



2002

## Environmental Law and the Supreme Court: Three Years Later

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19 Pace Env'tl. L. Rev. 653-674 (2002)

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## Faculty Publications



January 2010

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# Environmental Law and the Supreme Court: Three Years Later

RICHARD J. LAZARUS\*

Since my Garrison lecture three years ago, the Court has remained remarkably constant in at least one significant respect: Its membership. Justice Breyer remains today, as he was three years ago, the most junior Justice. Political scientists dub a court made up of the same judges over time as a “natural court.” Because Justice Breyer joined the Court in 1994, that means the Supreme Court has been a “natural court” for eight years and counting. While that might not seem like along time to some, for the Supreme Court that is a very long time. Indeed, it is the second longest time in the Court’s history. Between 1811 and 1823, when there were only seven Justices on the Court, there were no changes in membership. Only on two other occasions has the Court gone for as long as six years.<sup>1</sup>

The significance for environmental law is considerable. This is a Court with an affirmative agenda. It is not a passive Court. The Justices have discrete areas of law that they are interested in shaping and, because the Justices know each other so well, they are better able to maintain the stable majority necessary for such a shaping to be accomplished. They, accordingly, systematically grant review and decide cases that present the relevant legal issues in settings favorable to the outcome that the majority seeks to promote. When, moreover, the Court is so capable of sending out such clear signals, it is far more likely that sympathetic institutional litigants and lower court judges can effectively serve up to the Court cases that are attractive vehicles for lawmaking.

The upshot has been a Court able to issue a series of major related rulings in relatively short order. The gradual incrementalism that is supposedly structurally built into judicial deci-

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\* Professor of Law, Georgetown University Law Center. Thanks are owed to Carrie Jenks, Georgetown University Law Center 2003, who provided outstanding research assistance in the preparation of this article.

1. See Supreme Court Historical Society, Presidential nominees, *available at* <http://www.supremecourthistory.org/fp/courtlist.htm>; see also THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit Hall, ed. 1992).

sion-making is in short supply these days. The opportunity for conflict with the other branches of government is correspondingly increased. Deprived of a meaningful opportunity to reshape their own lawmaking efforts in response to the Court's rapidly evolving jurisprudence, the legislative and executive branches more frequently find themselves out of step with the Court. Once out of step, the lawmaking efforts of the other branches are more susceptible to legal challenge. That is also why the current Court, notwithstanding its "conservative" views, seems especially ready to overturn the decisions of other branches within the federal system and of state sovereigns.<sup>2</sup> In short, the stability within the Court is the source of some instability in its dealings with other parts of the government.

The Court's resurgent activism has been and portends to continue to be highly relevant to environmental law because of the way that environmental law interacts with those areas of law on the Court's front burner. Environmental law, largely because of the nature of the ecological problem that it seeks to address, depends upon certain institutional relationships between competing lawmaking authorities both within branches of government and between competing sovereigns. Environmental law expresses certain values and priorities that raise conflicts with other values and priorities, including some of a constitutional dimension. Whether by happenstance or design, much of the Supreme Court's current agenda seems disproportionately ready to unsettle those institutional relationships and the hierarchy of values upon which modern environmental law has depended since 1970.

In my Garrison Lecture three years ago, I surveyed the environmental law decisions of the Supreme Court between 1970 and 1999. I commented on which Justices had been more or less influential in shaping the Court's decisions and, even more provocatively (if not foolishly), sought to "score" the individual Justices on their responsiveness to environmental protection concerns based on their votes cast in a subset of those cases.<sup>3</sup> The broader thesis

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2. See, e.g., Mark Tushnet, *The Supreme Court 1998 Term Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Linda Greenhouse, *The High Court's Target: Congress*, N.Y. TIMES, Feb. 25, 2001 § 4 at 3.

3. Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 PACE ENVTL. L. REV. 1 (1999). The Garrison lecture was my initial analysis and publication. I subsequently published a fuller description of the results of my survey of the Justices in Richard J. Lazarus, *Restoring What's Environmental*

of the lecture, however, was that there is something distinctively “environmental” about environmental law and that the Court’s increasing inability to appreciate that dimension was leading to more poorly-reasoned decisions and results.

Pace has now provided me with the luxury to revisit my earlier conclusions with the benefit of three additional years of hindsight. To that end, this update addresses three topics. First, it considers whether the opinion assignments and votes of individual Justices during the past three years either reinforce or undermine my prior assessment. Second, the update surveys the most significant environmental law decisions of the past three years and considers their portent for the possible restoration of what is “environmental” about environmental law in the Court. Third and finally, the update identifies important legal issues now looming before the Court.<sup>4</sup>

### I. Reexamining the Environmental Scorecard of the Justices

The only completed Supreme Court Terms since my 1999 Garrison Lecture are the October Terms 1999 and 2000. Although the current Term is now more than halfway completed, there are not yet any decided environmental law cases. As it happens, there are almost no such cases on the docket this Term. The only exception is *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Commission*,<sup>5</sup> the latest in a seemingly never-ending series of regulatory takings challenges to environmental land use restrictions.<sup>6</sup>

During the last two Terms, however, the Court decided twelve additional cases arising in an environmental law context, as broadly described in my 1999 Lecture. As in the past, these cases include classic public land law controversies, pollution control conflicts, original actions raising border and interstate water alloca-

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*About Environmental Law*, 47 U.C.L.A. L. REV. 703 (2000). A fuller description of the numerical analysis underlying my Garrison lecture is set forth in that separate publication.

