Constitutional Law Task Force Newsletter

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CHAIR'S MESSAGE

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Season's Greetings. In this issue, we aim to summarize some recent developments in several areas of constitutional environmental law since our summer issue, provide predictions about where the law is headed—including whether John Robert's appointment would change its trajectory—and debate what it all means to the current practice of and policies underpinning environmental, natural resources and energy law.

You'll find three essays and one feature article inside. In the first essay, "Will the Supreme Court Decide the Commerce Clause Limits of the Clean Water Act?," Professor Robin Kundis Craig (University of Indiana School of Law) explains what's at stake in the Court's recent grant of *certiorari* for two cases involving the extent to which Congress can constitutionally regulate discharges into wetlands that are not adjacent to otherwise navigable waters. In the second essay, "Court Denies Tenth Amendment Challenge to U.S. Fish and Wildlife Service's Regulation of Endangered Wolves," Professor Jamison Colburn (Western New England College School of Law) discusses what *Wyoming v. U.S. Department of the Interior*, 360 F. Supp. 2d 1214 (D. Wyo. 2005) says about whether the Endangered Species Act contravenes state's rights. In the last essay, "Standing, Federalism, and Regulation of Summer Flounder Fishing under the Magnuson-Stevens Fishery Conservation and Management Act," Professor Craig reports the constitutional dimensions of regulating summer flounder yields as addressed by *Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp. 2d 237 (D. Conn. 2005).

In the feature article, "Constitutional Environmental Law: An Update and Overview," Professors Craig and Jonathan Adler (Case Western School of Law) adeptly summarize recent developments respecting the positive and negative implications of the Commerce Clause, Federalism and State Sovereignty, Preemption and Supremacy, Standing, Takings, Due Process, Spending and Speech.

The article starts with the Commerce Clause. Professor Craig concludes that "[w]hile nothing can prevent environmental litigants from continuing to raise Commerce Clause challenges to the federal environmental statutes, application of *Lopez* and *Morrison* in those courts is unlikely to change the scope of federal environmental law. While observing the Commerce Clause is fertile ground to possible invalidation of federal environmental laws, Professor Adler observes that Commerce Clause analysis "has not led to the invalidation of many federal statutes, environmental or otherwise."

Respecting the negative implications of the Commerce Clause at a blunt of state regulation of interstate commerce, Professor Craig says that the Court's two

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SECTION OF ENVIRONMENT ENERGY AND RESOURCES

such cases in 2005 "effectively underscore both the Court's consistent abhorrence for state regulation that obviously discriminates against interstate commerce and its tolerance of all other state regulation." Professor Adler, on the other hand, says that "[a]s a practical matter, the impact of the dormant commerce clause on environmental regulation is overstated. Most environmental problems can be addressed in a non-discriminatory manner."

The 10th and 11th Amendments address the core of the federal-state relationship. The 10th Amendment appears lately to have generated more heat than light. As Professor Adler notes: "In most other cases, the federal government either regulates public and private entities alike, thereby avoiding commandeering concerns, or induces state "cooperation" through a combination of positive and negative inducements, including threatened preemption and conditional federal spending, neither of which has been subject to successful legal challenge." Professor Craig seems to reach the same result, noting: "Tenth Amendment federalism challenges to federal environmental statutes have long been unsuccessful, and nothing in the Supreme Court's recent Tenth Amendment jurisprudence indicates that any changes are likely."

The Court's 11th Amendment jurisprudence has had profound impacts on the federal-state relationship. For example, as Professor Adler concludes, "state governments are no longer liable to private parties for response and cleanup costs under federal environmental statutes such as the Resource Conservation and Recovery Act or Superfund." He also describes the dampening effect of the Court's interpretation of the 11th Amendment on federal whistleblower protections.

Preemption has been a potent field. The Court's decisions in its latest term "suggest that the Court is willing to narrowly construe federal statutes to allow the co-existence of state law – although one should not expect the Court to push that tendency too hard," Professor Craig believes. Yet Professor Adler says "it is a mistake to consider [preemption cases] "constitutional" cases, for the result in these cases does not turn on constitutional concerns."

Standing and Article III issues remain relevant. While *Laidlaw* both dissipates and focuses Constitutional standing, the doctrine is far from having "disappeared," Professor Adler says.

The Court decided three regulatory takings in its most recent completed term. Professors Adler and Craig seem to agree that these cases do not much change 5th Amendment jurisprudence, though they disagree about the import of the decisions.

Both of our panelists identify areas of growth in constitutional environmental law. Professor Adler looks for more to come out of the Spending and Speech clauses. Professor Craig believes the Due Process Clause is likely to continue to engender more activity in the future.

