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Section of Environment, Energy & Resources**

**Emerging Issues in Constitutional Environmental Law in a Time of Transition**

**WHAT HAPPENS WHEN ENVIRONMENTAL LAW MEETS THE CONSTITUTION**

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**Introduction and Overview**

The expansive reach of environmental regulation makes constitutional challenges to such laws inevitable. Environmental regulation arguably represents the most ambitious and far-reaching assertion of federal regulatory authority. The very premise of much environmental regulation is that ubiquitous ecological interconnections require broad, if not all-encompassing, federal regulation. This premise is in profound tension with the notion that the U.S. Constitution creates a federal government of limited and enumerated powers. Ecologist David Orr, for one, claims there is a fundamental “mismatch between the way nature works in highly connected and interactive systems and the fragmentation of powers built into the Constitution.”<sup>1</sup> Due to their expansive scope, environmental statutes are particularly vulnerable to challenge on constitutional grounds. As Professor Robert Percival of the University of Maryland

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<sup>1</sup> David Orr, *The Constitution of Nature*, 17 CONSERVATION BIOLOGY 1478, 1481 (2003) (“Nature is a unified mosaic of ecosystems, functions and processes. Government, on the other hand, was conceived by the founders as a limited and fractured enterprise.”). It would be a mistake, however, to assume that the Founders were unaware of broad economic and other interrelationships and did not consider whether such interconnections justified a greater centralization of government power. The existence of interstate externalities and interrelationships was “an oft-repeated axiom in the constitutional debates.” Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 490 (2003). In other words, the decision to “fragment” government power horizontally (through separation of powers) and vertically (through federalism) was made *despite* the existence of such interrelationships. *Id.* at 492-93.

observed, “As a result of the Rehnquist Court’s ‘new federalism,’ constitutional challenges to federal environmental regulations are now being raised with regularity.”<sup>2</sup> Some even suggest that the revival of federalism and other doctrines that limit the reach and scope of federal environmental regulation has “the potential to undo the foundation of modern environmental law.”<sup>3</sup>

At the same time, constitutional protections of private property and other fundamental rights may restrain the ability of government at all levels to enact certain types of policies. While direct regulation of land-use may appear to be easiest and most direct means of advancing certain environmental goals, it can also be the most vulnerable to challenge under the Fifth Amendment. State and local environmental policies that infringe upon interstate commerce may also be challenged for violating the so-called “dormant commerce clause.” In sum, as the scope of complexity of environmental regulation increases, so too does environmental regulation’s vulnerability to constitutional challenge.

Does this mean that the constitution is itself an obstacle to environmental progress? Are conservative constitutional doctrines necessarily opposed to efforts to safeguard environmental values? Not necessarily.<sup>4</sup> To be sure, constitutional limits can often make it more difficult or costly to achieve desired public ends. Yet in this respect, environmental policy is no different than many other contentious policy areas. For instance, we are presently in the midst of a vigorous debate about the extent to which the Constitution limits federal efforts to combat terrorism and ensure domestic security. These are unassailable goals, yet it is generally accepted that the Constitution does—and should—constrain the manner in which these goals are pursued. Even when the nation is under threat, constitutional limits must be observed. To insist on such limits is not to question the underlying policy goal, but it does constrain the means through which even the most admirable goals may be pursued. This is what it means to have a constitutional government.

Just as government can seek effective ways to prevent terrorism and ensure domestic security while operating within constitutional limits. By the same token, governments at all levels can seek to ensure continued environmental progress while operating within the constraints imposed by the Constitution. Like domestic security, the goal of environmental protection is unassailable in itself, but the importance of the goal does not justify jettisoning the constitutional baseline. The challenge for the future is to pursue effective environmental protection within constitutional limits.

## I. Federalism<sup>5</sup>

Federal environmental regulation represents an expansive assertion of federal authority. Even where federal environmental programs are cooperative in nature, environmental regulation calls upon the

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<sup>2</sup> Robert V. Percival, “Greening” the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 840 (2002).

<sup>3</sup> See, e.g., Environmental Law Institute, *Endangered Environmental Laws Program Background Paper* (2003), at 1, available at [http://www.endangeredlaws.org/downloads/background\\_paper\\_final.pdf](http://www.endangeredlaws.org/downloads/background_paper_final.pdf) (last visited April 11, 2004).

<sup>4</sup> The tension between constitutional and environmental law addressed in greater depth in several articles, including Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005); Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205 (2001); Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL’Y F. 39 (2001); Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 12-14 (1999); Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON. L. REV. 573 (1998). See also Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights and Environmental Protection* (forthcoming) (on file with author).

<sup>5</sup> Portions of this section are adapted from Adler, *Judicial Federalism*, *supra* note 4.

federal government to affect, influence, and regulate a wider range of behavior – economic and otherwise – than any other area of federal concern. Because federal environmental programs are so expansive, environmental regulation may be particularly vulnerable to federalism constraints on federal power. Insofar as courts restrict the scope of federal regulatory authority due to federalism concerns, this may have a particular effect on environmental regulation.

#### A. Commerce Clause

Article I, Section 8 of the Constitution grants Congress numerous powers, including the power “to regulate Commerce . . . among the several states.”<sup>6</sup> As explained by Chief Justice John Marshall, this clause—the Commerce Clause—grants Congress “the power to regulate; that is, to prescribe the rule by which commerce is to be governed.”<sup>7</sup> In *United States v. Lopez*<sup>8</sup> and *United States v. Morrison*,<sup>9</sup> after decades of negligible commerce clause scrutiny, the Supreme Court reiterated that there are judicially cognizable limits on the scope of the commerce power. Under *Lopez* and *Morrison*, Congress may regulate: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) those activities that “substantially affect” interstate commerce.<sup>10</sup> The first two categories are rather unambiguous. If an item is used or sold in interstate commerce, it may be regulated, as may the channels through which such items flow. The contours of the “substantial effects” test, upon which most environmental regulation is based, is less obvious.