4. 528 U.S. 167 (1999).

5. No. 00-1167 (U.S. argued Jan. 7, 2002). The court has decided this case since this article first went to press. See note 77, *infra*.

6. *E.g.*, *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (U.S. 1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1991); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

tion disputes. They also include many cases that raise legal issues for which the environmental setting would seem wholly incidental to the resolution of the precise legal issue before the Court.<sup>7</sup>

The leading opinion writer for the Court in the past survey was Justice White by a large margin. During the past three years, the opinion writing is far more evenly divided. Justices Scalia and Ginsburg lead the pack, each writing three out of the twelve cases, with Justices Kennedy and Souter responsible for two opinions each. The small number of cases plainly limits the significance of any of these numbers.<sup>8</sup>

Justice Kennedy continued his remarkable feat of almost never dissenting in an environmental law case before the Court. In my earlier survey, Justice Kennedy was, aside from one interstate water allocation dispute and a few qualified concurring opinions, in the majority in virtually all fifty-seven of the environmental cases in which he had participated. For the twelve new cases, Kennedy kept his record fairly intact. He dissented only once, in *Idaho v. United States*,<sup>9</sup> which raised a dispute between the federal and state governments regarding ownership of certain submerged lands. Still, as before, no single Justice dissents from the majority very often in the environmental cases. The lowest percentage for a Justice being in the majority was still well above seventy percent.<sup>10</sup>

The final category, the “environmental protection” (EP) scores of the Justices, is also intriguing. In the last survey, I described several prominent examples in which individual Justices voted quite differently than one might expect. So-called “liberal” Justices voted for positions denounced by environmentalists, and Justices whom environmentalists presume are hostile to their legal positions in fact voted in their favor. I also explained some of the reasons for that phenomena and why its occurrence is not at all paradoxical, but rather to be expected. Indeed, that is why it was so striking that Justice Douglas maintained an EP score of 100 in favor of environmental protection. No matter what the legal issue, no matter what the context, the Justice always managed to cast a vote in favor of the position supported by environmentalists.

For that same reason, it is interesting that each of the Justices popularly aligned with the liberal side of the Court consist-

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7. A full listing of the cases is included in Appendix A, *infra*.

8. See Appendix A, *infra*.

9. 533 U.S. 262 (2000).

10. See Appendix A, *infra*.

ently voted in favor of the position supported by environmentalists during the past several years. As in 1999, for the purposes of this inquiry, I have identified a subset of cases for which the environmental context was more than wholly incidental to the issue before the Court. I have included six cases: *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, (Clean Water Act environmental citizen suit standing),<sup>11</sup> *Public Lands Council v. Babbitt* (Department of the Interior Taylor Grazing Act regulations),<sup>12</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (Clean Water Act jurisdiction over “isolated” waters),<sup>13</sup> *Whitman v. American Trucking Association* (nondelegation doctrine challenge to Clean Air Act),<sup>14</sup> *American Trucking Association v. Whitman* (relevance of costs in promulgation of national ambient air quality standards under the Clean Air Act),<sup>15</sup> and *Palazzolo v. Rhode Island* (regulatory takings challenge to state wetlands protection law).<sup>16</sup> Justices Stevens, Souter, Ginsburg, and Breyer cast all of their votes in these six cases in support of the environmentalist position.

By contrast, the conservative members of the Court were not nearly so one-sided. Justices Thomas and Scalia voted in favor of the environmentalist-favored position in three out of the six cases; and Chief Justice Rehnquist and Justices O’Connor and Kennedy did so in four out of the six cases. The lowest EP score for any Justice, accordingly, was a fifty, which was far higher than their previous scores, albeit based on an even smaller sample than before.<sup>17</sup>

Justice Scalia, moreover, authored the Court’s opinion in the two cases that handed environmentalists and federal regulators their single biggest win in the Supreme Court in decades. The Court granted review in the two *American Trucking* Clean Air Act cases separately, had separate briefings in the two cases, and scheduled them for back-to-back separate oral arguments. Justice Scalia authored the single unanimous opinion for the Court disposing of both cases. As further elaborated in the next part of this update, there was nothing remotely grudging or limited in the Court’s opinion. Scalia’s opinion for the Court constitutes a

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11. 528 U.S. 167 (2000).

12. 529 U.S. 728 (2000).

13. 531 U.S. 159 (2001).

14. 531 U.S. 457 (2001).

15. *Id.*

16. 533 U.S. 606 (2001).

17. See Appendix B, *infra*.

sweeping and categorical rejection of the regulated community's position on all the legal issues before the Court, or at least, perhaps more fairly described, of the D.C. Circuit's strained effort to revitalize the nondelegation doctrine.

## II. The Court's Recent Rulings and Their Portent for Environmental Law

What is clear at the outset is that the October 1999 and October 2000 Supreme Court Terms included several exceedingly important environmental rulings. What is less clear is their portent for the future of environmental law. The four cases are *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,<sup>18</sup> the companion cases *Whitman v. American Trucking Association*<sup>19</sup> and *American Trucking Association v. Whitman*,<sup>20</sup> and *Palazzolo v. Rhode Island*.<sup>21</sup>

*Friends of the Earth v. Laidlaw* was a significant victory for the environmental community. Immediately prior to that ruling, the discernable trajectory of the Court's standing decisions was to make it increasingly difficult for environmentalists to maintain citizen suit enforcement actions. As described in my 1999 Lecture, the Court's opinions in *Lujan v. National Wildlife Federation*<sup>22</sup> and *Lujan v. Defenders of Wildlife*,<sup>23</sup> in particular, promoted a view of standing requirements that systematically disadvantaged citizen suits. The inherent temporal and spatial uncertainties associated with ecological cause and effect coupled with the fragmentation of decision-making authority that exists both within government and the regulated community in environmental law seemed poised to render the Court's heightened standing requirements of injury, causation, and redressability virtually insurmountable.