As you can see, the practice of environmental law involves and increasing degree of practical and meaningful constitutional issues. We invite your ideas for an essay or feature, for which we'll pay big money. Not really, although there are other perquisites. If you'd like to publish a work of current, practical composition here, please contact Robin Craig at robcraig@iupui.edu.

We hope you enjoy the issue. Please feel free to send me your questions or comments, james.r.may@law.widener.edu.

WILL THE SUPREME COURT DECIDE THE COMMERCE CLAUSE LIMITS OF THE CLEAN WATER ACT?

Robin Kundis Craig

On Oct. 11, 2005, the Supreme Court granted *certiorari* to review three Clean Water Act cases, two from the Sixth Circuit and one from the Supreme Judicial Court of Maine. Two of these cases raise the issue of Congress's Commerce Clause authority to regulate the "waters of the United States": *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, — U.S. —, — S. Ct. —, 2005 WL 2493858 (Oct. 11, 2005), and *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, — U.S. —, — S. Ct. —, 2005 WL 2493859 (Oct. 11, 2005). (The third case, *S.D. Warren Co. v. Maine Board of Environmental Protection*, 868 A.2d 210 (Maine 2005), *cert. granted*, — U.S. —, — S. Ct. —, 2005 WL 2493860 (Oct. 11, 2005), raises a different issue: When do rearrangements of water flow constitute an "addition" and hence a "discharge" subject to Clean Water Act jurisdiction? While this case may clarify the Supreme Court's analysis from *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), it raises no constitutional issues, and hence this article does not discuss it.)

Specifically, *Rapanos* and *Carabell* involve the issue of when wetlands are sufficiently "adjacent" to otherwise "navigable" waters to be subject to federal jurisdiction under the Clean Water Act. Resolution of this issue may clarify several points left ambiguous in the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), which strongly suggested that EPA and the Army Corps of Engineers lack statutory authority to regulate isolated, intrastate wetlands pursuant to the act. However, in *Solid Waste Agency* the Supreme Court refused to accord *Chevron* deference to the agencies' regulatory definitions of "waters of the United States" on the ground that the agencies were pushing the outer limits of the federal government's Commerce Clause authority, indicating that such constitutional limitations do exist. Indeed, in *Solid Waste Agency* Justice Rehnquist said he thought the definition raised "serious" constitutional concerns under the Commerce Clause.

The constitutional question left open in *Solid Waste Agency* is now once again before the Court in two consolidated cases. The first case, *Rapanos*, involves several acres of wetlands in Michigan on three tracks, the Salzburg, Hines Road and Pine River sites, each of which Rapanos filled without a permit from the Army Corps. After the federal courts eventually upheld Rapanos' criminal convictions for wetlands activities at these sites, which the Supreme Court ultimately refused to review, the United States instituted a civil action

against Rapanos. After a bench trial, the district court found that Rapanos had filled 22 of 28 acres of jurisdictional wetlands at the Salzburg site, 17 of 64 acres of jurisdictional wetlands at the Hines Road site, and 15 of 49 acres of jurisdictional wetlands at the Pine River site without a permit in violation of the Clean Water Act.

The Sixth Circuit affirmed, noting that "[i]n order to invoke federal jurisdiction the wetlands must bear some connection to navigable waters or interstate commerce." *Rapanos*, 376 F.3d at 635. It summarized the split among the circuits regarding adjacency as follows:

> [T]he primary difference between the conclusion reached by the Fifth Circuit and that reached by the Fourth, Sixth, Seventh, and Ninth Circuits concerns the "adjacency" requirement. The Fifth Circuit requires that the non-navigable water be "truly adjacent to navigable waters" in order to qualify for CWA jurisdiction. The majority of courts, including this one, however, construe *Riverside Bayview* and *SWANCC* to hold that, while a hydrological connection between the non-navigable and navigable waters is required, there is no "direct abutment" requirement.

Id. at 639. However, the Sixth Circuit emphasized, "[w]hat is required for CWA jurisdiction over 'adjacent waters,' however, is a 'significant nexus between the wetlands and "navigable waters,"' *SWANCC*, 531 U.S. at 167 . . ., which can be satisfied by the presence of a hydrological connection." *Id*. (citations omitted). Because the district court "found that all three sites contained a hydrological connection to navigable waters and thus fell within the jurisdiction of the CWA," *id*. at 642, the Sixth Circuit affirmed. Along the way, the Sixth Circuit also concluded that the Michigan Wetlands Program, administered as part of a delegated section 404 program under the Clean Water Act, could not work to limit federal Clean Water Act jurisdiction. *Id*. at 646-47.