In *Morrison*, the Court identified four factors to consider when evaluating whether a given activity “substantially affects” interstate commerce. First, and perhaps most importantly, is the economic or commercial nature of the activity in question, as “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature.”<sup>11</sup> Second, is whether Congress included a jurisdictional element in the challenged statute that can serve to “limit its reach to a discrete set” of activities that substantially affect commerce.<sup>12</sup> Third, is whether Congress adopted legislative findings regarding the regulated activity’s alleged substantial effect on interstate commerce.<sup>13</sup> Fourth is the nexus between the regulated activity and the alleged substantial effect on interstate commerce. Where the relationship between the activity and the effect is “tenuous,” a statute will not be upheld.<sup>14</sup>

To date, the consideration of these factors has not led to the invalidation of many federal statutes, environmental or otherwise.<sup>15</sup> Thus far, constitutional challenges to the application of the Clean Air Act,<sup>16</sup> Clean Water Act,<sup>17</sup> Endangered Species Act,<sup>18</sup> and Comprehensive Environmental Response,

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<sup>6</sup> U.S. Const. Art. I, § 8.

<sup>7</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 196 (1824).

<sup>8</sup> 514 U.S. 549 (1995).

<sup>9</sup> 529 U.S. 598 (2000).

<sup>10</sup> *Lopez*, 514 U.S. at 558-59.

<sup>11</sup> *Id.* at 613. See also Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation, and Congressional Power over Commerce*, in CONSTITUTIONAL LAW STORIES 69, 104 (Michael C. Dorf ed. 2004) (“The aggregation principle remains nominally good law, but it operates only when the actors or activities at issue are commercial.”).

<sup>12</sup> *Lopez*, 514 U.S. at 562.

<sup>13</sup> *Morrison*, 529 U.S. at 612.

<sup>14</sup> *Id.* at 564.

<sup>15</sup> See Glenn Reynolds & Brannon Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Regulation and Nobody Came?*, 2000 WISC. L. REV. 369 (2000); Brannon Denning & Glenn Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003).

<sup>16</sup> See *Allied Local and Reg’ Mfrs. Caucus v. EPA*, 215 F.3d 61 (D.C. Cir. 2000).

Compensation, and Liability Act (CERCLA)<sup>19</sup> to intrastate activities have all failed. In many of these cases, federal regulatory authority was upheld because the statute or regulations in question regulated explicitly industrial or commercial activity. After *Gonzales v. Raich*,<sup>20</sup> in which the Supreme Court adopted a broad definition of economic activity, this is unlikely to change. In *Raich* a six justice majority reaffirmed the federal government’s power to regulate seemingly trivial, intrastate activities where such regulation is part of a broad, comprehensive regulatory scheme. Federal courts have already relied upon *Raich* to uphold broad assertions of federal regulatory authority where interstate commerce could be affected.<sup>21</sup>

The statute most vulnerable to commerce clause challenge is the ESA, under which any and all activities that harm endangered species, including modest habitat modification, are potentially subject to federal regulation. Although circuit courts have uniformly rejected commerce-based challenges to the ESA they have done so on conflicting grounds. In *Rancho Viejo v. Norton*,<sup>22</sup> for example, the D.C. Circuit held the ESA’s application was applicable to a commercial development \because the protection of the Arroyo toad itself “regulates and substantially affects commercial development activity which is plainly interstate.”<sup>23</sup> Specifically, Judge Garland’s opinion for the court noted that the regulated activity in question—“the construction of a 202-acre commercial housing development”—was “plainly an economic enterprise,” and could therefore be regulated despite its intrastate character.<sup>24</sup>

The rationale adopted in *Rancho Viejo* was considered, and explicitly rejected, by the Fifth Circuit in *GDF Realty Investments, Ltd. v. Norton*.<sup>25</sup> The Fifth Circuit noted there is no basis in the Supreme Court’s Commerce Clause jurisprudence for holding that Congress may regulate an activity—the taking of an endangered species—“solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.”<sup>26</sup> Such an approach “would allow the application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors,” and would eviscerate any constitutional limit on Congress’s authority to regulate intrastate activities, so long as those subjected to the regulation were

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<sup>17</sup> See *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *SWANCC v. U.S. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999). Appellate courts have, on the other hand, adopted narrowing constructions of federal environmental statutes so as to avoid potential Commerce Clause concerns. See *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (finding federal wetland regulations to be “unauthorized by the Clean Water Act as limited by the Commerce Clause”).

<sup>18</sup> See *Rancho Viejo v. Norton*, 323 F.3d 1062, 1065 (D.C. Cir. 2003); *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

<sup>19</sup> See *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176 (2nd Cir. 2002); *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).

<sup>20</sup> 125 U.S. 2195 (2005).

<sup>21</sup> See, e.g., *U.S. v. Gerke Excavating*, 412 F.3d 804 (7th Cir. 2005).

<sup>22</sup> 323 F.3d 1062, 1065 (D.C. Cir. 2003).

<sup>23</sup> *Rancho Viejo*, 323 F.3d. at 1067 (D.C. Cir. 2003) (quoting *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring)). Although adopting this rationale, the *Rancho Viejo* court sought “not to discredit” alternative rationales, including that species regulation is substantially related to interstate commerce because the loss of biodiversity, in itself, has a substantial effect on commerce. *Id.* at 1067 n.2. It is worth noting, however, that this rationale is drawn almost exclusively from Judge Henderson’s concurring opinion, and is not the basis upon which Judge Wald asserted there was substantial agreement in the panel majority. *Id.* at 1046 n.3 (Wald, J.) (noting agreement that “the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce” and that federal regulation of land-use under the ESA “has a plain and substantial effect on interstate commerce” (quoting opinion of Henderson, J.)).

<sup>24</sup> *Id.* at 1068.

<sup>25</sup> 326 F.3d 622 (5th Cir. 2003).

<sup>26</sup> *Id.* at 634.

entities which had an otherwise substantial connection to interstate commerce.”<sup>27</sup> The inconsistency between the D.C. and Fifth Circuits’ rationales was noted by the dissenters from the denial of rehearing en banc in both cases.<sup>28</sup> The dissenters in the Fifth Circuit further noted the existence of a third approach, that adopted by the Fourth Circuit in *Gibbs v. Babbitt*.<sup>29</sup> The Supreme Court denied cert in all three cases, however, and does not appear eager to identify the proper basis for regulating takes of endangered species under the commerce clause.