Justice Ginsburg's opinion for the Court in *Laidlaw*, by contrast, responds to those very same concerns and reaffirms the ability of environmental plaintiffs to demonstrate standing notwithstanding the inevitable uncertainties in their allegations of fact in support of standing. The Court agreed that the plaintiffs in an environmental citizen suit need not allege and prove that the

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18. 528 U.S. 167.

19. 531 U.S. 457.

20. *Id.*

21. 533 U.S. 606.

22. 497 U.S. 871 (1990).

23. 504 U.S. 555 (1992).



pollution will in fact harm the environment in a particular way. The plaintiffs need only show injury to themselves, which can be satisfied “when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened.’”<sup>24</sup> The Court further agreed that standing is not defeated by the fact that any civil penalties obtained are payable to the United States Treasury and not to the citizen plaintiffs themselves. The Court reasoned that civil penalties provide “redress to citizen plaintiffs . . . [t]o the extent that they encourage defendants to discontinue current violations and deter them from committing future ones.”<sup>25</sup>

The two *American Trucking* Clean Air Act rulings likewise constituted major victories for environmentalists and environmental regulators. Together, they rebuffed legal arguments that challenged two of modern environmental law’s most basic precepts. The nondelegation case, brought to the Court by the Solicitor General, questioned the very ability of the national government to construct an institutional framework for environmental lawmaking. Here too, as with the law of standing, the nature of the problem environmental law seeks to address generates certain hurdles for the lawmaking process. Of relevance to the nondelegation doctrine, the development of environmental standards necessarily depends on broad delegations of lawmaking authority to regulatory agencies. It also requires the agency to promulgate standards that are simultaneously enormously controversial, because of their distributional implications, and riddled with scientific uncertainty and technical complexity that undermine their transparency. In short, federal environmental law depends on the very kind of lawmaking framework that cannot be squared with the strict view of the nondelegation doctrine promoted by the D.C. Circuit and the regulated community in *American Trucking*.<sup>26</sup>

For that same reason, the Court’s sweeping rejection of the D.C. Circuit’s effort to resurrect a reinvigorated nondelegation doctrine was essential to the maintenance of modern environmental law. The Court’s ruling on the nondelegation issue was, moreover, unanimous. Even the Chief Justice, whose earlier opinion in

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24. *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

25. *Id.* at 203.

26. *American Trucking Ass’n, Inc. v. E.P.A.*, 175 F.3d 1027 (D.C. Cir. 1999) *opinion modified on rehearing by* 195 F.3d 4 (D.C. Cir. 1999).

the Benzene case had indicated support for closer nondelegation doctrine scrutiny,<sup>27</sup> joined the Court's ruling, without elaboration.

The Court also unanimously maintained the status quo in the companion case of *American Trucking Association v. Whitman*, upholding EPA's longstanding position that the Clean Air Act does not allow the Agency to consider compliance costs in establishing national ambient air quality standards (NAAQS) under the Act.<sup>28</sup> Here too writing for the Court, Justice Scalia did far more than just decline to embrace industry's proffered canon of statutory construction under which agencies could presumptively consider compliance costs in environmental standard setting unless Congress expressly and specifically provided otherwise.<sup>29</sup> The Court effectively endorsed the converse position at least for the purposes of promulgating NAAQS under the Clean Air Act. The Court reasoned that the factor of compliance costs "is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in Sections 108 and 109 had Congress meant it to be considered."<sup>30</sup> For that same reason, Justice Breyer's strained effort in his separate concurrence to rehabilitate costs as part of the public health inquiry ultimately falls flat.<sup>31</sup>

Notwithstanding the Court's rulings in *Laidlaw* and the two *American Trucking* cases, the warnings about the Supreme Court that Professor Oliver Houck delivered in his own Garrison Lecture about environmental law's future remain apt today.<sup>32</sup> No doubt the Court's most foreboding ruling was its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*<sup>33</sup> (SWANCC) in 2001. By a five to four vote, the Court not only struck down the so-called "Migratory Bird Rule,"<sup>34</sup> but went on to hold that the Clean Water Act's definition of "navigable waters"<sup>35</sup> does not extend to "nonnavigable, isolated, intrastate

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27. *Industrial Union Dept. v. American Petroleum Inst. v. OSHA*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

28. 531 U.S. at 469.

29. Brief Amicus Curiae of the General Electric Co. in Support of Cross-Petitioner, at 7, *American Trucking Ass'n v. Whitman*, 531 U.S. 457 (2001) (No. 99-1257).

30. *American Trucking*, 531 U.S. at 469 (emphasis in original).

31. *Id.* at 491 (Breyer, J., concurring).

32. Oliver Houck, *Second Annual Lloyd K. Garrison Lecture on Environmental Law: Environmental Law and the General Welfare*, 16 PACE ENVTL. L. REV. 1 (1998).

33. 531 U.S. 159 (2001).

34. *Id.* at 170.