The second case, *Carabell*, raises similar issues. In this case, landowners sought a section 404 permit from the Army Corps (Corps) to fill 15.9 acres of forested wetlands in order to construct a 130-unit condominium complex. The Corps denied the permit application on the grounds that the Carabells had failed to overcome the presumption that less damaging practicable alternatives were available, concluding that the proposed development "would have major, long-term, negative impacts on water quality, on terrestrial wildlife, on the wetlands, on conservation, and on the overall ecology of the area." *Carabell*, 391 F.3d at 706. The Carabells' administrative appeal was denied, and the federal district court affirmed that denial on the ground that the wetlands had a hydrological connection to navigable waters and hence were subject to the Act.

The Sixth Circuit affirmed, concluding that because a ditch separated from the wetlands by only a man-made berm connected to a drain that emptied into Auvase Creek that emptied into Lake St. Clair, which connects to Lake Huron and Lake Erie, two clearly navigable waters, the ditch was "connected on either end to tributaries of 'waters of the United States' as defined in the [EPA's and Army Corps'] regulations." *Id*. at 708. Because the wetlands were adjacent to the ditch, they were "adjacent wetlands" subject to Clean Water Act jurisdiction. *Id*. at 708-09.

Neither Sixth Circuit decision discussed the Commerce Clause limitations of the Clean Water Act. However, both Rapanos and the Carabells raised the Commerce Clause limitations on Congress's ability to regulate the filling of wetlands in their cases, and both explicitly listed that Commerce Clause issue as the second issues in their petitions for *certiorari*. Moreover, the Court granted *certiorari* with respect to both issues. Thus, while the Supreme Court could resolve these cases purely as a matter of statutory interpretation—an outcome that its 2001 decision in *Solid Waste Agency* indicates would be preferable—it has nevertheless reserved to itself the option of addressing the constitutional limits of environmental regulation.

The Supreme Court consolidated *Rapanos* and *Carabell*, granting one hour of oral argument. Oral argument has not yet been scheduled but is expected to take place in February 2006.

STANDING, FEDERALISM AND REGULATION OF SUMMER FLOUNDER FISHING UNDER THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

Connecticut ex Rel. Blumenthal v. United States, 369 F. Supp. 2d 237 (D. Conn. 2005)

Robin Kundis Craig

In this unusual law suit, the state of Connecticut sued the United States, claiming that the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1851 *et seq*., violates the Fifth and Tenth Amendments of the U.S. Constitution. Specifically, Connecticut challenged the application of 16 U.S.C. § 1854(f)(1)(A), which allows the secretary of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS), "to assign control over any fishery that extends beyond the geographic area of authority on any single [regional Fishery Management] Council" to either one Council or to two or more Councils acting jointly, to the summer flounder fishery. *Connecticut v. United States*, 369 F. Supp. 2d 237, 241-42 (D. Conn. 2005).

Using its assignment authority, the Secretary had assigned management of the summer flounder to the Mid-Atlantic Fishery Management Council (MAFMC, covering New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia and North Carolina) instead of to the New England Fishery Management Council (NEFMC, covering Maine, New Hampshire, Massachusetts, Rhode Island and Connecticut), even though "the fish is found in the greatest numbers between Cape Cod, Massachusetts and Cape Fear, North Carolina." *Id*. at 242. According to Connecticut, prior size restrictions on summer flounder from the Atlantic States Marine Fisheries Commission, which Connecticut and other New England states followed while the mid-Atlantic states did not, combined with the MAFMC's backward-looking quota system to disadvantage Connecticut fishermen's ability to catch summer flounder.

Before reaching the merits, the Connecticut District Court addressed whether Connecticut had standing to sue under the Fifth and Tenth Amendments, finding against the state on the former and for it on the latter. First, the United States argued that Connecticut lacked standing for its Fifth Amendment due process claim "because no change in the regulatory scheme of the [Magnuson-Stevens Act] will lead to the creation of more favorable regulation and a more meaningful role for Connecticut in the regulatory process." *Id*. at 244. The court, however, held that the United States had mischaracterized Connecticut's position; Connecticut instead "desires a new regulatory scheme that will provide Connecticut and its fishermen with the due process they claim to presently be denied." *Id*. Specifically, "Connecticut's Fifth Amendment claim asserts that it is improperly regulated, not by the executive or legislative branch of the federal government but instead by its economic competitors—the interest members of the fishing industry and fishing regulatory bodies of North Carolina, Maryland, etc." *Id*. Because "the power to be directly involved in the creation of the subject regulation is absolutely a meaningful increase in Connecticut's influence," *id*. at 245, Connecticut had Article III standing to bring its Fifth Amendment claim.