While the CWA is not itself particularly vulnerable to commerce clause challenge – largely because it only applies to “navigable waters” of the United States – commerce clause concerns did produce a narrowed interpretation of the CWA’s jurisdictional sweep. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*<sup>30</sup> the Court rejected the application of the CWA to isolated waters because such an interpretation would “push the limit of congressional authority.” The precise limits of *SWANCC* are the subject of some dispute. Several circuits, including the Fourth,<sup>31</sup> Sixth,<sup>32</sup> and Seventh,<sup>33</sup> have read *SWANCC* narrowly to preclude only federal regulation of isolated, intrastate, non-navigable waters. This is also the view adopted by the EPA and Army Corps of Engineers.<sup>34</sup> The Fifth Circuit, on the other hand, has read *SWANCC* more broadly to exclude waters that are neither navigable themselves nor adjacent to navigable waters.<sup>35</sup> Specifically, in the Fifth Circuit, federal jurisdiction under the CWA does not extend to wetlands, “puddles, sewers, roadside ditches and the like,” if such waters are not truly adjacent to navigable waters.<sup>36</sup> According to the Fifth Circuit, the interpretation adopted by the other circuits “is unsustainable under *SWANCC*” as the CWA is “not so broad as to permit the federal government to impose regulations over ‘tributaries’ that are neither themselves navigable nor truly adjacent to navigable waters.”<sup>37</sup> However this split is resolved, *SWANCC* reaffirms the principle that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise,” such as whether Congress can regulate a given activity under the Commerce Clause, “and by the other of which such questions are avoided,” a court’s “duty is to adopt the latter.”<sup>38</sup>

## B. State Sovereignty

Under current federalism jurisprudence, the federal government may neither command states to participate in or implement a federal regulatory program, nor may the federal government abrogate state

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<sup>27</sup> *Id.*

<sup>28</sup> See *GDF Realty v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (dissent from denial of en banc); 334 F.3d 1158 (D.C. Cir. 2003) (dissent from denial of en banc).

<sup>29</sup> 362 F.3d at 291.

<sup>30</sup> 531 U.S. 159 (2001).

<sup>31</sup> See *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

<sup>32</sup> See *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003).

<sup>33</sup> See *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003)

<sup>34</sup> See Memorandum by Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency, & Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers, Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters, Jan. 19, 2001; see also Lance D. Wood, *Do Not Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ENVTL. L. REP. 10187 (2004).

<sup>35</sup> See *In re Needham*, 354 F.3d 340 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). Although *Needham* and *Rice* specifically address the scope of federal regulation over “waters of the United States” under the Oil Pollution Act, both decisions note that federal jurisdiction under the OPA was intended to be coextensive with that under the Clean Water Act. *Needham*, 354 F.3d at 344; *Rice*, 250 F.3d at 267.

<sup>36</sup> *Needham*, 354 F.3d at 345.

<sup>37</sup> *Id.* Some government officials and commentators dismiss this language as “dicta.” See, e.g., Wood, *supra* note 34, at 10188.

<sup>38</sup> *Jones v. United States*, 529 U.S. 848, 858 (2000).

sovereign immunity from suits for money damages save in limited circumstances. Each of these doctrines has only a limited effect on federal environmental regulation.

In *New York v. United States*, in invalidating the Low-Level Radioactive Waste Policy Amendments, the Supreme Court held that “The Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>39</sup> Since that time, however, federal courts have only struck down two exceedingly minor environmental laws on such “anti-commandeering” grounds.<sup>40</sup> All other commandeering challenges to federal environmental laws have failed.<sup>41</sup> This is to be expected, as very few environmental laws issue direct, non-discretionary orders to state and local officials requiring them to regulate private conduct or otherwise implement a federal regulatory program. Two minor exceptions may be portions of the Emergency Planning and Community Right-to-Know Act<sup>42</sup> and the Underground Storage Tank (UST) provisions of the Resource Conservation and Recovery Act (RCRA).<sup>43</sup> Each of these statutes does commandeer state officials by requiring them to perform various duties, yet it is unlikely that the relevant provisions of either law will be challenged. The application of the ESA to require state agencies to regulate private activity could also raise commandeering concerns.<sup>44</sup> In most other cases, the federal government either regulates public and private entities alike, thereby avoiding commandeering concerns, or induces state “cooperation” through a combination of positive and negative inducements, including threatened preemption and conditional federal spending, neither of which has been subject to successful legal challenge.

The other line of decisions concerning state sovereignty concern state sovereign immunity. Under *Seminole Tribe of Florida v. Florida*,<sup>45</sup> Congress may not subject a state to suit for money damages in federal court pursuant to an otherwise valid exercise of the Congress’s enumerated powers in Article I, section 8. This also applies to state court<sup>46</sup> and federal administrative proceedings.<sup>47</sup> Congress may only abrogate state sovereign immunity pursuant to Section Five of the Fourteenth Amendment, a provision rarely implicated by environmental regulation.

As a result, state governments are no longer liable to private parties for response and cleanup costs under federal environmental statutes such as the Resource Conservation and Recovery Act<sup>48</sup> or

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<sup>39</sup> 505 U.S. 144, 188 (1992).

<sup>40</sup> See *Ass’n of Comty. Orgs. for Reform Now (ACORN) v. Edwards*, 81 F.3d 1387 (5th Cir. 1996) (invalidating portions of the Lead Contamination Control Act); *Bd. of Natural Res. v. Brown*, 992 F.2d 937 (9th Cir. 1993) (invalidating Forest Resources Conservation and Shortage Relief Act).

