial.[527] Justice Stevens asserts that it does not necessarily follow, however, that such a johnny-come-lately could present a case for the second type of remedy.[528]

The second remedy provided for an unconstitutional taking is to allow the restriction to stand, but to give the party who suffered a taking compensation. To alleviate the unconstitutionality, "due compensation" would be ordered for a taking. A taking, however, has a temporal element:

> A taking is a discrete event, a governmental acquisition of private property for which the state is required to provide just compensation. Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner.[529]

The importance of the date of taking is obvious and clear in the physical appropriation model. Property is valued as of the take-over date and the owner of the property at that date is the sole person compensated.[530] Justice Stevens notes that the Court's insistence that regulatory takings are differ from physical appropriations is troublesome, in that their similarity in impact on private property was the reason for recognizing that a regulatory taking could exist.[531]

To Justice Stevens, the crux of the matter is confusion between two separate dates: the date a taking occurs and the time a claim for compensation becomes appropriate for litigation. Before litigating a regulatory takings claim in which compensation is sought, the appropriate agency must clarify the regulatory impact on the particular property. Nevertheless, the injury was inflicted earlier and the procedures before the implementing bodies are simply measuring the damage.[532] Justice Stevens then explores when the alleged taking could have been completed.

The parties disputed precisely when filling and developing Mr. Palazzolo's wetlands was restricted. According to Mr. Palazzolo, the lands were developable up until 1971; the State of Rhode Island asserted that there were restrictions that pre-dated the 1971 statute. The argument of the petitioner, however, was that the regulations of the CRMC effectively prevented filling, thus denying the development right:

> The most natural reading of petitioner's complaint is that the regulations

527. *Id.* at 2468-69.
528. Justice Stevens acknowledges that this remedy had been favored as of late, but muses that invalidation was what was in the mind of Justice Holmes in *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922). *See id.* at 2469 n. 1 (Stevens, J. ,concurring and dissenting).
529. Palazzolo, 121 S. Ct. at 2469.
530. *Id.*
531. *Id.* at 2469 n. 2.
532. *Id.* at 2469.

> in and of themselves precluded him from filling the wetlands, and that their adoption therefore constituted the alleged taking. This reading is consistent with the Court's analysis in Part II-A of its opinion (which I join) in which the Court explains that petitioner's takings claims are ripe for decision because respondents' wetlands regulations unequivocally provide that there can be "no fill for any likely or foreseeable use."[533]

If the regulations were the taking, Justice Stevens concludes that Mr. Palazzolo is simply the wrong plaintiff. The compensable injury was done to the owner of the property at the time the regulations were promulgated, which owner was not Mr. Palazzolo.[534]

To Justice Stevens, the rationale for denying Mr. Palazzolo monetary recovery is not that he had "notice" of the restrictions at the time he acquired the property. He simply acquired only the property as restricted by the regulations. Mr. Palazzolo could assert that the regulation was invalid, but he could not seek damages for property that had been "taken" before he was the property owner. Justice Stevens provided an analogy: "A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner's orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property."[535] Like Justice Kennedy, Justice Stevens believes his construction is consistent with *Nollan v. California Coastal Commission*.[536] He notes that the *Nollan* case found a taking when a land use agency required the dedication of an easement in exchange for a permit to construct a larger house. To Justice Stevens, even if the prospective homebuilders knew of the policy before requesting a permit, the actual "taking" of the easement took place only when a landowner had to grant it.[537] Therefore, these later landowners could receive compensation.

If the taking in the subject case, however, occurred prior to 1978, Mr. Palazzolo could not receive compensation. Justice Stevens notes that Mr. Palazzolo, at times, argued that the taking occurred in 1986, when his final application for development was denied. In this situation, Justice Stevens concluded that he would still be an inappropriate plaintiff. The title he took in 1978 was subject to regulations validly promulgated under the police power. Therefore, his ownership did not contain the right to fill in the lands, or at most, contained the right to do so only after the CRMC exercised discretionary consideration. If the CRMC provided him with procedural due process, it had respected Mr. Palazzolo's rights.[538]

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533. *Id.* at 2470.
534. *Id.*
535. *Id.* at 2471.
536. *Cal. Coastal*, 483 U.S. at 825.
537. *Palazzolo*, 121 S. Ct. at 2471 (Stevens, J., concurring and dissenting). Justice Stevens also notes that the notice of the Nollans could impact on their reasonable expectations. *Id.* at 2471 n. 6.
538. *Id.* at 2471-72.

Justice Stevens concluded his discussion by noting that the ruling of the Court could be a limited one. He fears, however, that providing a right to compensation to the first purchaser after the enactment of valid land-use regulations could extend to "the second, the third, or the thirtieth purchaser."[539] Of course, Justice Stevens was analyzing this case by presuming that the regulation could have potentially created a taking of private property; he continued to register his belief that "even a newly adopted regulation that diminishes the value of property does not produce a significant Takings Clause issue if it (1) is generally applicable and (2) is directed at preventing a substantial public harm. It is quite likely that a regulation prohibiting the filling of wetlands meets those criteria. "[540]

5. The Dissenting Opinion of Justice Ginsburg

Justice Ginsburg dissented, with Justices Souter and Breyer joining her opinion. Justice Ginsburg's primary disagreement is on the ripeness issue, to which she takes vehement factual objection. To a certain extent, she agrees with the legal parameters for determining if a takings case is ready for adjudication; the relevant test comes from *Williamson County,* which maintains no case is ripe "until the agency administering the regulations at issue, proceeding in good faith, 'has arrived at a final, definitive position regarding how it will apply [those regulations] to the particular land in question.'"[541] Her disagreement is with whether the agency ever applied the regulations to the upland portion of the tract at all; the only plans examined and rejected were for fill and development of the wetland portions.[542]

The incompleteness of Mr. Palazzolo's submissions made it difficult to apprize the size and nature of his property. Although most reviewers assumed that there were eighteen acres of wetlands, the amount of uplands, whether they be in one area or several, was not disclosed because no comprehensive survey was provided.[543] Mr. Palazzolo simply sought to develop the wetlands, and when these plans were rejected, he claimed that *all value* was gone from his lands. Justice Ginsburg emphasized that one rationale for the state's finding of lack of ripeness was that there had never been an application to develop only the uplands.[544] This failure thus made the case similar to an earlier case, in which the Court had rejected the case for adjudication because the rejection of a "grandiose" plan did not mean