35. See 33 U.S.C. § 1251 (2002).

waters.”<sup>36</sup> Because, moreover, “navigable waters” is the jurisdictional touchstone for the entire Act, not just for the Section 404 program, the Court’s ruling is equally applicable to the Section 402 National Pollutant Discharge Elimination System permit program.<sup>37</sup>

The significance of the Court’s ruling is also not confined to the meaning of the Clean Water Act. The majority explained that it would have declined to defer to the Army Corps’ statutory interpretation even in the absence of “plain meaning” because of the ‘serious constitutional problems’ that would have been raised by the broader construction of the Act’s jurisdictional scope.<sup>38</sup> According to the Chief Justice’s opinion for the Court, there are “significant constitutional and federalism issues” concerning whether Congress has the authority under the Commerce Clause<sup>39</sup> to regulate dredge and fill activities in such isolated waters.<sup>40</sup> “Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’<sup>41</sup> would result in a significant impingement of the States’ traditional and primary power over land and water use.”<sup>42</sup>

What is most striking about the result in *SWANCC* is that until relatively recently, one could have safely assumed that the federal government would have easily prevailed on both of the questions presented. In *United States v. Riverside Bayview Homes, Inc.*,<sup>43</sup> to be sure, the Court expressly declined to address the precise issue of statutory construction before the Court in *SWANCC*.<sup>44</sup> The essential rationale of *Riverside Bayview*, however, especially as it relates to longstanding administrative construction, legislative ratification, and statutory objectives, is the same for both cases. The Court in *Riverside Bayview* had already overcome the most difficult hurdle in construing “navigable waters,” which was to uphold the notion that it extends to waters that are themselves not navigable and are instead a seasonally varying mixture of land and water.<sup>45</sup>

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36. *SWANCC*, 531 U.S. at 171-72.

37. See 33 U.S.C. § 1342 (2002).

38. *SWANCC*, 531 U.S. at 173.

39. U.S. CONST. art. I, § 8, cl. 3.

40. *SWANCC*, 531 U.S. at 174.

41. 51 Fed. Reg. 41, 217 (Nov. 13, 1986).

42. *SWANCC*, 531 U.S. at 174.

43. 474 U.S. 121 (1985).

44. *Id.* at 131-32 n.8.

45. *Id.* at 138.

Even more remarkable, however, was the Court's characterization of the Commerce Clause issue as problematic. To be sure, the "Migratory Bird Rule's" focus on whether certain birds crossed interstate borders does not even remotely reflect the relevant factors for determining Commerce Clause jurisdiction. It certainly did not after *United States v. Lopez*,<sup>46</sup> but also likely did not even do so before *Lopez*. The infirmities of the "Migratory Bird Rule," however, simply reflect the fact that the Rule asks the wrong question. It does not mean that if one asks the right question, Commerce Clause jurisdiction does not exist for the very kind of federal regulation at issue in *SWANCC*. Quite the opposite is true. Properly framed, federal regulation of either dredge and fill activities or discharges of pollutants into waters of the United States, no matter how broadly defined, is well within Congressional Commerce Clause authority both before and after *Lopez*.

The essentially economic nature of both the regulated activities themselves as well as their impacts fit well within a classic notion of regulation of activities that "substantially affect" interstate commerce. The precise environmental media—air, land, water—is not determinative of the economic character or substantiality of either the activity or the impact. In *SWANCC*, for example, the activity involved the construction of a large landfill facility, which is itself a commercial undertaking as are the numerous waste collection activities intimately associated with the landfill.<sup>47</sup> In addition, in *SWANCC*, the proposed landfill, by destroying habitat upon which substantial populations of migratory birds depended, would directly affect the multi-million dollar tourism and recreational industry that depends on maintenance and protection of such bird populations.<sup>48</sup>

The Court's constitutional problem with the Clean Water Act is not, at bottom, based on the notion that Congress could not in fact regulate the very activities at issue in *SWANCC*. It is instead based on the very different problem that the "Migratory Bird Rule," and perhaps even the Act's current statutory structure and jurisdictional touchstone fail to reflect the Court's newly constructed framework for Commerce Clause analysis post *Lopez*,<sup>49</sup>

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46. 514 U.S. 549 (1995).

47. Respondents' Brief at 43-47, *Solid Waste Agency of Northern Cook County* (No. 99-1178).

48. *Id.* at 47-49.

49. 514 U.S. 549 (1995).

and *United States v. Morrison*.<sup>50</sup> Instead, the Clean Water Act, like most of the other comprehensive federal environmental laws that Congress first enacted in the 1970s, pays little attention to Commerce Clause concerns in the first instance. These laws are, as Professor Oliver Houck described in his own Garrison Lecture, *sub silentio* premised on expansive notions of Congressional power under the General Welfare Clause.<sup>51</sup>

Environmental laws inevitably regulate and affect commerce because the nation's natural resources literally supply, after all, the basic ingredients of commercial life. But that is not to say that the objectives of those laws are commercial or that their commercial character is the reason the laws regulate certain activities. What frequently makes environmental laws so historically unique and important is that they promote a different vision of the relationship between humankind and the natural environment, which is deliberately *not* commercial in its emphasis.

Hence, even assuming that Congress could theoretically rewrite all of the current federal environmental laws in a manner wholly compatible with the Court's current Commerce Clause analysis, without any jurisdictional loss, the fact remains that there is an analytical gap between the Court's precedent and the existing statutes. It would, moreover, be no easy task simply to reenact existing laws in a manner more harmonious with the new judicial precedent. It is far more difficult under our system of law-making to enact statutes than it is to prevent their enactment. And, that would be especially so in the environmental arena, now that the substantiality of the cost implications of various statutory schemes are better understood than they were at the time of their original enactment. In the aftermath of *SWANCC*, for example, the legislative hurdles are high and wide to now amend the Clean Water Act to recapture the more expansive meaning of "navigable waters" and "waters of the United States" rejected by the Court in *SWANCC*.