<sup>41</sup> See, e.g., *City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003) (rejecting Tenth Amendment challenge to conditions placed on storm water discharge permits); *Env’tl. Def. Dtr. v. EPA*, 319 F.3d 398 (9th Cir. 2003) (rejecting Tenth Amendment challenge to permitting requirements of small municipal storm sewer discharges); *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996) (rejecting Tenth Amendment challenge to Clean Air Act requirements for State Implementation Plans); *Sweat v. Hull*, 200 F. Supp. 2d 1162 (D. Ariz. 2001) (rejecting Tenth Amendment defense of state’s unilateral decision to terminate pollution controls provided for in State Implementation Plan under Clean Air Act); *Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996) (rejecting Tenth Amendment challenge to Clean Air Act requirements for State Implementation Plans); see also Percival, “Greening” the Constitution, *supra* note 2, at 841 (“[C]ourts have had little difficulty rejecting claims of commandeering when regulatory programs are challenged.”).

<sup>42</sup> 42 U.S.C. § 11001 *et seq.*

<sup>43</sup> 42 U.S.C. § 6991a.

<sup>44</sup> Such concerns were considered, and rejected in *Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997). For a critique of the *Strahan* opinion, see Adler, *Judicial Federalism*, *supra* note 4, at 428-430.

<sup>45</sup> 517 U.S. 44 (1996).

<sup>46</sup> *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>47</sup> *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002).

<sup>48</sup> See, e.g., *Grine v. Coombs*, 189 F.3d 464 (3d Cir. 1999) (upholding dismissal on sovereign immunity grounds of citizen suit seeking monetary damages from state agency under RCRA).

Superfund.<sup>49</sup> This protection from liability does not extend to local governments, however, which may be more likely defendants in a Superfund contribution action because they own the majority of public waste disposal sites. Where states implement environmental regulations in lieu of the federal government, sovereign immunity also bars private suits in federal court seeking to enforce the state regulatory provisions.<sup>50</sup> The current rules on state sovereign immunity seem fairly clear, and are consistently applied in lower federal courts. The Supreme Court decisions have all been 5-4, however, and there are two cases revisiting the scope of state sovereign immunity that will be argued in the Supreme court's October 2005 term.

Insofar as federal whistleblower protection laws seek to authorize actions against state agencies seek monetary compensation, such as back pay, they are precluded by sovereign immunity as well.<sup>51</sup> Sovereign immunity does not bar whistleblower actions that seek purely prospective, injunctive relief from specific state officials, however.<sup>52</sup> Nor does sovereign immunity prevent the federal government from initiating its own suit against state agencies for violating whistleblower protections, even if the suit is based upon a private complaint and seeks monetary relief for the sanctioned employee.<sup>53</sup> It is also possible that Congress could reenact the various whistleblower provisions pursuant to its authority under Section 5 of the Fourteenth Amendment, on the grounds that whistleblower protections are necessary to safeguard state employees' First Amendment rights against state action.<sup>54</sup> Existing whistleblower provisions cannot be defended on this ground as there is no language in the relevant statutes to this effect. Intent to abrogate sovereign immunity will be found only if Congress "mak[es] its intention unmistakably clear in the language of the statute."<sup>55</sup> Nonetheless, it is possible Congress reenact the relevant whistleblower provisions to abrogate state sovereign immunity in this fashion.

### C. Dormant Commerce Clause

Under the dormant commerce clause, states may not discriminate against interstate commerce. Facially discriminatory state laws are *per se* invalid, and nondiscriminatory regulations that impose an undue burden on the flow of interstate commerce (in relation to the local benefits they protect) are presumed unconstitutional as well.<sup>56</sup> So, for instance, states may not erect barriers to the importation of out-of-state waste, either through importation bans<sup>57</sup> or differential fee structures,<sup>58</sup> nor may they otherwise discriminate against out-of-state providers of waste management or other environmental services.<sup>59</sup> Where a state lacks any non-discriminatory means of protecting a local interest, however, discriminatory measures, such as a ban on the importation of live bait fish, may be upheld.<sup>60</sup>

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<sup>49</sup> See, e.g., *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999).

<sup>50</sup> See *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001).

<sup>51</sup> See generally *Rhode Island DEM v. United States*, 304 F.3d 31 (1st Cir. 2002); *Connecticut DEP v. OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001); *Florida v. United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001); *Ohio EPA v. United States*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000).

<sup>52</sup> See *Florida*, 133 F. Supp. 2d at 1291-92 (administrative proceeding may continue insofar as it seeks prospective relief from state employees).

<sup>53</sup> *Rhode Island DEM*, 304 F.3d at 53; *Ohio EPA*, 121 F. Supp. 2d at 1167.

<sup>54</sup> See *id.* at 51 (noting possibility).

<sup>55</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (citation and quotation omitted); see also *Rhode Island DEM*, 304 F.3d at 51 (quoting same); *Florida*, 133 F. Supp. 2d at 1291 (assuming, without deciding, that Congress could abrogate state sovereign immunity from whistleblower claims under Section 5); *Ohio EPA*, 121 F. Supp. 2d at 1162 (same).

<sup>56</sup> See *Pike v. Bruce Church*, 397 U.S. 137 (1970).

<sup>57</sup> See *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

<sup>58</sup> See *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93 (1994).

<sup>59</sup>

<sup>60</sup> See *Maine v. Taylor*, 477 U.S. 131 (1986).

As a practical matter, the impact of the dormant commerce clause on environmental regulation is overstated. Most environmental problems can be addressed in a non-discriminatory manner. If a state is concerned about the risk of groundwater pollution from local landfills, for instance, a state can regulate landfill siting, construction requirements, waste disposal, and so on. All it is prevented from doing is adopting a rule that differentiates between in-state and out-of-state waste. This sort of rule is environmentally neutral because there is no environmental justification for treating waste from, say, New York, different from waste generated in Virginia or Oregon. States remain free to adopt neutral rules that impact some states (or some industries) more than others. Recent dormant commerce clause decisions reinforce this general approach and there is little reason to expect the doctrine to shift significantly in the near future.