539. *Id.* at 2472.
540. *Id.* at 2470 n. 3 (citations omitted).
541. *Id.* at 2472 (Ginsburg, J., dissenting) (quoting *Williamson County,* 473 U.S. at 191).
542. *Id.* She notes that one application was submitted to fill the wetlands without any plan to do anything with the property; Mr. Palazzolo simply asserted he wanted to fill because to fill was "his right." *Id.* at 2473 n. 1. Annoyance with government, rather than actual investment backed expectations, might have sparked not only this proposal, but also the two proposals for "beach clubs" that would have been eyesores.
543. *Palazzolo,* 121 S. Ct. at 2476.
544. *Id.* at 2473 (quoting *Palazzolo,* 746 A.2d at 714).

that all development was foreclosed.[545] Without consideration of the extent the uplands could be used, no final agency decision was made.

Justice Ginsburg finds the majority's solution to this dilemma reprehensible; foreclosing agency consideration by declaring that the value of the uplands was conclusively found to be one residence of $200,000 value rewarded the plaintiff for "bait and switch tactics."[546] Justice Ginsburg maintained that throughout the trial and state court appeals, Mr. Palazzolo claimed that there was a taking because his property was left with no viable economical use at all, that is, he alleged a categorical taking under *Lucas*. The state then logically defended this claim; it presented some evidence that the land could be developed for at least one home site. Justice Ginsburg notes that the state proved a "floor" of value, not a "ceiling."[547] It did not have to prove the ultimate value of permitted development because it did not need to value the remaining lands to compare them with any reasonable, investment-backed expectations Mr. Palazzolo might have had.[548]

Justice Ginsburg finds in the record ambiguous as to development potential, rather than the majority's conclusiveness.[549] The majority found that any additional uplands other than one tract were "islands" and hence undevelopable because no road fill would be permitted.[550] Justice Ginsburg noted other portions of the same witness's testimony pointed to the possibility of development on three or four lots.[551] Moreover, the only "finding" of the state court was open-ended: "[t]here was undisputed evidence in the record that it would be possible to build at least one single—family home on the existing upland area, with no need for additional fill."[552] Referring to a "fact" in a brief on *certiorari* did not make it so to Justice Ginsburg.[553]

Therefore, Justice Ginsburg rejected the waiver argument, namely that it was now "too late" for the state to argue that the total value of per-

545. *Id.* at 2473 (discussing *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 351-53 (1986), ("As presented to the Rhode Island Supreme Court, Anthony Palazzolo's case was a close analogue to *MacDonald.*")).

546. *Id.* at 2476 ("Casting away fairness (and fairness to a State, no less), the Court indulges Palazzolo's bait-and-switch maneuver.").

547. *Id.*

548. Justice Ginsburg notes that while there was "some" mention of a potential *Penn Central* case taking, it was not central at trial or in the state supreme court. *Id.* at 2475. The state supreme court mentioned only one factor–the impact of acquisition post regulation-and declined to consider anything else.

549. *Id.* at 2477 ("The ambiguities in the record thus are substantial. They persist in part because their resolution was not required to address the claim Palazzolo presented below, and in part because Palazzolo failed ever to submit an accurate survey of his property.").

550. *Palozzolo*, 121 S. Ct. at 2460.

551. *Id.* at 2476 (Ginsburg, J., dissenting).

552. *Palazzolo*, 746 A.2d at 714. Justice Ginsburg would rely on the finding of the state supreme court: "Under the circumstances, I would not step into the role of supreme topographical factfinder to resolve ambiguities in Palazzolo's favor." *Palazzolo*, 121 S. Ct. at 2477 (Ginsburg, J., dissenting).

553. Palazzolo, 121 S. Ct. at 2476.

mitted development on the tract was anything other than $200,000. This would penalize the state for defending the case as the plaintiff originally presented it. The term "caustic" might describe her reaction to the majority:

> This Court's waiver ruling thus amounts to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in your petition for certiorari; if the respondent fails to note your machinations, you have created a different record on which this Court will review the case.[554]

Therefore, Justice Ginsburg found that the case was not ripe. She noted that, had it been ripe, she would have concurred that taking title after a regulation could "impair a takings claim."[555]

6. The Dissent of Justice Breyer

Justice Breyer's presented his brief opinion to clarify his reading of the impact post-regulation title acquisition might have. First, he agreed with Justice O'Connor that the simple fact that

> a piece of property has changed hands (for example, by inheritance) does not always and automatically bar a takings claim. Here, for example, without in any way suggesting that Palazzolo has any valid takings claim, I believe his postregulatory acquisition of the property (through automatic operation of law) by itself should not prove dispositive.[556]

To Justice Breyer, the *Penn Central* test should be able to factor timing into its appraisal of reasonable expectations, which, he notes, can and do change dramatically as property changes hands.[557] He also tried to lay to rest fears that strategic behavior would be encouraged if the Court did not preclude the possibility of a taking for a party who acquires land after a regulation's enactment. He opined that a doctrine concerned with "fairness and justice" would not reward behavior such as selective transfers of non-developable acreage to separate people.[558]

C. Palazzolo in Perspective

1. Decoding the Supreme Court's Decision

The positions of the justices in *Palazzolo* reflect long standing divisions, not only between the individual justices,[559] but also in takings juris-

554. *Id.*
555. *Id.* at 2477 n. 3. This concurrence was specific. Justice Ginsberg delineated the pages of opinions in which she concurred (citing Justice O'Connor, *id.* at 2465-2467 (concurring opinion), Justice Stevens, *id.* at 2471-2472 (opinion concurring in part and dissenting in part), and Justice Breyer, *id.* at 2477-2478 (dissenting opinion)).
556. *Id.* at 2477 (Breyer, J., dissenting).
557. *Id.*
558. *Id.* at 2477-78.
559. *See e.g.* Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme*

prudence.[560] The tensions remain between *Mugler v. Kansas*,[561] with its proclamation that a valid regulation could not be a taking,[562] and *Pennsylvania Coal Co. v. Mahon*,[563] with its counter-declaration that regulation under the police power sometimes would require compensation if too great a diminution of value to private interests resulted.[564] More particularly, the debate between Justice Holmes and dissenting Justice Brandeis in *Pennsylvania Coal* itself has never ended. It dramatically reappeared in *Keystone Bituminous Coal Association v. DeBenedictis*[565] and *Lucas*.[566] The divergent views color the more particularized *Palazzolo* debate, namely when is a taking ripe for adjudication and what impact a regulation might have on subsequent purchasers.