Until *SWANCC*, the threat posed to existing federal environmental laws was only theoretical. The origins of the Court's revisiting of its Commerce Clause analysis were primarily derived from the Court's understandable concern with Congress's never-ceasing proclivity to expand the federal criminal jurisdiction of the

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50. 529 U.S. 598 (2000).

51. Houck, *supra* note 32, at 13; U.S. CONST. art I, § 8, cl. 1.

federal judiciary.<sup>52</sup> Neither of the laws struck down in *Lopez* or *Morrison* involved matters that readily lent themselves to state regulation in the absence of an overarching federal framework. Environmental protection requirements, by contrast, have been highly dependent on the existence of just such a comprehensive federal administrative framework even when that framework ultimately seeks state and local implementation efforts.

Finally, the Court has decided yet another significant regulatory takings claim, *Palazzolo v. Rhode Island*,<sup>53</sup> since I presented my Garrison Lecture. The *Palazzolo* results were far more mixed for both property rights advocates and governmental regulators. For each, there were parts of the opinion to be applauded, yet also other parts that should raise substantial concerns.

At issue in *Palazzolo* were two different kinds of *per se* takings tests, one favored by developers and the other by government regulators. The first concerns the relevance to the regulatory takings inquiry when a landowner acquires the property after the restriction being challenged is in place. In *Palazzolo*,<sup>54</sup> the Rhode Island Supreme Court held that such pre-acquisition notice is an absolute defense to a takings claim whether brought under *Lucas v. South Carolina Coastal Council*<sup>55</sup> or *Penn Central Transportation Co. v. City of New York*.<sup>56</sup> This so-called "notice rule" amounts to a *per se* "no takings" test.

The second concerns the degree of deprivation required to trigger a finding that a land use restriction is a *per se* taking under *Lucas*. In *Lucas*, the U.S. Supreme Court held that a *Lucas per se* taking required a threshold finding that the landowner had been deprived of all economic value or use.<sup>57</sup> *Palazzolo* argued before the Supreme Court in favor of an expansion of *Lucas* in which a landowner's loss would be measured by the amount of use or value allegedly lost by the restriction rather than by the amount of use or value remaining.<sup>58</sup> *Palazzolo* further argued for an expansion of *Lucas* under which a court would consider only

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52. See Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641 (2002).

53. 533 U.S. 606 (2001).

54. 746 A.2d 707 (R.I. 2000).

55. 505 U.S. 1003 (1992).

56. 438 U.S. 104 (1978).

57. 505 U.S. at 1015.

58. 533 U.S. at 623.

the restricted portion of the land in deciding whether a deprivation of all economic value or use had occurred.

The Court rejected both the *per se* no takings test at least as applied in *Palazzolo*, and Mr. Palazzolo's request that it expand the potential applicability of the *Lucas per se* takings test.<sup>59</sup> With respect to the former, the Court reasoned that "[t]he State may not put so potent a Hobbesian stick into the Lockean Bundle."<sup>60</sup> "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 were not taken, or could not have been taken, by a previous owner."<sup>61</sup>

In likewise rejecting the landowner's competing *per se* test, the Court substantially limited the *Lucas per se* rule by reaffirming the extreme nature of the regulatory impact needed for its application. The Court held that "permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"<sup>62</sup> The Court rejected Palazzolo's claim that a *Lucas per se* taking may be triggered by a substantial reduction in value alone, regardless of the amount of remaining value in the property.<sup>63</sup>

*Palazzolo* suggests the demise of *per se* takings analysis in favor of the kind of balancing approached favored by Justice O'Connor and seemingly favored by Justice Kennedy. Ever since Justice White departed from the Court in 1993, it has been clear that Justice Scalia's then-recent opinion for the Court in *Lucas* had lost its majority, meaning that the Court was likely to apply *Lucas* only narrowly in future cases. Justice White supplied the fifth vote in *Lucas* and Justice Kennedy, remarkably, joined only the Court's judgment and wrote separately.

As described in my original Garrison Lecture, Kennedy's concurring opinion in *Lucas* embraced a legal analysis that is very different than that advanced by the majority. He made plain his view that total economic deprivation is not enough, standing alone, to justify a *per se* approach. It is also relevant "whether the deprivation is contrary to reasonable, investment-backed expectations."<sup>64</sup> Kennedy also rejected suggestions that the kinds of

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59. *Id.* at 631.

60. *Id.* at 627.

61. *Id.* at 628.

62. *Id.* at 631.

63. *Palazzolo*, 533 U.S. at 616.

64. *Lucas*, 505 U.S. at 1034.