#### D. Supremacy Clause / Preemption

Many of the federalism cases brought in federal court are preemption cases. Under the Supremacy Clause, all laws made pursuant to the Constitution are “the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Where Congress adopts a law pursuant to its enumerated powers, it preempts conflicting state laws. Federal preemption comes in two forms, express and implied. Express preemption is straightforward. Where Congress, or a federal agency, explicitly preempts state laws on a given subject, states are barred from adopting and enforcing their own regulations.<sup>61</sup> Yet where Congress has not made its intention explicitly clear, preemption may be implied either “where the scheme of federal regulation is so persuasive as to make reasonable the inference that Congress left no room for the states to supplement it,”<sup>62</sup> so-called “field preemption,” or where state and federal law conflict or compliance with state law would obstruct, if not preclude, compliance with federal law, so-called “conflict preemption.”<sup>63</sup> In all instances, however, the burden is on the party asserting federal preemption, as courts are to start with a presumption that Congress has not preempted relevant state laws.<sup>64</sup>

Preemption is common in environmental law, particularly concerning the regulation of products that are manufactured for sale in interstate commerce.<sup>65</sup> For example, section 209(b) of the Clean Air Act prohibits states from adopting “any standard relating to the control of emissions from new motor vehicles.”<sup>66</sup> Similarly, the Energy Policy Conservation Act preempts any state regulation of automotive fuel economy.<sup>67</sup> In *United States v. Locke*, the Supreme Court found Washington state’s laws governing

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<sup>61</sup> See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm’n*, 461 U.S. 190, 203 (1983) (“It is well established that within Constitutional limits Congress may preempt state authority by so stating in express terms.”).

<sup>62</sup> *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

<sup>63</sup> *Id.*

<sup>64</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“we start with the assumption that the historic police powers of the States were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).

<sup>65</sup> See Ann Carlson, *Federalism, Preemption and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 306 (2003) (“environmental regulation – in which both the states and the federal government play an active role – frequently raises preemption questions”).

<sup>66</sup> 42 U.S.C. § 7543(a). There are exceptions to this rule. The EPA may waive preemption of emission standards adopted by California, subject to certain conditions. 42 U.S.C. § 7543(b). Where the EPA has approved a waiver for California, other states may adopt the California rule. In all cases, however, the other 49 states may not adopt a “third” standard. The Clean Air Act contains similar provisions governing standards for gasoline. 42 U.S.C. § 211(c)(4).

<sup>67</sup> 49 U.S.C. § 32919. Unlike with emission standards, there is no conditional exemption for California.



the prevention of spills from oil tankers to be preempted by federal law.<sup>68</sup> While several circuits had held otherwise, in *Bates v. Dow Agrosciences*,<sup>69</sup> the Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preempt some state common law tort claims.

While preemption cases are, most definitely, federalism cases, it is a mistake to consider them “constitutional” cases, for the result in these cases does not turn on constitutional concerns. Preemption cases do not call upon court to adjudicate the limits on the Supremacy Clause. There is no question that Congress may preempt state laws so long as it acts pursuant to an enumerated power. Rather, preemption cases turn upon statutory language and congressional intent. Moreover, if Congress disagrees with federal courts’ preemption holdings, there is no constitutional obstacle to the legislature’s ability to reenact the statute in question, either to preempt or preserve the relevant state laws. Thus, at bottom, preemption cases are statutory, rather than constitutional, cases.

## Standing

*Lujan v. Defenders of Wildlife*<sup>70</sup> was thought to presage a dramatic narrowing of standing. Post-*Lujan*, the requirement that citizen suit plaintiffs meet a rigid test for injury-in-fact, causation, and redressability could keep many environmental litigants out of court. The Court’s subsequent decision in *Friends of the Earth v. Laidlaw Environmental Services*<sup>71</sup> made clear that this was not to be the case. Specifically, the Court held that the existence of an environmental violation is enough to satisfy the injury-in-fact requirement even if there is no evidence whatsoever of any tangible environmental harm.<sup>72</sup> Under this rule, environmental plaintiffs attesting to a sufficient connection to a regulated resource should have little problem meeting the constitutional standing requirement.<sup>73</sup> So, for instance, the U.S. Court of Appeals for the Sixth Circuit found that the American Canoe Association had standing to challenge a CWA permit violation because one of the association’s members alleged that the violation caused him to use the river less than he would were the polluter in compliance with its permit requirements.<sup>74</sup> The U.S. Court of Appeals for the D.C. Circuit also upheld the National Parks Conservation Association’s standing to challenge the Department of the Interior’s finding that the construction of a coal-fired power plant would not harm air quality in Yellowstone National Park.<sup>75</sup>

This is not to say that the standing hurdle has disappeared, only that it is significantly lower than *Lujan* suggested. In *Legal Environmental Assistance Foundation (LEAF) v. EPA*,<sup>76</sup> the U.S. Court of Appeals for the Eleventh Circuit rejected an environmental groups challenge to Alabama and Florida’s permit programs implementing Title V of the Clean Air Act. LEAF maintained that the two programs’ standing requirements were more stringent than required, and that this might impair their ability to challenge permit violations that could lead to increased air pollution. The Eleventh Circuit found this alleged harm too speculative to satisfy the injury-in-fact requirement, though it noted LEAF and its members would still have standing to challenge individual permits in state court that actually harmed LEAF or its members. The Seventh Circuit also found that the Natural Resources Defense Council lacked standing to challenge EPA’s authority to issue general permits for storm water discharges from

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<sup>68</sup> 529 U.S. 89 (2000).

<sup>69</sup> 125 U.S. 1788 (2005).

<sup>70</sup> 504 U.S. 555 (1992).

<sup>71</sup> 528 U.S. 167 (2000).

<sup>72</sup> 588 U.S. at 181 (“The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.”).

<sup>73</sup> In a sense, *Laidlaw* replaced *Lujan*’s injury-in-fact with “injury-in-fiction.” See Adler, *Stand or Deliver*, *supra* note 4, at 56.

<sup>74</sup> *American Canoe Association v. Louisa Water & Sewer Commission*, 389 F.3d 536 (6th Cir. 2004).

<sup>75</sup> *National Parks Conservation Association v. Manson*, \_\_ F.3d \_\_, 2005 WL 1540792 (D.C. Cir. 2005).

<sup>76</sup> 400 F.3d 1278, 1281 (11th Cir. 2005).

construction activities absent a claim that an NRDC member is harmed by pollution that would be subject to the general permit.<sup>77</sup> This decision may be in tension with the approach adopted in other circuits.<sup>78</sup> Interestingly enough, in the same case the Seventh Circuit found the NRDC did have standing to challenge the EPA's alleged procedural violations in issuing the general permit at issue.

