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The Environmental Commerce Clause

by

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THE ENVIRONMENTAL COMMERCE CLAUSE

Christine A. Klein*

I. INTRODUCTION

In 1995, the United States Supreme Court shocked the legal community when it constrained the scope of the affirmative commerce power of Congress for the first time in sixty years. In *United States v. Lopez*,¹ the Court held that Congress exceeded its constitutional commerce authority when it enacted a statute to regulate the possession of guns near schools. The Court later increased this constitutional uncertainty by issuing two additional decisions that set forth a narrow view of the federal commerce authority.² Together, these cases require that when Congress seeks to regulate wholly *intrastate* activities on the basis that they substantially affect *interstate* commerce, the activities themselves must be economic or commercial in nature.³ A flurry of scholarly commentary followed, pondering the import of the Court's decisions upon the previous conventional wisdom that the federal commerce authority was virtually without limits.⁴ A subset of this scholarship discussed the potential impact of the decisions upon the specific area of federal environmental law, teasing out various strands of dicta suggesting that the regulation of land, water, and other natural resources is not within the authority of the federal government.⁵ Implicit in this commentary is the fear that federal environmental

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¹ 514 U.S. 549 (1995).

² *United States v. Morrison*, 529 U.S. 598 (2000); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs ("SWANCC"), 531 U.S. 159 (2001).

³ See *Morrison*, 529 U.S. at 611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor"). *Lopez*, 514 U.S. at 560, 566-67 (stating that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained" but conceding that "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty").

⁴ See, e.g., GERALD GUNTHER, *CONSTITUTIONAL LAW* 93 (12th ed. 1991) (articulating the conventional wisdom pre-*Lopez* that "[a]fter nearly 200 years of government under the Constitution, there are very few judicially enforced checks on the [federal] commerce power"); see also Alan T. Dickey, *United States v. Lopez: The Supreme Court Reasserts the Commerce Clause as a Limit on the Powers of Congress*, 70 TUL. L. REV. 1207 (1996); John P. Frantz, *The Reemergence of the Commerce Clause as a Limit on Federal Power: United States v. Lopez*, 19 HARV. J.L. & PUB. POL'Y 161 (1995); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995).

⁵ See, e.g., Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the En-*

law may be particularly vulnerable to the Court's shrinking view of commerce clause authority because environmental protection frequently requires the regulation of intrastate, noneconomic activities.⁶

Before *Lopez* the Court had begun to expand a related line of constitutional doctrine concerning the negative or dormant aspect of the commerce clause. Under this doctrine, although the commerce clause is "phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."⁷ This judicially created dormant commerce clause prevents states from engaging in economic protectionism, even when Congress has not acted.⁸ A separate stream of scholarly commentary followed this expansion of the dormant commerce clause,⁹ with some observers noting the particular vulnerability of state laws impacting natural resources.¹⁰ In some instances, states may seek to protect the

dangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?, 36 GA. L. REV. 723, 770-80 (2002); William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 10,741 (2001); John H. Turner, *Lopez Lives: Can an Expansive View of Federal Wetlands Regulation Survive? An Overview of Decisions Regarding the 'Proactive' Reach of the Commerce Clause, in WETLANDS LAW AND REGULATION*, (ALI-ABA Course of Study, May 31, 2000), WL SE88 ALI-ABA 197, 199-201.

⁶ See, e.g., *Morrison*, 529 U.S. at 657 (Breyer, J., dissenting) (asking "why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting cause? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?").

⁷ *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994).

⁸ See, e.g., *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949):

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court has said in *Baldwin v. Seelig*, 294 U.S. 511, 527, "what is ultimate is the principle that one state in its dealings with another may not place itself in a situation of economic isolation." In so speaking it but followed the principle that the state may not use its admitted power to protect the health and safety of its people as a basis for suppressing competition.

Id. at 537-38.

⁹ See, e.g., Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 414-15 (1998); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

¹⁰ See, e.g., Jonathan H. Adler, *Waste and the Dormant Commerce Clause—A Reply*, 3 GREEN BAG 2D 353 (2000); Richard A. Epstein, *Waste and the Dormant Commerce Clause*, 3 GREEN BAG 2D 29, 33-37 (1999); Frank P. Grad, *RCRA, The Business of Waste Disposal and the Dormant Commerce Clause, Now Wide Awake*, in ENVIRONMENTAL LAW (ALI-ABA Course of Study, Feb. 11, 1998), WL SC56 ALI-ABA 627, 629-30; Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency,*

health and safety of their residents by excluding harmful items such as solid waste or nonnative fish parasites, and retaining within their borders important resources such as water and indigenous fish species.¹¹ Such state efforts may have economic consequences for the free market and economic benefits for the regulating state, thus treading perilously close to the Court's expanding view of economic protectionism forbidden under the commerce clause.¹²

Although there is a substantial body of commerce clause literature, few authors focus upon the relationship between the affirmative and dormant commerce clauses other than to note that the latter has been judicially implied from the former.¹³ This Article represents both an expansion and a contraction of the existing literature. It enlarges the scope of current analysis by considering the relationship between the affirmative and dormant aspects of the commerce clause.¹⁴ In so doing, this Article attempts to avoid the practice of dividing the Court's commerce clause jurisprudence into two distinct bodies of law.¹⁵ Simultaneously, this Article narrows the commerce clause inquiry to a discrete subset of the Court's decisions, those

Environmental Protection, and State Autonomy, 73 N.C. L. REV. 1481, 1495–1500 (1995).

¹¹ See *infra* Part II.B.

¹² Justices Scalia and Thomas have accused the Court of adopting an overly expansive rationale for the dormant commerce clause, one that would hold unconstitutional any state law that disrupts the national market:

The purpose of the negative Commerce Clause, we have often said, is to create a national market. It does not follow from that, however, and we have never held, that every state law which obstructs a national market violates the Commerce Clause. Yet that is what the Court says today. It seems to have canvassed the entire corpus of negative-Commerce-Clause opinions, culled out every free-market snippet of reasoning, and melded them into the sweeping principle that the Constitution is violated by any state law or regulation that "artificially encourag[es] in-state production even when the same goods could be produced at lower cost in other States."

W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 207 (1994) (Scalia, J., dissenting, joined by Thomas, J.). Despite this criticism, Justices Scalia and Thomas found unconstitutional under the dormant commerce clause every state law at issue in the cases considered by this Article.

¹³ *But see* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1089 (2000) (attempting a "reconceptualization of developments in Commerce Clause jurisprudence between the Civil War and World War II by identifying ways in which that jurisprudence was structurally related to and accordingly deeply influenced by the categories of substantive due process and dormant Commerce Clause doctrine"); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 660 (1993) (considering the historical relationship between the affirmative and dormant commerce clauses in the context of "antitrust federalism").

¹⁴ See *infra* Part III.D.

¹⁵ See Cushman, *supra* note 13, at 1149 (arguing that the "doctrinal decontextualization involved in the conventional strategy of studying a *line* of doctrine [such as the affirmative commerce clause or the dormant commerce clause] from its earliest expression through its most recent is thus fundamentally misguided" and "too easily blinds us to the dynamics of interdoctrinal connections").

involving the regulation of natural resources. To accomplish these tasks, this Article studies every commerce clause decision of the modern Supreme Court that involves the scope of governmental authority to regulate the use of natural resources.¹⁶ These decisions comprise what I will call the *environmental commerce clause*—the Court's interpretation of the limits mandated by the commerce clause upon federal and state legislation protecting natural resources. Overall, the Court has been limiting the scope of the affirmative commerce clause while simultaneously expanding the reach of the dormant commerce clause.¹⁷ As a result, both federal and state efforts to protect the natural environment have been rendered constitutionally suspect.

This study supports two principal conclusions. First, the modern Court has been consistently hostile to environmental regulation. In the context of the commerce clause, for the past quarter century the Court has rarely upheld a natural resource law, whether promulgated by Congress or by the states.¹⁸ This Article considers cases in which the Court invalidated the governmental regulation under scrutiny in ten out of eleven instances.¹⁹ Observing this trend, Chief Justice Rehnquist and Justice Blackmun accused some of their colleagues of engineering a return to *laissez faire* government.²⁰

As a second principal conclusion, this study has uncovered a subtle inconsistency between the Court's affirmative and dormant commerce clause analyses. In particular, when the federal government has sought to regulate the use of water and land under the affirmative commerce clause, the Court has emphasized the natural, noncommercial nature of the pro-

¹⁶ To mark the starting point of the "modern" Supreme Court, I selected the year 1978. That was the year when Justice Rehnquist (prior to his 1986 elevation to the position of chief justice) participated in his first dormant commerce clause case relating to the topic of natural resources. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). To provide for a cleaner analysis, cases involving taxation were generally omitted, even if the tax was levied upon a natural resource. See, e.g., *Regan*, *supra* note 9, at 1101 (noting "special feature of tax cases that makes it necessary to split them off as a category" in dormant commerce clause analysis). The results of each of the eleven environmental commerce clause decisions, as well as the vote of each Justice in each case, are set forth in tabular form in the Appendix.

¹⁷ See *infra* Part III.B (discussing shrinkage of affirmative commerce clause); Part III.C (discussing expansion of dormant commerce clause).

¹⁸ This hostility extends beyond the purview of the commerce clause. For recent limitations upon federal environmental regulation, see ROBERT MELTZ, CONG. RESEARCH SERV., CRS REPORT 30670, CONSTITUTIONAL CONSTRAINTS ON CONGRESS' ABILITY TO PROTECT THE ENVIRONMENT (2000), <http://www.cnie.org/NLE/CRSreports/Risk/rsk-51.cfm> (noting that "[i]n the past decade . . . the Supreme Court has invigorated several [constitutional] strictures in ways that present new challenges to congressional drafters of environmental statutes" and reviewing recent Supreme Court environmental opinions involving the affirmative commerce clause, standing to sue in the federal courts, the Takings Clause of the Fifth Amendment, the Tenth Amendment, and the Eleventh Amendment).

¹⁹ See *infra* Part III.

²⁰ See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting, joined by Blackmun, J.). See *infra* note 259 and accompanying text.

tected resources rather than the commercial nature of the regulated activity.²¹ In the absence of commercial or economic activity, therefore, the federal government lacks commerce clause regulatory authority under the rationale of *Lopez*.²² Simultaneously, when the states have attempted to regulate the use of land, water, or fish, the Court has treated such things as market commodities rather than natural resources.²³ As a result, the Court has invalidated those state regulations under the dormant commerce clause as constituting an undue interference with commodities in the flow of interstate commerce.²⁴

Thus, the Court has bolstered its environmental hostility through an elusive rhetorical device—shifting back and forth between the metaphor of environment-as-natural-resource (thus precluding federal regulations protecting noncommercial objects such as land, water, and wildlife that fall within the traditional realm of the states' police power)²⁵ and environment-as-commodity (thus precluding state regulations that might interfere with interstate commerce). As a practical result of this inconsistent approach, the Court effectively treats the environment as neither commodity nor natural resource, thus frustrating both federal and state efforts to protect the natural environment.

Part II roots the constitutional controversy in a practical context, serving at the outset as a reminder of the significant, pragmatic consequences of the Court's environmental commerce clause decisions. In particular, this Part focuses upon federal and state efforts to protect two essential resources: land and water. As states struggle to preserve their

²¹ See, e.g., *SWANCC*, 531 U.S. 159 (2001). In *SWANCC*, the Court characterized the federal regulation of wetland filling as involving the regulation of wildlife habitat, rather than the landfill industry, and observed that permitting "federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 161, 173–74. *But see id.* at 191 (Stevens J., dissenting) (distinguishing between state land use planning, which "in essence chooses particular uses for the land," and federal environmental regulation, which "at its core, does not mandate particular uses of the land but requires only that . . . damage to the environment is kept within prescribed limits," and asserting that "[c]ontrary to the Court's suggestion, the [federal regulation] does not 'encroac[h]' upon 'traditional state power' over land use"). The *SWANCC* decision is discussed in Part III.B.3.

²² See *supra* note 3 and accompanying text.

²³ See, e.g., *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391 (1994) (invalidating under dormant commerce clause, state regulation of interstate shipments of solid waste to municipal landfills and commenting that "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it"); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 359 (1992) (holding that solid waste is an article of commerce, even if it has no value); *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982) (invalidating under dormant commerce clause, Nebraska statute regulating use of groundwater and holding that groundwater is an article of commerce).

²⁴ See, e.g., *C & A Carbone*, 511 U.S. at 406 (O'Connor, J., concurring) (supporting invalidation of state regulation on the basis that "if [other local governments] impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired").

²⁵ See *SWANCC*, 531 U.S. at 173 (citing land and water use as subjects within the traditional and primary power of the states).

dwindling inventory of uncontaminated commercial land against a growing volume of garbage and solid waste, states have sought to export their waste to neighboring jurisdictions, shipping more than fifteen million tons of solid waste across state lines for disposal.²⁶ A state's defensive measures intending to keep other states' garbage out of their jurisdictions have raised difficult constitutional questions concerning the distinction between legitimate health and safety regulations and impermissible interferences with interstate commerce. State efforts to protect water resources and prevent export to neighboring jurisdictions pose similar constitutional issues. The dual nature of land and water as both natural resources and market commodities exacerbates the legal ambiguity surrounding regulation.

Part III initially considers whether *Lopez* and its progeny signal a willingness of the Court to limit the ability of Congress to protect natural resources. If the sphere of federal commerce authority over land and water is indeed shrinking, then this might have a corresponding impact upon the scope of state regulatory authority. That is, as federal commerce authority contracts, one might expect that there would be fewer situations where courts should invalidate state laws for blundering into forbidden federal territory. In fact, the opposite result has occurred, with the Court increasingly striking down state environmental laws. This Part argues that the modern Court has failed to settle upon a consistent environmental understanding, leading to the constitutional invalidation of natural resource regulations promulgated by federal and state governments alike.

Part IV examines the voting record of each justice in isolation, revealing three distinct voting blocs. The first two blocs represent both sides in the traditional federalism debate among those who strive to maintain a careful balance of power between federal and state governments. Chief Justice Rehnquist has been the primary proponent of the first view, voting consistently to uphold state environmental regulation but to invalidate federal regulation.²⁷ The second voting bloc includes Justices Stevens, Ginsburg, Souter, and Breyer, who generally support federal environmental regulation, but strike down state regulation.²⁸ This Article characterizes the third voting bloc as "the newest federalists," those who are staunch advocates of the free market, exhibiting a *laissez faire* philosophy toward government intervention at both levels. This group includes Justices Scalia, Thomas, and Kennedy (often along with

²⁶ See Robert R. M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1247 n.33 (1997).

²⁷ Although Chief Justice Rehnquist has been described as a "new federalist," his approach nevertheless may be described as "traditional" when compared to what I will call "the newest federalists." See generally *infra* Part IV.B.

²⁸ Justices Stevens and Ginsburg consistently follow this pattern. Justice Souter has followed this pattern in six out of seven cases. Justice Breyer has voted consistently in favor of federal regulation, but joined the Court after the decisions in the dormant commerce challenges to state regulation considered in this Article. See *infra* Part IV.A.

Justice O'Connor), who have voted consistently against environmental protection by both the federal and state governments.²⁹ The consistently negative results of the environmental commerce clause cases may be rooted in the two separate notions of federalism held by some justices, coupled with the *laissez faire* philosophy of other justices. Part IV concludes that despite the fact that the Court as a whole has been hostile to environmental regulation, this may be an overly facile characterization that masks the subtle dynamics that influence the nine individual votes of the Court.

II. RESOURCE PROTECTION: FROM GARBAGE TO THE GREAT LAKES

Before examining the jurisprudential framework of the commerce clause, it will be useful to consider the underlying practical problems that the constitutional doctrine must address. This Part will provide a brief overview of two of the most fundamental natural resources: land and water. Notably, many of the Court's modern dormant commerce cases have addressed state attempts to protect these two resources. Moreover, in its only recent affirmative case dealing with natural resources, the Court considered federal efforts to protect wetlands, a unique type of landscape at the interface between land and water.³⁰

The current judicial interest in land and water may be simply the product of chance. As the Court has suggested on at least one occasion, however, the number of such lawsuits that find their way to the Supreme Court may be indicative of another phenomenon: the increasing scarcity of these resources and the corresponding boldness with which state and federal governments have reacted to impending shortages.³¹ This Part will discuss the factual context from which the environmental commerce clause disputes arise.

²⁹ Justice O'Connor generally votes in conformity with this bloc. She consistently voted against federal regulation in the affirmative commerce clause cases considered by this Article, and voted against state regulation in four out of the six dormant commerce decisions in which she participated. *See* Appendix.

³⁰ *See* *SWANCC*, 531 U.S. at 159.

³¹ As Justice Kennedy observed in 1994:

As solid waste output continues apace and landfill capacity becomes more costly and scarce, state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment. The difficulty of their task is evident from the number of recent cases that we have heard involving waste transfer and treatment [citing to four previous Supreme Court decisions rendered within the preceding 16 years].

A. Garbage: Keeping It Out

1. Garbage as an Article of Commerce

Garbage disposal presents a serious problem. In 1960, the United States generated 88.1 million tons of municipal solid waste, representing the disposal of 2.7 pounds of garbage per person per day.³² By the late 1980s, the popular press predicted that the disposal of waste in the United States was “approaching the crisis stage,” triggered in large measure by the “affluent, fast-paced, throwaway American culture.”³³ In 1999, the nation produced over 230 million tons of waste, or approximately 4.6 pounds of garbage per person per day.³⁴

The disposal of garbage is big business. During the 1980s, the United States buried about eighty percent of its waste in sanitary landfills.³⁵ In order to transport and process this waste, cities pay contractors up to one hundred dollars per ton in “tipping fees.”³⁶ Nationwide, municipalities spend up to \$5 billion annually for garbage disposal,³⁷ shipping approximately twenty-eight million tons of waste annually across state lines.³⁸ Perhaps influenced by the profitable nature of this interstate business, the Supreme Court has held that garbage is an article of commerce.³⁹ Later, the Court refined that view, explaining that “[i]n other

³² U.S. Environmental Protection Agency, *Municipal Solid Waste: Basic Facts*, at <http://www.epa.gov/epaoswer/non-hw/muncpl/facts.htm> (last modified Oct. 29, 2002) (on file with the Harvard Environmental Law Review) (reporting that “U.S. residents, businesses, and institutions produced nearly 232 million tons of [municipal solid waste]” in 2000).

³³ George J. Church, *Garbage, Garbage, Everywhere: Landfills Are Overflowing, but Alternatives Are Few*, TIME, Sept. 5, 1988, at 81 (observing that Americans disposed of approximately twice as much waste per capita than did the residents of West Germany or Japan).

³⁴ See *supra* note 32.

³⁵ Church, *supra* note 33.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Press Release, Congressman John D. Dingell, Dingell to Introduce Legislation to Halt the Flow of Unwanted Garbage into Michigan’s Landfills (Mar. 26, 2001) (reporting interstate shipments of 28.4 million tons of waste annually) (on file with the Harvard Environmental Law Review). In 1998, the Congressional Research Service reported that states imported 25.1 million tons of waste annually from other states. JAMES E. MCCARTHY, CONG. RESEARCH SERV., CRS REPORT 98-689, INTERSTATE SHIPPING OF MUNICIPAL SOLID WASTE: 1998 UPDATE (1998), <http://www.cnie.org/NLE/CRSreports/Waste/waste-7a.cfm> (citing shipping statistics, but cautioning, “One of the weaknesses of the available data is that total imports reported by the states do not match total exports. When one totals reported exports, the current survey shows a national total of 21.9 million tons, about 12% less than reported imports. Reported exports increased 4.2 million tons, or 24%, compared to 1995.”).

³⁹ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622–23 (1978) (rejecting argument that “the mere transportation and disposal of valueless waste between states” does not constitute commerce, and holding that “States are not free from constitutional scrutiny when they restrict that movement [of out-of-state wastes]”).

words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.”⁴⁰

2. Garbage as a Negative Natural Resource

The growth in garbage generation has brought about a corresponding decrease in available landfill space. During the 1980s, approximately half of the nation’s landfills reached capacity and closed.⁴¹ The Environmental Protection Agency (“EPA”) reported that, as of 1999, the District of Columbia had less than five years of landfill capacity remaining, and that an additional nine states had less than ten years of remaining capacity.⁴² These events have triggered controversial garbage disputes in which urban or densely populated areas have sought to ship their wastes to less-populated locations, often in other states.⁴³ One such conflict involves New York City’s efforts to ship its wastes by barge and truck to Virginia. These shipments generate \$550 million annually and provide some five thousand jobs in Virginia.⁴⁴ Despite these market benefits, the governor of Virginia informed the mayor of New York City that his state would no longer serve as New York’s “dumping ground.”⁴⁵ In an ensuing lawsuit, however, the Fourth Circuit invalidated portions of Virginia’s solid waste management statutes under the dormant commerce clause.⁴⁶

In another highly publicized dispute, the State of Michigan chastised other states and Canada for depositing annually over one million tons of waste into Michigan landfills.⁴⁷ Perhaps mindful of Virginia’s unsuccess-

⁴⁰ C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 391 (1994).

⁴¹ Church, *supra* note 33, at 81.