“background” legal principles that could justify a complete economic deprivation must reflect some static common law. In Kennedy’s “view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”<sup>65</sup>

In *Palazzolo*, Justice Kennedy’s writing for the Court finally realized that expectation by narrowly construing *Lucas* in several significant respects. His opinion for the Court narrowly construed the economic deprivation trigger necessary for a *Lucas per se* taking. His opinion purported not to reach the content of the “background principles” that provide an exception to a *Lucas per se* taking, but nonetheless described those principles in terms that make clear that they are *not* strictly confined to centuries-old common law doctrine. In particular, Justice Kennedy’s opinion for the Court repeatedly presumes that legislation or regulation may be a background principle, suggesting that the only question is not *whether* they may be, but the “precise circumstances” of “*when*” they are.<sup>66</sup> Perhaps even more significantly, Justice Kennedy’s opinion for the Court supports the contention that background principles not only can change over time, but can do so retroactively. Once, therefore, a land use regulation is deemed to reflect “common, shared understandings of permissible limitations derived from a State’s legal tradition,” background principles will apply to all landowners regardless of when they may have acquired their property: “A regulation or common law rule cannot be a background principle for some owners, but not for others.”<sup>67</sup>

The import of Justice Kennedy’s opinion for the Court, especially when combined with the concurring opinion of Justice O’Connor and the four dissenting Justices is that the Court is likely to fall back more on the kind of multi-factored balancing tests of reasonableness in its taking analysis, akin to that Justice Brennan set forth in his opinion for the Court in *Penn Central*, and away from the *Lucas per se* approach. Justice Kennedy’s opinion for the *Palazzolo* Court repeatedly emphasizes the essential touchstone of “reasonableness” just as he did in his separate concurring opinion in *Lucas*. And, Justice O’Connor’s concurring opinion makes even more explicit her view of the continuing via-

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65. *Id.* at 1035.

66. *Palazzolo*, 533 U.S. at 629.

67. *Id.* at 630.



bility of the *Penn Central* takings analysis and its balancing approach.<sup>68</sup>

### III. The Court's Future Docket

There is currently only one significant environmental case pending before the Court. The day after the Court decided *Palazzolo*, the Court showed that its appetite for regulatory takings claim remained whetted by granting review in yet another case.<sup>69</sup> There are also several major constitutional controversies that seemed destined for the Court's review in the near term. Indeed, to a certain extent, that Court has essentially invited the lower courts to explore the issues, with the apparent purpose of establishing a lower court record for the Court's review in a future proceeding.

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,<sup>70</sup> landowners appear to have reached the limits of the Court's willingness to protect private property rights. The upshot may well be the first unconditional victory for government regulators in an environmental takings case since *Keystone Bituminous Coal Association v. DeBenedictis* in 1987.<sup>71</sup> The landowners argue in *Tahoe-Sierra* that a temporary moratorium on land use development constitutes a *per se* taking under Lucas because the landowner is deprived of all "use" of the property during the time in which the moratorium is effective. This *per se* rule applies, they argue, regardless of the moratorium's duration, geographic scope, economic impact, or its interference with reasonable investment-backed expectations.<sup>72</sup> In the aftermath of *Palazzolo*, however, little doubt remains that a majority of the Justices are now ready to reject such an extreme *per se* approach to regulatory takings analysis.

For that same reason, however, government regulators and environmentalists have reason for concern that Justices Kennedy and O'Connor may, as part of their shift towards balancing tests and less absolutist positions, be ready to revisit the "*parcel as a whole*" touchstone that has proved so important to those defending government regulations challenged as a regulatory taking. In

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68. *Id.* at 632.

69. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 533 U.S. 948 (2001).

70. 216 F.3d 764 (9th Cir. 2000).

71. 480 U.S. 470 (1987).

72. Petitioner's Brief at 45, *Tahoe-Sierra Preservation Council* (No. 00-1167).

*Penn Central*, the Court ruled that a takings inquiry considered the “*parcel as a whole*” and not just that smaller portion of the property most restricted in deciding whether a land use regulation amounts to a taking requiring the payment of just compensation.<sup>73</sup> Because most land use restrictions do not restrict an entire parcel, the practical effect of the “*parcel as a whole*” analysis can be to make it far more difficult for landowners to prevail.

Justice Kennedy’s opinion for the Court in *Palazzolo* suggests that there are several Justices who are interested in revisiting the “*parcel as a whole*” test and who are questioning its propriety. The Court’s opinion formally declined “*to examine the persisting question of what is the proper denominator in the takings fraction,*” but only because Mr. Palazzolo did not properly present the issue in the courts below or in his petition for a writ of certiorari.<sup>74</sup> But the Court expressly noted that “*at times*” the Court “*has expressed discomfort with the logic of the rule,*” citing University of Chicago law professor Richard Epstein,<sup>75</sup> who promotes an aggressive application of the Fifth Amendment’s Just Compensation Clause to governmental regulation.<sup>76</sup>

The Court’s invitation is clear. A majority of the Court may be ready to revisit the *Penn Central* holding and is inviting litigants to raise and brief the issue in future cases. It seems likely, moreover, that at least the two “swing” Justices, Kennedy and O’Connor, will ultimately favor a more nuanced, contextual approach to defining the property that rejects automatically defining the relevant property either in its broadest or narrowest possible terms.<sup>77</sup>

Another major constitutional issue likely to be on the Court’s docket in the near future is whether the Endangered Species Act (ESA) Section 9’s application to habitat modification falls within Congress’s Commerce Clause authority.<sup>78</sup> In *SWANCC*, the Court could avoid the constitutional issue by interpreting the “plain

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73. 438 U.S. at 130-31.

74. 533 U.S. at 631 (emphasis added).

75. *Id.* (emphasis added).

76. RICHARD ALLEN EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

77. The Court decided the *Tahoe-Sierra* case since this essay went to press in March. See 122 S. Ct. 1465 (2002). By a six to three vote, Justice Stevens’ opinion for the Court did, as predicted, narrow the applicability of *Lucas* and expand the applicability of *Penn Central*. The Court’s reasoning, however, also reaffirmed the “*parcel as a whole*” approach. The result was a major win for environmental regulators.