One area where standing hurdles may be particularly difficult to overcome is in climate change litigation. In *Massachusetts v. EPA*,<sup>79</sup> in which several states and environmentalist groups sought review of the EPA's refusal to regulate greenhouse gas emissions under the Clean Air Act, a three judge panel of the D.C. Circuit split three-ways on the standing question in rejecting the petition for review. Judge Sentelle saw not standing, finding the asserted injuries too diffuse and generalized to meet the requirement that an asserted injury be "concrete and particularized." Judge Randolph failed to resolve the standing question, finding the standing question to be bound up in the merits of the case, and seeing another basis upon which to reject the petition for review. Judge Tatel, in dissent, thought the standing hurdle was easily met given Massachusetts' detailed allegations of the particular harms that could befall Massachusetts. This, Tatel believed, was sufficiently "concrete and particularized" to satisfy the standing test.

*Massachusetts v. EPA* is but the first high-profile case to address standing for alleged harms for climate change, and it will not be the last. As of this writing, there are standing questions in at least two other climate change cases pending in federal courts. How the courts will resolve this question is unclear. The very nature of climate change makes standing claims particularly difficult. An injury-in-fact must be both "actual or imminent" and "concrete and particularized" – a test climate change plaintiffs may find it difficult to meet. Insofar as litigants assert near-term effects – those that are most likely to be "actual or imminent" – they are more likely to be general, climatic effects that are not concrete and particularized to the particular litigants. The converse is also true. Insofar as a plaintiff, like the Commonwealth of Massachusetts, asserts specific, localized effects so as to meet the concrete and particularized requirement, the harms alleged will be farther off in the future, and less likely to meet the actual or imminent requirement. Given the global nature of climate change, redressability may also be a concern, as unilateral U.S. regulation may not do much, if anything, to address climate change concerns. An additional factor that may make standing particularly difficult in climate change cases is the general reluctance of federal courts to force federal action on major policy questions with international implications without congressional assent. This is not to say that all climate-based standing claims will be unsuccessful, only that they must overcome substantial hurdles.

## Property Rights

The Supreme Court decided three takings cases this past year without significantly changing the landscape of takings litigation. The Fifth Amendment's admonition that government may not take private property without just compensation will continue to be the basis for constitutional challenges to state and federal regulation, though absent a showing that a given regulation imposes a physical occupation or deprives a landowner of all economically viable use of his or her land,<sup>80</sup> such challenges will remain procedurally complex, time-consuming, and difficult to win.

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<sup>77</sup> *Texas Independent Producers and Royalty Owners Association v. EPA*, 410 F.3d 964 (7th Cir. 2005).

<sup>78</sup> *Id.* at 976 (discussing *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir.2003); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir.2005), in which challenges to general permits were allowed).

<sup>79</sup> \_\_\_ F.3d. \_\_\_, 2005 WL 1653055 (D.C. Cir. 2005).

<sup>80</sup> *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

In *Lingle v. Chevron U.S.A.*,<sup>81</sup> the Court unanimously upheld a Hawaii law that limited the rent oil companies could charge on leased service stations. While the economic case for the law is exceedingly weak, that did not make it an unconstitutional “taking” of private property. As the Supreme Court has reiterated time and again, the purpose of takings clause is to prevent the government from imposing burdens on a minority of property owners that should rightfully be borne by the public at large. In *Lingle*, however, the landowner’s property was not “taken” in any meaningful sense of the word. Rather, the petitioners alleged that the law violated the constitution because it failed to “advance legitimate state interests.” Even were this so, it would not make the law a Fifth Amendment “taking.” How “effective” or sensible the government action has nothing to do whether a landowner has lost the right to his or her property. As Justice O’Connor explained for a unanimous court,

A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation. The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation.<sup>82</sup>

The bottom-line is that a given regulation’s effectiveness has no bearing on whether it effects a Fifth Amendment taking that requires compensation. Federal courts have already applied *Lingle* to dismiss claims that state regulations took private property because they failed to substantially advance the state’s interest.<sup>83</sup> Interestingly, in *Lingle* the Court suggested that if, as Chevron claimed, the regulation failed to advance a legitimate government interest it could well be unconstitutional, perhaps as a due process violation, but not under the “takings” clause.<sup>84</sup>

In *San Remo Hotel v. San Francisco*,<sup>85</sup> a hotel owner sought to challenge San Francisco’s housing law in federal court, even though state courts had already rejected the claim. A unanimous court turned away the suit because the federal full faith and credit statute clearly bars the relitigation in federal court of federal takings claims resolved by state courts.<sup>86</sup> To challenge state court constitutional judgments, parties have to appeal from the state’s high court straight to the Supremes. The problem for landowners is that Supreme Court precedent bars takings claims against state governments in federal court until a state court denies the compensation claim. As a practical matter, this creates a Catch-22 for landowners, because a state court takings claim will often resolve the federal claims too. Nonetheless, San Remo Hotel’s claim was clearly precluded under federal law.

If there was a silver-lining for landowners in *San Remo Hotel*, it was Chief Justice Rehnquist’s opinion concurring in the judgment.<sup>87</sup> Joined by Justices Thomas, Kennedy, and O’Connor, Rehnquist questioned whether the prudential requirement announced in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*<sup>88</sup> that landowners to sue in state court first should remain good law. If other constitutional claims against states can be filed when the violation occurs, Rehnquist reasoned, there’s no reason to treat takings claims any differently. Federal law may have precluded relitigation of San Remo Hotel’s specific claim, but this concurring opinion suggests the possibility that future claimants could bring federal takings claims in federal court before litigating their claims in state

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<sup>81</sup> 125 S.Ct. 2074 (2005)

<sup>82</sup> *Id.* at 2084

<sup>83</sup> *See, e.g., Spoklie v. Montana*, 411 F.3d 1051 (9th Cir. 2005).

<sup>84</sup> 125 S.Ct. at 2084.

<sup>85</sup> 125 S.Ct. 2491 (2005)

<sup>86</sup> *Id.* at 2507; 28 U.S.C. § 1738.