⁴² U.S. Environmental Protection Agency, *Municipal Solid Waste: Years of Remaining Landfill Capacity*, at <http://www.epa.gov/garbage/longdesc/4-9longdesc.htm> (last modified Oct. 29, 2002) (on file with the Harvard Environmental Law Review) (specifying five to ten years of remaining capacity for Alabama, Minnesota, Mississippi, Missouri, North Carolina, Rhode Island, Tennessee, Vermont, and Wisconsin).

⁴³ See generally Verchick, *supra* note 26.

⁴⁴ *New York v. Virginia: Dumping Grounds*, ECONOMIST, Feb. 20, 1999, at 27; see also CONG. RESEARCH SERV., *supra* note 38 (reporting New York’s export of 3.77 million tons of municipal solid waste in 1997, the most in the country, and observing that “waste exports from New York are expected to grow rapidly because of the planned closure of New York City’s Fresh Kills Landfill [sic]—the city’s only landfill—in 2001”). According to 1997 data, Virginia is the nation’s second largest importer of municipal solid waste. *Id.* tbl. 3 (citing 1997 imports of municipal solid waste into Virginia at 2.8 million tons).

⁴⁵ *New York v. Virginia: Dumping Grounds*, *supra* note 44.

⁴⁶ Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316 (4th Cir. 2001) (holding unconstitutional under the dormant commerce clause, portions of Virginia solid waste management laws purporting to regulate transportation and shipments of municipal solid waste for disposal in Virginia landfills), *cert. denied sub nom.* Murphy v. Waste Mgmt. Holdings, Inc., 122 S. Ct. 1203 (2002).

⁴⁷ Tim Martin, *Trash in the Great Lakes State*, LANSING ST. J., Sept. 9, 2001, at A1 (showing the 2000 Michigan disposal of 1.3 million tons of solid waste from Canada). Congressman Mike Rogers (R-Mich.), one of the sponsors of such federal legislation, stated, “[The Canadians] can send all the hockey players they want. But they should keep their dirty diapers and Canadian bacon scraps at home.” *Id.*

ful defense in the lawsuit arising out of its objection to garbage imports from New York, Michigan has refrained from banning the importation of out-of-state waste, even though approximately seventeen percent of the waste deposited in its landfills originates in Canada and other jurisdictions.⁴⁸ Rather, Michigan has entreated Congress to pass federal legislation explicitly authorizing states and local communities to prevent the import of foreign waste.⁴⁹

These garbage conflicts have been brought to the attention of the Supreme Court. A minority of the justices has opposed the notion that garbage is a commodity beyond the scope of state regulation.⁵⁰ Expressing this opposition, Chief Justice Rehnquist has articulated a concise correlation between the garbage business and land use; "Landfill space evaporates as solid waste accumulates."⁵¹ When considering the problem of landfills, Chief Justice Rehnquist's dissents have emphasized the land consumed rather than the commodity that comprises the fill material.⁵² Accordingly, he has been sympathetic toward state regulation of garbage shipments, opining that "states may take actions legitimately directed at the preservation of the State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators."⁵³ Chief Justice Rehnquist has chastised the majority on the basis that it "stubbornly refuses to acknowledge that a clean and healthy environment, unthreatened by the improper disposal of solid waste, is the commodity really at issue in cases such as these."⁵⁴

⁴⁸ *Id.*

⁴⁹ Press Release, Congressman David E. Bonior (D-Mich.), Congressman David E. Bonior (D-Mich.) Seeks Movement on Legislation Allowing Local Communities to Regulate Out-of-State Trash (Apr. 6, 2000) (on file with the Harvard Environmental Law Review).

⁵⁰ See, e.g., *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 112 (1994) (Rehnquist, C.J., dissenting, joined by Blackmun, J.) ("While I understand that solid waste is an article of commerce . . . it is not a commodity sold in the marketplace.")

⁵¹ *Id.* at 108.

⁵² See, e.g., *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 349 (1992) (Rehnquist, C.J., dissenting); see also *Or. Waste Sys.*, 511 U.S. at 113 (Rehnquist, C.J., dissenting) (viewing landfill space as a natural resource).

⁵³ *Chem. Waste Mgmt., Inc.*, 504 U.S. at 349. In other instances, Chief Justice Rehnquist has referred to a clean environment as a natural resource, rather than a commodity; see, e.g., *Or. Waste Sys.*, 511 U.S. at 113 (Rehnquist, C.J., dissenting) ("Congress has recognized taxes as an effective method of discouraging consumption of natural resources . . . Nothing should change the analysis when the natural resource—landfill space—was created or regulated by the State in the first place.")

⁵⁴ *Or. Waste Sys.*, 511 U.S. at 110 (Rehnquist, C.J., dissenting); see also *Fort Gratiot Sanitary Landfill, Inc., v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 369 n.1 (1992) (Rehnquist, C.J., dissenting) ("I am baffled by the Court's suggestion that this case might be characterized as one in which garbage is being bought and sold.")

B. Water: Keeping It In

At least as early as 1966, United States officials expressed concern over the adequacy of this nation's water supply.⁵⁵ Internationally, the United Nations has predicted that by the year 2025, more than 2.7 billion people will face severe water shortages, and that 5 billion people will be unable to satisfy all of their water needs.⁵⁶ This "looming crisis . . . overshadows nearly two-thirds of the Earth's population."⁵⁷ Just as communities have struggled to keep their neighbors' garbage *out* of their jurisdictions in the face of diminishing land resources, so also have they fought to keep scarce water resources *within* their borders.

This Section will emphasize the historic dual vision of water, both as a highly mobile market commodity and as a permanent fixture of the natural landscape in which the identity of surrounding communities is firmly rooted. Part II.B.1 explores the water-as-commodity philosophy, a view the Supreme Court has espoused. In its 1982 decision *Sporhase v. Nebraska*, the Court invalidated a provision of Nebraska law that restricted the out-of-state transport of groundwater withdrawn from any well in Nebraska.⁵⁸ In reaching its conclusion, the Court explicitly held that water is an article of commerce.⁵⁹ This holding provides a basis for limiting far-reaching state water statutes in order to preserve the federal prerogative to regulate interstate commerce.⁶⁰ *Sporhase* has been of particular concern in the arid western United States, where most states follow the prior appropriation doctrine, a water-law regime rooted in the vision of water as a marketable commodity.⁶¹ Although these states may favor the marketability of water within their state boundaries, *Sporhase's* water-as-commodity philosophy may hamper these states' ability to limit the export of their water resources to other states.

⁵⁵ See, e.g., JIM WRIGHT, *THE COMING WATER FAMINE* (1966). Former Congressman Wright stated:

The crisis of our diminishing water resources is just as severe (if less obviously immediate) as any wartime crisis we have ever faced. Our survival is just as much at stake as it was at the time of Pearl Harbor, or the Argonne, or Gettysburg, or Saratoga.

Id., quoted in Andrew Guy, *A "Small" Withdrawal? Perrier Plan Raises Critical Questions About Fresh Water Supply* (Apr. 23, 2001), at <http://www.mlui.org/projects/enviropolicy/guyperrierarticle.html>.

⁵⁶ *UN Warns of Water Shortage by 2025: Looming Crisis to Affect Two-Thirds of World Population*, TORONTO STAR, Mar. 22, 2002, <http://www.thestar.com/NASApp/cs/content...intFriendly&c=Article&cid=101679749925> (on file with the Harvard Environmental Law Review).

⁵⁷ *Id.*

⁵⁸ 458 U.S. 941 (1982).

⁵⁹ *Id.* at 954.

⁶⁰ *Id.* ("[G]round water overdraft is a national problem and Congress has the power to deal with it on that scale").

⁶¹ See *infra* notes 79–84 and accompanying text.

Part II.B.2 considers the competing vision of water as a natural resource, a view incorporated into the prevalent riparian water law doctrine in the eastern states. In contrast to the market view of water as a mobile commodity, this water-as-resource philosophy endorses keeping water within its geographic basin of origin for uses such as domestic consumption, environmental protection, aesthetic enjoyment, and recreation.⁶² Some federal laws also follow the water-as-resource view. Despite the suggestion in *Sporhase* that water overuse is a national problem subject to federal regulation, subsequent statements indicate that the Court also may be willing to limit the federal regulation of water resources.⁶³

Finally, Part II.B.3 presents the Great Lakes as a case study of a current controversy involving a region's efforts to prevent the interstate export of its water resources. This study illustrates the need for the Supreme Court to provide a clear signal as to whether the federal government, state governments, or both provides the proper constitutional channel through which water resources may be protected.

1. *Water as a Market Commodity*

Humans have exhibited an extraordinary unwillingness to take their water where they find it. Rather than accept the natural geographic distribution of water as a barrier to settlement and development, we have engaged in wondrous engineering feats designed to redistribute the earth's natural water supply. The term "reclamation" has been applied with equal aplomb to the irrigation of arid landscapes⁶⁴ and to the draining of wetlands.⁶⁵ The apparent unifying idea is of reclaiming the earth from itself, bringing water to the desert and removing it from swamps. Some even claim that the effort to move water around the planet has been so successful that the resultant weight redistribution has changed the tilt of the earth on its axis and varied the speed of its rotation.⁶⁶

Both governmental agencies and private entrepreneurs have developed creative schemes for moving water around the landscape from regions of surplus to regions of scarcity. An impressive number of these plans have come to fruition. Under the authority of the Reclamation Act

⁶² See generally WATER RIGHTS OF THE EASTERN UNITED STATES (Kenneth R. Wright ed., 1998) (observing that although "inconsistencies abound," traditional riparian water law incorporated a "watershed limitation, which is the doctrine that the riparian owner has the right to use the water only within the same watershed").

⁶³ See *infra* Part III.C.2.

⁶⁴ See Reclamation Act of 1902, ch. 1093, Pub. L. No. 57-161, 32 Stat. 388 (codified as amended in scattered sections beginning 43 U.S.C. § 371). See generally Christine A. Klein, *On Dams and Democracy*, 78 OR. L. REV. 641, 672-79 (1999) (providing brief overview of the history of the Bureau of Reclamation).

⁶⁵ See generally ANN VILEISIS, *DISCOVERING THE UNKNOWN LANDSCAPE: A HISTORY OF AMERICA'S WETLANDS* (1997).

⁶⁶ See PATRICK McCULLY, *SILENCED RIVERS: THE ECOLOGY AND POLITICS OF LARGE DAMS* 7 (1996).

of 1902,⁶⁷ for example, the federal Bureau of Reclamation has brought water for irrigation to 9.1 million acres of arid land, constructing 345 diversion dams, 322 storage reservoirs, 14,490 miles of canals, 34,990 miles of laterals, 930 miles of pipeline, 218 miles of tunnels, and 15,530 miles of drains.⁶⁸ Other water users have engineered complex trans-mountain diversions, piping water from one side of a mountain to the other. In perhaps the most notorious of these water transfers, the city of Los Angeles pumped a yearly average of 99,580 acre-feet of water over the Antelope-Mojave Plateau from the Owens Valley.⁶⁹ The resultant water conflict—made infamous by Roman Polanski's movie *Chinatown*—involved the irate Owens Valley residents' attempt to sabotage Los Angeles' diversions with dynamite and violence.⁷⁰

Other schemes have proved to be unrealistic or remain in the planning stages. In 2000, an agricultural and water development company captured national headlines with its proposal to pump over six hundred billion gallons of "pristine, fossil-age groundwater" from beneath the Mojave desert to supply the growing needs of the cities of Southern California.⁷¹ More recently, an Alaskan entrepreneur developed a proposal to transport annually over six billion gallons of water from rivers in Northern California to supply more than forty thousand households in San Diego.⁷² The water would be pumped into huge floating bags three football fields in length, which would be pulled by barges hundreds of miles south through the Pacific Ocean to San Diego.⁷³ The failed Enron Corporation proposed perhaps the most grandiose of such water marketing schemes.⁷⁴ In 1998, the corporation launched a water unit called the Azurix Corporation, intending to dominate the global water market through a

⁶⁷ 43 U.S.C. § 371 (1994).

⁶⁸ DONALD WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST* 277 (1985).

⁶⁹ See *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 713–14 (Cal. 1983). An acre-foot equals 325,851 gallons and is defined as "the volume of water required to cover 1 acre of land to a depth of 1 foot." U.S. Geological Survey, *Water Science Glossary of Terms*, at <http://ga.water.usgs.gov/edu/dictionary.html> (last modified July 1, 2001) (on file with the Harvard Environmental Law Review).

⁷⁰ For an account of the Owens Valley water conflict, see MARK REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* (1993).

⁷¹ See *Thirsty Mojave Knee-Deep in Water Controversy*, CNN, Oct. 30, 2000, at <http://www.cnn.com/2000/NATURE/10/30/mojave.desert.enn/index.html> (on file with the Harvard Environmental Law Review).

⁷² See Michelle Locke, *Plan to Bag River Water for Sale Alarms Northern Californians*, PITTSBURGH POST-GAZETTE, Mar. 11, 2002, 2002 WL 3801154.

⁷³ See Daniel B. Wood, *Latest Plan to Ease Water Woes: Big Baggies*, CHRISTIAN SCI. MONITOR, Mar. 12, 2002, at 1. This entrepreneur heads an international consortium that is attempting to implement a similar proposal in the Mediterranean Sea. *Id.*; see also Eric Bailey, *Plan to Bag Rivers May Not Float: An Entrepreneur's Bid to Tug Giant Sacks of Fresh North Coast Water to San Diego Stirs Up Anger Amid the Skepticism*, L.A. TIMES, Mar. 2, 2002, at A1.

⁷⁴ See Brad Foss, *Deep Roots of Enron Fall Studied*, AP ONLINE, Feb. 3, 2002, 2002 WL 11687183.

variety of mechanisms, including the development of a short-lived online water-trading market called "Water2Water.com."⁷⁵ In the past, such schemes might have been dismissed as absurd. Today, however, with the confluence of technological development and the prospect of immediate shortage,⁷⁶ water export proposals are taken seriously by both supporters and opponents.⁷⁷ Reflecting this concern, *Fortune Magazine* predicted in 2000 that "[w]ater promises to be to the 21st century what oil was to the 20th century: the precious commodity that determines the wealth of nations."⁷⁸

Many states have adopted the water-as-commodity philosophy as well. In the western United States, for example, the doctrine of prior appropriation awards water rights to the first users of water, without regard for the ownership of land adjacent to the water source.⁷⁹ The doctrine explicitly contemplates the movement of water from one area to another, awarding the "usufructuary" right to withdraw a specific quantity of water from a particular source for a defined use.⁸⁰ Often absent is any requirement that the water be used on the same tract of land, or even in the same drainage basin, from which it was extracted.⁸¹ Rather, the legal right to utilize water in a particular location is conditioned primarily on the demonstration that the contemplated use will not injure the water

⁷⁵ See Michael Grunwald, *Enron Unit Lobbied Bush to Privatize Florida Water*, S. FLA. SUN-SENTINEL, Feb. 9, 2002, at 15A, available at 2002 WL 2946103 (discussing \$400 billion global water industry); see also Foss, *supra* note 74 (describing plans for online water market as an "untenable" venture that failed to consider the "complexity of laws surrounding the transport of water and the lack of infrastructure to move this heavy liquid from one region to another").

⁷⁶ San Diego, which imports some ninety percent of its water supply, anticipates water shortages by the year 2004. See Wood, *supra* note 73; *Morning Edition: Plans to Capture Water From Rivers in Northern California and Shipping It South Causing Protests*, (NPR broadcast, Mar. 8, 2002), 2002 WL 3187381. The World Water Council has estimated that over 1 billion people currently lack safe drinking water, and has predicted that by 2025 that number will increase to 3.1 billion people. *Billions Will Lack Safe Water by 2025, International Panel Says*, GLOBE & MAIL, Mar. 7, 2002, at A5. In the United States, a former chief of the U.S. Forest Service stated that two-thirds of the world's population will experience water shortages within the next twenty years, including regions of the United States. Ted Snyder, *Short Supply*, (Earthwatch Radio broadcast, Jan. 31, 2002), <http://www.ewradio.org/program.asp?ProgramID~3136> (on file with the Harvard Environmental Law Review).

⁷⁷ See *Billions Will Lack Safe Water by 2025*, *supra* note 76. See generally Bailey, *supra* note 73 (describing evolving response toward California proposal from early dismissal as "harebrained, goofy, ridiculous, ludicrous, absurd" to growing concern over an idea regarded as "potentially . . . very, very dangerous").

⁷⁸ Shawn Tully, *Water Water Everywhere*, FORTUNE, May 15, 2000, at 342, 344.

⁷⁹ David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3 (2001); Charles F. Wilkinson, *In Memoriam, Prior Appropriation 1848-1991*, 21 ENVTL. L. (1991).

⁸⁰ David H. Getches, *Changing the River's Course: Western Water Policy Reform*, 26 ENVTL. L. 157, 161-63 (1996).

⁸¹ But see David Howard Davis, *Water Diversion from the Great Lakes*, 1999 TOL. J. GREAT LAKES' L. SCI. & POL'Y 109, 113 (1999) (describing eastern water law basin of origin doctrine as generally confining water use to lands adjacent to the natural water source or to lands within the same hydrologic water basin).

rights of users with a senior priority.⁸² Indeed, the western water system is an outgrowth of the customs followed in nineteenth-century California mining camps, where it was essential for miners to pipe water long distances from scarce rivers to the site of mining operations.⁸³ Today, western water rights are routinely bought and sold within a particular state as a species of property right, independent of the sale of any particular parcel of land, and often commanding impressive prices in the marketplace.⁸⁴

2. *Water as a Natural Resource*

Despite the increasingly common view of water as a market commodity, many disagree vehemently, seeing water as the cornerstone of a community's sense of identity and place.⁸⁵ Perhaps ahead of his time, Henry David Thoreau protested the idea of diverting Walden Pond water from its natural setting to the taps of village homes:

My Muse may be excused if she is silent henceforth Now . . . the dark surrounding woods, are gone, and the villagers, . . . instead of going to the pond to bathe or drink, are thinking to bring its water, which should be as sacred as the Ganges at least,

⁸² See Janet C. Neuman & Keith Hirokawa, *How Good Is an Old Water Right? The Application of Statutory Forfeiture Provisions to Pre-Code Water Rights*, 4 U. DENV. WATER L. REV. 1 (2000).

⁸³ See *Irwin v. Phillips*, 5 Cal. 140 (1855). The California Supreme Court stated:

[T]he most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development.

Id. at 146.

⁸⁴ See, e.g., David W. Yoskowitz, *Markets, Mechanisms, Institutions, and the Future of Water*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 10,237 (2001); Olen Paul Matthews et al., *Marketing Western Water: Can a Process Based Geographic Information System Improve Reallocation Decisions?*, 41 NAT. RESOURCES J. 329 (2001); Andrew P. Morriss, *Lessons From the Development of Western Water Law for Emerging Water Markets: Common Law vs. Central Planning*, 80 OR. L. REV. 861 (2001).

⁸⁵ See, e.g., INT'L JOINT COMM'N, PROTECTION OF THE WATERS OF THE GREAT LAKES, FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 6, Feb. 22, 2000 [hereinafter IJC REPORT] (asserting that "[t]he waters of the Great Lakes Basin are a critical part of the natural and cultural heritage of the region" and observing that "these freshwater seas have made a vital contribution to the historical settlement, economic prosperity, culture, and quality of life and to the diverse ecosystems of the Basin and surrounding region").

to the village in a pipe, to wash their dishes with!—to earn their Walden by the turning of a cock or drawing of a plug!⁸⁶

The two competing visions of water-as-commodity and water-as-natural-resource are not mutually exclusive—after all, even Thoreau appears to tolerate some practical uses of his “sacred” Walden Pond. The categorization of water as a resource or as a commodity may turn upon such variables as how much water remains at the original source and the extent to which water is utilized in a manner that maintains some essential relationship to the source from which it was withdrawn.⁸⁷

The common law of the eastern states, espousing the riparian doctrine of water law, has long recognized the natural resource aspect of water. In fact, under the traditional doctrine, only those who own land adjacent to a water source possess the legal right to make use of that water.⁸⁸ Originally, even use by such riparian landowners was severely restricted. Under the English natural flow doctrine, riparian landowners could make use of adjacent waters for limited purposes, such as the operation of mill wheels, but they could not alter the rate of flow, the quantity, or the quality of the stream.⁸⁹ Later, riparian law settled upon the more tolerant “reasonable use doctrine,” under which each riparian owner shares an equal right to put the water to a beneficial use without unreasonably injuring other riparian users.⁹⁰ Despite this doctrinal relaxation, the riparian law of most states retains some sort of “basin of origin” limitation—preferring, or even demanding, that water remains in the geographic basin of its natural source.⁹¹

Even western states following the prior appropriation doctrine acknowledge some aspects of the water-as-resource philosophy.⁹² For example, some western states have recognized legal water rights to keep water *within* a specified stream or lake, thus precluding water uses that draw natural water levels beneath a specified floor.⁹³ These “instream

⁸⁶ HENRY D. THOREAU, WALDEN 187–88 (Houghton Mifflin, 1995) (1854) (bemoaning scheme to pipe Walden Pond water to nearby village).

⁸⁷ For example, the withdrawal of water from a stream to irrigate adjacent farmland might be compatible with the natural resource philosophy, despite the fact that the resultant product (crop) might be sold as a market commodity.

⁸⁸ See generally A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 111–14 (5th ed. 2002).

⁸⁹ See, e.g., *Boyd v. Greene County*, 644 S.W.2d 615, 616 (1983).