Nevertheless, the court concluded, Connecticut could not bring its due process claim because of its very status as a state. "The Supreme Court has held unequivocally that a state is not a person in the context of the Fifth Amendment and thus may not invoke that amendment in court." *Id*. (citing *State of South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966)). Nor could Connecticut bring the claim as *parens patriae* for the people of Connecticut because, in general, states have no authority to enforce their citizens' rights in respect to their relations with the federal government. *Id*. at 245-46.

Second, Connecticut faired better with its Tenth Amendment standing. According to the court, "Connecticut's standing to challenge section 1854(f)(1)(A) is even more certain for the Tenth Amendment claim." *Id*. at 245. Specifically:

> Connecticut claims that its sovereignty is violated by virtue of its compelled participation in the Magnuson-Stevens Act regulatory scheme. Essentially, Connecticut asserts that it is required

> by law to enforce a federal regulation against Connecticut citizens. The injury caused by such compulsion is clear and any ruling that finds the offending statute unconstitutional would free Connecticut from participation in the scheme and correct the injury.

Id.

The Connecticut District Court was not convinced on the merits, however, given Connecticut's amended complaint. Focusing specifically on section 1854(f)(1)(A), it concluded that "[t]hat section is not directed at the states and does not, on its face, compel any action by Connecticut." *Id.* at 248. As a result, "[t]here is nothing in this provision that violates the Tenth Amendment." *Id.*

Nevertheless, the court noted that "Connecticut's original complaint challenged the constitutionality of the [Magnuson-Stevens Act] as a whole, and such an attack might have considerable merit." *Id.* It agreed with the reading of the statute set forth in *Connecticut v. Daley*, 53 F. Supp. 2d 147 (D. Conn. 1999), and emphasized that much of the rest of the Act is written in command form. *Id.* However, "[t]he state's Amended Complaint removes all of these provisions from the claim," precluding their consideration in this decision. *Id.* at 248-49.

The Connecticut District Court thus all but invited a renewed Tenth Amendment challenge to the entirety of the Magnuson-Stevens Act. Given Connecticut's long-running battle with the federal government in marine fisheries management, moreover, it is likely that such a challenge will not be long in coming.

ABA Section of Environment, Energy, and Resources
14th Section Fall Meeting
Oct. 4-8, 2006
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PLAN TO ATTEND!

COURT DENIES TENTH AMENDMENT CHALLENGE TO FWS'S REGULATION OF ENDANGERED WOLVES

***Wyoming v. U.S. Department of the Interior*, 360 F. Supp. 2d 1214 (D. Wyo. 2005)**

Jamison Colburn

To remove the gray wolf from the list of threatened and endangered species, the Fish & Wildlife Service (FWS) had to find that the population in question had "recovered" according to the Endangered Species Act's (ESA) listing criteria and the applicable recovery plan. *See* 50 C.F.R. § 424.11(d). With respect to the gray wolf in the western United States, the "recovery" finding turned on the FWS reasonably concluding that wolves would not be treated as "game" under state law and subjected to uncontrolled killing. When the FWS approached the state of Wyoming about measures to recover the gray wolf, the state legislated a multi-faceted "Wolf Management Plan" that classified wolves as "predatory animals," which allows the wolf, with some minor exceptions, to "be taken without a license in any manner and at any time." W.S. § 23-1-203 (2004).

The FWS refused to move forward with de-listing until Wyoming changed this aspect of its Wolf Management Plan. The state then sued the agency, claiming that the FWS had violated the ESA, the Administrative Procedure Act, the Tenth Amendment and the Commerce and Guarantee Clauses of the federal Constitution. The district court took pains in rejecting the statutory claims, which included the argument that the ESA's "best available commercial or scientific information" criteria applied to this decision by the FWS and that the FWS had been arbitrary and capricious in not killing more problem wolves than it had. *See Wyoming et al. v. United States Dept. of the Interior*, 360 F. Supp. 2d 1214, 1226-35 (D. Wyo. 2005).

Most interestingly, though, the court denied the Tenth Amendment challenge by finding that the FWS had offered Wyoming a "permissible *quid pro quo*, namely that Wyoming establish a wolf management plan that comports with the ESA, or the [federal government],

though [*sic*] the ESA will continue to pre-empt Wyoming's regulation of the gray wolf." *Id.* at 1241. Nevertheless, had Wyoming's allegations that the federal government had failed to control problem wolves not been "speculative and unproven," the court intimated that it might have reached a different result. *Id.* at 1241. That situation, the court suggested, really might have created the Hobson's choice that *New York v. United States*, 505 U.S. 144 (1992), held that the Tenth Amendment prohibits. 360 F. Supp. 2d at 1241-44. Presumably, the coercive effect on a state legislature caused by wolf depredation and angry ranchers might, if proven, carry the rather heavy burden that the Supreme Court has said must be carried by states alleging Tenth Amendment or Guarantee Clause violations.