Justice Kennedy presented a non-absolutist opinion on the latter issue, namely, a regulation's potential influence on reasonable expectations or background principles, which are respectively crucial to a *Penn Central*[567] or *Lucas*[568] takings analysis. He simply stated that merely acquiring land after the effective date of a limitation did not bar either type of claim.[569] In light of the blanket ruling the Rhode Island court made, Justice Kennedy found no opportunity to explore precisely when a state legislature's or agency's pronouncement could become part of background principles[570] or limit expectations. His concurrence in *Lucas*, however, does recognize that a non-judicial definition of harmful activity could play

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Court's Taking Cases, 38 Wm. & Mary L. Rev. 1099 (1997).

560. *See* the author's prior explications, Marla Mansfield, *When "Private" Rights Meet "Public" Rights: Problems of Labeling and Regulatory Takings*, 65 U. Colo. L. Rev. 193, 212-25 (1994) [hereinafter Mansfield, *Private Meets Public*]; Marla E. Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law*, 18 Ecol. L.Q. 43, 92-102 (1991) [hereinafter Mansfield, *On the Cusp*]; Marla E. Mansfield, *Regulatory Takings, Expectations and Valid Existing Rights*, 5 J. Min. L. & Policy 431, 436-61 (1989-90) [hereinafter Mansfield, *Regulatory Takings*].

561. 123 U.S. 623 (1887).

562. *Id.* at 668-69 ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of the property for the public benefit.").

563. 260 U.S. 393 (1922).

564. *Id.* at 415 ("One fact for consideration in determining such limits [of proper police power impingement] is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be the exercise of the eminent domain and compensation to sustain the act. . . . The general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

565. 480 U.S. 470 (1987).

566. 505 U.S. 1002 (1992).

567. *Penn Central* requires (at least for a partial taking) a consideration of three factors: 1) the governmental purpose being forwarded; 2) the financial impact on the regulated party; and 3) the degree the regulation affected reasonable, investment backed expectations. *See generally Penn Central*, 438 U.S. 104.

568. *Lucas* held that a total deprivation of a property's economic value would be a "categorical taking" if the activity prohibited was not also prohibited by background principle of property law so as to not be part of the private property right. *Lucas*, 505 U.S. at 1018.

569. *Palazzolo*, 121 S. Ct. at 2463.

570. *Id.*

such a role.[571] Most of the remaining Justices also appear to view the presence of a law to be non-determinative of the takings issue, requiring a more individualized appraisal of the total circumstances.[572] Justice Scalia and Justice Stevens, however, display more absolutist views.

Justice Stevens, with the *caveat* restating his position that the regulation might not engender any taking at all,[573] asserts that a statute or regulation would enter into background principles or color expectations for a subsequent owner. Although in theory the post-enactment acquirer could seek an injunction against the operation of the law upon his or her property if individually injured,[574] that owner could not seek compensation for a "taking" if the regulation or law itself was the value-diminishing event or "taking" because it "took" the property of a predecessor in interest. If a future event, such as application of the regulations in an agency's adjudicative setting is the taking, then the subsequent owner could not protest because the title acquired would have been subject to that law or regulation and its restrictions.[575] Only if the application was a unique or unforeseeable extension of the pre-existing rule would it not already condition the subsequent owner's title.[576] Therefore, Justice Stevens posits a strong position for the influence of a legislative or regulatory pronouncement on property rights.

Justice Scalia, however, continues to discount the possibility that a legislature or regulatory body could have any effect on title or expectations.[577] He earlier held in *Lucas*:

> Any limitation so severe [as to deprive the landowner of all economically viable use] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts —by adjacent landowners (or other uniquely affected persons) un-

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571. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) (common law of nuisance does not restrict the government's ability to regulate without compensation because that doctrine is "too narrow a confine for the exercise of regulatory power in a complex and interdependent society").

572. The core majority, Justices Kennedy, Thomas, and Chief Justice Rhenquist lean toward the assumption that the regulation or statute would not bar subsequent purchasers, and Justices O'Connor, Ginsburg, and Souter seem to lean toward an assumption that the same could at least impair a takings claim. Justice Breyer aligns with this group, except when acquisition was by operation of law.

573. He maintains that a valid exercise of the police power, which is of general applicability and seeks to prevent a substantial harm, would not be a taking. *Palazzolo*, 121 S. Ct. at 2470 n. 3 (Stevens, J., concurring and dissenting).

574. That is, "[i]f the application of such restriction to a property owner would cause her a 'direct and substantial injury'." *Id.* at 2468-69.

575. *Id.* at 2471. Naturally, if one's title is limited by the regulations existent at the date of acquisition, this would seem to make it difficult for the subsequent owner to prove a "direct and substantial injury" in order to seek an injunction.

576. *Id.* at 2472 n. 7.

577. *Id.* at 2468 (Scalia, J., concurring).

> der the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[578]

As for expectations, in *Palazzolo*, Justice Scalia mantains that only *constitutional* regulations or laws could ever enter into a private party's expectations.[579] In short, as other recent cases averred, a state's ability to define property rights does not enable it to undertake a wholesale revision of such rights.[580]

The differences between Justice Scalia and Justice Stevens about the role of governmental action hark back to the differences between Justice Holmes and Justice Brandeis in *Pennsylvania Coal*. Conceptually, those who champion the Holmesian view that a regulation could be tantamount to a taking, focus on the practical impact of regulation on a private party. Regulation might be akin to appropriation if active use of property is central to private rights.[581] For instance, Justice Holmes declared: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[582] A more recent Holmesian, Justice Scalia, pedantically asserted in *Lucas* that the line between mitigating harm and putting property to public purpose is sometimes blurry. Private property may be pressed into public use in the guise of preventing harm; refusing to allow wetlands to be filled may be for flood plain retention to mitigate flooding harm or for the purpose of creating a wildlife refuge.[583] Justice Brandeis,[584] and his current

578. *Lucas*, 505 U.S. at 1035. Similar sentiments about state power appear in *Loretto v. Teleprompter Manhattan CATV, Corp.*, 458 U.S. 419, 439 (1982).