78. 16 U.S.C. § 1538 (2002).

meaning” of “navigable waters.” In an ESA Section 9 case, however, the Court will not be able to similarly avoid the constitutional issue because the Court has already upheld the Department of the Interior’s regulatory construction of the statutory term “take” to extend to modification of habitat that actually harms the species.<sup>79</sup> To date, two courts of appeals (the D.C. Circuit and the Fourth Circuit) have upheld the constitutionality of the statute, but both times over loud dissents.<sup>80</sup> In the absence of a circuit conflict, the Supreme Court denied certiorari on each of those prior occasions.

Although it seems, therefore, unlikely that the Court would agree to hear the issue in the absence of a circuit conflict, there is reason to believe that such a conflict may soon be presented by one of a host of cases pending in the lower courts. The case with the most immediate potential to provide a candidate for Court review, *Shields v. Norton*, is now pending before a reportedly skeptical Fifth Circuit. If that appellate court rules against the federal government on Commerce Clause grounds, the Supreme Court will have little choice but to grant a Solicitor General’s request for further review.<sup>81</sup>

Whenever it is finally presented to the Court, the question whether ESA Section 9 passes constitutional muster will challenge the Court’s commitment to the analytical framework that it has adopted and pursued in its recent precedent. The ESA’s structure and jurisdictional touchstones do not neatly fit that new framework, which focuses in the first instance on whether the activities being regulated are sufficiently “economic” in character.<sup>82</sup> The dilemma for the Court is that, notwithstanding the awkwardness of that misfit, the ESA is the very kind of legislation that is necessarily national in its purpose and reach.<sup>83</sup>

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79. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

80. *Gibbs v. Babbitt*, 214 F.3d 483, 506 (Sentelle, J., dissenting); *National Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1060 (1997) (Luttig, J., dissenting).

81. This case was on appeal at the time this essay went to press, but has since been decided. See *Shields v. Norton*, 289 F.3d 832 (5th Cir. 2002). The Court did not reach the merits because it dismissed the case for lack of jurisdiction.

82. See *Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598.

83. The same could not be readily said of the federal laws at issue in either *Lopez* or *Morrison*. And, although many believe that it was true of the federal dredge and fill permitting program contested in *SWANCC*, the procedural posture of that case masked the federal character of the program before the Justices. Because the State of Illinois, unlike most states, has a comprehensive permitting program that applied to the proposed dredging and filling activity at issue in *SWANCC*, the Court may well

Whether the Court is willing to recognize the constitutional propriety of allowing Congress to address these kinds of environmental and natural resource issues may well turn on its appreciation of what is "environmental" about environmental law. It should be sufficient to sustain national legislation that protection and maintenance of the nation's natural resource base is fundamental to any viable economy. No greater commercial motive or nexus should be necessary. As explained by another Garrison Lecturer, Professor Joseph Sax, albeit in another context, it will require the Justices to appreciate the "economy of nature" as well as respond to the current "market economy."<sup>84</sup>

There is reason for defenders of the ESA to be hopeful in this regard. Justice O'Connor joined Justice Blackmun's dissent in *Lujan v. Defenders of Wildlife*, which faulted Justice Scalia's opinion for the Court for engaging in a "slash and burn expedition" through the environmental law of standing.<sup>85</sup> And, Justice Kennedy declined to join part of the majority rationale and wrote separately about the need for broader Congressional authority than contemplated by the majority opinion.<sup>86</sup> Even more importantly, perhaps, was the Fourth Circuit opinion upholding the ESA's constitutionality in *Gibbs v. Babbitt*,<sup>87</sup> which was authored by Chief Judge Wilkinson. Chief Judge Wilkinson is a highly-regarded moderate conservative jurist and is more likely to foreshadow the views of O'Connor and Kennedy than Judge Luttig who dissented in that case.<sup>88</sup>

Finally, Justice Kennedy's overlooked concurring opinion in *Laidlaw* strongly suggests a potential third round of constitutional litigation on the Court's docket in the near future. While joining Justice Ginsburg's opinion for the Court in *Laidlaw*, Kennedy separately wrote that "[d]ifficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the

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have been left with the impression that the federal Section 404 permit requirements were merely duplicative of the state program.

84. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

85. 504 U.S. at 606 (Blackmun, J. dissenting with O'Connor, J., joining).

86. *Id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment).

87. 214 F.3d 483.

88. *Id.* at 506 (dissenting opinion).

Constitution of the United States.”<sup>89</sup> Justice Kennedy, in short, questioned the constitutionality of environmental citizen suit enforcement under Article II as currently provided for in most every federal environmental law.