The Wyoming District Court's intimations are hard to understand, unless there is some sovereign right to be free of predatory wildlife that exists apart from the positive law of federal statutes like the ESA. Perhaps such an incident of states' dignity is one aspect of state sovereignty that a higher court can "find" in the Constitution with the proper effort. Practitioners of our federalism, after all, have never been under a duty of peer review.

LIKE TO WRITE?

The Constitutional Law Task Force welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor Robin Kundis Craig at robcraig@iupui.edu.

CONSTITUTIONAL ENVIRONMENTAL LAW: AN OVERVIEW

Robin Kundis Craig
Jonathan H. Adler

On Friday, Sept. 23, 2005, as part of the 13th Section Fall Meeting of the ABA Section of Environment, Energy, and Resources, the Constitutional Law Task Force presented a session entitled "Emerging Issues in Constitutional Environmental Law in a Time of Transition." Associate Professor Jonathan H. Adler of the Case Western Reserve University School of Law, who has written extensively on environmental constitutional issues and federalism, traded thoughts with Task Force Vice Chair Robin K. Craig, who is a professor of Law at the Indiana University School of Law and author of *The Clean Water Act and the Constitution* (ELI). Task Force Chair James R. May, Professor of Law at the Widener University School of Law, moderated the discussion. Below is a summary of the topics covered and the remarks made, including those regarding the Commerce Clause, Dormant Commerce Clause, 10th and 11th Amendments, Preemption, Standing, Due Process and the 5th Amendment. Both panelists and the moderator submitted papers for inclusion in the Fall Meeting materials, which Task Force members may find helpful as overview reference materials.

Commerce Clause

JHA: Article I, section 8 of the Constitution gives Congress the authority "to regulate Commerce . . . among the several states." While the Supreme Court interpreted this clause for many years to give Congress almost plenary authority to regulate, in the decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Court actively restricted congressional regulatory authority, holding that Congress may regulate: (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities that "substantially affect" interstate commerce.

Although Commerce Clause challenges have been leveled at several environmental statutes in the wake of

Lopez and *Morrison*, including the Clean Air Act, Clean Water Act, Endangered Species Act (ESA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), these challenges have to date been unsuccessful. However, Commerce Clause considerations did help to limit the *statutory* scope of the Clean Water Act in the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* decision, 531 U.S. 159 (2001). The statute that remains the most vulnerable, however, is the Endangered Species Act, although the Supreme Court has repeatedly refused to grant *certiorari* to any of the courts of appeals' Commerce Clause evaluations of this statute.

RKC: I agree with Jonathan that the ESA remains the most vulnerable environmental statute, especially given Chief-Justice-apparent John Roberts' dissent from the D.C. Circuit's decision in *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003). However, Commerce Clause challenges to the Clean Air Act are becoming increasingly frequent and may be well worth watching.

The most critical question in Commerce Clause challenges to environmental statutes is how to define the regulated activity. Some statutes, like the Resource Conservation and Recovery Act (RCRA), clearly seek to regulate businesses operating in interstate commerce. Some are a little more ambiguous: Does the Clean Water Act regulate the navigable waters, or does it regulate all of the point sources that must get permits before discharging into the navigable waters? The ESA is obviously the most troublesome statute on this point, and the federal courts of appeals have varied on whether the statute regulates species or regulates activities that can "take" listed species. As a result, the Supreme Court's decision this term in *Gonzalez v. Raich*, 125 S. Ct. 2195 (June 6, 2005) (the "medical marijuana" case) may help environmental statutes to withstand Commerce Clause scrutiny. In that case, the Court affirmed the use of the "aggregate effects" test to establish a "substantial effect" on interstate commerce, and noted that Congress need only have a rational basis for concluding that such an aggregate effect existed. Moreover, the Court indicated that Congress's regulation of economic activity was presumptively constitutional, and it considered the distinction between "as applied" challenges and facial challenges to be "pivotal" to the likelihood of constitutional violation. The logic of this case suggests that Judge Roberts' analysis in the *Rancho Viejo* dissent is no longer viable and that the ESA should continue to survive constitutional scrutiny.