⁹⁰ See Robert E. Beck, *Use Preferences for Water*, 76 N.D. L. REV. 753 (2000).

⁹¹ See WATER RIGHTS OF THE EASTERN UNITED STATES, *supra* note 62, at 25.

⁹² As a dissenting view, Chief Justice Rehnquist would argue that “a State may so regulate a natural resource as to preclude that resource from attaining the status of an ‘article of commerce’ for the purposes of the negative impact of the Commerce Clause.” See *Sporhase v. Nebraska*, 458 U.S. 941, 963 (1982) (Rehnquist, J., dissenting).

⁹³ See generally Christine A. Klein, *The Constitutional Mythology of Western Water Law*, 14 VA. ENVTL. L.J. 343, 359–69 (1995).

flow” laws are premised generally upon noneconomic, environmentally protective rationales.⁹⁴

To the extent that the law has protected the natural resource values of water, states have assumed the dominant role in providing such protection. However, an overlay of federal law contributes to this effort. Notably, these federal laws are typically something other than pure “water law” allocation schemes, impacting water rights in a tangential, but significant, manner. As early as 1908, the Supreme Court recognized the “federal reserved water rights” doctrine.⁹⁵ Under this concept, when the federal government makes a reservation of land, it implicitly reserves water rights necessary to accomplish the purpose for which it made the reservation.⁹⁶ As a result, the declared federal need to keep water in place to preserve natural resources has trumped state-sanctioned commodity uses of water. In *Cappaert v. United States*, for example, the Court curtailed the use of state-authorized water rights for irrigation when necessary to preserve water levels in a desert pond in Nevada’s Devil’s Hole National Monument for the survival of the endangered desert pupfish.⁹⁷

Congress, as well as the federal judiciary, has assisted states in protecting their natural water resources, albeit in an indirect manner. For example, section 404 of the Clean Water Act forbids the “discharge of dredged or fill material . . . [into] navigable waters” without a permit.⁹⁸ This section has been applied primarily to prohibit the filling of wetlands.⁹⁹ The statutory touchstone for the issuance of section 404 permits utilizes the rhetoric of natural resource protection: the permitting agency must consider whether the proposed discharge “will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”¹⁰⁰ The statute’s general declaration of goals echoes this emphasis upon water-as-natural-resource, stating that the legislation’s objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁰¹

The federal Endangered Species Act¹⁰² (“ESA”) also provides some protection to water resources in their natural condition. Among other things, the ESA requires federal agencies to insure that their actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse

⁹⁴ *Id.* at 359.

⁹⁵ See *Winters v. United States*, 207 U.S. 564 (1908).

⁹⁶ *Cappaert v. United States*, 426 U.S. 128, 138 (1975).

⁹⁷ *Id.*

⁹⁸ 33 U.S.C. § 1344(a) (2000).

⁹⁹ See generally *SWANCC*, 531 U.S. 161, 163–64 (2001) (discussing application of section 404 to wetlands and other “waters of the United States”).

¹⁰⁰ 33 U.S.C. § 1344(c).

¹⁰¹ *Id.* § 1251(a).

¹⁰² 16 U.S.C. § 1531 (2000).

modification of [critical] habitat of such species”¹⁰³ As applied, this provision has stopped federal plans that would have facilitated out-of-stream water uses, such as the construction of dams and reservoirs.¹⁰⁴ An additional provision of the ESA applies to both federal and nonfederal actors, making it unlawful for “any person” to “take” any endangered species of fish or wildlife¹⁰⁵ as through actions that “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” endangered species.¹⁰⁶ The Supreme Court has approved a broad definition of the term “take” that may serve to protect water resources in their natural condition.¹⁰⁷ For example, drought has caused low water levels in the Klamath River in California and Oregon, creating concern over the coho salmon and endangered suckerfish that depend on the river for survival. Pursuant to the ESA, federal officials were urged to restrict water diversions that support Klamath Basin farmers in favor of the endangered fish that would be harmed if too much water were diverted from the river.¹⁰⁸

3. Case Study: Great Lakes Dreaming

The Great Lakes are on the newest front of the “water wars.” Historically a region of surplus, the Great Lakes states have perceived recently that their water supply is threatened by a combination of climate change, pollution, diversion, direct removal of lake water by tanker, and well-pumping from tributary aquifers as a source of bottled drinking water.¹⁰⁹ The realization of the impending threat has come slowly. As one commentator observed, “A lot of people just can’t believe that we may be running out of water, living this close to the Great Lakes.”¹¹⁰ Overall the case study of the Great Lakes provides anecdotal evidence of two important points. First, in some places, a threatened shortage may prompt

¹⁰³ 16 U.S.C. § 1536(a)(2) (2000).

¹⁰⁴ See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (enjoining completion of Tellico Dam to avoid adverse modification of critical habitat of endangered snail darter). However, the project was ultimately allowed to go forward as a result of post-litigation political maneuvers. See Klein, *supra* note 64, at 682–89.

¹⁰⁵ 16 U.S.C. § 1538(a)(1)(B) and (C).

¹⁰⁶ *Id.* § 1532(19) (defining the term “take”).

¹⁰⁷ See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (upholding as reasonable broad agency definition of “harm” that includes “significant habitat modification or degradation where it actually kills or injures wildlife”).

¹⁰⁸ See generally Eric Bailey, *The State Administration May Cut Klamath’s Flow Again*, L.A. TIMES, Oct. 11, 2002, at B10 (noting that after a “massive die-off” of salmon the Bush administration was accused of diverting too much water for farmers); Deborah Schoch, *Klamath Plan Will Hurt Fish*, *State Official Says*, L.A. TIMES, Mar. 29, 2002, at B7 (reporting that Interior Secretary Gail Norton and Agriculture Secretary Ann Veneman would preside over a ceremony on March 29, 2002 to open irrigation headgates).

¹⁰⁹ Timothy Egan, *Near Vast Bodies of Water, The Land Still Thirsts*, N.Y. TIMES, Aug. 12, 2001, at A1.

¹¹⁰ *Id.* at 20 (quoting water engineer employed by the Northeastern Illinois Planning Commission).

communities to seek protection at both the federal and state levels of government. This effort, however, may be foreclosed by the Supreme Court's current inclination toward expanding the dormant commerce clause and contracting the affirmative commerce clause. Second, such shortages underscore the value of water as a natural resource, leading affected communities to align their personal identities with the protection of their resources in a natural condition.

Less than three percent of the earth's water sources consist of fresh water.¹¹¹ The Great Lakes Basin contains an impressive one-fifth of that useable water supply.¹¹² As world water resources dwindle, thirsty regions have periodically cast a greedy eye upon the seemingly inexhaustible waters of the Great Lakes, going back as far as the 1800s.¹¹³ The scope of these schemes to capture the lakes' water challenges the imagination. Engineers of the 1950s dreamed of using atomic bombs to dig giant canals that would transport water from the Great Lakes to the Great Plains.¹¹⁴ In the 1980s, planners proposed to send Great Lakes water to Texas, New Mexico, Oklahoma, Kansas, Colorado, and Nebraska to recharge the Ogallala aquifer of the high plains.¹¹⁵ Other proposals called for the piping of Lake Superior water to Montana for the transport of coal slurry.¹¹⁶

The federal government acted to alleviate the fears of the Great Lakes states that their resources would be depleted.¹¹⁷ In 1968, Congress approved the Great Lakes Basin Compact, an agreement among the eight lake states providing for joint and cooperative action to "promote the orderly, integrated, and comprehensive development, use, and conservation of the water resources of the Great Lakes Basin."¹¹⁸ In 1986, Congress enacted the Water Resources Development Act, prohibiting the diversion of water within the United States from the Great Lakes or their tributaries for use outside the basin, unless the governors of all the Great Lakes states approved the diversion.¹¹⁹

¹¹¹ *UN Warns of Water Shortage by 2025*, *supra* note 56 (citing Mar. 22, 2002 report of the United Nations).

¹¹² See IJC REPORT, *supra* note 85.

¹¹³ *Id.*

¹¹⁴ See Davis, *supra* note 81, at 109.

¹¹⁵ See Chris A. Shafer, *Great Lakes Diversions Revisited: Legal Constraints and Opportunities for State Regulation*, 17 T. M. COOLEY L. REV. 461, 463 (2000).

¹¹⁶ *Id.* See IJC REPORT, *supra* note 85, app. 6 (summarizing past diversion and removal proposals). See generally DONALD A. WILHITE, CENTER FOR AGRICULTURAL METEOROLOGY AND CLIMATOLOGY, UNIVERSITY OF NEBRASKA (LINCOLN), THE OGALLALA AQUIFER (1989), <http://www.meteor.iastate.edu/gcp/issues/society/ogallala/ogallala.html> (on file with the Harvard Environmental Law Review).

¹¹⁷ See IJC REPORT, *supra* note 85.

¹¹⁸ See *id.* at 36.

¹¹⁹ 42 U.S.C. § 1962d-20(d) (2000) ("[N]o water shall be diverted from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lake States").

Despite these federal legislative responses, Great Lakes water schemes continued to develop. In 1998, the Canadian Nova Group proposed to ship almost 160 million gallons of Lake Superior water annually by supertanker to Asia.¹²⁰ Although the province of Ontario initially issued a permit for the proposed project, the permit was later withdrawn following a firestorm of public criticism.¹²¹ Three years later, the Perrier water company sought permission to withdraw up to 262 million gallons of groundwater annually from Michigan wells for sale as bottled drinking water.¹²² Unlike Nova Group, Perrier was successful in its bid for state approval.¹²³

State lawmakers and citizens responded with concern and outrage to the approval of Perrier's plan. In perhaps the most colorful response, a Michigan state senator established a citizen group that sponsored billboards along interstate highways within the state.¹²⁴ Featuring a map of Michigan surrounded by huge caricatures of a Texas cowboy, a Utah skier, a California surfer, and a New Mexico man wearing a large sombrero—all guzzling Great Lakes water through giant straws—the billboard proclaims, "Back Off Suckers."¹²⁵ The senator's response was prompted, in part, by his fear that proposals such as the Perrier plan would establish a precedent allowing states in the southwest to utilize the Great Lakes as a cost-effective method of solving their freshwater shortages.¹²⁶

At least two aspects of the criticism of the approval of Perrier's groundwater withdrawals are noteworthy. First, opponents have called for both federal and state assistance.¹²⁷ Michigan's attorney general issued an

¹²⁰ See IJC REPORT, *supra* note 85, at 44.

¹²¹ See James M. Olson, *Great Lakes Water*, 80 MICH. B.J. 32, 34 (2001).

¹²² Andy Guy, *Great Lakes Supernova: State Environmental Agency Decision Nears for Perrier* (July 19, 2001), at <http://www.mlui.org/projects/enviropolicy/guysupernova.asp> (on file with the Harvard Environmental Law Review).

¹²³ See *State Issues Permits for Perrier Wells*, DETROIT FREE PRESS, Aug. 15, 2001, http://www.freep.com/news/mich/out16_20010816.htm (on file with the Harvard Environmental Law Review).

¹²⁴ Michael Critzon, *Billboards Support [sic] Great Lakes Protection*, CENT. MICH. LIFE, Oct. 24, 2001, http://www.cm-life.com/usnews/display.v/ART/2001/10/24/3bd646fee7050?in_archive=1 (on file with the Harvard Environmental Law Review) (describing actions of Michigan State Senator Ken Sikkema). Senator Sikkema served as Chairman of the Natural Resources and Environmental Affairs Committee and Vice-Chairman of the Technology and Energy Committee. See *Senator Ken Sikkema: About the Senator*, at <http://www.senate.state.mi.us/gop/senator/sikkema/bio.html> (last visited Nov. 23, 2002) (on file with the Harvard Environmental Law Review).

¹²⁵ Critzon, *supra* note 124.

¹²⁶ *Id.*

¹²⁷ A nonprofit organization, Citizens for Michigan's Future, for example, asserts on its Web site that "[i]t is widely recognized . . . that new laws are necessary at both the state and federal levels to adequately protect the Great Lakes from new diversion proposals that are certain to emerge in the future." Citizens for Michigan's Future, *Great Lakes Water Diversion*, at <http://www.protectthegreatlakes.com/diversion.htm> (last visited Mar. 19, 2002) (on file with the Harvard Environmental Law Review).

opinion that Perrier's groundwater withdrawals fell within the ambit of the federal Water Resources Development Act and were not permissible unless approved by the governors of the Great Lakes states.¹²⁸ However, the Michigan attorney general observed that the federal statute relies primarily upon the Great Lakes governors for its implementation, and therefore called upon state lawmakers to adopt a state water use statute to protect such resources from depletion.¹²⁹

Others have expressed similar concerns that complete reliance upon the federal government to protect the region's waters may be undesirable or inadequate. President George W. Bush—perhaps unwittingly—exacerbated the region's distrust of federal protection when he stated cryptically, "Water will forever be an issue in the U.S., particularly the western part. I look forward to discussing this with [the Canadian Prime Minister]."¹³⁰ Supporters of state resource protection observe that political power in the Great Lakes region and Midwestern states has been eroding gradually in favor of the growing population of the southwest.¹³¹ Mindful of this concern, a bipartisan coalition of Michigan state senators developed sixty-six recommendations for state laws to protect the Great Lakes and the groundwater that replenishes them.¹³²

¹²⁸ Letter from Attorney General Jennifer Granholm to Governor John Engler (Sept. 17, 2001), http://www.ag.state.mi.us/press_release/pr10256.htm (on file with the Harvard Environmental Law Review).

¹²⁹ Letter from Attorney General Jennifer Granholm to State Senator Christopher D. Dingell et al. (Sept. 13, 2001), http://www.ag.state.mi.us/press_release/pr10256.htm (on file with the Harvard Environmental Law Review). The Attorney General observed that:

[T]here is no guarantee that the governors of the Great Lakes states will subject the [Perrier] proposal to a substantive review, or that this will satisfactorily address the foreseeable increase in similar proposals Thus, reliance on the WRDA as the *only* means by which the State of Michigan can act to protect and conserve the water resources of our Great Lakes is simply unacceptable. If the governors are not able to achieve a consensus regarding the interpretation of the federal statute, it is difficult to foresee effective enforcement of its requirements in any but the most blatant cases.

Id.

¹³⁰ See *National Battle Looms Over Great Lakes Resource*, THE CABIN, Dec. 16, 2001, http://www.thecabin.net/stories/121601/mon_1216010016.shtml (on file with the Harvard Environmental Law Review) (discussing subsequent headline, "George W. Bush Is at the Door and He Wants Canada's Water," appearing in a major Canadian newspaper); see also Michigan Environmental Council, *Message for the President: Great Lakes Are Not For Sale* (July 18, 2001), at 207.126.116.12/culture/native-news/m13323.html (on file with the Harvard Environmental Law Review).

¹³¹ Andrew Guy, *A "Small" Withdrawal? Perrier Plan Raises Critical Questions About Fresh Water Supply* (Apr. 23, 2001), at <http://www.mlui.org/projects/enviropolicy/guyperrierarticle.html>. Guy observed that "political power is ebbing in the Great Lakes, falling away from Midwest states and towards the gradually drier, and increasingly thirsty southwest. Every Great Lakes state, with the exception of Minnesota, lost congressional representation with the 2000 census. At the same time, Arizona, California, Nevada, Colorado, and Texas all gained representation." *Id.*

¹³² Andrew Guy, *As a Thirsty World Watches, Michigan Considers New Water Security Law* (Apr. 23, 2002), at <http://www.mlui.org/landwater/fullarticle.asp?fileid=15167> (on file

Second, the Perrier controversy revealed concern expressed by Great Lakes citizens that their water be preserved as an undisturbed natural resource.¹³³ This concern was lost on politicians. For example, Great Lakes protection was an important centerpiece of Michigan's 2002 gubernatorial contest. The statements of Democratic candidate Jennifer Granholm were representative:

The next Michigan leadership must embrace the principles of stewardship and sustainability. We must manage and care for our natural resources by recognizing our responsibility to future generations. The next Michigan Governor must establish and advance a conservation and environmental ethos that protects and celebrates our heritage.¹³⁴

Similarly, Republican candidates for governor emphasized the need for a "Marshall Plan" to protect the Great Lakes and for other measures to promote the security of those waters.¹³⁵ Beyond idealism, pragmatic observers fear that the water-as-commodity view may trigger international obligations that preclude environmental protection.¹³⁶ Conversely, water in its natural state may not be subject to free trade agreements, making it

with the Harvard Environmental Law Review); see also Editorial, *Precious Waters: State Senators Commit to Strong Protection; Voters Must Hold Them to Their Promises*, DETROIT FREE PRESS, Jan. 22, 2002, <http://www.freep.com/voices/EDITORIALS/ewater22-20020122.htm> (noting philosophical transformation of State Senator Sikkema, "who recoiled in horror at the idea of water-use laws a couple of years ago, [but who] became convinced of their necessity after hearing about residential wells that have run dry in at least three places after major water users set up shop nearby or increased their capacity").

¹³³ See, e.g., Editorial, *Michiganders' Love of the Lakes Should Come As No Surprise*, DETROIT FREE PRESS, Jan. 22, 2002, <http://www.freep.com/voices/EDITORIALS/ewside22-20020122.htm> (criticizing state lawmakers for failing to anticipate "how much Michiganders love their lakes" and the vehemence with which they would defend the lakes).

¹³⁴ Andrew Guy, *Granholm's Great Lakes Initiative*, GREAT LAKES BULL., Feb. 27, 2002, <http://www.mlui.org/projects/enviropolicy/print/initiativeprint.asp> (on file with the Harvard Environmental Law Review). Attorney General Granholm succeeded in her bid for election as governor of Michigan. See Edward Walsh, *Democrats Gain, But Both Sides Claim Success*, WASH. POST, Nov. 7, 2002, at A41.

¹³⁵ Guy, *supra* note 134 (noting that "candidates in both parties have made the environment a top campaign issue" and "water security—the promise of a robust, clean, fresh supply of aqua for drinking, farming, fishing, manufacturing, and playing—is emerging as the most prominent environmental issue").

¹³⁶ Guy, *supra* note 131. The author stated:

According to the International Joint Commission, when water is "captured" and entered into commerce, it may attract obligations under international agreements. Undoubtedly, Perrier's operation, and others like it, would shift a certain degree of decision-making away from the sovereign state of Michigan and toward the global markets. . . . [However,] water in its natural state (e.g., in a lake, river, or aquifer) is not included within the scope of any of these trade agreements.

easier to protect under federal and state environmental laws.¹³⁷ In the Great Lakes region and elsewhere, water disputes will trigger litigation requiring judges to decide the extent to which the affirmative and dormant commerce clauses permit federal and state regulation of increasingly scarce resources.

III. THE COMMERCE CLAUSE: TWO FACES

Part II discussed the dual nature of actions such as water use and garbage disposal, involving both natural resources and market commodities. This Part contemplates how those two frameworks have been translated into constitutional law: if the Court views water and garbage as objects of commerce, then *Lopez* suggests that federal regulation of such objects falls within the affirmative commerce clause.¹³⁸ Conversely, if the Court views water and landfill sites as natural resources, then it should be more willing to permit state regulation in the name of public health, safety, and welfare, despite the strictures of the dormant commerce clause. Neither of these characterizations has proved entirely sufficient to explain the Court's commerce clause jurisprudence. Instead, the Court has been inconsistent in its understanding, simultaneously limiting both federal and state regulation of natural resources.

A. *History of the Court's Commerce Clause Interpretation*

1. *Early Interpretation: Gibbons v. Ogden*

For its first century, the commerce clause served primarily as a limit upon state legislation that threatened to interfere with interstate commerce, rather than as a basis for federal legislation.¹³⁹ In fact, the first authoritative Supreme Court commerce clause case, *Gibbons v. Ogden*, went beyond the clause's affirmative grant of authority to the federal government, pondering the implications for state regulatory authority.¹⁴⁰ In *Gibbons*, Chief Justice John Marshall invalidated a New York statute that purported to regulate the licensing of steamboats in the waters of New York. Applying a rationale more relevant to the supremacy clause than the commerce clause, the Chief Justice observed that the New York statute was in direct conflict with a federal statute regulating the same activities.¹⁴¹ Justice Marshall envisioned a federal commerce power that was both vast and exclusive, explaining that the federal commerce power "is complete in itself, may be exercised to its utmost extent, and ac-

¹³⁷ *Id.*

¹³⁸ See *supra* notes 1–3 and accompanying text.

¹³⁹ *Lopez*, 514 U.S. at 553–54; see also *id.* at 568–69 (Kennedy, J., concurring).

¹⁴⁰ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁴¹ *Id.*

knowledges no limitations, other than are prescribed in the constitution."¹⁴² The Chief Justice's vision of the commerce power permitted a whittling down of the role of the states in regulating subjects that touch upon interstate commerce.