<sup>87</sup> 125 S.Ct. at 2507 (Rehnquist, C.J., concurring in the judgment).

<sup>88</sup> 473 U.S. 172 (1985).

court. This would reduce the risk that litigating state law-based takings claims in state court would preclude subsequent litigation of the federal claims in federal court.

Whereas most constitutional challenges under the takings clause concern “regulatory takings,” the most high profile takings case of late was of a different sort. *Kelo v. New London*<sup>89</sup> asked the Court to consider whether the Fifth Amendment contains a judicially enforceable “public use” requirement that limits the purposes for which private land may be taken through eminent domain. Not really, was the Court’s reply in upholding the use of eminent domain for economic development. Insofar as there is a “public use” limitation on the power of eminent domain, it does not foreclose the use of eminent domain wherever the legislature asserts, in good faith, that it provides a public benefit. Thus, an older residential community can be taken to clear the way for commercial development that will increase the local tax base, so long as compensation is paid. While the *Kelo* case has attracted substantial attention, it is no more expansive than the Supreme Court’s prior holding in *Hawaii Housing Authority v. Midkiff*.<sup>90</sup> Each decision gives state legislatures ample leeway to use eminent domain as they see fit. If anything, the language of *Kelo* is more restrictive, suggesting procedural bases upon which to challenge eminent domain in the future.

While the *Kelo* result was supported by many environmentalist groups, including Community Rights Counsel, some environmentalists may come to rue the result. If states are allowed to use eminent domain to enhance economic development and increase the local tax base, there is no constitutional obstacle to the use of such power to develop undeveloped lands. Just as older residential communities have become attractive targets for eminent domain, fallow farmland and conservation properties may be next in local government’s crosshairs. Insofar as developing such lands will provide the public benefit of economic growth, they will have no *federal* constitutional protection. In the future, the proper use of eminent domain will be debated, and decided, at the state level in both legislatures and the courts.

Lower courts have been busy with takings claims as well. After several successful takings claims under Section 404 permit denials under the Clean Water Act, in 2001, the U.S. Court of Federal Claims also found an uncompensated taking under the Endangered Species Act (ESA) for the first time in *Tulare Lake Basin Water Storage District v. United States*,<sup>91</sup> and the federal government subsequently settled the case. At the time of this writing we are also awaiting resolution of class action takings claims brought against the federal Rails-to-Trails program. Most recently the U.S. Court of Appeals for the Federal Circuit remanded the Idaho case for further proceedings,<sup>92</sup> and it appears likely that at least some of the landowners will prevail in their takings claims. In another interesting case, the Court of Federal Claims also denied the government’s motion for summary judgment alleging that alleged Forest Service contamination of groundwater constitutes a Fifth Amendment taking.<sup>93</sup>

## Looking to the Future

Two areas in which we may see future constitutional challenges to environmental regulations are the federal spending clause and the First Amendment protection of commercial speech. While it is too early to predict the precise context in which such challenges may arise, broad legal trends suggest such challenges are likely.

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<sup>89</sup> 125 S.Ct. 2655 (2005).

<sup>90</sup> 467 U.S. 229 (1984).

<sup>91</sup> 49 Fed.Cl. 313 (Fed. Cl. 2001).

<sup>92</sup> *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005).

<sup>93</sup> *Hansen v. United States*, *Hansen v. U.S.*, 65 Fed.Cl. 76 (Fed. Cl. 2005)

## A. Spending Clause<sup>94</sup>

Federalism has emerged as a particularly important area of constitutional law over the past decade. While the Rehnquist Court has reconsidered many aspects of federalism, the federal government's power to impose conditions on states' receipt of federal funds still looms on the horizon.<sup>95</sup> Because conditional spending is used in many environmental laws to encourage, or otherwise induce, state cooperation with federal regulatory efforts, the scope of the spending power is important for federal environmental law. As the spending power is used to supplement, or extend, existing federal authority over state governments, legal challenges to such use of the spending power become more likely.

Article I, section 8 of the Constitution empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States.” As long interpreted by the federal courts, this grants Congress broad authority to appropriate money for a wide range of purposes, as well as the power to impose conditions on the use of federal funds conditional federal spending. As with all federal powers, the spending clause has limits. In 1987, in *South Dakota v. Dole*,<sup>96</sup> the Supreme Court outlined the requirements for conditional federal spending. First, the appropriation of funds must be for the “general welfare.”<sup>97</sup> Second, there can be no independent constitutional bar to the condition imposed upon the federal spending.<sup>98</sup> In other words, Congress may not seek to use the spending power to induce states to engage in conduct that would otherwise be unconstitutional. Third, any conditions imposed upon the receipt of federal funds must be clear and unambiguous.<sup>99</sup> Recipients of federal funds must have notice of any conditions with which they must comply, and the scope of their obligation. Fourth, and most significant, the conditions themselves must be related to the federal interest that the exercise of the spending power is itself supposed to advance. In the Court's words, “the condition imposed by Congress is directly related to one of the main purposes for which . . . funds are expended.”<sup>100</sup>

*Dole* also suggested a fifth limitation on the use of conditional spending: “coercion.” Specifically, the Court noted that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>101</sup> This point has been reiterated in subsequent cases without much explanation.<sup>102</sup> Thus far, federal appellate courts have been generally reluctant to invalidate conditional spending on federalism grounds, though it appears such claims are raised with increasing regularity.

Among all federal environmental statutes, the Clean Air Act may be most vulnerable to a spending clause challenge. Under the CAA, a state that fails to adopt an adequate State Implementation Plan (SIP) risks the imposition of federal sanctions, including the loss of federal highway funds. While

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<sup>94</sup> The potential for spending clause challenges to federal environmental laws is discussed in greater detail in Adler, *Judicial Federalism*, *supra* note 4, at 433-52.

<sup>95</sup> See Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 105 (2001) (“The next frontier of [federalism] litigation is sure to be the Spending Clause.”).

<sup>96</sup> *United States v. Dole*, 483 U.S. 203 (1987).

<sup>97</sup> *Id.* at 207.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 208.

<sup>101</sup> *Id.* at 211.