Dormant Commerce Clause

RKC: The dormant Commerce Clause prevents states from discriminating against other states in interstate commerce and from overly burdening interstate commerce. The Supreme Court's two dormant Commerce Clause cases from last term reinforce the Court's traditional willingness to invalidate state legislation that clearly discriminates against other states while upholding most other kinds of state regulation. In *Gramholm v. Heald*, 125 S. Ct. 1885 (May 16, 2005) (the wine sales case), a sharply divided Court (on the 21st Amendment issue) invalidated Michigan and New York laws that prohibited out-of-state wineries from directly selling to in-state customers while allowing in-state wineries to do so. In contrast, in *American Trucking Associations v. Michigan Public Service Commission*, 125 S. Ct. 2419 (June 20, 2005), the Court upheld Michigan's fee for trucks acting in interstate commerce, determining that the fee did not unduly burden interstate commerce.

In the environmental arena, the dormant Commerce Clause has historically been most important when states try to limit or tax solid and hazardous waste imported from other states. In a series of decisions, the Supreme Court determined that waste is an article of commerce, and hence determined that almost any state attempt to discriminate against out-of-state waste would be unconstitutional. These cases seem to be in decline, but future dormant Commerce Clause challenges are likely to arise in the context of state attempts to deal with interstate air quality problems, such as MTBE, ozone and global warming.

JHA: As a practical matter, the impact of the dormant Commerce Clause on environmental regulation has been overstated, because most environmental problems can be addressed in a

nondiscriminatory manner. All that states are prevented from doing is adopting a rule that differentiates between in-state sources and problems and out-of-state sources and problems.

However, it is also worth emphasizing that the line of dormant Commerce Clause cases that will invalidate state regulation that overly burdens interstate commerce still exists. Those cases could play a role in environmental regulation.

Tenth Amendment

JHA: The most important Tenth Amendment case for environmental law remains *New York v. United States*, 505 U.S. 144 (1992). In this case, the Supreme Court invalidated the Low-Level Radioactive Waste Policy Amendments because they compelled states to regulate and hence represented the federal government's commandeering of state governmental authority. However, all other such challenges to environmental statutes have failed. This is to be expected, because very few environmental statutes issue direct, non-discretionary orders to state and local officials.

Nevertheless, two provisions of existing environmental statutes may be vulnerable to Tenth Amendment challenges. Portions of the Emergency Planning and Community Right-to-Know Act and the Underground Storage Tank provisions of RCRA do commandeer state officials by requiring them to perform various duties. However, it is unlikely that either of these provisions will ever be challenged. In addition, the application of the ESA to require state agencies to regulate private activity could also raise commandeering concerns, as was arguably the case in *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), in which the First Circuit held that Massachusetts' fishing license scheme violated the ESA's "take" prohibition.

RKC: I would disagree with Jonathan's characterization of the *Strahan v. Coxe* decision, which didn't require Massachusetts to do anything but rather simply decided that Massachusetts itself was violating the ESA. However, I do agree that *New York v. United States* remains the critical case and that there has been no real change in the law since. One development worth noting, however, is that Tenth Amendment challenges are now being leveled not only at the environmental *statutes* but also at certain environmental *regulations*. Notably, the EPA's storm water regulations have survived two Tenth Amendment challenges in the federal courts despite some fairly strong arguments that they do commandeer state and local government authority.

Eleventh Amendment

RKC: Application of the Eleventh Amendment in environmental law most often affects environmental citizen suits. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court decided that Congress could not abrogate states' Eleventh Amendment sovereign immunity through either the Indiana Commerce Clause or the Interstate Commerce Clause. Because almost all environmental statutes are based on Congress's Commerce Clause authority, this decision meant that citizens could no longer use environmental citizen suit provisions to sue states directly in federal court for violations of the federal environmental statutes.

Most of the case law since *Seminole Tribe* has been re-evaluating the availability of the *Ex parte Young* doctrine in environmental citizen suits against state officials. The *Ex parte Young* doctrine generally allows citizens to sue state officials in federal courts for declaratory and injunctive relief, but not for damages or fines. *Seminole Tribe*, however, called into question the automatic application of the *Ex parte Young* doctrine by deciding that the structure of certain federal statutes could establish procedures and remedies that were inconsistent with the *Ex parte Young* doctrine. To date, however, all courts addressing this issue in the environmental law context have concluded that the federal environmental statutes allow *Ex parte Young* suits against state officials. This term, the Supreme Court will be hearing Eleventh Amendment arguments in two cases, *Central Virginia Community College v. Katz*, which involves student loans and bankruptcy, and the combined cases of *United States v. Georgia* and *Goodman v. Georgia*, which involve the Americans with Disabilities Act.

JHA: In addition, where states implement environmental regulations in lieu of the federal government, sovereign immunity also bars private suits in federal court to enforce the state regulatory provisions. It's important to remember, however, that Eleventh Amendment sovereign immunity does not extend to local governments, which are more likely to be the defendants in Superfund contribution actions, because they own the majority of public waste disposal sites.

