Introduction:
The Intersection of Constitutional and Environmental Law

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Practice Tip: This chapter introduces the various ways that constitutional law shapes environmental law, ways that are examined in detail in the chapters that follow. It is hard to overstate the profound influence constitutional law has on legal and policy responses to the most pressing environmental issues of our day: climate change, species and biodiversity conservation, pollution control, use of natural resources, sustainability, rights to a quality environment, individual property rights and liberty interests, wind power, interstate movement of waste and energy, carbon allowances, and land use, to name a few. These issues are molded by constitutional features including the Commerce, dormant Commerce, Supremacy, Takings, and Due Process Clauses; the nondelegation, standing, and political question doctrines; the Tenth and Eleventh Amendments; and principles of executive authority and federalism. Constitutions in many U.S. states, as well as in other countries, also explicitly address environmental concerns. This chapter briefly explains how these and other lower profile constitutional issues shape environmental law.
For a document that weighs in at a featherweight 7,369 words, the U.S. Constitution has a heavyweight impact on the arc of environmental law. Constitutional law doctrines often dictate what Congress, states, and individuals can and cannot do regarding the environment. From the nation’s founding until about 1900, nearly all of the U.S. Supreme Court cases involving environmental matters turned on either constitutional issues, such as the reach of the Commerce, Contract, Property, Enclave, Takings, and Due Process Clauses, or on legal theories such as the nondelegation and incorporation doctrines. From around 1900 until the dawn of the modern environmental era in about 1970, however, state and federal environmental protection laws seldom collided with constitutional principles because these laws were generally viewed as lying within legislative authority.¹

Since 1970, the sea has changed again, with constitutional issues often occupying center stage in federal and state efforts to protect land, air, water, species, and habitat,² perhaps fueled by the U.S. Supreme Court’s ambivalence about environmental protection and its renewed uncertainty about legislative authority generally.³ Indeed, from 2005 to 2010, more than 50 percent of the nearly four hundred federal cases yielding reported decisions involving constitutional issues—including most often standing, sovereign immunity, takings, due process,⁴ and, with increasing frequency, political question, preemption, and federalism.

Most issues surrounding the extent to which Congress and the states can protect the environment arise in the crucible of federalism under our republican system that “split the atom of sovereignty.”⁵ Accordingly, the subject of whether environmental protection is better served by federal or state authorities has been much debated. Suffice it to say that the Tenth Amendment provides states with wide latitude to regulate in spheres not withheld or retained. Yet there are substantial constitutional restraints on state authority, including the dormant Commerce, Supremacy, and Takings Clauses.

This chapter provides a bird’s-eye view of the constitutional features of environmental law. The first section examines the various constitutional law developments affecting the scope of Congress’s power to regulate the environment. It focuses on the Commerce Clause and the concomitant extrinsic limits on such authority, including principles of federalism and the Tenth Amendment, as well as the diminished nondelegation doctrine. The second section does the same for state authority and the dormant Commerce and Supremacy Clauses. The third section then examines two dynamic constitutional doctrines that tend to thwart the implementation of environmental laws—standing and political question. The fourth section canvasses individual rights, including compensable takings, due process, environmental rights, and use of the common law.
Constitutional jurisprudence in this area is a surrogate for wider debates about government regulation of human activity in the United States. At bottom are questions that began soon after our nation’s birth about who decides who can do what, when, and where under the U.S. Constitution.

Most of these questions elude easy answers. After all, as Chief Justice John Marshall observed nearly two hundred years ago, “we must never forget that it is a constitution we are expounding.” The legacy of jurisprudence from the Rehnquist Court and indications from the Roberts Court suggest that constitutional law will continue to exert a large amount of force on how environmental laws develop, suggesting a shade against environmental protection that is likely vestigial to the limited government, property rights, and federalism hues that imbue our founding document.

Sources of and Limits to Federal Environmental Law

Most congressional authority to regulate the natural environment, especially resources not found on federal lands, stems from the Commerce Clause, with some contributions from the Treaty, Spending, General Welfare, and Property Clauses. The Tenth Amendment and, to a lesser extent, the nondelegation doctrine have the potential to cabin the exercise of congressional authority over the environment. Moreover, as discussed in chapter 4, Article II provides the president with “take care” and “unitary executive” authority concerning environmental protection.