It was not until the rapid development of industry at the end of the nineteenth century that Congress actively utilized the expansive commerce power, enacting legislation such as the Interstate Commerce Act of 1887¹⁴³ and the Sherman Act of 1890.¹⁴⁴ In response, the courts were faced with the difficult task of determining the outer limits of that federal power. As later acknowledged by several members of the Rehnquist Court, the resulting affirmative commerce clause jurisprudence lacked "a coherent or consistent course of interpretation," in part because "neither the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts."¹⁴⁵

2. Formalism and the Scope of the Commerce Clause

The Court fashioned a morass of tests designed to determine the parameters of the commerce power, experimenting with a variety of formalistic approaches. Under one such test, the Court attempted to distinguish between "manufacturing" (appropriate for state regulation) and "commerce" (appropriate for federal regulation). In the 1888 decision *Kidd v. Pearson*, for example, the Court upheld, against a dormant commerce clause challenge, an Iowa statute prohibiting the in-state manufacture of liquor that would be sold out-of-state.¹⁴⁶ In setting forth its rationale, the Court asserted:

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacturers and commerce. Manufacture is transformation—the forming of raw materials into a change of form for use. The functions of commerce are different.¹⁴⁷

In perhaps the quintessential example of the formalist approach, *United States v. E. C. Knight Co.*, the Court categorically rejected congressional authority to regulate the "manufacture" of sugar, based upon the Court's view that the regulated activity did not involve interstate "commerce."¹⁴⁸

¹⁴² *Id.*

¹⁴³ Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

¹⁴⁴ Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000)).

¹⁴⁵ *Lopez*, 514 U.S. at 568 (1995) (Kennedy, J. concurring, joined by O'Connor, J.).

¹⁴⁶ *Kidd v. Pearson*, 128 U.S. 1 (1888).

¹⁴⁷ *Id.* at 20.

¹⁴⁸ *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

As a result, Congress was powerless to prevent the monopolization of more than ninety-eight percent of the country's refining capacity for domestic sugar.¹⁴⁹

A second formalistic test relied upon the distinction between "local" and "national" activities. In *Cooley v. Board of Wardens*, for example, the Court upheld against a dormant commerce clause challenge, state laws regulating ship pilots.¹⁵⁰ Drawing a distinction between local and national subjects, the Court stated:

Whatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.¹⁵¹

The Court's approval of the challenged Pennsylvania legislation was based upon the perception that the state laws were "local in character and object, an essential exercise of one branch of the police power of the state, to aid and not to regulate commerce."¹⁵²

A third formalistic test limited the federal commerce power to the regulation of only those activities that have a "direct" effect on interstate commerce. This test precluded federal regulation of activities such as wage-setting or price-fixing if their impact upon interstate commerce—however substantial—was deemed to be "indirect." In *Schechter Poultry Corp. v. United States*, for example, the Court struck down federal legislation regulating employee hours and wages, finding that such activities had only an indirect relationship to interstate commerce.¹⁵³ The Court articulated its concern that ignoring the direct-indirect constitutional distinction might create a situation whereby "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."¹⁵⁴

¹⁴⁹ See *Lopez*, 514 U.S. at 570 (Kennedy, J. concurring).

¹⁵⁰ *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851); see also *Lopez*, 514 U.S. at 554.

¹⁵¹ *Cooley*, 53 U.S. at 319.

¹⁵² *Id.* at 306.

¹⁵³ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁵⁴ *Id.* at 548.

3. Realism and the Scope of the Commerce Clause

Beginning about 1937 and faced with the imperatives of the Depression and Roosevelt's New Deal, the Court retreated from these formalistic distinctions in a series of cases that adopted a realism approach. Under this line of analysis, the Court began to examine the actual impact of an activity upon interstate commerce, focusing upon the degree to which the regulated intrastate activity had an interstate effect.¹⁵⁵ In general, the Court has sustained federal regulation of intrastate activities where singly or in the aggregate such local activities have a substantial impact upon interstate commerce. In *Wickard v. Filburn*, the Court sustained a federal statute that imposed quotas upon home-grown wheat.¹⁵⁶ Even though the Court characterized the regulated activity as noncommercial,¹⁵⁷ it held that the wholly local activity of growing wheat for personal consumption was subject to federal regulation if—taken together—all such local farming activities exerted a “substantial economic effect on interstate commerce.”¹⁵⁸ Based upon this “aggregation” or “cumulative effects” doctrine, the Court subsequently described *Wickard* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity.”¹⁵⁹

Three broad categories of activity reflect the realism philosophy. The modern Court recognizes three activities as appropriate subjects for Congressional regulation under the commerce clause power: (1) the use of the channels of interstate commerce; (2) instrumentalities of, or persons or things in, interstate commerce; and (3) activities that “substantially affect” interstate commerce.¹⁶⁰ The first two of these categories represent

¹⁵⁵ See *Lopez*, 514 U.S. at 569, 573–74 (Kennedy, J., concurring) (discussing rejection of categorical tests and Court's “definitive commitment to the practical conception of the commerce power”); *United States v. Darby*, 312 U.S. 100, 118 (1941) (upholding the Fair Labor Standards Act and holding that congressional power under the commerce clause “extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce”); see also *Wickard v. Filburn*, 317 U.S. 111, 123 n.24 (1942), quoted with approval in *Lopez*, 514 U.S. at 573–75 (Kennedy, J., concurring) (disapproving direct-indirect and local-national formalistic distinctions and quoting “[W]hatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution.”); *Standard Oil Co. v. United States*, 221 U.S. 1, 68–69 (1911) (rejecting manufacturing-commerce distinction as “unsound”).

¹⁵⁶ *Wickard*, 317 U.S. 111 (upholding the constitutionality of amendments to the federal Agricultural Adjustment Act of 1938 as applied to the homegrown production and consumption of wheat).

¹⁵⁷ *Id.* at 118 (upholding application of federal statute, even though it “extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm”).

¹⁵⁸ *Id.* at 125.

¹⁵⁹ *Lopez*, 514 U.S. at 560.

¹⁶⁰ See *id.* at 565. In category three, the inclusion of the word “substantially” was de-

the longstanding notion that the federal commerce power permits the federal regulation of interstate activities that cross state lines. The third category reflects a more expansive view of the commerce clause, permitting the regulation of even intrastate activities, provided they have the required nexus to commerce.

This broad view of the affirmative commerce clause prevailed throughout the remainder of the twentieth century, until the Court abruptly changed course in its unexpected 1995 opinion, *United States v. Lopez*, a case limiting "category three" federal regulation.¹⁶¹ Rather than make room for an expanded state regulatory authority, this dilution of the federal commerce power was accompanied by a similar reduction in the scope of state regulatory authority tolerated under the dormant commerce clause doctrine.

B. The Affirmative Commerce Clause: Shrinkage¹⁶²

In 1991, a prominent constitutional law scholar observed, "[A]fter nearly 200 years of government under the Constitution, there are very few judicially enforced checks on the commerce power."¹⁶³ Just four years later, in *United States v. Lopez*,¹⁶⁴ Chief Justice Rehnquist would write on behalf of a 5-4 majority of the Court that "[t]he Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."¹⁶⁵ Accordingly, the *Lopez* Court invalidated a federal statute that purported to prohibit firearms within school zones, finding that such legislation exceeded Congress's authority to regulate under the commerce clause.¹⁶⁶ The Court observed:

liberate. The Court observed:

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

Id. at 559.

¹⁶¹ *Id.* at 559.

¹⁶² Aficionados of the television show *Seinfeld* will recognize the potential horrors associated with the term "shrinkage" experienced by cold-water swimmers. See *Seinfeld: The Hamptons* (NBC television broadcast, May 12, 1994).

¹⁶³ GUNTHER, *supra* note 4, at 93.

¹⁶⁴ 514 U.S. 549. Chief Justice Rehnquist's majority opinion was joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

¹⁶⁵ *Id.* at 566. The Chief Justice also cited with approval the 1819 statement of Chief Justice Marshall that the "[federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted." *Id.* (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819)).

¹⁶⁶ *Lopez*, 514 U.S. at 551.

Admittedly, some of our prior cases have taken long steps down that road [of converting congressional authority under the Commerce Clause to a general police power of the sort retained by the states]. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.¹⁶⁷

The *Lopez* decision marked the end of a sixty-year period during which the Court had rejected every commerce clause challenge to federal legislation that was brought before it.

This Section will consider three recent decisions that indicate the Court's potential willingness to contract the scope of the affirmative commerce clause.¹⁶⁸ A careful examination of the Court's rationale in each case will illuminate the Court's developing stance toward congressional regulation in general and toward federal resource protection in particular.

1. *United States v. Lopez*

In 1995, the Supreme Court halted a sixty-year expansion of commerce clause jurisprudence through the issuance of its decision in *United States v. Lopez*.¹⁶⁹ In its 5-4 decision, the Court found that Congress exceeded its commerce clause authority by enacting the Gun-Free School Zones Act, making it a federal offense for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.¹⁷⁰ Although *Lopez* did not involve natural resources, several aspects of the decision may portend the future of the environmental commerce clause.

First, the *Lopez* Court revived the local-national distinction. Simultaneously, the Court imposed an important new limitation upon the federal commerce authority, restricting it to the regulation of activities that are specifically "economic" in nature.¹⁷¹ Evaluating the challenged federal gun legislation within the parameters of this new economic restric-

¹⁶⁷ *Id.* at 567 (internal citation omitted).

¹⁶⁸ This Article does not engage in a comprehensive analysis of *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Although this case falls within the 1978-2001 time period that this Article defines as relevant to the "environmental commerce clause" and although *Hodel* considers the constitutionality of a federal mining statute under the commerce clause, it was decided prior to the Court's recent efforts to limit the reach of federal commerce authority, as represented by the trio of decisions in *Lopez*, *Morrison*, and *SWANCC*.

¹⁶⁹ 514 U.S. 549 (1995).

¹⁷⁰ *Id.* Chief Justice Rehnquist wrote the Court's opinion, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Kennedy (joined by Justice O'Connor) and Thomas filed concurring opinions. Justices Breyer (joined by Justices Stevens, Souter, and Ginsburg), Stevens, and Souter filed dissenting opinions.

¹⁷¹ *Id.* at 565-66.

tion and the old formalistic distinctions, the Court concluded that “[t]he possession of a gun in a local school zone is in no sense an *economic* activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”¹⁷² The Court was offended by the intrusion of Congress into “local” activities, finding that the respondent was a “local student at a local school.”¹⁷³ Fearing an erosion of the distinction between “what is truly national and what is truly local,” the Court struck down the challenged federal legislation.¹⁷⁴ Thus, not only did the Court reinvigorate the local-national distinction, but it introduced the “economic” restriction that may tip the balance of federalism in favor of the states.

Second, *Lopez* revived the rationale supporting the distinction between activities that directly affect interstate commerce from those that do so only indirectly.¹⁷⁵ In supporting its view, the Court quoted *Schechter Poultry Corp.*, a 1935 decision that represents the last pre-*Lopez* decision invalidating federal regulation on commerce clause grounds:

There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours “is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.”¹⁷⁶

The *Lopez* Court identified specific categories of federal regulation that may be particularly vulnerable to affirmative commerce clause challenges for their failure to directly affect commerce, including criminal law, family law, and education. With respect to criminal law, the Court rejected the general notion that violent crime constitutes commercial or economic activity regulable by Congress, despite the federal petitioner’s arguments that violent crime results in substantial costs to the national economy. The Court rejected such “costs of crime” reasoning as an attempt to subject activities that relate only tenuously to interstate com-

¹⁷² *Id.* at 567 (emphasis added).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 567–68 (citing *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 30 (1937)). Subsequent to *Jones & Laughlin Steel*, however, the Court had stated that the “denomination of an activity as a ‘local’ or ‘intrastate’ activity does not resolve the question whether Congress may regulate it under the Commerce Clause.” *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 281 (1981) (holding that the federal Surface Mining Control and Reclamation Act did not violate the commerce clause, where Congress “rationally determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity”).

¹⁷⁵ See *supra* notes 153–154 and accompanying text.

¹⁷⁶ *Lopez*, 514 U.S. at 567 (quoting *United States v. Schechter Poultry Corp.*, 295 U.S. at 554 (1935) (Cardozo, J., concurring)).

merce to federal regulation.¹⁷⁷ Similarly, the Court rejected the petitioner's efforts to cast the educational process as an economic activity, the impairment of which could lead to a poor learning environment and a less productive citizenry to the detriment of the national economy. The Court dismissed this "national productivity" reasoning as a slippery-slope type of argument that would allow Congress to regulate virtually any activity related to the "economic productivity of individual citizens."¹⁷⁸ Similarly, the Court cited family issues such as marriage, divorce, and child custody as quintessential local activities that should remain beyond the purview of federal regulation, and that relate only tangentially or indirectly to interstate commerce.¹⁷⁹

Why did the Court choose to revive the formalistic categorical distinctions that it had apparently abandoned in prior cases? The Court's rationale may be particularly instructive in answering this question and in attempting to predict the future of the environmental commerce clause. In carving out categories of presumptively "noncommercial activity" that affect interstate commerce only indirectly—criminal law, education, and family law—the Court asserted its desire to protect state sovereignty and traditional spheres of state authority. For example, the Court noted that the "states possess primary authority for defining and enforcing the criminal law."¹⁸⁰ Similarly, the Court pointed to education as an area where "states historically have been sovereign."¹⁸¹ In a concurring opinion, Justice Kennedy did not quarrel with the goal of the unconstitutional federal statute, observing that "it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises."¹⁸² He justified the invalidation of the statute, however, by invoking the categorical distinction that "education is a traditional concern of the States."¹⁸³ In addition, the concurrence articulated the practical rationale that because the States serve as "laboratories for experimentation," they may be able to devise better solutions than the federal government to the problem of guns in the schools.¹⁸⁴

In sum, the modern Court has indicated a propensity to restrict federal regulatory authority over entire subject matter areas based upon its perception that such areas concern "local" issues of traditional concern to

¹⁷⁷ *Id.* at 564. The Court emphasized its view of the indirect relationship between criminal activity and commerce, stating "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

¹⁷⁸ *See id.* at 564.

¹⁷⁹ *See id.*

¹⁸⁰ *Id.* at 561 n.3 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

¹⁸¹ *Lopez*, 514 U.S. at 564.

¹⁸² *Id.* at 581 (Kennedy, J., concurring).

¹⁸³ *Id.* at 580 (citing *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974)).

¹⁸⁴ *See id.* at 581.

the states. This tendency to define federal authority as whatever remains unregulated after the states have chosen to act turns the commerce clause on its head. Under this logic, federal environmental law may be the next subject matter area particularly susceptible to attack because the states have traditionally exercised a dominant role in the regulation of land and water resources.¹⁸⁵

2. United States v. Morrison

Five years after its decision in *Lopez*, the Court issued a second opinion, *United States v. Morrison*,¹⁸⁶ that continued to limit the scope of the commerce clause. The Violence Against Women Act of 1994 provided a federal civil remedy against any person "who commits a crime of violence motivated by gender."¹⁸⁷ When a female college student brought a claim under that statute against two male students who had allegedly raped her, the Fourth Circuit struck down the statute's civil remedy provision as exceeding Congress' commerce clause authority.¹⁸⁸ The Supreme Court was sympathetic to the petitioner's plight, opining that "[i]f the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison."¹⁸⁹ Nevertheless, the Court upheld the judgment of the Fourth Circuit, holding that "under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."¹⁹⁰ The same Justices who comprised the majority in *Lopez* joined the majority in *Morrison*.¹⁹¹

The role of the states in this litigation is noteworthy. Thirty-six states and the Commonwealth of Puerto Rico filed an amicus brief in support of the petitioners and of the federal power to regulate.¹⁹² Prior to the enactment of the Violence Against Women Act, attorneys general in thirty-eight states informed Congress that "[o]ur experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds."¹⁹³ Moreover, during Senate hearings on the proposed legislation, the National Association of Attorneys General joined in unanimous support of the federal statute.¹⁹⁴ Petitioners and state amici

¹⁸⁵ See *SWANCC*, 531 U.S. 159, 173–74 (2001).

¹⁸⁶ 529 U.S. 598 (2000).

¹⁸⁷ *Id.* at 605 (citing 42 U.S.C. § 13981(b) (1994) (repealed pursuant to *Morrison*)).

¹⁸⁸ See *id.* at 601–02.

¹⁸⁹ *Id.* at 627.

¹⁹⁰ *Id.*

¹⁹¹ See *supra* note 170 and accompanying text (discussing majority opinion of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas).

¹⁹² *Morrison*, 529 U.S. at 654 (Souter, J., dissenting).

¹⁹³ *Id.* at 661 (Breyer, J., dissenting).

¹⁹⁴ *Id.* at 653 (Souter, J., dissenting) (citing *Violence Against Women: Victims of the*

sought to sustain the challenged regulation as falling within *Lopez*'s "category three"¹⁹⁵—federal regulation of activities that substantially affect interstate commerce.¹⁹⁶ Despite the strong showing of state support for the federal legislation, the Court struck down the statute's civil remedy provision. The dissent noted wryly, "[I]t is, then, not the least irony of these cases [*Lopez* and *Morrison*] that the States will be forced to enjoy the new federalism whether they want it or not."¹⁹⁷

The Supreme Court's decision in *Morrison* also reflects how the affirmative commerce clause has evolved to promote and protect interstate business and trade.¹⁹⁸ As the Court reflected in 1992:

[T]his [federalism] framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.¹⁹⁹

Justice Souter has remarked "[t]hat the national economy and the national legislative power expand in tandem is not a recent discovery."²⁰⁰

At least three aspects of *Morrison*'s analysis bear comment for their future potential impact upon the environmental commerce clause. First, as in *Lopez*, the Court applied the rationale of the discarded local-national distinction.²⁰¹ As in *Lopez*, the Court's test for national regulation was whether the alleged violent acts of the respondents were "economic" in nature.²⁰² In *Morrison*, the Court concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."²⁰³ The Court supported its reliance upon the local-national distinction by asserting that "thus far in our Nation's history our

System, Hearing on S.15 Before the Senate Committee on the Judiciary, 102d Cong. 37–38 (1991)).

¹⁹⁵ See *supra* note 160 and accompanying text.

¹⁹⁶ *Morrison*, 529 U.S. at 609.

¹⁹⁷ *Id.* at 654 (Souter, J., dissenting).

¹⁹⁸ *Id.* 608 (2000).

¹⁹⁹ *New York v. United States*, 505 U.S. 144, 157 (1992), *quoted in Lopez*, 514 U.S. 549, 574–75 (1995) (Kennedy, J., concurring); see also *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877) (observing that the commerce powers "keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances").

²⁰⁰ *Morrison*, 529 U.S. at 647 n.15 (Souter, J., dissenting).

²⁰¹ See *supra* notes 150–152 and accompanying text.

²⁰² See *Morrison*, 529 U.S. at 610 (commenting that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case").

²⁰³ *Id.* at 613.

cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."²⁰⁴

The dissenting justices accused the majority of "breath[ing] new life into the approach of categorical limitation."²⁰⁵ They noted the difficulties inherent in applying such a formalist test, asking "[d]oes the local street corner mugger engage in 'economic' activity or 'noneconomic' activity when he mugs for money?"²⁰⁶ The dissent also disagreed with the majority's examination of the regulated *activity* itself, rather than the potential *effect* of the activity upon interstate commerce:

[W]hy should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting cause? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?²⁰⁷

Second, *Morrison* revived the direct-indirect distinction of earlier case law.²⁰⁸ The majority acknowledged that Congress had made "numerous findings" regarding the serious impacts of gender-motivated violence and that Congress had found that such violence indeed substantially affects interstate commerce.²⁰⁹ Nevertheless, the Court declined to accept such an indirect or "attenuated" effect upon interstate commerce as a validation of the statute.²¹⁰ The Court rejected what it termed Congress's "but-for-casual chain," noting that such sweeping logic "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."²¹¹ In rejecting Congress's findings, the Court repeated its view in *Lopez* that the regulation of certain subject matter areas—including violent crime, marriage, divorce, and child rearing—should be reserved to the states, despite the significant aggregate effect of

²⁰⁴ *Id.* The court also stated that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.* at 611.

²⁰⁵ *Id.* at 640–41 (Souter, J., dissenting) (noting the prevalence of a non-categorical approach to the commerce clause from the period after 1937 through *Lopez*).

²⁰⁶ *Morrison*, 529 U.S. at 656 (Breyer, J., dissenting).

²⁰⁷ *Id.* at 657.

²⁰⁸ See *supra* notes 153–154 and accompanying text. *Lopez* signaled the first modern revival of the direct-indirect dichotomy. See *supra* notes 175–179 and accompanying text.

²⁰⁹ *Morrison*, 529 U.S. at 614–15.

²¹⁰ *Id.* at 615; see also *id.* at 628–29, 632 (Souter, J., dissenting) (characterizing congressional findings as a "mountain of data . . . showing the effects of violence against women on interstate commerce," demonstrating that such crime costs the national economy at least \$3 billion annually).

²¹¹ *Id.* at 615.

such activities upon the national economy.²¹² Not only does this aspect of *Morrison* bear upon the direct-indirect distinction, but it also indicates the Supreme Court's radically diminishing deference toward findings of Congress.²¹³

Third, *Morrison* restricted the aggregation principle first set forth in *Wickard v. Filburn*.²¹⁴ The Court indicated doubt as to Congress' conclusion that individual acts of violent *intrastate* crime—taken in the aggregate—substantially affect *interstate* commerce.²¹⁵ Even if it were to accept the congressional findings of violent crime's commercial impacts, the Court suggested that the statute might still fail to pass constitutional muster. In a statement that reinforced *Lopez*'s constriction of federal activities that fall into "category three,"²¹⁶ the Court stated, "If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."²¹⁷ Rather, the majority insisted that "in every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn* . . . the regulated activity was of an apparent commercial character."²¹⁸ Justice Thomas's concurrence underscored this point, repeating his *Lopez* argument that the "substantial effects" test should be discarded entirely as contrary to the original understanding of the commerce clause.²¹⁹ The majority stopped short of adopting Justice Thomas's suggestion, stating:

While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history, our cases have upheld

²¹² *Id.* at 615–16 (limiting the specter of federal intrusion into traditional state areas, even though the "aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant").