There are three potentially pertinent clauses in Article II. These include the Appointments Clause (§ 2, cl. 2), Vesting Clause (§ 1, cl. 1), and the Take Care Clause (§ 3, cl. 4). The Appointments Clause provides exclusive authority in the President to appoint officers of the United States, subject to Senate confirmation.<sup>90</sup> The Vesting Clause provides that “the Executive Power shall be vested in the President;”<sup>91</sup> and the Take Care Clause provides simply that the President shall “take care that the Laws be faithfully executed.”<sup>92</sup>

The gist of Kennedy’s suggestion is that allowing environmental suits for civil penalties payable to the federal Treasury amounts to an impermissible Congressional delegation of Executive branch authority to private citizens in violation of Article II. Kennedy’s statement has breathed life into the issue in the lower courts because the regulated community is well aware of the pivotal role the Justice plays in the Court’s decision-making in environmental cases. The issue is currently pending in two federal courts of appeals and one federal district court in North Carolina. The Fifth Circuit case is *Shields v. Norton*,<sup>93</sup> the same case previously described as raising the question of whether Congress has exceeded its Commerce Clause authority in section 9 of the Endangered Species Act. In the cases pending before the Eighth Circuit and in North Carolina, *Mississippi River Revival v. City of St. Paul*<sup>94</sup> and *North Carolina Shellfish Growers Association v. North Carolina Coastal Federation*,<sup>95</sup> defendants have each raised the constitutional defense in resisting a Clean Water Act citizen suit.

Here too it is no coincidence that this latest constitutional issue arises in an environmental case. The nature of the ecological problem to be addressed is what prompted Congress to include citizen suit provisions. The vast number of activities subject to envi-

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89. 528 U.S. at 197 (Kennedy, J., concurring).

90. U.S. CONST. art. II, § 2, cl. 2.

91. U.S. CONST. art. II, § 1, cl. 1.

92. U.S. CONST. art. II, § 3, cl. 4.

93. No. 00-50839, *on appeal*, (5th Cir. 2002). As described in note 81, *supra*, the Fifth Circuit has since dismissed this case for lack of jurisdiction without reaching this issue. See 289 F.3d 832.

94. No. 01-2511, *on appeal*, (8th Cir.).

95. No. 7:01-CV-36-BO(1) (E.D.N.C.)

ronmental protection requirements makes it impossible for the government to rely solely on its own limited enforcement resources. In addition, the schizophrenic nature of government's role in environmental protection—as both regulator and the regulated—renders it all the more important to have a citizen overseer. Having the penalties payable to the Treasury is a sensible safeguard to ensure against the unjust enrichment of private citizens to the detriment of the public fisc. Ironically, however, it may well be that same safeguard that is the nub of Justice Kennedy's suggestion of a possible constitutional infirmity.

### Conclusion

Environmental law will continue, as it has in the past, to raise difficult questions of federal constitutional law. Some of these will be rooted in the peculiar way in which the concerns addressed by environmental law challenge our nation's lawmaking institutions and processes. Others are even more fundamental in nature because they relate to possible differences in priorities and substantive values between environmental law and those reflected in certain constitutional guarantees. The Court's ability to address both kinds of issues will ultimately turn on the extent to which the Justices appreciate the "environmental" dimension to the legal issue they face.

APPENDIX A

Environmental Cases Decided by the United States Supreme Court  
October Term 1999–October Term 2000

Cite	Name*	Year Decided	Opinion Author**	Majority	Dissent	EP Desig***
528 U.S. 167	<i>Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.</i>	2000	G	G, By, OC, R, So, Sv, K	Sc, T	Maj
529 U.S. 89	<i>U.S. v. Locke</i>	2000	K	K, By, G, OC, R, Sc, So, Sv, T		
529 U.S. 728	<i>Public Lands Council v. Babbitt</i>	2000	By	K, By, G, OC, R, Sc, So, Sv, T		Maj
529 U.S. 765	<i>Vermont Agency of Natural Resources v. U.S. ex rel. Stevens</i>	2000	Sc	Sc, K, By, G, OC, R, T	Sv, So	
530 U.S. 392	<i>Arizona v. California</i>	2000	G	Sc, R, So OC, K, G, T, Sv, By		
531 U.S. 159	<i>Solid Waste Agency of Northern Cook County v. U.S.</i>	2001	R	R, OC, Sc, K, T	Sv, So, G, By	Dis
531 U.S. 457	<i>American Trucking Associations v. Whitman</i>	2001	Sc	Sc, So, K, G, Sv, By	R, T, OC	Maj
531 U.S. 457	<i>Whitman v. American Trucking Associations</i>	2001	Sc	Sc, R, So OC, K, G, T, Sv, By		Maj
532 U.S. 1	<i>Department of Interior v. Klamath Water Users Protective Ass'n</i>	2001	So	Sc, R, So OC, K, G, T, Sv, By		
532 U.S. 742	<i>New Hampshire v. Maine</i>	2001	G	Sc, R, OC, K, G, T, Sv, By		
533 U.S. 262	<i>Idaho v. United States</i>	2001	So	Sv, OC, So, G, By	R, Sc, K, T	
533 U.S. 606	<i>Palazzolo v. Rhode Island</i>	2001	K	K, R, T, OC, Sc	Sv, G, So, By	Dis

\**Italicized* case names are those used in the “EP” scoring.

\*\*Key to Abbreviation of Names of Justices: By (Breyer); G (Ginsburg); K (Kennedy); OC (O'Connor); R (Rehnquist); Sc (Scalia); So (Souter); Sv (Stevens); T (Thomas)

\*\*\*Position favored by environmentalists.

## APPENDIX B

Environmental Cases Decided by the  
United States Supreme Court  
October Term 1999–October Term 2000

By Justice—Environmental Protection Scores

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Justice	EP Ratio (# EP votes/EP cases)	EP Score (EP Ratio × 100)
Breyer	6/6	100
Ginsburg	6/6	100
Kennedy	4/6	66.7
O'Connor	4/6	66.7
Rehnquist	4/6	66.7
Scalia	3/6	50
Souter	6/6	100
Stevens	6/6	100
Thomas	3/6	50

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