Congressional Authority

Commerce Clause

As chapter 2 explains in greater detail, a majority of the nation’s core environmental laws are founded on Congress’s authority under the Commerce Clause. The Commerce Clause provides that “Congress shall have the power . . . [t]o regulate Commerce . . . among the several states.” These laws include the National Environmental Policy Act (NEPA), the Clean Air Act (CAA), the Clean Water Act (CWA), the Endangered Species Act (ESA), the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), to name a few.

Commerce Clause jurisprudence has a long lineage. In 1824, the Supreme Court upheld Congress’s broad Commerce Clause authority to regulate competing use of navigable waterways notwithstanding countervailing state laws. The Court found that Congress may regulate “those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States.” Writing for the Court, Chief
Justice Marshall maintained that in a representative democracy it is the voting
citizen’s job, and not the Court’s, to curtail or redirect congressional action.

For about the next century, the Court rarely concluded that Congress ex-
cceeded its authority under the Commerce Clause, and when it did so, the
cases did not involve the use and disposition of the environment. But this
changed during the throes of the Industrial Revolution, when the Court invali-
dated numerous congressional efforts to regulate natural resources under the
Commerce Clause. The invalidated congressional acts attempted to control
the use of natural resources at the point of manufacturing or production
within a state. Examples include federal laws restricting monopolies in the
sugar industry, limiting the extent to which children and sometimes women
could work the fields and factories to convert natural resources into com-
mercial products, setting prices in the coal and oil industries, or empower-
ing coal and oil workers to engage in collective bargaining regarding maximum
hours, minimum wages, pensions, and health care.

This trend reversed in 1937 when the Court, by a bare majority, upheld
congressional authority under the Commerce Clause to regulate unfair labor
practices in manufacturing and production in the steel industry, because it
has a “close and substantial relation to interstate commerce.” Four years
later, the Court held that Congress’s Commerce Clause authority extends to
intragovernmental activities that have a “substantial effect” on interstate commerce.
And the next year, the Court allowed Congress to regulate noncommercial use
of natural resources, such as wheat grown for home consumption, if such indi-
vidual activities could in the aggregate affect interstate commerce.

Given this expansive backdrop, for the next four decades natural re-
source laws were seldom subject to Commerce Clause challenges. When they
were, the Court found Congress to have acted within its authority. For in-
fstance, in *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, the Court held
that the Commerce Clause provided Congress with authority under the Sur-
face Mining Control and Reclamation Act (SMCRA) to require private mining
companies to restore private lands located entirely within a state. The Court
determined that the appropriate inquiry is whether Congress has a “rational
basis” to find that a state activity substantially affects interstate commerce,
not whether it actually does. Concurring, Justice Rehnquist nonetheless omi-
nously noted that Congress cannot regulate commerce “to the nth degree.”

Recent Commerce Clause jurisprudence supports Rehnquist’s limiting
view of Congress’s Commerce Clause authority. In *United States v. Lopez*, the
Supreme Court held that the Commerce Clause permits Congress to regulate
in three areas: channels of interstate commerce (such as navigable waters),
instrumentalities of interstate commerce, and activities that “substantially af-
fect” interstate commerce. Following *Lopez*, in *United States v. Morrison*, the
Court described the substantially affects test as a function of whether (1) the underlying activity is “inherently economic,” (2) Congress has made specific findings as to effect, (3) the law contains a jurisdictional element, and (4) the overall effects of the activity are actually substantial.

*Lopez* and *Morrison* have the potential to limit federal control over the environment, particularly such programs as the ESA—both because the survival of endangered species is often not inherently economic and because, even in the aggregate, endangered species do not necessarily have a substantial effect on interstate commerce. The lower courts, however, have not limited federal power in this way. For example, on the heels of *Lopez*, the D.C. Circuit decided that Congress has Commerce Clause authority under the ESA to protect an endangered fly that exists predominantly within a single state. Following *Morrison*, the Fourth Circuit held in *Gibbs v. Babbitt* that the ESA’s prohibition on the “taking” of an individual endangered red wolf in North Carolina is within Congress’s authority under the Commerce Clause. Over a stinging dissent, a majority of the court found that protecting endangered red wolves satisfies *Morrison* because tourism and the potential of a pelt market make regulation inherently economic in nature.