579. *Palazzolo*, 121 S. Ct. at 2468 (Scalia, J., concurring).

580. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 165 (1998). *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation.") *Webb*, like *Phillips*, dealt with a state attempting to make public use of interest on specific accounts and noted the old rule that interest follows the principle. *See Sevens v. City of Cannon Beach*, 510 U.S. 1207 (1994). Justices Scalia and O'Connor dissented from the denial of *certiorari*, declaring, "No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation." *Id.* at 1334.

581. Justice Scalia explains it in *Lucas*: "Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. *See San Diego Gas & Electric Co. v. San Diego*, 450 U.S. at 652 (Brennan, J., dissenting)." *Lucas*, 505 U.S. at 1017.

582. 260 U.S. at 414. A taking was found pursuant to the Holmes-authored majority opinion in *Penn. Coal.* The Kohler Act at issue required coal to be left under houses and streets when owned by a party other than the coal company. Justice Holmes characterized this as benefitting private owners of houses. Public streets were also protected, but Holmes felt cities should have bought more than the surface originally or, if a sufficient problem existed for a city, it should use eminent domain and buy the coal. *Id.*

583. *Lucas*, 505 U.S. at 1019.

584. Justice Brandeis in his dissent envisioned an entire city falling into a gaping hole, and there were such widespread problems. He believed the statute was thus close to preventing noxious use, and made an analogy to mining releasing noxious gases, which might not have been a gross exaggeration. *Penn. Coal*, 260 U.S. at 421-22 (Brandeis, J., dissenting).

adherents such as Justice Stevens in his *Keystone* opinion, conversely would concentrate on the public's right to protect itself.[585]

These justices have divergent outlooks on both the motives and potential for chicanery on the part of legislators and agencies, that is, the administrative state at the state or federal level. These differences can explain the divergent roles Justice Stevens and Justice Scalia assign to expectations. Justice Stevens credits legislatures and administrators with concern for preventing harm:

> Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners.[586]

To Justice Steven's, once a non-discriminatory rule is established, parties should conform their behavior and attitudes to the community-enhancing norm, incorporating it into their expectations. Justice Scalia, on the other hand, has a greater respect for the risk-taker who demands that a more static view of property be recognized. In essence, he believes it "reasonable" to doubt the wisdom of legislatures if they are changing developmental rights more than in a minor way.[587] He therefore lauds the speculator who purchases seemingly burdened property and fights to clear it of "un-

585. *Keystone*, 480 U.S. at 492. In *Keystone*, which found no taking, Justice Stevens and the majority found the purpose of an act very reminiscent of the Kohler Act to clearly have a strong public purpose, tied to maintaining the health, environment and fiscal integrity of the area. Justice Stevens noted the Subsidence Act had no exception to the prohibition against mining if the coal company also owned the surface and concluded that "the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area. That private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance." *Id.* at 492. The conclusion echoed Justice Brandeis, not Justice Holmes.

To Justice Stevens, the purpose related to preventing a public nuisance, but he used average reciprocity language to justify upholding the law. *Id.* at 493 ("While each of us is burdened somewhat by such restrictions [on our use of property], we, in turn, benefit greatly from the restrictions that are placed on others."). This rationale for upholding a law has a strong pedigree. Even Justice Holmes acknowledged that, at least in some situations, "average reciprocity of advantage" from regulation could nullify a taking argument. In *Penn. Coal Co.*, he approved of the holding in *Plymouth Coal Co. v. Penn.*, 232 U.S. 531 (1914), which upheld a statute that required a pillar of coal to be left at boundaries of adjoining property. The coal pillar protected workers in both mines from water, which creates an "average reciprocity of advantage." This is important when government restricts the use of property to benefit property of another. With a small group of similarly situated coal mining companies involved, leaving coal in place helps a neighboring miner but the neighbor would also leave coal in place. This rationale is also part of the justification of zoning. The value of the total land area will go up if discordant uses are separated, even if there is some limitation of use on individual lots.

586. *Lucas*, 505 U.S. at 1038 (Stevens, J., dissenting).

587. He does pay at least lip service to the mantra that "the *functional* basis for permitting the government, by regulation, to affect property values without compensation" resides in the holding of Holmes in *Penn. Coal* that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 1018 (citing *Penn. Coal*, 260 U.S. at 413).

constitutional" restrictions.[588]

Justice Scalia also joins the majority in *Palazzolo* and finds that the case is ripe for adjudication. Justice Kennedy's opinion discounted the possibility that further development on the non-wetlands portion of the property could be relevant, holding that there had already been a "finding" on the upper limits of development.[589] Although expressly stating he was not deciding whether the uplands and wetlands were two different tracts because the question was not presented below,[590] the rush to ripeness might reflect the belief that the relevant property is not the total tract, but only the wetlands; it therefore would be less important to know how much development on the uplands could satisfy Mr. Palazzolo's reasonable investment-backed expectations.