<sup>102</sup> See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) (noting that, in some instances, “the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion” (quotation omitted)). See also *New York*, 505 U.S. at 167 (noting limits of federal spending power).

federal courts have rejected state challenges to this sanction under *Dole*,<sup>103</sup> it is not clear the highway fund sanction complies with *Dole*'s limitations. The connection between the CAA's purpose of reducing air pollution and that of federal highway funding is not as direct as it may at first seem. While Congress repeatedly noted the potential environmental impacts of highway construction, none of the recent highway funding statutes establishes that a *purpose* of federal highway programs is environmental protection. In addition, nothing in the CAA requires any connection to highways, mobile sources, or even the specific pollutants most associated with vehicular traffic. Failure to adopt a sufficiently rigorous stationary source permit scheme, sufficiently stringent emission regulations on dry cleaners, bakeries and other "area" sources, or even failure to provide adequate citizen suit access to state courts can provide the basis for rejecting an SIP and imposing sanctions. The conditions on receipt of federal highway funds imposed by the CAA are more expansive than the conditions upheld in recent cases such as *United States v. Sabri*<sup>104</sup> and *Barbour v. WMATA*.<sup>105</sup>

There is also reason to question whether the CAA's delegation of authority to EPA to determine the precise scope of SIP requirements establishes sufficiently clear conditions upon receipt of federal highway funds. Finally, the extent to which states rely upon federal highway funds – and the amount of money at stake – may increase the likelihood that the highway fund sanction could be deemed coercive.

For these reasons, and because some federal appellate courts have seemed at least somewhat sympathetic to spending clause claims,<sup>106</sup> spending clause challenges to the CAA's highway fund sanction seem to be a reasonable possibility, particularly if states have difficulty meeting the tightened federal air quality standards for ozone and particulates. While most other federal environmental statutes impose conditions on the use of funds for specific programs as well, these are not as vulnerable under the *Dole* test. The Clean Water Act and Safe Drinking Water Act, for example, provide funds for state water quality and drinking water programs respectively that are to be used in support of related programs that meet specific federal requirements.<sup>107</sup> Under *Dole*, this sort of "reimbursement" spending does not raise the same constitutional questions as does the use of highway funds to induce cooperation in an environmental program.

## B. Commercial Speech

The increased reliance upon information disclosure and labeling requirements to advance environmental values could produce First Amendment challenges to environmental regulations. In recent years the Supreme Court has increased the protection provided to commercial speech<sup>108</sup> and reiterated that compelled speech is also subject to the same level of First Amendment scrutiny as are restrictions on speech.<sup>109</sup> The result is that the First Amendment provides some protection against compelled

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<sup>103</sup> *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996); *Missouri v. United States*, 918 F. Supp. 1320 (1996) *vacated* 109 F.3d 440 (1997).

<sup>104</sup> 541 U.S. 600 (2004).

<sup>105</sup> 374 F.3d 1161 (D.C. Cir. 2004).

<sup>106</sup> *See, e.g., Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc) (holding the Department of Education could not condition state receipt of federal funds under the Individuals with Disabilities Education Act (IDEA) on compliance with terms not explicit in the statute itself).

<sup>107</sup> *See* 33 U.S.C. § 1252 (2000); 42 U.S.C. § 300j-2 (2000).

<sup>108</sup> *See, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (striking down federal prohibition on advertising particular compounded drugs); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down state ban on price advertising for prediction drugs).

<sup>109</sup> *See United States v. United Foods*, 533 U.S. 405 (2001) ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object" (citations omitted)).

commercial speech. Therefore requirements that commercial entities disclose information about product characteristics or the manner in which given products were produced could be challenged on First Amendment grounds.

While the Supreme Court has reiterated a preference for mandatory disclosure over limitations on speech, the power to compel disclosure is not unlimited. Under the prevailing test, regulation of commercial speech is subject to a four-part test.<sup>110</sup> First, the court must consider whether the commercial speech in question is not misleading and concerns lawful activity. Second, the court must determine whether the government has a substantial interest in regulating the speech. If the answer to both these inquiries is “yes,” the court must then consider whether the regulation directly advances the asserted governmental interest and whether the regulation embodies the least restrictive means of advancing the asserted governmental interest. Only if both of these requirements are met will courts uphold restrictions on commercial speech.

Protection for compelled commercial speech could limit the ability of government agencies to impose various environmental labeling requirements, particularly those that concern the manner in which a given product was produced. For instance, in *International Dairy Foods Association v. Amestoy*, the U.S. Court of Appeals for the Second Circuit struck down Vermont’s requirement that milk producers label milk that had come from cows treated with recombinant bovine growth hormone (rBGH).<sup>111</sup> Because Vermont could not identify any health risk or other interest sufficient to justify the labeling requirement, it violated the First Amendment. Consumer curiosity alone is not a strong enough state interest to sustain the mandatory labeling, even of a factually accurate statement.<sup>112</sup> If governments continue to adopt information-based environmental protection strategies that rely upon company disclosure of production information, similar First Amendment challenges could arise.

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Constitutional challenges to environmental regulation are not going away. If anything, such claims will proliferate as environmental regulation expands its scope. It is difficult to predict where new constitutional challenges will arise. Who, for instance, would have predicted that companies accused of environmental violations would raise Fourth Amendment claims in their defense?<sup>113</sup> That the administrative compliance orders under the Clean Air Act violate due process?<sup>114</sup> Or that a federal appellate court would be sympathetic to a non-delegation challenge to federal air quality standards?<sup>115</sup> The only thing certain is that so long as environmental regulation presses the limits of governments’ constitutional authority, constitutional questions will remain an important part of environmental law.

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<sup>110</sup> *Central Hudson Gas & Elec. Corp. v. Public Service. Commision*, 447 U.S. 557 (1980).

<sup>111</sup> 92 F.3d 67 (2nd Cir. 1996).

<sup>112</sup> *Id.* at 74.

<sup>113</sup> *See Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55 (1st Cir. 2004).

<sup>114</sup> *See Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11<sup>th</sup> Cir. 2003).

<sup>115</sup> *See American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) *reversed in part* 531 U.S. 457(2001).