Likewise, the Fifth Circuit upheld Congress’s Commerce Clause authority to apply the ESA to land development that would harm federally protected spiders and insects that neither inhabit nor cross state borders. In addition, the D.C. Circuit upheld Congress’s authority to provide ESA protection to intrastate toads that do not facilitate economic opportunities like tourism. The Supreme Court denied petitions for certiorari each time they were sought in these cases, which might suggest the Court is not yet inclined to extend *Lopez* and *Morrison* to regulation of the environment.

A broader reading of the Commerce Clause was also suggested in *Gonzales v. Raich*. There, the Court upheld an aspect of the federal Controlled Substances Act, which prohibits in-state sale and distribution of marijuana notwithstanding state laws that permit in-state sale for medical purposes if prescribed by a physician. In a decision by Justice Stevens, the Court held that it was not necessary to decide “whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a rational basis exists for so concluding.”

Whether courts adopt the *Raich* or the *Lopez/Morrison* standard of review could profoundly impact environmental law. It is easier to show that Congress has Commerce Clause authority to protect species, habitat, and water quality under *Raich* than it is under *Lopez* and *Morrison*. For example, in *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, the Eleventh Circuit upheld Congress’s authority under the Commerce Clause to allow federal wildlife agencies to list as a protected species the last remaining population of the
Alabama sturgeon, a noncommercial species that exists only within the state of Alabama. Applying Raich, the court maintained that “when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.” Notwithstanding the lack of an inherently economic activity and congressional findings of impact, the court easily held that Congress could have had a rational basis for concluding that protecting endangered species, in the aggregate, substantially affects interstate commerce. That the ESA bears a substantial relation to commerce, the court found, is reflected in the $5 to $6 billion spent annually on illegal trade in rare plants and animals; the “incalculable” value of genetic heritage; the unknown value of safeguarding species and genetic diversity for medical, agricultural, and aquacultural purposes; and the tens of billions of dollars in annual expenditures associated with hunting, fishing, birding, tourism, and other economic activities. Thus, the court concluded, “Congress was not constitutionally obligated to carve out an exception” for intrastate species or noncommercial species from the ESA’s “comprehensive statutory scheme.”

Some have also argued, based on Lopez and Morrison, that Congress lacks the authority to regulate waters that are not historically navigable-in-fact. But applying Raich, the Tenth Circuit found otherwise in United States v. Hubenka. There, the court held that the Commerce Clause authorizes the U.S. Army Corps of Engineers to regulate the dredging and filling of nonnavigable tributaries that flow downstream into navigable waters.

The record thus shows broad support among the federal appellate courts for congressional authority to regulate intrastate activities that could substantially affect interstate commerce under the Commerce Clause. Nevertheless, the validity of congressional authority under the ESA and other federal natural resource acts is hardly secure. The composition of the Supreme Court has changed significantly since Raich. Justice O’Connor cast the deciding vote in Raich, but her successor, Justice Alito, seems inclined to view federal authority more narrowly. Moreover, Chief Justice Roberts, who was not involved in Raich, rather famously remarked in a circuit court dissent that the Commerce Clause does not provide Congress with authority to protect a “hapless toad that, for reasons of its own, lives its entire life in California.”

In addition, context matters. The majority Justice Stevens mustered in Raich, involving controlled substances like marijuana, may not hold when the subject of regulation is a noncommercial, intrastate species with no inherent economic value, particularly when Congress has not made specific findings that loss of individual species has a “substantial effect” on interstate commerce. Finally, the Court also has employed a constrained view of Commerce Clause authority as a tool of statutory construction to limit the jurisdictional
reach of other natural resources and environmental laws. For example, in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the Court passed on an opportunity to decide whether the Corps’ and EPA’s interpretation of the CWA as requiring a permit for discharge into an isolated, intrastate water not adjacent to a navigable waterway exceeds Congress’s authority under the Commerce Clause. Instead, the Court invalidated the government’s action as a matter of statutory interpretation, finding that the Corps’ and EPA’s use of the migratory bird rule to establish jurisdiction exceeded the reach of the act’s definition of “navigable waters.” But the Court noted that a contrary interpretation would raise “significant constitutional questions” under the Commerce Clause.