A more limited, or segmented, view of property affected by a regulation resembles Justice Holmes' view that the regulated property in *Pennsylvania Coal* was the individual tons of coal left behind[591] or the support estate.[592] A broader view reveals itself in Justice Brandeis' statement: "The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in parts can not be greater than the rights in the whole."[593] Similar distinctions were made between the majority and dissent in the *Keystone* case, with Justice Stevens taking the expansive view,[594] and Chief Justice Rehnquist taking the more segmented position.[595]

The definition of the "property" impacted is important post-*Lucas*, which did not resolve this issue, as its footnote 7 reveals.[596] The definition question contains at least two subparts. One is whether the relevant "property" is the totality of property rights or one particular "strand," such as the right to mine or to sell. The question is how much of a tract is im-

588. *Palazzolo*, 121 S. Ct. at 2467 (Scalia, J., concurring).
589. *Id.* at 2460.
590. *Id.* at 2465.
591. *Penn. Coal*, 260 U.S. at 413-15.
592. *Id.* at 416. At common law, the owner of the surface had a common law right to force the mineral owner to avoid subsidence as a result of mining. This could be rearranged by contract. In Pennsylvania, a "support estate" may be owned separately from either the mineral or surface estates. In the particular case, the coal estate had the "support estate," which meant it could mine without liability for causing subsidence.
593. *Id.* at 419, (Brandeis, J., dissenting).
594. Of the twenty-seven million tons of coal required to remain in place for thirteen mines from 1966-72 out of 1.46 billion tons in the mine, Justice Stevens noted that less than two percent was required to be left in place; therefore the tons were not separate property interest and, even without the regulation, only seventy-five percent of coal was mineable. *Keystone*, 480 U.S. at 489. Additionally the support estate needed a context; it was a part of the value of either the surface or the coal estate because, as a practical matter, it was always owned by one of the two. It was not an individual piece of property. *Id.* at 487.
595. As Chief Justice Rehnquist put it, the regulation "does not merely inhibit one strand in bundle, but instead destroys completely any interest in a segment of property." *Id.* at 517-18 (Rehnquist, J., dissenting).
596. *Lucas*, 505 U.S. at 1015 n. 7.

pacted.[597] Justice Stevens in *Keystone* said: "The hill is made especially steep because Petitioners have not claimed . . . that the Act makes it commercially impracticable for them to continue mining their bituminous coal interest in western Pennsylvania. Indeed, petitioners have not even pointed to a single mine that can no longer be mined at a profit."[598] Although looking at the rights impacted to be mining coal, this hints that a court could aggregate property interests in determining whether a taking has occurred, a thought which would send a shudder through Justice Scalia.[599] This second issue is to determine how much of a physical tract of land should be considered as the "property" affected by the regulation.

The dissent in *Palazzolo*, however, appears much more eager than the majority to consider the answer to the "property" question to be the tract as a whole, at least in regard to the land still owned by Mr. Palazzolo, rather than the wetlands acres themselves.[600] This suggestion comes from their insistence that what the impact of the regulation cannot be known until development of the uplands is adjudicated. This ripeness decision is not a perfect barometer of how the justices would vote if the "denominator" question was distinctly before them, but may reflect parallel concerns.[601] One logical way to approach the problem is to look to see what had been the functional unit for planning and potential revenue stream.[602]

When the major issues in the *Palazzolo* opinions are identified, therefore, the opinions follow familiar debate lines. Nevertheless, the Justices tend to reflect back these arguments through their own lenses; the debate

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597. On segmentation generally, *see* Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After Lucas*, 13 St. Thomas L. Rev. 65, 83-93 (2000).

598. *Keystone*, 480 U.S. at 496.

599. *Cf. Lucas*, 505 U.S. at 1015 n. 7 ("For an extreme—and, we think, insupportable—view of the relevant calculus, *see Penn. Central Transp. Co.*, 366 N.E.2d 1271 (1977), *aff'd*, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.").

600. As a shareholder, he benefitted from SGI's sale of property earlier. However, to consider this would be inconsistent with judging his expectations as an individual as dating from the time the corporation lost its charter.

601. The issue has been directly in front of courts other than the Supreme Court. These courts have split. Some consider the property regulated to be an entire tract. *See e.g. Brace v. U.S.*, 48 Fed. Cl. 272, 280 (2000) (thirty acres could not be drained; court unable to determine if a taking occurred without knowing how much land he owned); *Forest Properties, Inc.*, 39 Fed. Cl. 56 (1997), *aff'd*, 177 F.3d 1360, 1365 (Fed. Cir. 1999), *cert. denied sub nom., RCK Properties, Inc. v. U.S.*, 528 U.S. 951 (1999) (dredge and fill permit); *Tabb Lakes, Ltd., v. U.S.*, 10 F.3d 796 (Fed. Cir. 1993); *Ciampitti v. U.S.*, 22 Cl.Ct. 310, 319 (1991), *Deltona Corp. v. U.S.*, 657 F.2d 1184, 1192-93 (Ct.Cl. 1981); *Jentgen v. U.S.*, 657 F.2d 1210, 1213-14 (Ct.Cl. 1981), *cert. denied*, 445 U.S. 1017 (1982).

Others segment and look at the wetlands regulated as the affected property. *See e.g. Loveladies Harbor v. U.S.*, 21 Cl.Ct. 153 (1990), *aff'd*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (permit denied development of twelve and a half acres; original tract was 250 acres and only 57.4 still owned); *Fla. Rock Indus. v. U.S.*, 18 F.3d 1560, 1570 (Fed. Cir. 1994).

602. *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999), *cert. denied*, 121 S. Ct. 34 (2000) (Tract was one parcel because lots were "spatially and functionally contiguous").

is not static and nuances may result in different syntheses or approaches to problems.[603] Expectation analysis is one area that might emerge.[604]

2. Some Musings on Expectations

The mythology of land creates one of the difficulties in properly appraising when new legislation or rules influence either reasonable investment backed expectations or background principles of law. Identifying expectations and general background principles of law are different exercises, *albeit* related. Background principles of law foreclose viewing even a total deprivation of value as a taking. In theory, these principles would be of generalized import. Although an individual might not have specific notice of them, the principles generally permeate societal values. Reasonable expectations in regard to property may depend more on the claimant's individual history with the particular tract of land. However, the adjective "reasonable" requires incorporating some objective standards. If a regulation or statute is a general principle of law, it should color a person's reasonable expectations. In theory, however, a regulation or statute may influence reasonable expectations about *types* of property before it is a general principle of law.[605] To understand how this would influence the takings analysis requires a examination of how or why investments in land should be treated differently than other investments.

Supreme Court cases examining expectations readily take the state of regulation into account if the property affected is not land. For example, in *Rucklehaus v. Monsanto Company*,[606] the highly regulated nature of the

603. *See* David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 Notre Dame. L. Rev. 717, 721 (1999) (arguing that synthesis in the takings arena is perhaps impossible because of the fact-dependent nature of the inquiry).