²¹³ For a critical view of "the Court's intrusion into congressional processes," including its willingness to "wrongly transplant[] to constitutional statutory review the model of judicial review of administrative decisionmaking," see Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

²¹⁴ See *supra* notes 156–159 and accompanying text.

²¹⁵ *Morrison*, 529 U.S. at 614 (arguing that simply "because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so") (quoting *Lopez*, 514 U.S. 549, 557 n.2 (1995)). But see *Morrison*, 529 U.S. at 632 (Souter, J., dissenting) (citing numerous congressional findings relating violence against women to interstate commerce, including the conclusion that violent crime "costs this country at least 3 billion—not million, but billion—dollars a year").

²¹⁶ See *supra* note 160 and accompanying text.

²¹⁷ *Morrison*, 529 U.S. at 615.

²¹⁸ *Id.* at 611 n.4.

²¹⁹ *Id.* at 627 (Thomas, J., concurring).

Commerce Clause regulation of interstate activity only where that activity is economic in nature.²²⁰

In conclusion, the Court stated forcefully, “We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”²²¹

The Court’s rationale in *Morrison* is consistent with that of *Lopez*. In particular, the *Morrison* Court emphasized its solicitude for the protection of areas of traditional state regulation from federal intrusion. The Court claimed that the regulation of certain types of activities—such as intrastate violence and family law—have “always been the province of the States.”²²² Moreover, the Court refused to recognize a general police power in the federal government.²²³

3. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers

In 2001, the Court decided *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”) by the same 5-4 majority that had decided *Lopez* and *Morrison*.²²⁴ In SWANCC, the Court invalidated a regulation purporting to exert federal authority over wetlands frequented by migratory birds.²²⁵ Although the case was decided on narrow statutory grounds, the Court’s dicta cast doubt upon the future of federal efforts to protect land and water resources.

In SWANCC, the Army Corps of Engineers (“the Corps”) had claimed federal regulatory jurisdiction to protect so-called “isolated” wetlands—intrastate ponds that were neither navigable themselves nor tributary or adjacent to navigable waters.²²⁶ A consortium of Illinois mu-

²²⁰ *Id.* at 613.

²²¹ *Id.* at 617–18. *But see id.* at 613 (noting that “we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases by finding a relationship to interstate commerce”).

²²² *Morrison*, 529 U.S. at 618 (labeling this idea as “one of the few principles that has been consistent since the [Commerce] Clause was adopted”); *see also id.* at 615–16 (citing family law as “area[] of traditional state regulation”).

²²³ *Id.* at 618. The Court stated, “Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” *Id.*; *see also id.* at 627 (Thomas, J., concurring) (favoring elimination of the “substantial effects” test in order to avoid a federal appropriation of the state police power).

²²⁴ SWANCC, 531 U.S. 161 (2001). The majority opinion was written by Chief Justice Rehnquist and joined by Justices O’Connor, Scalia, Kennedy, and Thomas.

²²⁵ *Id.*

²²⁶ SWANCC, 531 U.S. at 161; *see also* 33 C.F.R. § 328.3 (2001) (Corps regulation asserting Clean Water Act jurisdiction over intrastate waters that are tributary or adjacent to jurisdictional waters).

municipalities had planned to develop an abandoned sand and gravel pit into a solid waste disposal facility, filling in permanent and seasonal ponds located on the 500-acre site.²²⁷ When the Corps claimed regulatory jurisdiction under the Clean Water Act²²⁸ and denied permission to proceed with the project, the municipalities brought suit. They alleged that a) the Corps had exceeded its statutory authority in interpreting the Clean Water Act to regulate isolated wetlands, and b) Congress lacked power under the commerce clause to grant such regulatory jurisdiction.²²⁹

The Court cited the Corps's finding that more than one hundred bird species utilized the site, including migratory birds that crossed state lines.²³⁰ The Court acknowledged the Seventh Circuit's conclusion that the municipalities' planned destruction of the natural habitat of migratory birds—when *aggregated* with the similar activities of other developers—would have a substantial impact upon interstate commerce because “each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds.”²³¹ Nevertheless, the Court held that Congress did not intend to regulate waters such as those on the petitioner's site and that the Corps had exceeded its statutory authority in attempting to exercise jurisdiction over the area.²³² In reaching its statutory-based holding, the Court indicated its “prudential desire not to needlessly reach constitutional questions.”²³³ Ignoring its own admonition, the Court proceeded to discuss the constitutional ramifications of the case in dicta.²³⁴ Whatever their status, the Court's constitutional comments provide important clues that reveal the present attitude toward federal protection of natural resources.

²²⁷ *SWANCC*, 531 U.S. at 162–63.

²²⁸ 33 U.S.C. § 1344 (2000).

²²⁹ *SWANCC*, 531 U.S. at 165–66.

²³⁰ *Id.* at 164; *see also id.* at 194 (Stevens, J., dissenting) (citations omitted) (noting that the proposed landfill site is home to “the second-largest breeding colony of Great Blue Herons in northeastern Illinois and several species of waterfowl protected by international treaty and Illinois endangered species laws”).

²³¹ *SWANCC*, 531 U.S. at 166.

²³² *Id.* at 172–74.

²³³ *Id.* at 172–73. The Court stated:

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

Id.

²³⁴ The Court itself indicated that its decision was based solely upon statutory, rather than constitutional, grounds. *See id.* at 162 (summarizing the questions presented and stating that “[w]e answer the first [statutory] question in the negative and therefore do not reach the second [constitutional question]”).

The Court repeated its now-familiar concern that the judiciary should not tolerate “federal encroachment upon a traditional state power.”²³⁵ Whereas *Lopez* and *Morrison* had sought to protect non-environmental categories of state regulation such as criminal law, family law, and education, *SWANCC* specifically enumerated land and water use as areas within “the States’ traditional and primary power.”²³⁶ Ironically, although the Clean Water Act authorizes the states to administer their own wetlands permitting program,²³⁷ Illinois had declined to develop such a program.²³⁸ Furthermore, the Court engaged in a somewhat novel interpretation of the Clean Water Act, emphasizing the states’ role in controlling water pollution and Congress’s desire to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.”²³⁹ The Court declined to acknowledge, however, that the impetus for enacting the statute was the growing recognition that water pollution is a problem of national scope and that prior state efforts to correct the problem had failed.²⁴⁰

SWANCC is also noteworthy for its explicit validation of federal regulation of activities that “substantially affect” interstate commerce and for its continued approval of the “aggregation doctrine,”²⁴¹ despite the willingness of Justice Thomas to eliminate both justifications for federal regulation.²⁴² This validation is relevant to the question of the future of the environmental commerce clause because most federal environmental

²³⁵ *Id.* at 173. *But see id.* at 191 (Stevens, J., dissenting) (distinguishing between traditional state land use regulation and federal environmental laws and stating, “The CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power.”).

²³⁶ *SWANCC*, 531 U.S. at 174. The Court also reiterated that “[r]egulation of land use [is] a function traditionally performed by local governments.” *Id.* at 174 (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

²³⁷ 33 U.S.C. § 1344(g)(1) (2000).

²³⁸ *SWANCC*, 531 U.S. at 192 (Stevens, J., dissenting) (noting that “[i]t is particularly ironic for the Court to raise the specter of federalism while construing a statute that makes explicit efforts to foster local control over water regulation” and concluding that “[b]ecause Illinois could have taken advantage of the opportunities offered to it through § 404(g), the federalism concerns to which the majority adverts are misplaced”). At this time, only Michigan and New Jersey have assumed administration of the section 404 program. *See* U.S. Environmental Protection Agency, *Wetlands: State or Tribal Assumption of the Section 404 Permit Program*, <http://www.epa.gov/owow/wetlands/facts/fact23.html> (last modified July 3, 2002) (on file with the Harvard Environmental Law Review).

²³⁹ *SWANCC*, 531 U.S. at 166–67 (quoting 33 U.S.C. § 1251(b) (1994)).

²⁴⁰ *See, e.g.*, 33 U.S.C. § 1251(a) (listing seven “national” goals and policies related to pollution prevention); Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873 (1993) (noting the evolving understanding of the need for national water regulation). The *SWANCC* dissent criticized the majority for ignoring the history of federal water regulation. *SWANCC*, 531 U.S. at 179 (Stevens, J., dissenting) (describing the Clean Water Act as “the first truly comprehensive federal water pollution legislation”).

²⁴¹ The Court indicated that to resolve the constitutional issues that had been raised, “we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.” *SWANCC*, 531 U.S. at 173.

²⁴² *See supra* notes 219–223 and accompanying text.

statutes that survive a commerce clause challenge rely precisely upon these two rationales.²⁴³

However, the *SWANCC* Court tempered its approval of this type of federal law by indicating its interest in closely examining challenged federal regulations for the requisite nexus to *commerce* or *commercial* activities.²⁴⁴ In the case at bar, the Court expressed skepticism that the Corps's attempted regulation was aimed at the commercial activity of municipal landfill development, dismissing the government's proffered rationale as mere belated rationalization:

These arguments [that the commerce power allows the federal government to protect migratory birds and the wetlands upon which they depend] raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature."²⁴⁵

The Court's inclusion of the word "object" may indicate an ongoing shift in its approach. Previously, the Court has invalidated federal regulations that apply to wholly intrastate, noncommercial activities.²⁴⁶ Federal environmental laws might be rendered vulnerable to commerce clause challenges if the Court shifts its focus from the nature of regulated *activities* (such as violence in the schools, violence against women, or commercial landfill development) to the nature of protected *objects* (such as school children, women, migratory birds, or wetlands). In other words, whereas *activities* proscribed on environmental grounds are often commercial in nature,²⁴⁷ the *objects* of such environmental protection invariably have little to do with economics or commerce. In fact, virtually any federal law with noncommercial social or environmental goals could be invalidated under this logic. Such a result would be consonant with Jus-

²⁴³ See, e.g., John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,421 (1995); William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,741 (2001); Turner, *supra* note 5.

²⁴⁴ See *supra* notes 171-174 and accompanying text.

²⁴⁵ *SWANCC*, 531 U.S. at 173.

²⁴⁶ See *supra* notes 171-172 and accompanying text.

²⁴⁷ See *SWANCC*, 531 U.S. at 193 (Stevens, J., dissenting) (arguing that "the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons").

tice Thomas's emphatic view that the "Federal Government has nothing approaching a police power."²⁴⁸

C. The Dormant Commerce Clause: Expansion

On its face, the commerce clause contains only an affirmative grant of power to Congress, remaining silent as to the effect—if any—of this grant upon the authority of the states to regulate in areas that might overlap with the federal sphere of commerce authority.²⁴⁹ The Constitution enumerates the affirmative commerce power of the federal government in one brief sentence: "Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."²⁵⁰ The putative goal of this clause was to guarantee "an area of trade free from interference by the States."²⁵¹

And yet, since its 1824 decision in *Gibbons v. Ogden*,²⁵² the Court has read into the clause an implied limitation upon state regulation.²⁵³ In *Gibbons*, Chief Justice John Marshall addressed perhaps the easiest circumstance under which the federal commerce clause might invalidate state legislation: where the latter creates an actual conflict with legislation enacted pursuant to the authority of the former.²⁵⁴ In so doing, Chief Justice Marshall engaged the Court in an uncertain enterprise, one with which it has struggled for more than 175 years.

This Section will evaluate eight of the Court's most recent decisions involving state natural resource laws that potentially run afoul of the dormant commerce clause. The discussion will highlight the views of individual justices in an effort to find a pattern in the seeming chaos of the cases. Of all the current members of the Court, Chief Justice Rehnquist has been perhaps most consistent in his advocacy of state authority.

In each of the natural resource cases discussed below, Chief Justice Rehnquist has supported the challenged state regulation, repeatedly ad-

²⁴⁸ *Lopez*, 514 U.S. 549, 584–85 (1995) (Thomas, J., concurring); see also *Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.").

²⁴⁹ The commerce clause provides, "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several states . . ." U.S. CONST. art. I, § 8, cl. 3.

²⁵⁰ *Id.*

²⁵¹ See, e.g., *Boston Stock Exch. v. St. Tax Comm'n*, 429 U.S. 318 (1977).

²⁵² 22 U.S. (9 Wheat.) 1 (1824). The *Gibbons* case is discussed in *supra* notes 140–142 and accompanying text.

²⁵³ At least one member of the current Supreme Court would characterize the dormant commerce clause analysis in *Gibbons* as mere dicta. See *Tyler Pipe Indus. v. Wash. St. Dep't of Revenue*, 483 U.S. 232, 259–60 (1987) (Scalia, J., dissenting) (citing *Case of the State Freight Tax*, 15 Wall. 232 (1873) as the first time that "the doctrine of the negative Commerce Clause was formally adopted as holding of this Court").

²⁵⁴ See *Gibbons*, 22 U.S. at 1.

vocating the view that states retain at least a "residuum of power" to make laws that affect interstate commerce, as long as those laws do not conflict with federal legislation.²⁵⁵ This is particularly true, according to Chief Justice Rehnquist, where the state law is "directed to legitimate local concerns," such as the protection of health, safety, and the environment.²⁵⁶

In contrast, the opinions of Justices Scalia and Thomas have been the most inconsistent puzzle of all the justices on the Court. Both have asserted strong objections to the very foundations of the dormant commerce clause. For example, in his first term on the Court, Justice Scalia asserted forcefully that the grant of federal authority under the commerce clause is not exclusive and contains "no correlative denial of power over commerce to the States."²⁵⁷ In an impassioned dissent to the invalidation of a manufacturing tax imposed by the State of Washington, Justice Scalia stated:

In sum, . . . the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.²⁵⁸

²⁵⁵ See *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 116 (1994) (Rehnquist, C.J., dissenting) (quoting *Hunt v. Wash. St. Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977)). Chief Justice Rehnquist participated in each of the eight decisions analyzed in Part III.C.2-4, voting in favor of state resource protection in every case.

²⁵⁶ See *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 368 (1992) (Rehnquist, C.J., dissenting).

²⁵⁷ *Tyler Pipe Indus.*, 483 U.S. at 260-61 (Scalia, J., dissenting) (acknowledging that over the course of more than 150 years, "our applications of the [dormant commerce clause] doctrine have, not to put too fine a point on the matter, made no sense").

²⁵⁸ *Id.* at 265. Justice Scalia advocates an abandonment of the "balancing" approach used in negative commerce clause cases, "leav[ing] essentially legislative judgments to the Congress." *Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring in judgment invalidating state tolling statute of limitations, on narrow ground that record contains a "brief implication that there is here a discrimination unjustified by any state interest"). If the Court, in addition to Congress, must become involved in the enforcement of the dormant commerce clause, then Justice Scalia would support only a very limited test under which "a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose. When such a validating purpose exists, it is for Congress and not us to determine it is not significant enough to justify the burden on commerce." *Id.* at 898; see also *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment) (complaining that an inquiry into whether the burden imposed by a state statute on commerce is excessive in relation to its claimed benefits is "ill suited to the judicial function and should be undertaken rarely if at all").

Similarly, Justice Thomas favors only a narrow application of the dormant commerce clause. He joined a dissent written by Justice Scalia, which asserted that they would enforce a self-executing negative commerce clause only on the basis of *stare decisis* to produce "a clear rule that honors the holdings of our past decisions but declines to extend the rationale that produced those decisions any further."²⁵⁹ Despite their unenthusiastic view of the dormant commerce clause, both justices have consistently invalidated all state natural resource regulations that they have considered in challenges brought under the dormant commerce clause.²⁶⁰

1. Doctrinal Incoherence

Some have interpreted the affirmative commerce clause as granting exclusive authority to Congress to regulate commerce.²⁶¹ Under this view, when Congress does not act, the courts may step in to enforce the dormant aspect of the commerce clause by invalidating state legislation that regulates commerce. Although the Constitution contains no express restraints against state legislation, "[t]he bounds of these restraints . . . have emerged gradually in the decisions of [the Supreme Court] giving effect to the . . . basic purpose [of the commerce clause.]"²⁶² This dormant commerce clause is premised upon the "principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control . . . the economy, . . . [which] has as its corollary that the states are not separable economic units."²⁶³

Other commentators argue that the constitutional silence as to the correlative scope of state authority provides no basis for judicial invalidation of state legislation. As Justice Scalia asserts, the growth of federal authority would soon obliterate all state laws remotely impacting commerce:

The exclusivity rationale is infinitely less attractive today than it was [in the past.] Now that we know interstate commerce em-

²⁵⁹ *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 207–12 (1994) (Scalia, J. concurring, joined by Thomas, J.). The concurrence explained that state regulation should be invalidated on commerce clause grounds in only two situations: (1) where the state law "facially discriminates" against interstate commerce, or (2) where the state law is "indistinguishable from a type of law previously held unconstitutional by this Court." *Id.* at 210.

²⁶⁰ See *infra* Part IV and Appendix. See generally WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1068–88 (11th ed. 2001) (containing table of the members of the U.S. Supreme Court and the term of each).

²⁶¹ In 1852, for example, Justice Curtis wrote, "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Coley v. Bd. of Wardens*, 53 U.S. 299, 319 (1852).

²⁶² *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

²⁶³ *Id.* at 623 (quoting *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 537–38 (1949)).

braces such activities as growing wheat for home consumption, . . . and local loan sharking, . . . it is more difficult to imagine what state activity would survive an exclusive Commerce Clause than to imagine what would be precluded.²⁶⁴

Justices Scalia and Thomas would limit severely the judicial enforcement of the dormant commerce clause, striking state legislation "if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose."²⁶⁵

Under the "negative" or "dormant" aspect of the commerce clause, the Court's avowed purpose is to prohibit "economic protectionism," defined as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."²⁶⁶ Although even the most charitable of observers would not describe this area of the law as "coherent,"²⁶⁷ one can assert with some confidence that the Court generally conducts three levels of analysis. First, the Court determines whether the *purpose* of state law is to regulate interstate commerce. If so, the state regulation is *per se* unconstitutional.²⁶⁸ Second, the Court determines whether a state regulation *discriminates* against interstate commerce either on its face or in practical effect.²⁶⁹ If so, then the statute will be subject to a demanding level of scrutiny under which "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available reasonable nondiscriminatory means."²⁷⁰ Finally, where a nondiscriminatory state statute nevertheless *burdens* interstate commerce, the Court will

²⁶⁴ *Tyler Pipe Indus., Inc. v. Wash. St. Dep't of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., dissenting).

²⁶⁵ *Bandix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring); see *Eule*, *supra* note 9, at 427-28 (urging the Court to invalidate state commercial regulation under a model "gauged to preserve processes rather than to protect products," a model that is "more comfortably embedded in the privileges and immunities clause of Article IV than in the commerce clause of Article I"); see also *supra* notes 257-259 and accompanying text.

²⁶⁶ See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994).

²⁶⁷ See *Lawrence*, *supra* note 9, at 397 (compiling epithets for the Court's current dormant commerce clause jurisprudence, including "anachronistically metaphysical," "hopelessly confused," and a "quagmire").

²⁶⁸ See, e.g., *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970) (setting forth a general rule to determine the validity of a state statute affecting interstate commerce, and assuming as a prerequisite to validity that the statute's "effects on interstate commerce are only incidental" and that the statutory goal is "to effectuate a legitimate local public interest"); see also *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion) (asserting that the commerce clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state").

²⁶⁹ *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

²⁷⁰ *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 332, 336 (1974)) (upholding state ban against the importation of baitfish, despite facial discrimination, where state successfully proved its inability to prevent the spread of parasites and adulteration of its native fish species by any other method).

apply the so-called "balancing test" articulated in *Pike v. Bruce Church*.²⁷¹ In this situation, the Court will presume a state regulation is constitutional "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."²⁷² These tests have engendered confusion. Beyond the issues of which test *should* be employed and which test *has been* employed, scholars dispute whether *any* test should be employed, questioning the very pedigree of the dormant commerce clause.²⁷³

Given the confusion surrounding the dormant commerce clause, it is not surprising that no one seems able to chart the Court's course with any degree of precision. For the period 1953 through 1975, the Supreme Court decided only eight dormant commerce clause cases involving state regulations other than tax measures.²⁷⁴ During the last quarter of the twentieth century, the number of decisions increased significantly. For example, the scope of the dormant commerce clause was the central issue in an additional ten decisions handed down between 1976 and 1981,²⁷⁵ and still ten more decisions written between 1986 and 1989.²⁷⁶ The

²⁷¹ 397 U.S. at 142. The *Pike* test applies primarily to the state regulation, rather than taxation, of interstate commerce. See, e.g., *Eule*, *supra* note 9, at 479 (noting unique complexities of tax legislation and resultant tendency to resist synthesis of regulation and taxation cases); *Regan*, *supra* note 9, at 1101 (noting special feature of tax cases that makes it necessary to split them off as a category in dormant commerce clause analysis).

Some have questioned whether the *Pike* test actually involves balancing at all. See *Regan*, *supra* note 9, at 1092 ("For almost fifty years, scholars have urged the Court to 'balance' in dormant commerce clause cases; and the scholars have imagined that the Court was following their advice. The Court has indeed claimed to balance, winning scholarly approval. . . . Despite what the Court has said, it has not been balancing"); see also *Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgement) (asserting that, in application, the Court's so-called balancing test "is more like judging whether a particular line is longer than a particular rock is heavy").