The tenuous grip *Raich* has on Commerce Clause jurisprudence was on display again in *Rapanos v. United States*. Like *SWANCC*, *Rapanos* raised a question about the scope of the Corps’ authority to regulate dredge and fill discharges. In *Rapanos*, the key discharges were on wetlands that were adjacent to nonnavigable tributaries of “navigable waters.” Notably in *Rapanos*, Justice Kennedy’s concurrence, which provided the key vote for remanding the case, relied on *Raich* for the proposition that “when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.” That is, in Justice Kennedy’s view, Congress’s commerce power extends to a class of activities that substantially affect interstate commerce, even when the individual activity being regulated itself has only a de minimis relationship to interstate commerce.

As recent cases under the Commerce Clause cast doubt about Congress’s ability to protect the environment—particularly rare plants and animals, habitat, and water—the constitutionality of natural resource laws may hinge more frequently on other less prominent sources of congressional authority, like the Treaty, Spending, General Welfare, and Property Clauses, discussed below.

**Treaty Clause**

The Treaty Clause is an underutilized source of congressional authority to enact environmental laws. It provides that the executive branch “shall have power, by the consent and with the advice of the Senate, to make Treaties, provided two thirds of the Senators present concur.” After a treaty is approved, Congress has the power under the Necessary and Proper Clause “to make all laws which shall be necessary and proper for carrying into execution . . . all . . . powers vested by this Constitution in the Government of the United States.” Because of the Supremacy Clause, these laws effectively preempt any conflicting laws enacted by states, although states are inclined to argue that the Tenth Amendment’s reservation of power “to the states . . . or to the
people” limits the reach of federal statutes on matters traditionally left to the states. Some jurisprudence suggests that the Treaty Clause vests Congress with the authority to force state adherence to federal environmental laws enacted pursuant to validly ratified treaties, irrespective of the limitations otherwise imposed by the Tenth Amendment. The leading case involves the Migratory Bird Treaty Act (MBTA). Congress enacted the MBTA to facilitate enforcement of a treaty between the United States and Great Britain to protect a number of migratory birds in the United States and Canada. Missouri claimed the treaty infringed on rights reserved by the Tenth Amendment. The Supreme Court disagreed. In Missouri v. Holland, Justice Holmes, writing for the Court, upheld Congress’s authority to enact legislation pursuant to a treaty that governed a traditional state function like hunting. The Court found that the Treaty Clause, when coupled with the Necessary and Proper Clause, provided Congress with authority to infringe on state sovereignty in ways it could not under the Commerce Clause alone.

Missouri v. Holland suggests that the Treaty and Necessary and Proper Clauses may offer better sources of constitutional authority for environmental laws enacted pursuant to an underlying treaty. The ESA, for example, which is subject to persistent Commerce Clause challenges, may be more constitutionally secure as an incident of Congress’s Treaty Power, as it was enacted in part to implement aspects of the Convention on the International Trade in Endangered Species of Wild Fauna and Flora, and the Western Convention on Nature Protection and Wildlife Preservation. This also suggests a possible advantage for Senate ratification and congressional implementation of other treaties designed to level the playing field in the use of natural resources, such as the United Nations Convention on the Law of the Seas.

Bilateral treaties may also play a more substantial role in the future of water use and environmental protection. In 1909, the United States and Canada entered into the International Boundary Waters Treaty, which established the International Joint Commission to help resolve disputes regarding waters shared by the two countries, including the Great Lakes. Disagreement between the countries about water use could become more significant, particularly with a warming planet and the loss of the polar ice caps. Thus far, however, federal courts in the United States have declined to entertain disputes about boundary waters, finding such matters to be constitutionally committed to foreign policy and thus not justiciable.

Spending and General Welfare Clauses
The Spending and General Welfare Clauses also provide potential bases for promoting environmental protection values. In tandem, they permit Congress to tax and spend so as to “provide for the common defense and General Welfare of the United States,” by attaching conditions to the receipt of federal funds, provided the conditions are not coercive.
The Land and Water Conservation Fund (LWCF) is a good example of a federal spending program that benefits environmental protection. Established in 1964, the LWCF has provided hundreds of millions of dollars in grants to federal, state, and local governments to acquire land, water, and related resources for recreational, wildlife, and aesthetic purposes that benefit the public.

The General Welfare Clause’s imprint on environmental protection can also be problematic. This is perhaps best reflected by the work of the Bureau of Reclamation, which has sponsored many large water development projects throughout the western United States under the auspices of the General Welfare Clause and the Reclamation Act of 1902. Without the bureau, much of the western United States would still be undeveloped desert. Between 1902 and 1981, the federal government invested $7.3 billion in bureau projects to construct about 350 diversion dams, more than 15,000 miles of diversion canals, and about 50 hydroelectric plants, including the Hoover Dam.