604. *But see* Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1368, 1371 (1993) (expectations analysis is circular; government should attempt to maximize social welfare and regulate so that we can make one person better off and leave no one worse off).

605. Some of the Judges on the Federal Circuit Court of Appeals have engaged in a lively debate about whether any inquiry into reasonable expectations is needed when a total taking is involved. *Compare* Judge Plager: "In light of the Court's [in *Lucas*] repeated juxtaposition of physical takings with 'categorical' regulatory takings, and the Court's repeated unqualified statements that the latter deserve the same compensation without more, we can only conclude that the Court's purpose was to convey that principle that, when there is a physical taking of land, or a regulatory taking that constitutes a total wipeout, investment-backed expectations play no role." *Palm Beach Isles Associates v. U.S.*, 208 F.3d 1374, *on rehearing*, 231 F.3d 1354, 1362-63 (Fed.Cir. 2000), *with* Judge Gajarsa: "Investment-backed expectations must be considered in *all* regulatory takings cases, even in those rare situations where the government has deprived a landowner of all economically beneficial use." *Palm Beach Isles Assoc. v. U.S.*, 231 F.3d 1365, 1367 (Fed.Cir. 2000) (Gajarsa J. dissenting from denial of *en banc* hearing). Judge Gajarsa find the following statement of the law to be correct: "[A] *Lucas*- type taking, therefore, is categorical only in the sense that the courts do not balance the importance of the public interest advanced by the regulation against the regulation's impact on private property rights." *Id.* at 1368 (quoting *Good v. U.S.*, 189 F.3d 1355, 1361 (Fed. Cir. 1995), *cert. denied*, 529 U.S. 1053 (2000)). This author would apply expectation analysis to both types of takings.

606. 467 U.S. 986 (1984).

pesticide industry militated against a taking on expectation grounds. If a company submitted trade data to the EPA for the purpose of getting pesticide registration knowing of a regulation providing for some disclosure of the data, the company's voluntary submission of the data prevents the disclosure from being a taking of a property right in the data.[607] A person's ability to sell an eagle feather, which is personal property, may be curtailed without "taking" the property.[608] Justice Scalia in *Lucas* seems to imply that personal property rules are different than those applying to land.[609] However, even if real property is involved, the highly regulated nature of an industry would allow for some intrusions, such as warrantless administrative searches.[610]

Land, and a "right" to develop land,[611] however, has often been viewed as different from personal property ownership. For land-starved immigrants to the United States, the immutable nature of land and freedom from landlords represented an ultimate goal. Many a child was told to own and invest in land, because land was always of value and no additional land could be created. An investment an land, therefore, was seen as somehow different from any other investment. Land ownership, however, has never created an inviolate fiefdom.

Land use has always been subject to dual masters: the individual and the public.[612] Even in Colonial times, land was regulated, often requiring

607. *Id.* at 1006-07. *See Concrete Pipe and Prod. of Ca., Inc. v. Constr. Laborers Pension Trust for S. Ca.*, 508 U.S. 602, 645-46 (1993) (pension plans had long been subject to federal regulation so the plaintiff "could have had no reasonable expectation that it would not be faced with liability"). Granting this role to regulations is not a universally held belief. For example, Judge Hodges refuses to categorically find takings impossible in a highly regulated industry unless the government regulation had initially created the right; takings in other heavily regulated industries would simply be more difficult to pursue. *Maritrans, Inc, v. U.S.*, 40 Fed. Cl. 790, 794-97 (1998), *after rehearing*, 43 Fed. Cl. 86 (1999) (tank owner's expectation that the United States would not institute a double-hull requirement was reasonable, but at present only suffered a diminution of value and the taking claim was untimely).

608. *Andrus v. Allard*, 444 U.S. 51, 66 (1979). There is a dispute about whether a later case overruled *Andrus v. Allard*. *See Hodel v. Irving*, 481 U.S. 704 (1987) (finding a taking when descent and devise of land was totally abolished, Justices Brennan, Blackmun, and Marshall opined that it did not. *Id.* at 718. Justices Scalia and Powell said *Hodel* overruled *Allard*. *Id.* at 719-20. Moreover, there is an additional intimation that the *Allard* holding may not stand. Four Justices employed a taking analysis to void a retroactive regulation that "took" an unspecified bundle of money by imposing retroactive liability. *E. Enter. v. Apfel*, 524 U.S. 498 (1998) (plurality opinion).

609. *Lucas*, 505 U.S. at 1015.

610. *Donovan v. Dewey*, 452 U.S. 594 (1981).

611. *See Prah v. Maretti*, 321 N.W.2d 182 (1982) (detailing reluctance in nineteenth and early part of the twentieth century to protect a landowner's access to sunlight as being based on three policy considerations; two were general: an interest in not impeding land development and a belief that a person could do whatever one liked on private property so long as not causing an injury to another).

612. These are the Madison/Lockean concept of land promoting individuality and the Jeffersonean/Roussauuean concept, which imbues property with a social purpose, creating citizens. *See* Mansfield, *Private Meets Public supra* n. 560, at 205-08. Another dichotomy posited is that between the "transformative economy" and the "economy of nature." *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433, 1442-46 (1993) ("In the former, land is

specific uses of property owned in fee; the law regulated both what could or could not take place on property.[613] Modern cases have begun to recognize that developmental expectations must take into account existent regulatory objectives. For example, a land developer in Washington had to be cognizant of increasing regulations to protect historic landmarks over a sixty year period. These regulations, which were after the land was acquired, but before development permission was sought, could eliminate a land owner's reasonable expectations to develop as requested.[614] If the regulations pre-dated the land acquisition, there have been several other examples of court's denying taking claims.[615] One judge, although rejecting the analysis in the particular case, explained the rationale for such a denial:

> In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.[616]

Even more important than reliance interests or discounted prices, a landowner must view regulation - either before or after land acquisition, but

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considered as a distinct entity that can be made into a human artifact. The second view, however, is that land is systems, defined by their function, not by man-made boundaries.").

613. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1281 (1996) ("The first century and a half of private land ownership in America reveals no sign of the later-imagined rights of landowners to be let alone as long as they do not harm others. In the minds of colonial legislators, the bundle of rights received by patentees and passed on to their successors did not include a right to use the land for everything short of nuisance. Instead, the landowner's right to control and utilize land remained subject to an obligation to further important community objectives."). *See* Lazarus, *supra* n. 559, at 1122 (Original intent constitutional analysis actually favors those supporting regulations because there is little historical evidence that the framers considered a regulatory action to be a trigger of the Fifth Amendment protection).

614. *Dist. Intown Prop. Ltd. Partn.*, 198 F.3d at 883-84 ("[A] buyer's reasonable expectations must be put in the context of the underlying regulatory regime . . . Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends). The court here did not do a separate "background principles of law" analysis, but folded the same into its discussion of expectations. Judge Williams concurred in the judgment; he noted, however, that under economic analysis, wasteful regulation could be promoted if the government can make costs external to the government if it treats land as a "free" good. *Id.* at 884-90 (Williams, J., concurring).

615. *Good v. U.S.*, 189 F.3d 1355, 1360-62 (Fed. Cir. 1995), *cert. denied*, 529 U.S. 1053 (2000) (regulatory regime of endangered species act foreclosed expectations even if particular species not listed at land acquisition); *Brace v. U.S.*, 48 Fed. Cl. 272, 284 (2000) (plaintiff knew of wetland character of land when bought land in 1975; even if the specific wetland regulations were not in place, he was generally aware of CWA); *Creppel v. U.S.*, 41 F.3d 627, 634 (Fed Cir. 1994) (test "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation"); *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (reasonable expectations missing in regard to building home when homes were only allowed in special situations when they acquired their property in a Forest Use Zone). *See* state cases collected in Gerstenblith, *supra* n. 597, at 82 n. 110 (2000). *But see Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171 (Fed. Cir. 1994).

616. *Loveladies Harbor, Inc.*, 28 F.3d 1171.

especially before - as part of the speculative aspect of land investment.

Ownership of land is an investment, and all investments are speculative. Neither Mr. Palazzolo nor his predecessor in title, SGI, developed the property since they acquired it. Similarly, the lot Mr. Lucas bought never had been built on, but the lot was sold several times for seemingly ever-increasing prices:

> The properties were sold frequently at rapidly escalating prices before Lucas purchased them. Lot 22 was first sold in 1979 for $96,660, sold in 1984 for $187,500, then in 1985 for $260,000, and, finally, to Lucas in 1986 for $475,000. He estimated its worth in 1991 at $650,000. Lot 24 had a similar past. The record does not indicate who purchased the properties prior to Lucas, or why none of the purchasers held on to the lots and built on them.[617]

Mr. Lucas, obviously, thought the land would continue to appreciate in value. However, so did the buyers of Enron stock in 2000, tulip bulbs in 1636, and Beanie Babies in 1999. No investment is guaranteed to be successful.

Nevertheless, one characteristic of the type of land that is sometimes viewed as a "safe" investment is obvious in the lands involved in both *Lucas* and *Palazzolo*; the lands were near shores. Land that is desirable from a lifestyle or investment perspective is often near beaches or forests, lakes, mountains or parks. These lands are of limited supply, even more so than land generally. But the same characteristics that attract land buyers also emphasize the importance of the lands both ecologically and for recreation and aesthetics.[618] In other words, the public values regulation forwards also cluster on these lands. Two sets of expectations exist. The public relies upon retaining these public values, which may directly provide ecological services,[619] and the landowner expects profit from either development or resale.[620] Justice Brennan commented on this in his dissent in *Nollan v. California Coastal Commission*:[621]

> It is therefore [sometimes] private landowners who threaten the disruption of settled public expectations. Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose. In

617. *Lucas*, 505 U.S. at 1039 (Blackmun, J., dissenting).

618. *See* Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court*, 12 J. Land Use & Envtl. L. 179, 192 (1997) ("The collision between private expectations and environmental protection is further exacerbated at the border between land and water because land values there are high.").

619. *See* for instance, the values wetlands provide. Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post-Lucas Era*, 30 Land & Water L. Rev. 349, 354-57 (1995).

620. Some of this profit may be in the form of individual pleasure from residing on the land before resale. That is, even if resale is not the immediate plan, there is still "profit," even if not monetary.

621. 483 U.S. 825 (1987).

> this case, however, the State has sought to protect *public* expectations of access from disruption by private land use. The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens.[622]

At some point, the balance may tip to the expectations of the public.

If one requires the landowner's expectations to be reasonable, the landowner must be part of the modern world. This is a world that recognizes the interrelationships of land and other elements of an ecosystem. Therefore, regulation and the possibility of regulation to prevent harm to public values must be within these expectations.[623] Only if a new regulation or application of a regulation is not evolutionary, but totally novel, should landowners be able to escape the fact that their expectations, to be reasonable, had to factor in the regulation or statute.[624]

Investment-backed expectations are not, of course, the only aspect of a takings analysis. Also of import are the nature of the governmental interest forwarded and the financial impact on the private property owner. What is reasonable, however, may reflect where on the continuum the other factors lie. In other words, when the public purpose forwarded is stronger, the reasonable landowner would expect more limitations.[625] The lesser the financial impact, the more the landowner would expect to have to accommodate the public need. In this regard, distinctions would emerge based on whether or not the regulation had curtailed an existing use or stopped an activity after the private party had initiated other individualized activity indicating a strong expectation of imminent development before the regulatory action. If neither situation was present, the landowner's expectations would be weaker.[626] Rarely would a landowner expect land to be-

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622. *Id.* at 848 (Brennan, J., dissenting) (arguing against the need for an exact match between harm and remedy in the land exaction setting). *See Dolan v. City of Tigard*, 512 U.S. 374, 411 (1994) (Stevens, J. dissenting: "In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh th private interest of the commercial entrepreneur.").

623. Westbrook, *supra* n. 603, at 754 (arguing government is now expected to do certain things, such as prevent externalities, prohibit nuisances and protect cultural history and banking; "[t]he expectations of government action may preclude the formation of the publicly settled expectations of stable relations that constitute property rights.").

624. It also would be unreasonable to factor in a law that is targeting individual property, rather than a general, wide-ranging problem. If a law, however, is of general applicability, it represents at least what a majority of representatives find to be "reasonable" about land use, subject to the *caveats* about the limitations of the legislative process.