²⁷² *Pike*, 397 U.S. at 142. Ironically, the *Pike* Court set forth a test relevant to *nondiscriminatory* state legislation, but then proceeded to analyze the legislation at bar under the strict scrutiny test applicable to *discriminatory* legislation. See *id.* at 145 (assuming legitimacy of asserted state interest, but nevertheless concluding that "[e]ven where the State is pursuing a clearly legitimate local interest, this particular burden on commerce [requiring business operations to be performed in the home State that could more efficiently be performed elsewhere] has been declared to be virtually per se illegal").

²⁷³ See, e.g., *Epstein*, *supra* note 10, at 30 (observing that, "[a]s an interpretive matter, the case for the dormant commerce clause seems weak" and "[j]udged by the interpretive standards that I have invoked to condemn the expansive reading of the affirmative commerce clause, the case for the dormant commerce clause flunks").

²⁷⁴ See *Eule*, *supra* note 9, at 425-26. Some commentators have isolated the state tax cases as particularly confusing and problematic. *Id.* at 426 n.2 (noting that the author's case statistics are concerned solely with state regulatory measures and omit "the equally confusing and often more complex problem of dormant commerce clause limitations on state taxation").

²⁷⁵ *Id.* at 426 n.4.

²⁷⁶ See David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Potential Unsettling of the "Well-Settled Principles,"* 22 U. Tol. L. Rev. 675, 680-94 (1991) (tallying the judicial results and concluding that "the state regulators won five and the interstate commerce challengers won five").

significance of this "flurry of activity" remains unclear.²⁷⁷ Increased judicial involvement might signal a corresponding increase in judicial willingness to strike down discriminatory state regulations that have any impact upon interstate commerce.²⁷⁸ This hypothesis is certainly true in the context of state efforts to protect natural resources. With only one exception,²⁷⁹ the Court has invalidated every state law protecting water or land resources that it has considered between 1978 and the end of the twentieth century.

2. *The Water Cases*

The Court has long recognized the regulation of water resources as a power that is uniquely within the purview of the states. In 1908, Justice Holmes stated in *Hudson County Water Co. v. McCarter*:²⁸⁰

[It] appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of . . . a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.²⁸¹

Despite this longstanding understanding of the right of states to protect their natural resources, the Court has invalidated the only state water law that has come before it in a challenge under the dormant commerce clause.²⁸² In striking the state statute, the Court articulated a vision of water as commodity, rather than natural resource.

In its 1982 decision *Sporhase v. Nebraska*, the Court held unconstitutional, under the dormant commerce clause, a Nebraska statute that

²⁷⁷ Eule, *supra* note 9, at 426 (noting "flurry" of judicial activity and questioning whether it is "doctrinal" or merely "numerical").

²⁷⁸ At least Justices Scalia and Thomas would support the view that the Court has been expanding the scope of the dormant commerce clause, striking as invalid an increasing range of state regulations. See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 207-08 (1994) (Scalia, J., concurring, joined by Thomas, J.) (supporting invalidation of particular Massachusetts pricing order under challenge, but complaining that the Court has adopted an "expansive view of the Commerce Clause [that] calls into question a wide variety of state laws that have hitherto been thought permissible").

²⁷⁹ See *Maine v. Taylor*, 477 U.S. 131, 131 (upholding state ban against the importation of live baitfish from other states in order to protect the State's wild fish population from potential harm caused by nonnative species).

²⁸⁰ *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) (upholding against dormant commerce clause challenge New Jersey prohibition against the out-of-state transport of state waters).

²⁸¹ *Id.* at 356.

²⁸² See *Sporhase v. Nebraska*, 458 U.S. 941 (1982). One lower court has viewed *Sporhase* as "implicitly overruling" *Hudson County Water. State v. Ader*, 1992 WL 119194, at *3 (Conn. Super. Ct. May 15, 1992) (unpublished opinion).

limited the withdrawal of groundwater from any well within the state for use in neighboring states.²⁸³ Central to this holding was the Court's view that water is an "article of commerce."²⁸⁴ According to Justice Stevens's majority opinion,²⁸⁵ groundwater should be regulated at the federal level:

[Nebraska's claim that] ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation. . . . Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.²⁸⁶

The Court insisted upon this conceptual commodification of water, despite the Nebraska Supreme Court's finding that state law established that Nebraska groundwater does not constitute "a market item freely transferable for value among private parties, and therefore [is] not an article of commerce."²⁸⁷ Nineteen years later in *SWANCC*, Justice Stevens would again articulate a broad view of the federal commerce power, arguing that the affirmative commerce clause empowers the federal government to pass legislation for the protection of wetlands, recognizing both the hydrological and ecological connection between wetlands and waterways of national interest.²⁸⁸ By that time, however, the composition of the Court had changed and Justice Stevens's view was relegated to the dissenting minority.²⁸⁹

In *Sporhase* the Court was sympathetic to Nebraska's "genuine" and "unquestionably legitimate" interest in preserving its diminishing groundwater resources.²⁹⁰ Moreover, the Court recognized that state authority to regulate scarce water resources for the protection of the public health and safety "is at the core of its police power," particularly where the availability of the resource resembled a "good publicly produced" by the state through its conservation efforts.²⁹¹ Nevertheless, the Court invalidated the statute's reciprocity requirement, which forbade the use of Nebraska water in any state that did not grant reciprocal rights to withdraw and transport groundwater from that state into Nebraska.²⁹² In

²⁸³ *Sporhase*, 458 U.S. at 941.

²⁸⁴ *Id.* at 954.

²⁸⁵ Justice Stevens was joined by Justices Blackmun, Brennan, Burger, Marshall, Powell, and White. *Id.* at 942.

²⁸⁶ *Id.* at 953-54.

²⁸⁷ *Id.* at 944 (quoting *Sporhase v. Nebraska*, 305 N.W. 2d 619 (Neb. 1981)).

²⁸⁸ See *SWANCC*, 531 U.S. 161, 176 n.2 (2001) (Stevens, J., dissenting).

²⁸⁹ Justice Stevens' dissent in *SWANCC* was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 174.

²⁹⁰ *Sporhase v. Nebraska*, 458 U.S. 941, 954-55 (1982).

²⁹¹ *Id.* at 956-57.

²⁹² *Id.* at 944 (citing NEB. REV. STAT. § 46-613.01 (1978)).

particular, the Court held that the Nebraska statute was discriminatory on its face and that Nebraska had failed to demonstrate that such discrimination was narrowly tailored to serve its legitimate conservation and preservation interests.²⁹³

In dissent, Justice Rehnquist, joined by Justice O'Connor, articulated a vision that he has repeated consistently over the past two decades. Rejecting the view of water as a commodity, Justice Rehnquist argued passionately for the recognition of the states' "quasi-sovereign" interest in protecting local water, air, and forests.²⁹⁴ At a certain point, according to Justice Rehnquist, a state may "so regulate a natural resource [essential not only to the well-being but often to the very lives of its citizens] as to preclude that resource from attaining the status of an 'article of commerce' for the purposes of the negative impact of the Commerce Clause."²⁹⁵ The dissenting justices may have been motivated by a desire to promote state resource protection. Alternatively, they may have acted out of hostility toward federal regulation, as indicated by the dissent's criticism of the majority for its "gratuitous" suggestion that Congress possesses constitutional authority to regulate the use and overdraft of groundwater.²⁹⁶

The legacy of *Sporhase* is uncertain. At one level, it retains precedential value for the proposition that state water resources are articles of commerce, potentially subject to federal regulation.²⁹⁷ And yet, in its 2001 decision in *SWANCC*, the Court indicated in dicta that federal regulation of wetlands—certainly a subset of water resources—might be beyond the scope of the affirmative commerce clause.²⁹⁸ Three explanations are possible to reconcile the two decisions. First, it may be simply that the factual distinction between groundwater and wetlands calls for a different constitutional result.²⁹⁹ In fact, the Court suggested that the status of water as market commodity might vary from state to state.³⁰⁰ Alternatively, the pendulum may be swinging back toward a federalist view under which the Court prefers state regulation to federal manage-

²⁹³ *Sporhase*, 458 U.S. at 958.

²⁹⁴ *Id.* at 963 (Rehnquist, J., dissenting).

²⁹⁵ *Id.* at 963.

²⁹⁶ *Id.* at 961; see *supra* note 286 and accompanying text (majority's suggestion that Congress may regulate state groundwater resources).

²⁹⁷ See *supra* note 286 and accompanying text.

²⁹⁸ See *SWANCC*, 531 U.S. 159 (2001).

²⁹⁹ The *SWANCC* decision concerned so-called "isolated" wetlands located entirely within one state. See *id.* at 159.

³⁰⁰ *Sporhase*, 458 U.S. at 949–50 (noting rule under Texas law that a landowner "could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced" and concluding that "ground water, once withdrawn, may be freely bought and sold in States that follow this [Texas] rule, in those States ground water is appropriately regarded as an article of commerce").

ment.³⁰¹ As a final possibility, the Court may be adopting a laissez faire attitude toward the environment, disfavoring regulation at both the state and federal levels.³⁰² As discussed in Part IV, the votes of the individual justices reflect all three of these explanations. In combination, however, the decisions of nine justices have combined in a manner that often precludes environmental regulation at both the federal and state levels.

3. The Garbage Cases

In response to the critical shortage of landfill space, many states have enacted measures designed to limit the importation or processing of garbage from outside the state.³⁰³ Predictably, those who stand to profit financially through the operation of landfills or the transport of garbage have opposed such measures as obstructions of commerce. In each of its five late-twentieth century decisions considering the scope of state authority to enact such measures, the Court invalidated the challenged state regulation.³⁰⁴

This Section will analyze the following five cases as a group, seeking to extract themes common to all in an effort to understand the modern Court's treatment of the dormant aspect of the environmental commerce clause: (1) *City of Philadelphia v. New Jersey* (1978), (2) *Chemical Waste Management, Inc. v. Hunt* (1992), (3) *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources* (1992), (4) *Oregon Waste Systems v. Department of Environmental Quality* (1994), and 5) *C & A Carbone v. Town of Clarkstown* (1994).³⁰⁵ Each case concerns local efforts to exclude "foreign" waste, which includes solid waste or hazardous materials brought into a county or state from outside the jurisdiction.

Two of the cases, *Chemical Waste Management* and *Oregon Waste Systems*, involved differential surcharges under which foreign waste brought into the state for disposal was assessed a higher charge than that

³⁰¹ The SWANCC Court emphasized that land and water use are areas within "the States' traditional and primary power." 531 U.S. at 174.

³⁰² See discussion *infra* Part IV.B.

³⁰³ See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 385-86 (1994) (observing that number of waste transfer and treatment cases heard by the Court has escalated, indicative of the difficulty of state undertakings to develop "trash control systems that are efficient, lawful, and protective of the environment"); see *supra* Part II.A.

³⁰⁴ See *C & A Carbone*, 511 U.S. 383 (invalidating local flow control ordinance requiring all solid waste to be processed at a designated transfer station before leaving the municipality); *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93 (1994) (invalidating state statute imposing extra fee on waste brought into Oregon from other states for disposal); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353 (1992) (prohibiting importation of foreign waste for disposal unless explicitly authorized by county waste management plan); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992) (invalidating state statute imposing extra fee on hazardous waste brought into Alabama from other states for disposal); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating New Jersey statute that prohibited the import of solid waste).

³⁰⁵ See *supra* note 304.

imposed upon waste generated within the state.³⁰⁶ The Court found such differential surcharges to be invalid, "even if the surcharge merely recoups the costs of disposing of out-of-state waste."³⁰⁷

Two other cases, *City of Philadelphia* and *Fort Gratiot Sanitary Landfill*, considered state statutes that prohibited the importation of foreign waste into the jurisdiction.³⁰⁸ The Court's disapproval of the challenged state law in *City of Philadelphia* is not surprising because the state statute clearly discriminated on its face against other states, flatly prohibiting the importation of certain wastes originating outside New Jersey.³⁰⁹ More surprising, in *Fort Gratiot Sanitary Landfill*, the Court also invalidated a Michigan statute that prohibited landfill operators from accepting wastes produced outside their home counties and thus equally restricting both in-state and out-of-state waste generators.³¹⁰

The final case, *C & A Carbone*, concerned a town flow control ordinance requiring the deposit of all waste within the community at a single town-sponsored transfer station.³¹¹ The Court struck down the ordinance, even though it applied to all waste within the town's authority, whether generated locally or in foreign jurisdictions.³¹²

These garbage decisions comprise the bulk of the modern Court's treatment of the dormant commerce clause vis-à-vis natural resources.³¹³ As such, if they are of any explanatory value, they suggest a growth of the dormant commerce clause, with a concomitant contraction of the states' ability to regulate within the sphere of interstate commercial activity. On two occasions, the Court acknowledged explicitly this evolutionary expansion of the doctrine,³¹⁴ in both cases over a vigorous dissent. In the only such dissent to capture more than two votes,³¹⁵ Justice Souter

³⁰⁶ See *Chem. Waste Mgmt.*, 504 U.S. 334; *Or. Waste Sys.*, 511 U.S. 93.

³⁰⁷ *Or. Waste Sys.*, 511 U.S. at 93, 100. The Court stated, "[E]ven if the surcharge merely recoups the costs of disposing of out-of-state wastes in Oregon, the fact remains that the differential charge favors shippers of Oregon waste over their counterparts handling waste generated in other States. In making that geographic distinction, the surcharge patently discriminates against interstate commerce." *Id.* at 100.

³⁰⁸ See *City of Philadelphia*, 437 U.S. at 617; *Fort Gratiot*, 504 U.S. at 353.

³⁰⁹ See *City of Philadelphia*, 437 U.S. at 617.

³¹⁰ See *Fort Gratiot*, 504 U.S. at 354.

³¹¹ *C & A Carbone*, 511 U.S. at 383 (1994).

³¹² *Id.* at 383-84.

³¹³ In addition to the garbage cases, the Court has issued one decision relevant to states' authority to regulate water resources, see *supra* Part III.C.2, and two decisions relevant to states' authority to limit the importation of live fish from other states. See *infra* Part III.C.4.

³¹⁴ See *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 95 (1994) (reaching question left open in *Chemical Waste Management* whether a state differential surcharge might be valid if based on the costs of disposing of wastes from other states); *C & A Carbone*, 511 U.S. at 386 (describing decision as "perhaps a small new chapter" in the course of recent cases involving waste transfer and treatment, but contending that the current decision "rests nevertheless upon well-settled principles of our Commerce Clause jurisprudence").

³¹⁵ See *C & A Carbone*, 511 U.S. at 410 (Souter, J., dissenting, joined by Rehnquist,

chastised the majority for "greatly extending the Clause's dormant reach" by "strick[ing] down an ordinance unlike anything this Court has ever invalidated."³¹⁶

The garbage decisions are of interest in at least three respects. First, in every case the Court struck down the relevant state law, applying the "strictest scrutiny" in its review of the state regulation, without considering the putative local benefits of the offending measure. Under this "virtually *per se* rule of invalidity,"³¹⁷ laudable environmental motives or achievements become irrelevant.³¹⁸ Under this approach, in each of the five garbage cases, the Court acknowledged that environmental protection and careful waste disposal practices may constitute legitimate state interests but nevertheless invalidated the challenged state measures that attempted to protect those interests.³¹⁹

Second, the garbage cases are important because they suggest that the Court may be expanding its definition of "commerce" in the context of the dormant commerce clause. In 1978, the Court held in *City of Philadelphia* that the interstate movement of solid wastes constitutes

C.J., and Blackmun, J.). No more than two justices dissented from any of the other dormant commerce clause decisions discussed in this Article. See Appendix.

³¹⁶ *C & A Carbone*, 511 U.S. at 410–11. Compare *supra* 259 and accompanying text (Justices Scalia and Thomas assert intention to enforce a "self-executing negative commerce clause only on the basis of *stare decisis*").

³¹⁷ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978) ("Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.").

³¹⁸ See, e.g., *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (asserting that "[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry").

³¹⁹ See *City of Philadelphia*, 437 U.S. 625–26, 628 (invalidating New Jersey statute that "[o]n its face . . . imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space," and citing with approval appellants' contention that challenged state statute "while outwardly cloaked 'in the currently fashionable garb of environmental protection,' . . . is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents"); *Chem. Waste Mgmt.*, 504 U.S. at 342–43 (finding that Alabama statute imposing additional hazardous waste disposal fee on all waste generated outside the state impermissibly discriminates on its face against interstate commerce, despite Court's acknowledgement that Alabama may possess a legitimate interest in protecting its citizens from toxic wastes and in conserving the state's environment and natural resources); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361, 363 (1992) (finding that Michigan statute limiting counties' ability to accept out-of-county waste for disposal impermissibly discriminates on its face against interstate commerce, and striking statute despite Michigan's contention that statute constitutes a comprehensive health and safety regulation rather than economic protectionism of the state's limited landfill capacity); *Or. Waste Sys.*, 511 U.S. at 93, 100, 107 (finding that Oregon statute imposing surcharge on out-of-state waste deposited in Oregon landfills impermissibly discriminates on its face against interstate commerce, and striking statute despite Oregon's contention that statutory goal was the protection of landfill space as an increasingly scarce natural resource); *C & A Carbone*, 511 U.S. at 391–93 (finding that town ordinance requiring deposit of all nonhazardous waste at specified state-sponsored transfer station impermissibly discriminates on its face against interstate commerce, and striking ordinance despite town's contention that regulatory goal was to ensure the safe handling and proper treatment of solid waste).

"commerce," even if the wastes are "valueless" and possess no commercial worth.³²⁰ The Court explained that "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."³²¹ Through that refinement, the Court expanded the constitutional strictures placed upon the states, precluding them from interfering with both the movement of garbage and the business of disposal.

Finally, the garbage cases reveal the Court's broad view of when state statutes have a discriminatory purpose, the touchstone for application of the rule of virtually per se facial invalidity.³²² In its analysis, the Court expresses only a limited tolerance of state regulations ostensibly designed to protect land and water from out-of-state waste disposal, viewing many such measures as having a discriminatory purpose. These cases may represent evidence of a developing trend under which the Court is expanding the definition of discrimination. Alternatively, the Court may doubt, as a factual matter, the sincerity of the environmentally protective motives asserted by the states, viewing them as mere subterfuge designed to cover discrimination against out-of-state interests.³²³ If the second explanation is true, then the garbage cases may be limited by their facts, possessing no doctrinal significance.³²⁴

A close analysis of the Court's discrimination rhetoric, however, lends support to the first of these two hypotheses—that indeed the Court is expanding its view of discriminatory purpose. At the very least, the Court has staunchly enforced the most restrictive aspects of the definition as applied in prior cases. In this regard, the garbage cases remind us that there is no de minimis exception and that even minor burdens upon interstate commerce constitute forbidden discrimination. In *Oregon Waste Systems*, the majority dismissed Chief Justice Rehnquist's dissenting view that "an increase of about \$0.14 per week for the typical out-of-state solid waste producer" seems "a small price to pay for the right to deposit your 'garbage, rubbish, refuse . . . sewage sludge, septic tank and cesspool pumpings, . . . manure, . . . dead animals, [and] infectious

³²⁰ *City of Philadelphia*, 437 U.S. at 621–23.

³²¹ *C & A Carbone*, 511 U.S. at 391.

³²² See *supra* note 270 and accompanying text.

³²³ In 1986, University of Michigan Professor Donald H. Regan argued convincingly that for the fifty years preceding the publication of his article, the Court had been concerned solely with preventing "purposeful economic protectionism"—that is, striking regulations borne of improper motives. Regan, *supra* note 4, at 1092. Professor Regan asserted, "Not only is this what the Court has been doing, it is just what the Court should do. This and no more." *Id.* However, Professor Regan's analysis considered cases decided only through 1986, excluding four of the five cases considered in this Section.

³²⁴ I am certainly not the first person to ponder whether or not a specific subset of the Court's dormant commerce clause decisions possess doctrinal significance. See, e.g., Eule, *supra* note 9, at 426–27 (noting 1976–1981 "flurry of activity" in Court's dormant commerce jurisprudence, and questioning whether the ten decisions issued during that period represent a resurgence that is "doctrinal" or merely "numerical").

waste' on your neighbors."³²⁵ Rather, the majority described the dissent's suggestion as a "novel understanding of discrimination" that runs counter to the Court's precedents, "which clearly establish that the degree of a differential burden or charge on interstate commerce 'measures only the extent of the discrimination' and 'is of no relevance to the determination of whether a State has discriminated against interstate commerce.'"³²⁶

Moreover, the Court counts as discrimination even *incidental* burdens placed upon commerce. In this regard, the Court has created a difficult dilemma for the states. On the one hand, the Court acknowledges that its past opinion reflected an awareness that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people."³²⁷ And yet, the Court imposes such a heavy burden of proof upon the states that it becomes virtually impossible for the states to prove that their intentions are legitimate. In *Chemical Waste Management*, for example, neither the Court nor petitioner disputed the legitimate environmental purposes served by Alabama's differential surcharge.³²⁸ Nevertheless, the Court invalidated the statute because Alabama was unable to sustain its nearly insurmountable burden of showing that the presumed discrimination was justified by a factor unrelated to economic protectionism.³²⁹ Likewise, in *Oregon Waste Systems*, the Court interpreted as discriminatory the state's imposition of a differential surcharge for the purpose of recouping the costs of foreign waste disposal.³³⁰

In addition, the garbage cases clearly warn that the states' attempts to solve their environmental problems at the local level may constitute discrimination. The Court repeatedly asserts that "[n]o state may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade"³³¹ nor engage in "economic Balkanization."³³² In at least this aspect of its discrimination analysis, the Court appears to break new ground. Both *Fort Gratiot Sanitary Landfill* and *C & A Carbone* found discrimination by regulatory schemes that im-

³²⁵ *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 109 (1994) (Rehnquist, C.J., dissenting) (citations omitted). Chief Justice Rehnquist is referring to the costs passed on to individual household residents ("producers"), rather than charges incurred by commercial waste-haulers. *Id.* at 109 n.2.