The Property Clause
The Property Clause authorizes Congress to make all “needful” rules concerning federal land, which constitutes about 28 percent of the country. In 1897, the Court analogized Congress’s power under the Property Clause to state police power, lest federal property be at the mercy of the states. Since then, the Court has interpreted the scope of this authority to be “virtually without limitation.”

Other provisions of the Constitution allow Congress to exercise relatively unquestioned authority to protect natural resources on federal lands under the Enclave Clause. And, as described in chapter 4, Congress also has authority to “acquiesce” to presidential power to “reserve” natural resources on federal land.

Limits on Federal Authority
Federalism and the Tenth and Eleventh Amendments present the principal constraints on Congress’s authority to enact environmental laws not exclusively designed to address activities on federal lands. The Tenth Amendment potentially limits the scope of federal legislation, while the Eleventh Amendment limits the federal government’s ability to enforce its laws against the states in court. The largely defunct nondelegation doctrine and the First Amendment also influence federal authority to enact and implement environmental laws.

Tenth Amendment
As discussed in chapter 5, the Tenth Amendment supplies potential limits on Congress’s authority to enact environmental laws, particularly in traditional areas of state and local authority, such as land use or public health. It preserves the “dignity” and sovereignty of the states by providing that “the pow-
ers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the People.”

Thus far, Tenth Amendment jurisprudence has curtailed environmental programs that upset political accountability and diminish state dignity. In *New York v. United States*, the Supreme Court held that Congress may not “commandeer” state political or personnel resources by requiring a state to “take title” of its own low-level radioactive waste even if it fails to arrange for proper disposal under federal law. Courts have been reluctant, however, to find that Congress has commandeered state resources under other circumstances. For example, a federal court rejected a state claim that the Magnuson-Stevens Fishery Conservation and Management Act violates the Tenth Amendment by compelling participation in a regional management council that set quotas on the seasonal catch of fish. Another court rejected a state’s Tenth Amendment claim that the ESA commandeers state resources by requiring the state to engage in conservation efforts. Moreover, the Supreme Court held, by a slim majority, that EPA’s rejection of a state’s determination of what constitutes “best available control technology” did not unduly infringe on state prerogatives under the Clean Air Act’s system of cooperative federalism.

Eleventh Amendment

As chapter 5 explains, under the Eleventh Amendment, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State.” Absent express consent, states are virtually immune from legal action in federal court, including lawsuits to force compliance with federal environmental protection programs. The Eleventh Amendment clearly limits federal jurisdiction in actions based on diversity. A century ago, the Court extended this prohibition to federal court actions based on federal question jurisdiction. Since then, the Court has made clear that Congress may not subject states to federal question lawsuits without state consent in federal court, in state court, or before federal agencies. In 1986, the Court upheld the constitutionality of CERCLA insofar as it permits suits against the states for monetary damages in federal court, although the current Supreme Court majority has since become less tolerant even of lawsuits for money damages that would run against state treasuries.

Eleventh Amendment jurisprudence thwarts implementation of federal protection laws, for instance by creating a potential obstacle to federal citizen suits seeking to redress violations of federal environmental laws by state agencies. For example, SMCRA allows citizens to sue state and federal mining agencies to enforce its provisions, including bonding provisions and requirements to protect water quality. Thus, in *Bragg v. West Virginia Coal Ass’n*, citi-
zens brought an action to forestall the practice of filling valleys with excess spoil or waste rock from mountaintop mining. The citizens sued state and federal officials to enjoin them from issuing permits in the absence of the sufficient financial assurances SMCRA requires, including funding to protect affected streams. The Fourth Circuit dismissed the action. It held that SMCRA's “exclusive” delegation of permitting to a state transforms SMCRA requirements into state standards, which cannot be enforced in federal court.

Notwithstanding the decision in this and subsequent cases, an argument remains that states waive their claim to immunity when they voluntarily seek approval to operate a program pursuant to a federal law like SMCRA.