625. *Cf.* Mansfield, *On the Cusp*, *supra* n. 560, at 96-97 (positing the evolutionary growth of a "collective-protection servitude" to counter a regulatory taking challenge).

626. *Cf.* Mansfield, *Regulatory Takings*, *supra* n. 560, at 465-68 (arguing for a "strong expectation test" to determine valid existing rights under the Surface Mining Control and Reclamation Act); Lazarus, *supra* n. 597, at 1136 (predicting that Justice Kennedy may require economic deprivation be of actual rather than theoretical use and the actual use must be clearly lawful at the time property owner gets the expectations); *Sibson v. State*, 336 A.2d 239, 243 (N.H. 1975) ("The board has not denied plaintiffs current uses of their marsh but prevented a major change inn the marsh that plaintiffs seek to make for speculative profit."); *Carter v. S.C. Coastal Council*, 314 S.E.2d 327, 329 (S.C. 1984) (quoting *Just*

come valueless.[627] Nevertheless, at some point a regulation or law may become such a part of the fabric of society that it does become a general principle of property law; to violate the same would be unreasonable, or even a taking of the public's rights.[628] This is especially true in the case of long-term private non-development and long existing public environmental concerns.

In essence, a reasonable party must factor in the possibility that land values can go down, as well as up. As one court phrased it:

> A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market. As his Court observed in *Florida Rock II* [791 F.2d 893 (Fed Cir. 1986) cert. denied 479 U.S. 1053 (1987)] at 902-3, yesterday's Everglades swamp to be drained as a mosquito haven is today's wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow's view of public policy will bring, or how the market will respond to it.[629]

A speculator need not always win, or may have to be in the game for the long haul, and wait for regulation to change. As even Justice Scalia has acknowledged, "business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense."[630] It is an anachronism to believe that development interests in land have a super-hallowed position unlike all other investments.

VI. CONCLUSION

The various members of the Supreme Court replayed some of their well-known themes in the triad of cases *Solid Waste, American Trucking,* and *Palazzolo.* None of the cases made profound changes in the constitutional doctrines they considered. However, the cumulative affect of their rulings shows the continued hostility some justices harbor toward the fed-

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v Marinette Co., 201 N.W. 2d 761, 768 (Wis. 1972) ("While unquestionably respondent's wetland would have greater value to him if it were filled, an owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use if for a purpose for which it was unsuited in its natural state and which injures the rights of others."); *Graham v. Estuary Prop., Inc.*, 399 So.2d 1374 (Fla. 1981), *cert. denied sub nom., Taylor v. Graham*, 454 U.S. 1083 (1981) (Destruction of the mangroves and creation of interceptor waterway would pollute the surrounding waters; action in denying permit is to prevent harm).

627. The Rhode Island court found that Mr. Palazzolo could gain $157,500 from donating the property *Palazzolo*, 746 A.2d at 715.

628. *Cf. Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998) (statutory effort to immunize certain agricultural enterprises from liability for externality-generating activities a "taking" of neighbors' land).

629. *Fla. Rock Indus., Inc v. U.S.*, 18 F.3d 1560, 1566 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). On remand, Judge Smith found that the 73.1% diminution of value was a taking. He noted that the claimant had what this article labeled "strong expectations;" it had obtained all state and local permits to mine before passage of the 1977 wetland regulations.

630. *Fla. Prepaid Postsecondary Ed. Expenses Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2225 (1999).

eral administrative state.

Of the three cases, the *Solid Waste* case most greatly altered the regulatory scheme it reviewed. The case considered the Migratory Bird Rule, under which the Corps of Engineers asserted jurisdiction over non-navigable, non-interstate waters simply because they were or could be habitat for migratory birds. Rather than finding the rule violated the Commerce Clause, the Court found that the Clean Water Act did not intend such an assertion of jurisdiction. This changed Clean Water Act jurisdiction from a grant that goes as far as Commerce Clause would allow to one of more limited stretch. The route to this conclusion was through tortured statutory interpretation, in which the textualist style of interpretation drowned most "conventional wisdom" on the CWA as well as any deference to the agency. Through it all came an echo of recent federalism concerns, as Chief Justice Rehnquist again voiced objection to federal intrusion into state-based land regulation.

The concern for land use also revealed itself in the takings case, *Palazzolo*. The majority opinion, with some quibbling on nuance, rejected a *per se* rule which would make the existence of a regulation at the time of land acquisition dispositive of a takings claim. If the Court had concluded otherwise, it would have signaled much more support for state and federal efforts toward environmental protection than ever before. Therefore, this position, taken by almost all the justices, was not surprising. It was also not startling that a familiar five of the justices remanded the case as ripe to "get at" the substantive taking issues. They found the judgment ripe and discounted the fact that the full developmental potential of the remainder of the tract was not determined.[631]

The Clean Air Act case, *American Trucking*, was the only case that did not fall into the now unsurprising five-four split.[632] All the Justices decided that the CAA provision at issue did not violate a prohibition against delegating "legislative" power to the Executive. Many environmental and other regulatory laws would have been vulnerable to attack had the Court not found the delegation to contain a sufficient "intelligible principle," which was the prior standard to judge legality, or if the Court had changed the standard itself. Nevertheless, the Court, through the expediency of statutory interpretation, managed to negate one of the EPA's proposals.

Viewing the three cases together, it appears that champions of environmental law pursuant to the dominant administrative state model do not have five consistent allies on the Supreme Court. Interference with the

631. After considering Justice Stevens' partial concurrence, the alignment was the same as in *Solid Waste*: on one side is Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, and Thomas. The minority was comprised of Justice Stevens, Souter, Ginsburg, and Breyer.

632. In *American Trucking*, Justice Scalia wrote an opinion in which seven justices joined. Justice Stevens wrote a separate opinion concurring in the judgment, but with a different rationale. Justice Souter joined with him. Justice Thomas joined in Justice Scalia's opinion and also wrote a special concurrence.

model, however, will be by incremental means, not wholesale doctrinal upheaval. Delegation, Commerce Clause jurisdiction, and regulation without compensation remain viable. The Court is not ready to discard these doctrines supporting the administrative state, but it has and probably will continue to assert pressure to circumscribe their use.