Federal whistleblower provisions will probably provide an interesting source of Eleventh Amendment jurisprudence. When federal whistleblower provisions seek to authorize actions against state agencies for monetary compensation, such as back pay, they are barred by sovereign immunity. However, whistleblower provisions that authorize purely prospective, injunctive relief from specific state officials are constitutional. And, of course, the federal government can always initiate its own lawsuits against state governments.

It is also possible that Congress could reenact the various whistleblower provisions pursuant to its authority under Section 5 of the Fourteenth Amendment, on the grounds that whistleblower protections are necessary to safeguard state employees' First Amendment rights against state action. Existing whistleblower protections cannot be defended on this ground because there is no language in the relevant statutes to this effect. Nonetheless, it is possible that Congress could reenact the relevant whistleblower provisions to abrogate state sovereign immunity in this fashion to protect whistleblowers who expose environmental misconduct in government agencies.

Federal Preemption

RKC: Jonathan and I disagree on whether federal preemption is really a constitutional issue or whether it's an issue of statutory interpretation. Federal preemption in based in the Supremacy Clause of the Constitution, which dictates that that Constitution, the federal statutes, and federal treaties trump when state constitutions and laws conflict with them. What's interesting about the Supreme Court's preemption jurisprudence is the remarkable unanimity in those decisions, which are often 9-0, 8-1 or 7-2.

The two most recent preemption decisions out of the Supreme Court seem to reflect the traditional presumption that the state law is valid, absent a conflict. Most important for environmental lawyers was *Bates v. Dow Agrosciences*, 125 S. Ct. 1788 (Apr. 27, 2005), in which the Court decided that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does *not* preempt a series of state-law torts related to applications of pesticides. This decision was significant for two reasons. First, the Court reached this conclusion despite the wide-ranging and unanimous opinions of the federal courts of appeals that FIFRA *did* preempt these kinds of torts. Second, this decision comes at a time when plaintiffs are increasingly trying to use state tort law to supplement statutory environmental protections of all kinds. If it signals a shift to allowing more supplemental state law claims, state tort law may become an increasingly important aspect of environmental law. However, it is worth noting that most federal environmental statutes already have savings clauses that preserve state-law causes of action.

The other decision last term was *Mid-Con Freight Systems v. Michigan Public Service Commission*, 125 S. Ct. 2427 (June 20, 2005), in which the Court held that the Intermodal Surface Transportation Efficiency Act did *not* preempt Michigan's $100 fee on interstate trucks. The Court interpreted the relevant statute narrowly. However, practitioners should also remember last term's decision in *Engine Manufacturers Association v. SCAQMD*, 541 U.S. 246 (2004), in which the Court held that the Clean Air Act preempted the South Coast Air Quality Management District's Fleet Rules for southern California.

JHA: Preemption cases are common in environmental law, but they rarely call upon the Court to interpret the Supremacy Clause itself. What's interesting about them, however, is that even when the justices do split in their Supremacy Clause decisions, they tend not to split along their normal alliances.

Standing

JHA: In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court appeared to narrow standing in environmental litigation, especially in terms of the injury-in-fact requirement. However, the Court's subsequent decision in *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), made it clear that the narrowing only went so far, because the existence of an environmental violation could be enough to support standing even if there is no evidence of tangible environmental harm.

Nevertheless, standing hurdles remain, and one area in which standing hurdles may be difficult to overcome is in climate change cases. In *Massachusetts v. EPA*, — F.3d —, 2005 WL 1653055 (D.C. Cir. 2005), the three-judge panel split three ways on the standing question in rejecting the states' and environmental groups' petition for review of the EPA's refusal to regulate greenhouse gases under the Clean Air Act. Judge Sentelle saw no standing, finding the asserted injuries too diffuse to meet the "concrete and particularized" requirement. Judge Randolph failed to resolve the standing question, finding it to be bound up in the merits of the case. Judge Tatel in dissent thought that the standing issue was easily met, given Massachusetts' allegations of particular harms in Massachusetts. *Massachusetts v. EPA* is the first high-profile case to address standing for alleged harms from climate change, and it will not be the last—there are at least two other standing challenges in climate change cases pending. The very nature of climate change makes standing claims particularly difficult.

RKC: One of the interesting leftover problems from *Defenders of Wildlife* and *Laidlaw* is that the Court did not fully reconcile its treatment of the injury-in-fact requirement. As a result, lower federal courts continue to split in their practical applications of the injury-in-fact test, with some applying a more stringent test and others embracing the "relaxation" evident in *Laidlaw*.