The Court’s Eleventh Amendment jurisprudence has also hampered implementation of federal whistleblower protection laws, designed to protect state employees who report a state agency’s transgressions from federal environmental laws, including appropriations to states to administer federal natural resource programs. For example, in Rhode Island Department of Environmental Management v. United States, the First Circuit held that a state whistleblower could not bring an action against the state of Rhode Island before a federal administrative agency, alleging that he had been fired for reporting misappropriation of federal funds that were supposed to be used to implement the Solid Waste Disposal Act.

State officials are still subject to federal causes of action for prospective injunctive relief, a tack left available under Ex parte Young. Thus, the Eleventh Amendment does not prevent a court from requiring a state official to comply with federal environmental protection laws. Eleventh Amendment jurisprudence will likely continue to hamper efforts to enforce environmental laws against states. This is especially true insofar as it does not seem as though any of the newer members of the Court—Chief Justice Roberts and Associate Justices Alito, Kagan, and Sotomayor—share Justice Rehnquist’s solicitude for states’ rights in this regard.

Nondelegation Doctrine
The nondelegation doctrine is rarely used, but it remains available as a limit on Congress’s authority to vest administrative agencies with wide authority to implement environmental laws. The doctrine, described in greater detail in chapter 3, stems from Article I of the Constitution, which vests “all legislative” authority in Congress and presumably not in agencies charged with implementing national policies. Nonetheless, while Congress may not “delegate” legislative authority to agencies that administer federal law, legislation that provides an “intelligible principle” to guide the exercise of agency discretion will be upheld. The relevance to environmental law is acute. Most federal pollution control laws contemplate agency implementation, and many federal
programs governing the administration of public lands provide agencies with considerable discretion in managing those lands for the public interest or to achieve multiple, but possibly inconsistent, uses.

Other than in the midst of the New Deal in the 1930s, the Court has seldom found that Congress has failed to provide an “intelligible principle.” Most recently, in 2001, the Court declined an opportunity to use the doctrine to strike a provision of the CAA that charges EPA with the duty to set national ambient air quality standards as “requisite” to protect public health and welfare. In *Whitman v. American Trucking Ass’n*, the Court unanimously rejected the nondelegation challenge, holding that “requisite” falls “comfortably within” the Court’s nondelegation jurisprudence.58

It is risky, however, to think that the nondelegation doctrine—while in desuetude—is bereft of meaning. For example, Justice Thomas’s concurrence in *American Trucking* all but invited a test case challenging other statutory provisions granting general authority to federal natural resource and environmental agencies. In addition, *American Trucking* reversed a contrary opinion from the D.C. Circuit Court of Appeals, usually the second most influential court in cases involving agency action and natural resources and environmental law.59 Moreover, the Court’s newest appointees, Chief Justice Roberts and Associate Justices Alito, Sotomayor, and Kagan, have yet to weigh in on the nondelegation issue.

**The First Amendment**
The First Amendment protects “freedom of speech” and prohibits Congress from passing laws “respecting an establishment of religion, or prohibiting the free exercise thereof.” In the environmental law context, First Amendment claims can arise in the context of public land management. In a leading case on the Free Exercise Clause, *Lyng v. Northwest Indian Cemetery Protective Ass’n*, various parties contested the U.S. Forest Service’s plans to permit timber harvesting and road construction in an area of national forest that was traditionally used for religious purposes by members of three Native American tribes in northwestern California.60 The Court held that the Free Exercise Clause protects an individual from certain forms of governmental compulsion, but it does not give an individual a right to dictate government conduct, even if that conduct might significantly interfere with one’s religious practices. Thus, the timber harvesting and road construction were allowed to go forward.61

Unlike free exercise cases, Establishment Clause cases typically arise when the government seeks to protect resources of religious significance and someone objects to that protection on the ground that the government is promoting religion. For example, in *Mount Royal Joint Venture v. Kempthorne*, the Department of the Interior withdrew about 20,000 acres of public mineral estate from mineral location and entry, in part to protect areas of traditional
spiritual importance to Native Americans. The court found that the secretary had articulated secular purposes for the withdrawal, including the protection of aquifers and the environment. Consequently, the court concluded that the withdrawal did not primarily affect religious interests and thus did not foster excessive government entanglement with religion in a manner that would violate the Establishment Clause.