³²⁶ *Id.* at 100 n.4 (citations omitted).

³²⁷ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

³²⁸ *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 343 (1992).

³²⁹ *Id.* at 345. In dissent, Chief Justice Rehnquist defended Alabama's asserted environmentally protective motives: "States may take actions legitimately directed at the preservation of the State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators." *Id.* at 349.

³³⁰ See *supra* note 319 and accompanying text.

³³¹ See *Chem. Waste Mgmt.*, 504 U.S. at 339-40.

³³² *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994); see also *City of Philadelphia*, 437 U.S. at 623-24 (reflecting an "alertness to the evils" of economic protectionism and isolation).

posed restrictions upon both in-state and out-of-state waste generators. In *C & A Carbone*, the majority acknowledged a distinction between laws that favor all local actors at the expense of out-of-state competitors and laws that favor one specific local proprietor above all others, but concluded that "this difference just makes the protectionist effect of the ordinance more acute."³³³ This expansion of the definition of discrimination prompted Justice O'Connor to file a concurring opinion in *C & A Carbone*, rather than join the majority opinion.³³⁴ Justice O'Connor expressly concluded that the town's flow control ordinance does not discriminate against interstate commerce because the town's "garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal."³³⁵ In dissent, Chief Justice Rehnquist, Justice Souter, and Justice Blackmun echoed Justice O'Connor's conclusion that "the exclusion worked by [the town ordinance] bestows no benefit on a class of local private actors, but instead directly aids the government in satisfying a traditional governmental responsibility."³³⁶

4. *The Fish Cases*

The Court has also considered two challenges under the dormant commerce clause to state fishery protection. In *Hughes v. Oklahoma*, the State of Oklahoma had enacted a statute prohibiting the export of minnows taken from the state's waters to be sold out of state.³³⁷ The statute seemed to contemplate a distinction between minnows as resources and minnows as commerce, applying the ban only to minnows naturally occurring within the state's boundaries and not to the export of stock minnows produced in commercial hatcheries.³³⁸ The Court struck the Oklahoma statute, overruling its previous decision in *Geer v. Connecticut* that had held that the states "own" the wildlife within their borders for the benefit of all their citizens.³³⁹ In so doing, the *Hughes* Court held that henceforth "wild animals should be considered according to the same general rule applied to state regulations of other natural resources."³⁴⁰

Seven years later, the Court sustained the State of Maine's ban against the import of live baitfish. The Court's decision, *Maine v. Tay-*

³³³ *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

³³⁴ *See id.* at 401 (O'Connor, J., concurring in the judgment).

³³⁵ *Id.* at 404. Justice O'Connor argued that "the town's ordinance is unconstitutional not because of facial or effective discrimination against interstate commerce, but rather because it imposes an excessive burden on interstate commerce." *Id.* at 401.

³³⁶ *Id.* at 411 (Souter, J., dissenting).

³³⁷ *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

³³⁸ *Id.* at 325.

³³⁹ *Id.* at 326 (overruling *Geer v. Connecticut*, 161 U.S. 519 (1896)).

³⁴⁰ *Id.* at 335 (eliminating the "anomaly, created by the decisions distinguishing *Geer*, that statutes imposing the most extreme burdens on interstate commerce (essentially total embargoes) were the most immune from challenge").

lor,³⁴¹ is significant because it represents the only dormant commerce clause case considered in this Article where the law survived challenge. The Court held that Maine's statute discriminated on its face against interstate commerce and therefore subjected the statute to strict scrutiny.³⁴² Despite this searching level of review, the Court upheld the statute, finding that it promoted the legitimate purpose of preventing the importation of baitfish parasites that might adversely affect Maine fish.³⁴³ Furthermore, the Court held that there were no less discriminatory means available to the state because testing procedures for baitfish parasites had not yet been developed.³⁴⁴ The Court concluded with perhaps the strongest statement in favor of state resource conservation that it uttered in any of the environmental commerce decisions considered in this Article:

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.³⁴⁵

Taylor is also noteworthy for its deference to the trial court as fact finder and its determinations concerning the State's legitimate purpose and lack of less discriminatory motives.³⁴⁶

D. The Curious Relationship of the Two Commerce Clauses

This Section will attempt to determine the relationship between the two clauses, limited to the context of the Court's environmental decisions as a discrete and manageable subset of the commerce clause jurisprudence.³⁴⁷ Two options are logically possible.

First, it may be that the regulation of commerce is a sort of zero-sum game under which an expansion of the constitutionally permissible authority of either federal or state sovereign must be offset by a corre-

³⁴¹ 477 U.S. 131 (1986). Justice Stevens was the lone dissenter.

³⁴² *Id.* at 138.

³⁴³ *Id.* at 151.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 151-52 (citations omitted). Of the justices who joined in the *Taylor* majority opinion, only Justices Rehnquist and O'Connor remain on the Court at the time of this writing.

³⁴⁶ *Taylor*, 477 U.S. at 144-45.

³⁴⁷ I will leave to another day the daunting task of assimilating all of the Court's affirmative and dormant commerce cases and contexts beyond natural resources law. For an excellent synthesis and reconceptualization of both aspects of the clause between the Civil War and World War II, see Cushman, *supra* note 13.

sponding loss of regulatory authority by the other sovereign. This view is premised upon the assumption that federal authority is *exclusive*, leaving no area at the margins for state regulation. Further, this option seems to require the Court to recognize and apply a consistent definition of "commerce" applicable in both the affirmative and dormant realms of inquiry, such that Congress may regulate this commerce and the states may not. Statements of James Madison at the Constitutional Convention provide perhaps the strongest historical evidence supporting this notion of exclusivity: "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States."³⁴⁸ In *Gibbons v. Ogden*, Chief Justice Marshall suggested in dicta that Congress may possess an exclusive authority to regulate commerce that precludes similar efforts by the states.³⁴⁹

As a second logical possibility, the Court's affirmative commerce jurisprudence may be independent of its dormant commerce decisions. Accordingly, the Court could bring about a constriction (or expansion) of the scope of federal regulatory authority without triggering an inversely proportional change in the ability of the states to legislate. This approach presumes that federal regulatory authority over commerce is shared with the states, rather than exclusive of them, as long as the states do not impose an unacceptable burden upon interstate commerce.

1. Rhetoric: What the Court Has Said

The Court's dormant commerce decisions of at least the last quarter of the twentieth century advance the view of a concurrent commerce

³⁴⁸ *Tyler Pipe Indus. v. Dep't of Revenue*, 483 U.S. 232, 263-64 (1987) (Scalia, J., dissenting) (arguing for nonexclusive federal authority over commerce, but acknowledging Madison's comments as the "strongest evidence in favor of a negative Commerce Clause—that version of it which renders federal authority over interstate commerce exclusive") (citing 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 625 (1937)).

³⁴⁹ *Gibbons v. Ogden*, 22 U.S. 1 (1824) (invalidating New York's grant of a steamboat monopoly under the supremacy clause, finding a conflict with federal laws licensing the coastal trade). Chief Justice Marshall summarized the appellant's argument in favor of exclusive federal regulation:

[It] has been contended by counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. . . . [That regulation] produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

Id. at 209. In words that were not essential to his holding in the case, the Chief Justice observed, "There is great force in this argument, and the court is not satisfied that it has been refuted." *Id.*

authority that is shared by federal and state governments.³⁵⁰ In *Sporhase v. Nebraska*, the Court stated:

Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional. For the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, of the uses of water within the State, or indeed, of interstate commerce in water.³⁵¹

Similarly, in the garbage cases the Court acknowledged that the existence of a federal regulatory power does not end the inquiry into whether or not state regulation of commerce is valid.³⁵² In these dormant cases, the Court has advanced an increasingly broad definition of interstate "commerce" that encompasses the interstate movement of groundwater resources³⁵³ and waste materials, regardless of whether they possess commercial value.³⁵⁴

More recently, the Court's affirmative commerce decisions of the 1990s articulate a less expansive definition of "commerce." In particular, the Court has cited the regulation of education, violent crime, family law, water, and land use as traditional state powers outside the range of federal commerce authority.³⁵⁵ These pronouncements are susceptible to at least two interpretations. The Court may desire simply to limit the opportunities for conflict between federal and state law, in order to avoid the invalidation of the latter under the supremacy clause of the constitu-

³⁵⁰ See Cushman, *supra* note 13, at 1147. Professor Cushman chronicles the "decoupling" of the affirmative and dormant clauses in the late 1930s:

But state and local regulations affecting . . . commerce "directly" had long been held to transgress the implicit limitations of the Commerce Clause. Were the growth of federal power not to obliterate state and local regulatory authority by implication, dormant Commerce Clause jurisprudence would have to be placed upon a new footing. It would have to be decoupled from its affirmative counterpart, to abandon the categories the two had shared, and regulatory authority over such matters would have to become concurrent.

Id.

³⁵¹ 458 U.S. 941, 954 (1982); see *supra* Part III.C.2.

³⁵² See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1994) (noting that the "real question is whether the [local] flow control ordinance is valid despite its undoubted effect on interstate commerce"); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978) (stating that the "opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people").

³⁵³ See *supra* note 284 and accompanying text.

³⁵⁴ See *supra* notes 320-321 and accompanying text.

³⁵⁵ See *supra* notes 177-179 and accompanying text.

tion.³⁵⁶ For example, in their *Lopez* concurrence, Justices Kennedy and O'Connor voted to overturn federal guns in the schools legislation because "[t]he statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term."³⁵⁷

Alternatively, these statements may indicate an impending sea change in the Court—a willingness to expand the sphere of state regulatory authority at the expense of federal authority. There is some evidence that the Court will *first* determine the full sphere of influence that should be reserved to the states and then permit federal commerce regulation only to the extent that it does not interfere with the regulatory authority of the states. For example, in cutting back the federal commerce power for the first time in sixty years, Chief Justice Rehnquist's majority opinion in *Lopez* expressed his concern that "the scope of the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."³⁵⁸ The Court expressed a similar sentiment in *Morrison*, explaining that it was cutting back on the scope of federal regulation in order to reserve a broader sphere of authority for the states.³⁵⁹ Reminding us that "[t]he Constitution requires a distinction between what is truly

³⁵⁶ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding.").

³⁵⁷ *Lopez*, 514 U.S. 549, 583 (1995). The justices provide additional discussion of their rationale, indicating their support of concurrent federal and state jurisdiction:

The tendency of this [federal] statute to displace state regulation in areas of traditional state concern is evident from its territorial operation. There are over 100,000 elementary and secondary schools in the United States . . . Each of these now has an invisible federal zone extending 1,000 feet beyond the . . . boundaries of the school property. In some communities no doubt it would be difficult to navigate without infringing on those zones. Yet throughout these areas, school officials would find their own programs for the prohibition of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule.

Id.

³⁵⁸ *Id.* at 557 (citations omitted) (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)).

³⁵⁹ In dissent, Justice Souter argued that, contrary to the majority's view, "we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme." *Morrison*, 529 U.S. 598, 639 n.12 (2000) (Souter, J., dissenting).

national and what is truly local,"³⁶⁰ the Court asserted that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."³⁶¹ Therefore, the Court held the federal law unconstitutional and stated, "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."³⁶²

2. Reality: What the Court Has Done

With only one exception, the Court has invalidated every natural resource protection regulation that it has considered between 1978 and 2001 in the context of a commerce clause challenge.³⁶³ In so doing, the Court has simultaneously struck federal, state, and local legislation. A survey of this admittedly narrow sampling of cases indicates that the affirmative environmental commerce clause has been shrinking, while its negative counterpart has been expanding. The net result of these decisions, if continued into the future, may be a dearth of environmentally protective legislation at both levels of government. Although the Court has utilized the rationale of federalism, the consequences of its actions have served a philosophy that goes beyond mere federalism. Rather, the modern Court's anti-statist proclivity may be characterized more appropriately as *laissez faire*, rather than federalist, in tone.

A comparison of the Court's positive and negative commerce clause decisions reveals two curious trends. First, despite its rhetoric that land and water regulation are areas reserved to the states, the Court's dormant commerce holdings have limited the states' ability to enact such legislation in every case that has come before the Court. This sleight of hand has been accomplished through the rhetorical device of commodification. That is, the dormant decisions create a dual identity for land and water,

³⁶⁰ *Id.* at 617-18 (Rehnquist, C.J.).

³⁶¹ *Id.* at 618.

³⁶² *Id.*

³⁶³ For a tabular depiction of the Court's holdings, see Appendix (column two). In making this sweeping statement, I have excluded some dormant clause cases that may be viewed only tangentially as natural resource cases. See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (striking Oklahoma statute requiring coal-fired electric utilities to burn a mixture containing at least ten percent coal mined in Oklahoma, an act that caused Wyoming to suffer a consequential loss of tax revenue generated by the severance of its coal). This exercise necessarily involves an element of discretion, and some readers may disagree with my judgment. The exception to which I refer is *Maine v. Taylor*, 477 U.S. 131 (1986), where the Court upheld a state ban on the importation of live baitfish from other states. Justice Stevens was the lone dissenter in that case. *Id.* Although the Court found that the state fish import ban discriminated on its face against interstate commerce, the Court held that Maine had sustained its burden of demonstrating that the statute served a legitimate local purpose that could not be served as well by any available nondiscriminatory method.

both as natural resource and as market commodity. Although the former may be the stuff of state authority, the latter falls squarely within the scope of the federal commerce power. In *Sporhase v. Nebraska*, for example, the Court insisted on commodifying the state's water resources, despite a contrary view expressed by the state's own supreme court.³⁶⁴ The federal Court premised its view of water as commodity in part upon the observation that "ground water, once withdrawn, may be freely bought and sold" under the relevant state law.³⁶⁵ The precise dividing line between commodity and resource remains unclear, allowing the Court simultaneously to preclude federal regulation of resources and state regulation of commodities.³⁶⁶

A second curious aspect of the environmental commerce decisions relates to the order in which the modern Court has considered the respective spheres of federal and state authority. Under the traditional view of federalism, courts first determine whether the activity under consideration falls within the commerce authority expressly granted to the federal government by the Constitution. Only then should the courts ask whether an overlapping state regulation unduly interferes with that federal authority.³⁶⁷ The modern environmental commerce clause decisions invert this scheme, as the Court often begins its analysis by identifying spheres of regulation traditionally reserved to the states.³⁶⁸ Then, the Court proceeds to invalidate *federal* regulations that impinge upon the domain of the states, thereby violating their sovereign autonomy. In *SWANCC*, for example, the Court opined that the federal government lacks authority over certain water bodies because it would result in "a significant impingement of the States' traditional and primary power over land and water use."³⁶⁹ This solicitude for excluding the federal government from the province of the states is reminiscent of Tenth Amendment analysis, rather than commerce clause jurisprudence.³⁷⁰ In fact, it appears

³⁶⁴ 458 U.S. 941 (1982).

³⁶⁵ *Id.* at 949.

³⁶⁶ *See, e.g., SWANCC*, 531 U.S. 159, 172-73 (2001) (suggesting in dicta that intrastate waters such as ponds, mudflats, and water-filled abandoned sand and gravel pits lack an interstate commercial aspect, even though "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds" that depend upon such water sources).

³⁶⁷ State statutes may be invalidated under the supremacy clause where they conflict with an exercise of federal commerce authority. Where the federal power has not been exercised, state laws may be invalidated nevertheless under the dormant commerce clause. *See supra* notes 275-279 and accompanying text.

³⁶⁸ *See supra* notes 189-191, 235, 255-257 and accompanying text.

³⁶⁹ *SWANCC*, 531 U.S. at 174; *see also Morrison*, 529 U.S. 598, 617-18 (2000) ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce The regulation and punishment of intrastate violence . . . has always been the province of the States.").

³⁷⁰ The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively,

that Justice Thomas would conflate the two lines of inquiry. He bemoans the Court's case law, which "could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution."³⁷¹

The Court accomplishes this inversion of federal and state roles through a subtle rhetorical technique that utilizes two slightly different definitions of "commerce." In the dormant commerce cases, the Court has adopted a broad view of commerce that precludes state regulation. In *City of Philadelphia*, for example, the Court indicated that a commodity is anything that moves across state lines, including valueless wastes or harmful items.³⁷² Conversely, in the affirmative commerce cases, the Court has recently applied a narrow view of commerce that precludes federal regulation. In *Morrison*, for example, the Court defined commerce as including only economic activities that have a direct effect on interstate commerce.³⁷³ These inconsistent definitions contravene the Court's previous rejection of such a two-tiered definition of commerce.³⁷⁴

IV. THE ENVIRONMENTAL COMMERCE CLAUSE: TWO VISIONS

Part III surveyed the Court's affirmative and dormant commerce clause decisions, relying primarily upon the holding of each decision. This Part will depart from a treatment of the Court as a monolithic whole and focus instead upon the votes of the individual justices in each of the

or to the people." U.S. CONST. amend. X. *See generally Lopez*, 514 U.S. 549, 567 (1995) ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated.").

³⁷¹ *Lopez*, 514 U.S. at 589 (Thomas, J., concurring) ("Our construction of the scope of congressional authority has the . . . problem of coming close to turning the Tenth Amendment on its head"). *But see Morrison*, 529 U.S. at 648 n.18 (Souter, J., dissenting) (criticizing the "special solicitude for 'areas of traditional state regulation'" as relying upon "not the text of the Constitution but on what has been termed the 'spirit of the Tenth Amendment'" (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting))).

³⁷² 437 U.S. 617, 621-23 (1978); *see also supra* note 320 and accompanying text. More recently, in *C & A Carbone*, the Court modified the *City of Philadelphia* definition, noting that "the article of commerce here is not so much the waste itself, but rather the service of processing and disposing of it." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-92 (1994).

³⁷³ 529 U.S. at 610-13; *see also supra* notes 206-208 and accompanying text. In concurrence, Justice Thomas expressed his view that commerce should include only economic activities themselves, and not activities that impact interstate commerce, no matter how strong or direct the impact. *Id.* at 627; *see supra* notes 223-224 and accompanying text.

³⁷⁴ *See City of Philadelphia*, 437 U.S. at 621-22. The Court rejects the New Jersey Supreme Court's view that "there may be two definitions of 'commerce' for constitutional purposes," including a "very sweeping concept" for the purpose of sustaining federal regulation, and a "much more confined reach" for the purpose of restricting state legislation. *Id.* (quoting *Hackensack Meadowlands Dev. Comm'n v. Mun. Sanitary Landfill Auth.*, 348 A.2d 505, 514 (N.J. 1975)).

eleven decisions that comprise the modern environmental commerce clause.³⁷⁵ In its affirmative commerce clause decisions, the Court has voted in a consistent 5-4 pattern against the challenged exercise of federal authority. In contrast, the dormant commerce clause decisions reveal no such consistent pattern.

Overall, an examination of individual voting patterns reveals two primary visions held by members of the Court. The first contemplates the maintenance of a careful balance of power between federal and state governments, with each subscribing justice showing a marked preference for one level of government over the other. The second vision favors a market economy, relatively free of both federal and state restrictions, at least in the context of environmental protection. The line of demarcation between these two views depends, in large measure, upon whether the justice views land and water as natural resources, or as free market commodities.

A. *The Traditional Federalism: Supporting Government Regulation of Natural Resources*

The wisdom of a messianic insistence on a grim sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind. It is the Court which has imposed the policy under the dormant Commerce Clause, a policy which bodes ill for the values of *federalism* which have long animated our constitutional jurisprudence.

—Chief Justice Rehnquist (1994)³⁷⁶

Five members of the Court have taken a consistent view as to which sovereign—federal or state—should regulate the use of natural resources. Chief Justice Rehnquist has been the staunchest advocate of state environmental regulation, voting consistently to sustain state regulation and to strike federal regulation.³⁷⁷ Conversely, Justices Stevens, Souter, Gins-

³⁷⁵ In terms of the Appendix, Part III relied primarily upon the holdings set forth in column two; Part IV will rely upon the data contained in columns three to eleven, focusing upon the views of the nine justices that currently comprise the Court: Chief Justice Rehnquist and Justices Breyer, Ginsburg, Kennedy, O'Connor, Scalia, Souter, Stevens, and Thomas.

³⁷⁶ *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting) (emphasis added).

³⁷⁷ Chief Justice Rehnquist dissented from the Court's invalidation of state regulation in *City of Philadelphia, Hughes, Spohase, Chemical Waste Management, Fort Gratiot, Oregon Waste Systems*, and *C & A Carbone*. In *Taylor*, he also voted in favor of state regulation, joining the majority in that case. In contrast, he voted to strike federal regulation in *Lopez, Morrison*, and *SWANCC*.

burg, and Breyer have been firm supporters of federal resource protection, voting consistently to sustain federal regulation and to strike state regulation.³⁷⁸ Each of these justices has recognized land and water as important resources that merit protection in their natural state. This Section will describe the philosophy of these five Justices as the "traditional federalism," the idea that natural resource regulation is a proper role of government, regardless of whether one would cast a federal or state actor into that role.