One of the more interesting issues that could emerge in standing litigation is the extent to which states must adopt federal standing requirements for environmental litigation when they are delegated federal environmental programs. In law professor-ese, this could become a converse-*Erie* or reverse federalism issue. Many states, like Connecticut, have less stringent standing requirements than the federal courts for environmental litigation; others have more stringent requirements. In *Legal Environmental Assistance Foundation v. U.S. EPA*, 400 F.3d 1278 (11th Cir. 2005), plaintiff LEAF tried to challenge EPA's delegation of Clean Air Act Title V permitting programs to states on the grounds that the states had to give standing to litigants who had participated in the permitting process, and the states did not. EPA argued that because the states met the Article III standing requirements, the delegations were lawful. The Eleventh Circuit held that LEAF lacked standing to challenge the standing issue, because it had not yet suffered any injury as a result of the delegation.

Due Process

RKC: Due process challenges come in two flavors—substantive due process challenges to statutes, which are rarely successful; and procedural due process challenges. Procedural due process challenges are becoming increasingly important in environmental law. In *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), the court of appeals struck down the administrative compliance order (ACO) provisions of the Clean Air Act as *facially* violative of due process, because noncompliance with the ACO triggers civil and criminal liability even though EPA can base the ACO on "any information," without an adjudicatory determination of the facts. The D.C. Circuit more recently determined that the federal courts have jurisdiction to determine whether CERCLA's unilateral administrative order regime facially violates due process, *General Electric Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004), paving the way for a similar due process analysis in 2005 or 2006.

JHA: These due process cases are interesting and it's difficult to know at this point what they portend for environmental law. In the *TVA* case the Eleventh Circuit felt compelled to invalidate the use of ACOs under the Clean Air Act because it was not possible to interpret the Act in a way that would enable the ACOs to comply with due process requirements. Should other circuits, or the Supreme Court, adopt this

reasoning, Congress would need to revisit—and clean up—the relevant Clean Air Act provisions in order to facilitate the use of ACOs in future environmental enforcement actions.

Fifth Amendment Takings

JHA: The Supreme Court decided three takings cases this past year without significantly changing the landscape of takings litigation. In *Lingle v. Chevron USA*, 125 S. Ct. 2074 (May 25, 2005), the Court unanimously upheld a Hawaii law that limited the rent oil companies could charge on leased service stations. The bottom line in this case is that a given regulation's effectiveness—the challengers' argument that the Hawaii state law did not "advance legitimate state interests"—has no bearing on whether it effects a Fifth Amendment taking that requires compensation. Instead, state laws that fail to advance a legitimate state interest may violate due process.

In *San Remo Hotel v. San Francisco*, 125 S. Ct. 2491 (June 20, 2005), a hotel owner sought to challenge San Francisco's housing law in federal court, even though state courts had already rejected the claim. A unanimous Court turned away the suit because the federal full faith and credit statute clearly bars the relitigation in federal court of federal takings claims resolved by state courts. The problem for landowners is that Supreme Court precedent bars takings claims against state governments in federal court until a state court denies the compensation claim. However, Chief Justice Rehnquist, joined by Justices Thomas, Kennedy, and O'Connor, argued in concurrence that it may be time for this rule to be overturned.

The most high profile taking claim of late was of a different sort. In *Kelo v. New London*, 125 S. Ct. 2655 (June 23, 2005), the Court had to decide whether the Fifth Amendment's "public use" requirement limits the purposes for which private land may be taken through eminent domain. "Not really," was the Court's reply in upholding the use of eminent domain for economic development. Insofar as there is a "public use" limitation on the power of eminent domain, it does not foreclose the use of eminent domain whenever the legislature asserts, in good faith, that it provides for a public benefit. However, while *Kelo* has attracted substantial attention, it is no more expansive that the Supreme Court's prior holding in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

RKC: I agree with Jonathan that these three cases did little to change the Fifth Amendment takings analysis, although it is worth noting that the Supreme Court in *Lingle* laid out a very clear process for analyzing regulatory takings. One of the issues that *does* remain in regulatory takings cases, however, is the need to define property rights that can be taken. Thus, at the end of June of this year, the Court of Federal Claims held in *Sacramento Grazing Association, Inc. v. United States*, 66 Fed. Cl. 211 (2005), that grazing permits and grazing preferences are *not* property rights that can be taken in violation of the Fifth Amendment. In contrast, in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005), the Federal Circuit held that landowners, not the government, held the reversionary interests in certain railroad easements and thus that the conversion of those easements to trails under the Rails-to-Trails program could be an unconstitutional taking.

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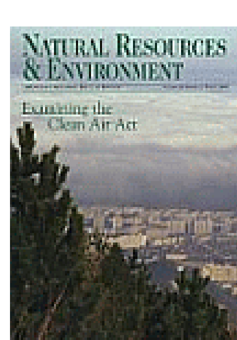

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