Chief Justice Rehnquist has advanced a creative but lonely vision of state environmental regulation. He has chastised the Court for refusing to recognize a distinction between forbidden economic protectionism and legitimate health and safety regulation. In *Oregon Waste Systems*, he observed:

Far from neutralizing the economic situation for Oregon producers and out-of-state producers, the Court's analysis turns the Commerce Clause on its head. Oregon's neighbors will operate under a competitive advantage against their Oregon counterparts as they can now produce solid waste with reckless abandon and avoid paying concomitant state taxes to develop new landfills and clean up retired landfill sites.³⁷⁹

In his view, state legislation should be allowed to protect health, safety, and the environment without attracting the fatal label of "protectionism."

Chief Justice Rehnquist has supported state environmental laws based upon his perception of the environment as a resource, rather than as a commodity. That is, he has disagreed with the Court's characterization of waste as a market commodity, beyond the scope of state regulation.³⁸⁰ Justice Rehnquist has explained that "[w]hile I understand that solid waste is an article of commerce, it is not a commodity sold in the marketplace; rather it is disposed of at a cost to the State. Petitioners do not buy garbage to put in their landfills; solid waste producers pay peti-

³⁷⁸ Justice Stevens voted to strike state regulation in each of the environmental dormant commerce clause cases considered in this Article: *City of Philadelphia*, *Hughes*, *Sporhase*, *Taylor* (casting the only dissenting vote), *Chemical Waste Management*, *Fort Gratiot*, *Oregon Waste Systems*, and *C & A Carbone*. Justice Ginsburg, joining the Court on August 10, 1993, voted against state regulation in the two dormant environmental commerce clause cases in which she participated. Justice Souter, joining the Court on October 19, 1990, would fall neatly into this camp, but for his support of one state law in his dissent in *C & A Carbone*. See COHEN & VARAT, *supra* note 260, at 1688 (listing terms of service for each member of the Supreme Court). Justice Breyer did not join the Court until after all of the environmental dormant commerce clause cases discussed in this Article had been decided. However, he participated in each of the Court's affirmative commerce clause decisions, voting consistently in favor of federal regulation in *Lopez*, *Morrison*, and *SWANCC*.

³⁷⁹ See *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 112 (1994) (Rehnquist, C.J., dissenting); see also *supra* Part III.C.3.

³⁸⁰ See *Or. Waste Sys.*, 511 U.S. at 112 (Rehnquist, C.J., dissenting).

tioners to take their waste."³⁸¹ Instead, he believes that the garbage cases are about natural resources rather than commodities, and he focuses upon landfills rather than upon garbage. Similarly, he views water as a natural resource subject to state regulation, particularly where state law "so regulate[s] a natural resource as to preclude that resource from attaining the status of an 'article of commerce' for the purposes of the negative impact of the Commerce Clause."³⁸²

Like Chief Justice Rehnquist, the other four "traditional federalists" believe that government protection of land and water is critically important. In contrast to the Chief Justice, however, these four justices support federal, rather than state, environmental protection. For example, in *SWANCC*, those justices began their dissenting plea for federal protection with a stark reminder that in 1969, "the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire."³⁸³ Despite that fact, those justices lamented that "the Court takes an unfortunate step that needlessly weakens our principal safeguard against toxic water."³⁸⁴

Whereas Chief Justice Rehnquist emphasizes the noncommercial nature of the land and water *resources* that the states seek to protect,³⁸⁵ the opposing four justices highlight the commercial nature of the environmental *threats* that the federal government seeks to control.³⁸⁶ For example, the pro-federal justices view the filling of a wetland as an activity that "is almost always undertaken for economic reasons."³⁸⁷ Despite their differences, each of these justices believes that the invalidation of legislation at one level of government does not preclude the passage of similarly protective legislation by the opposing sovereign.

B. *The Newest Federalism: A Return to Laissez Faire?*

It is, then, not the least irony of these cases [*Lopez* and *Morrison*] that the States will be forced to enjoy the new federalism whether they want it or not.

—Justice Souter (2000)³⁸⁸

³⁸¹ *Id.* at 112 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 (1978)).

³⁸² *Sporhase v. Nebraska*, 458 U.S. 941, 953 (1982) (Rehnquist, J., dissenting).

³⁸³ *SWANCC*, 531 U.S. 159, 174 (2001) (Stevens, J., dissenting).

³⁸⁴ *Id.* (referring to the Clean Water Act).

³⁸⁵ *See, e.g., supra* note 54 and accompanying text.

³⁸⁶ *See SWANCC*, 531 U.S. at 193–94 (Stevens, J., dissenting) (distinguishing the state role in land use planning from the federal role in environmental regulation).

³⁸⁷ *Id.* at 193.

³⁸⁸ *Morrison*, 529 U.S. 654 (2000) (Souter, J., dissenting) (discussing Court's disapproval of federal legislation supported by the states themselves, with the result that certain undesirable activities such as violence against women may be beyond the effective reach of both state and federal regulation).

In contrast to the willingness of the five justices discussed in the previous Section to support government protection of natural resources, Justices Scalia, Thomas, and Kennedy—and often Justice O'Connor—have demonstrated hostility to all regulation, both federal and state, designed to protect the natural environment.³⁸⁹ This voting pattern may reflect hostility toward government regulation in general or toward environmental protection in particular. Although the environmental commerce clause cases contain no overt language demonstrating environmental hostility, these four justices have consistently voted against environmental protection in non-commerce clause contexts, including decisions involving standing, Fifth Amendment takings, and the Tenth Amendment.³⁹⁰

This Section describes the view of these four justices as the “newest federalism.” This highlights an important irony: although five justices have recently joined together in a series of cases limiting the *federal* commerce power for the express purpose of preserving the rights of the states,³⁹¹ of that group only Chief Justice Rehnquist has demonstrated a commitment to that rationale by supporting *state* regulatory authority against dormant commerce clause challenges.³⁹² As a result, the four newest federalists have joined with Chief Justice Rehnquist to effectively preclude environmental regulation at both the federal and state levels.³⁹³

³⁸⁹ See Appendix. Justices Scalia, Thomas, and Kennedy voted against environmental laws in each of the environmental commerce clause cases considered by this Article in which they participated. Joining the Court on September 26, 1986, Justice Scalia voted against state regulation in *Chemical Waste Management, Fort Gratiot, Oregon Waste Systems*, and *C & A Carbone*, and voted against federal regulation in *Lopez, Morrison*, and *SWANCC*. Joining the Court on October 23, 1991, Justice Thomas voted against state regulation in *Chemical Waste Management, Fort Gratiot, Oregon Waste Systems*, and *C & A Carbone*, and against federal regulation in *Lopez, Morrison*, and *SWANCC*. Joining the Court on February 18, 1988, Justice Kennedy voted against environmental laws in each of the seven environmental commerce clause cases in which he participated.

Justice O'Connor fits well within this group, but for her pro-state votes in *Sporhase* (dissent) and *Taylor*. Joining the Court on September 25, 1981, Justice O'Connor voted against state regulation in four out of the seven dormant environmental commerce clause cases in which she participated (*Chemical Waste Management, Fort Gratiot, Oregon Waste Systems*, and *C & A Carbone*), and against federal regulation in *Lopez, Morrison*, and *SWANCC*. See COHEN & VARAT, *supra* note 260, at 1687–88 (listing terms of service for each member of the Supreme Court).

³⁹⁰ See *supra* note 18, and accompanying text.

³⁹¹ Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor joined the majority opinions in *Lopez, Morrison*, and *SWANCC*. See *supra* Part III.B.

³⁹² See generally *supra* Part III.C.

³⁹³ As an additional irony, in both *Morrison* and *SWANCC* the majority invalidated federal legislation to protect the prerogatives of the states, *even over* the protest of the states themselves. See *Morrison*, 529 U.S. at 653 (Souter, J., dissenting) (noting that “Attorneys General from 38 States urged Congress to enact the [federal legislation invalidated by the majority as beyond the scope of the affirmative commerce clause], representing that the current [state law] system for dealing with violence against women is inadequate”); *SWANCC*, 531 U.S. 159, 192 (2001) (Stevens, J., dissenting) (noting that relevant provision of federal Clean Water Act included a scheme that “encouraged States to supplant federal control with their own regulatory programs,” and concluding that “[b]ecause Illi-

Whatever their motivation, this minority of four anti-regulatory justices has been able to commandeer a majority of the Court by creating unexpected alliances. To invalidate state natural resource laws, the staunchly conservative newest federalists have been joined by the staunchly liberal bloc of the traditional federalists. Conversely, to invalidate federal natural resource regulation, the free market predilection of the newest federalist minority has been reinforced by the pro-state traditional federalism view of Chief Justice Rehnquist.

The vocabulary of the free market permeates the newest federalist analyses. In the context of the dormant commerce clause, the newest federalists have voted to invalidate state regulation on the basis that water and garbage are market commodities beyond the purview of state control. With respect to garbage, for example, they view with grave concern the possibility that "[t]he increasing number of [local] flow control regimes virtually ensures some inconsistency between jurisdictions, with the effect of eliminating the movement of waste between jurisdictions."³⁹⁴ Similarly, their view of garbage-as-market-commodity has been expressed through their criticism of a local flow-control ordinance they perceived as "hoard[ing] solid waste, and the demand to get rid of it, for the benefit of the preferred [local] processing facility."³⁹⁵

In contrast, under the affirmative commerce clause these justices have voted to invalidate federal legislation on the basis that it does not regulate "economic" activities that substantially affect interstate commerce.³⁹⁶ Justice Thomas would go even further, allowing the federal government to regulate only activities that are themselves of a "commercial character" or related to "business."³⁹⁷ Accordingly, Justice Thomas would eliminate the third category of acceptable federal authority, as recognized in *Lopez*: the regulation of economic activities that substantially affect interstate commerce.³⁹⁸

Justice Souter has been a particularly passionate critic of this free market view of the federal commerce power. In his *Morrison* dissent, he criticizes the majority for categorically excluding certain commerce affecting activities from the reach of Congress simply because the regulated activity is not itself commercial or economic in nature.³⁹⁹ He reminds the Court of its "nearly disastrous experiment" with substantive

nois could have taken advantage of the opportunities offered to it through [that statute], the federalism concerns to which the majority adverts are misplaced").

³⁹⁴ *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 407 (1994) (O'Connor, J., concurring).

³⁹⁵ *Id.* at 392.

³⁹⁶ *See, e.g., Lopez*, 514 U.S. 549, 560-61 (1995) (holding that federal guns-in-the-schools legislation cannot be sustained "under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction").

³⁹⁷ *See id.* at 599, 601 (Thomas, J., concurring).

³⁹⁸ *See id.* at 558-59 (majority opinion describing the three categories).

³⁹⁹ *See Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting).

due process prior to 1937 and argues that “today’s decision [distinguishing between commercial and noncommercial conduct] can only be seen as a step toward recapturing the prior mistakes.”⁴⁰⁰ Justice Souter explains:

If we now ask why the formalistic economic/noneconomic distinction might matter today . . . [t]he answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit.⁴⁰¹

Justice Souter asserts that such formalistic reliance upon whether or not an activity is “commercial” hearkens back to the previously discarded philosophy of “laissez-faire economics, the point of which was to keep government interference to a minimum.”⁴⁰²

V. CONCLUSION: EMBRACING LIMITS

Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. “In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”

—Justice Kennedy (1995)⁴⁰³

Those who love poetry and music have long recognized the powerful force of artistic creativity expressed within the parameters of precise

⁴⁰⁰ *Id.* at 642–43.

⁴⁰¹ *Id.* at 644–45.

⁴⁰² *Id.* at 644 (observing that the Court in 1936 “was still trying to create a laissez-faire world out of the 20th century economy” and dismissing such attempts in the modern world as impossible).

⁴⁰³ *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (holding unconstitutional federal statute, but writing separately to emphasize the limited nature of the Court’s holding and the continued need for deference to Congress) (quoting *THE FEDERALIST* No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)).

structural constraints. Thus, the haiku can be a forceful method of communication, even though its structural requirements limit the poet to three lines of verse, a mere “breath of words.”⁴⁰⁴ In the context of music, the fugues of Johann Sebastian Bach and others are much loved, despite their “strict discipline in conformity with the musical tradition of [a] specific time and place.”⁴⁰⁵ One modern commentator speculates that the fugue “may well represent the human search for a degree of order and systemic consistency in an apparently confused mesh of intertwined but separate particular realities.”⁴⁰⁶ The commentator concludes that the fugue presents “a vision, both eternal and ephemeral, of tolerant and expansive intermingling, of a human discipline that allows true human flight.”⁴⁰⁷

Applying this concept of freedom generated by limits to the environmental commerce clause, one might ask whether the modern Court’s vision of a free market commerce clause in fact promotes freedom in any meaningful and socially beneficial sense. This Article suggests a negative response to that question, at least in cases where such market freedom comes at the expense of both state and federal efforts to protect natural resources and perhaps also at the expense of constitutional integrity.⁴⁰⁸ In an era threatened by severe shortages of the most basic resources—unpolluted water and land—it is disingenuous for the Court to invoke the rhetoric of freedom to thwart good-faith attempts of both state and federal governments to protect the natural environment.

The modern Court’s shrinkage of federal and state legislative power under the commerce clause is ironic for its purported protection of economic freedom, achieved at the expense of legislative freedom. The commerce clause cases are part of a broader pattern under which the Court has become increasingly distrustful of legislative enactments at both the state and federal levels of government. In *Lucas v. South Carolina Coastal Council*, for example, the Court held that a state environmental statute limiting beachfront development constituted a taking of private property without just compensation, unless it could fall within a narrowly described nuisance exception.⁴⁰⁹ In setting forth the parameters of that safe haven for state regulation, the Court noted that regulations prohibiting “all economically beneficial use of land . . . cannot be newly

⁴⁰⁴ See Ian Codrescu, Rules of Form and Freedom of Spirit in Haiku, Keynote Speech at World Haiku Review Conference (Nov. 2001) (describing traditional haiku form of 5-7-5 syllables, but noting the possibility of free form haiku), http://www.worldhaikureview.org/1-3/whcessay_codrescul.shtml (on file with the Harvard Environmental Law Review).

⁴⁰⁵ Jayati Ghosh, *The Art and Science of Fugue*, MACROSCAN: AN ALTERNATIVE ECONOMICS WEBCENTRE, available at <http://www.macrosan.com/index.htm> (last visited Mar. 26, 2002) (on file with the Harvard Environmental Law Review) (describing the fugue as simultaneously cerebral and sensual).

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ See *supra* notes 18–24 and accompanying text (noting inconsistencies between the Court’s affirmative and dormant commerce clause analyses).

⁴⁰⁹ 505 U.S. 1003 (1992).

legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."⁴¹⁰ The Court indicated that the judicial branch must have the final word in the matter, for "law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."⁴¹¹

Similarly, the Court indicated its distrust of federal legislative findings in *Morrison*. In that case, the Court rejected explicit congressional findings indicating that the subject of the challenged federal law—violence against women—had a substantial effect upon interstate commerce.⁴¹² Although the Court couched its disapproval in terms of the legal reasoning underlying Congress's factual conclusions, *Morrison* also contains broad language questioning whether Congress can ever be the final arbiter of cause-and-effect relationships involving commerce: "Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."⁴¹³

In conclusion, I would like to suggest that in appropriate cases, environmental regulation by one—or even both—sovereigns should be left undisturbed by the courts. This is not a radical proposition. As reflected by the quotation introducing this part, Justices Kennedy and O'Connor have recognized that at some level, governmental limits can enhance security and freedom. Similarly, Chief Justice Rehnquist has observed that:

In adopting this [garbage disposal] legislation, the [State Legislature] . . . appears to have concluded that, like the State, counties should reap as they have sown—hardly a novel proposition. It has required counties within the State to be responsible for the waste created within the county.⁴¹⁴

⁴¹⁰ *Id.* at 1029.

⁴¹¹ *Id.*

⁴¹² *Id.* at 614–15 (acknowledging that the challenged statute is "supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families").

⁴¹³ *Id.* at 614 (quoting *Lopez*, 514 U.S. 557, n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964))). This decreasing judicial deference toward Congress has been the subject of vigorous scholarly debate. See, e.g., *Symposium—The Constitution in Exile: Is it Time to Bring it in From the Cold?*, 51 *DUKE L.J.* (2001) (containing articles both supporting and criticizing the Court's active judicial review of congressional enactments).

⁴¹⁴ *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 370 (1992) (Rehnquist, C.J., dissenting).

Furthermore, there is considerable historical evidence that the Framers did not intend for the affirmative commerce clause to be exclusive, nor for the Court, rather than the political process, to be the final arbiter of the balance between federal and state power.⁴¹⁵ Congress itself has advanced the idea of "cooperative federalism," a principle that forms the basis of numerous environmental statutes including the Clean Air Act,⁴¹⁶ the Clean Water Act,⁴¹⁷ and the Resource Conservation and Recovery Act.⁴¹⁸ Land, water, and other natural resources are life-sustaining and infinitely more precious than any laissez faire construction of the newest federalists. Perhaps the greatest gift of freedom that these free market proponents could give to the nation is the gift of judicial restraint, allowing federal and state governments to protect natural resources, free from undue interference by the Supreme Court.

⁴¹⁵ See, e.g., *Lopez*, 514 U.S. at 575-79 (Kennedy, J., concurring) (acknowledging historical ambiguity concerning proper role of the judiciary in enforcing a balance of power with respect to the commerce clause).

⁴¹⁶ 42 U.S.C. § 7401(a)(4) (1994) (establishing the framework for cooperative federal, state, regional, and local programs to prevent and control air pollution).

⁴¹⁷ 33 U.S.C. § 1251(g) (2000) (establishing scheme of federal, state, and local cooperation to develop comprehensive solutions for managing water resources).

⁴¹⁸ 42 U.S.C. § 6901(a)(4) (1994) (discussing the necessity of federal, state, regional, and local action to reduce the amount of waste and "to provide for proper . . . solid waste disposal practices").

APPENDIX
THE ENVIRONMENTAL COMMERCE CLAUSE (1978–2001)

The Dormant Commerce Clause									
	Rehnquist	Powell	Blackman	Brennan	Stevens	Marshall	White	Stewart	Burger
1978: ↓ <i>City of Philadelphia v. New Jersey</i> , 437 U.S. 617: Striking state ban on importation of waste.	↑ W	↓	↓	↓	↓	↓	↓	↓ W	↑ J
1979: ↓ <i>Hughes v. Oklahoma</i> , 441 U.S. 322: Striking state ban on exportation of minnows to other states.	↑ W	↓	↓	↓ W	↓	↓	↓	↓	↑ J
1982: ↓ <i>Sporhase v. Nebraska</i> , 458 U.S. 941: Striking state regulation on withdrawal of groundwater for use in other states.	↑ W	↓	↓	↓	↓ W	↓	↓	O'Connor ↑ J	↓
1986: ↑ <i>Maine v. Taylor</i> , 477 U.S. 131: Upholding state ban on importation of live baitfish from other states.	↑	↑	↑ W	↑	↓ W	↑	↑	↑	↑
1992: ↓ <i>Chemical Waste Management v. Hunt</i> , 504 U.S. 334: Striking state fee on disposal of hazardous waste from other states.	↑ W	Kennedy ↓	↓	Souter ↓	↓	Thomas ↓	↓ W	↓	Scalia ↓
1992: ↓ <i>Fort Gratiot Sanitary Landfill v. Michigan</i> , 504 U.S. 353: Striking state restriction on importation of waste from outside county.	↑ W	↓	↑	↓	↓ W	↓	↓	↓	↓

	Rehnquist	Kennedy	Blackman	Souter	Stevens	Thomas	Ginsburg	O'Connor	Scalia
1994: ↓ Oregon Waste Systems v. Department of Environmental Quality, 511 U.S. 93: Striking state surcharge on importation of waste from other states.	↑ W	↓	↑	↓	↓	↓ W	↓	↓	↓
1994: ↓ C & A Carbone v. Town of Clarkstown, 511 U.S. 383: Striking local ordinance requiring deposit of all solid waste within town at a single town-sponsored transfer station.	↑	↓ W	↑	↑ W	↓	↓	↓	↓ C	↓

The Affirmative Commerce Clause									
1995: ↓ U.S. v. Lopez, 514 U.S. 549: Striking federal statute prohibiting guns in school zones.	↓ W	↓ C	Breyer ↑ W	↑	↑	↓ C	↑	↓	↓
2001: ↓ U.S. v. Morrison, 529 U.S. 598: Striking federal statute providing federal civil remedy for victims of gender-motivated violence.	↓ W	↓	↑	↑ W	↑	↓	↑	↓	↓
2001: ↓ SWANCC v. U.S. Army Corps of Engineers, 531 U.S. 159: Striking federal regulation of intrastate wetlands used by migratory birds.	↓ W	↓	↑	↑	↑ W	↓	↑	↓	↓

Legend:

↑ Justice voted to uphold challenged state or federal regulation

↓ Justice voted to strike challenged state or federal regulation

W = Wrote J = Joined C = Concurred