Recent limits on free speech rights of public employees may also have significant effects on putative whistleblowers. Under *Garcetti v. Ceballos*, government employees lose their First Amendment rights to speak out against government wrongdoing if they do so in the course of their employment. So, for instance, a government employee may be disciplined for speaking to a supervisor or writing an internal memo about an agency's wrongdoing. *Garcetti*, then, deters whistleblowing, even when the agency is violating environmental rules.

**Sources of and Limits to State Environmental Law**

The Tenth Amendment generally provides the justification for state police power authority to regulate the use and disposition of the environment on state or private land. The dormant Commerce Clause doctrine and the doctrine of federal preemption generally constrain such authority.

**Sources of State Authority**

**Tenth Amendment**

As the Tenth Amendment “reserves” state authority in areas neither reserved for Congress nor withheld from the states, many states have adopted extensive laws governing the environment, especially when federal regulation has left gaps. Indeed, as chapter 5 explains, much environmental regulation is the product of federal-state cooperation, which is valid unless the federal government seems to be commandeering the states—that is, leaving them without a choice as to whether to comply—which, as discussed above, violates the Tenth Amendment.

**The Compact Clause**

The Compact Clause of the U.S. Constitution provides that “no state shall, without the consent of Congress . . . enter into any agreement or compact with another state.” States have entered into more than two hundred compacts, twenty-six of which involve allocating interstate waters.

Historically, water resource allocation has been the area where regional issues warranted an appreciation of the Compact Clause. For example, the Colorado River Compact of 1922—the first interstate water compact—includes seven states and has had a substantial influence on water resources al-
location among those states. As our climate changes and demands for fresh water resources grow, disputes among states sharing waters are expected to increase dramatically. This is true even in areas that historically have had ample water supplies, such as the southeastern United States. Georgia, Florida, and Alabama, for example, have waged a pitched and unresolved battle over water rights to the Apalachicola-Chattahoochee-Flint river system for two decades.

The Supreme Court is generally loath to reach the merits of state disputes about water, pushing instead for interstate compacts. To aid in this effort, the Utton Transboundary Resources Center began work in 2004 to develop a Model Interstate Water Compact. Moreover, Tenth Amendment limitations apply to interstate compacts as well. As New York v. United States demonstrates, states cannot agree by interstate compact to allow Congress to commandeer their state environmental programs.

Limits to State Authority
The dormant (or “negative”) doctrine of the Commerce Clause and the Supremacy Clause most commonly limit state environmental laws.

Dormant Commerce Clause
As chapter 6 describes, in the absence of federal laws, many states, counties, and municipalities have enacted legislation either to protect the environment from toxic wastes or to conserve resources for state purposes. Yet, the Supreme Court has invalidated many such efforts under a principle called the dormant or negative Commerce Clause. The idea that the Commerce Clause contains a dormant or negative aspect arguably originated in a natural resources case. Chief Justice John Marshall coined the phrase “dormant Commerce Clause” in Willson v. Black-Bird Creek Marsh Co., a case that allowed Delaware to issue a license to block navigation of the Black-Bird Creek, absent a countervailing federal law.

Today, the phrase “dormant Commerce Clause” is most often used to describe limits on a state’s authority to adopt laws or policies that discriminate against interstate commerce because they favor one state or impose an excessive economic burden on outsiders. The idea is that the United States constitutes a single economic market, and state laws regulating commerce cannot disadvantage economic activity from other states, just as interstate tariffs used to do. For example, the Court has struck down a ban on the importation of dangerous out-of-state waste, higher tipping fees or surcharges for wastes generated out of state, and waste flow control ordinances prohibiting landfill operators from accepting out-of-state waste or requiring all county waste be processed at the county’s facility.
State efforts to sequester natural resources for the benefit of in-state residents are also vulnerable to dormant Commerce Clause objections. While several early cases upheld such state laws, the modern view is illustrated by such cases as *Hughes v. Oklahoma*, which overturned an Oklahoma law prohibiting the transport of minnows caught in the state for sale outside the state,73 and *Sporhase v. Nebraska*, which struck down a Nebraska statute that restricted withdrawal of groundwater from any well in the state for use in an adjoining state.74

In similar fashion, the Court has also rejected state efforts to control commerce in energy and fuels. In 1982, for example, the Court struck down a state law that prohibited the export of energy generated within the state.75 The Court has also invalidated other state initiatives awarding tax credits for in-state ethanol production76 and requiring that in-state power plants burn in-state-mined coal.77

*Hughes* establishes the general test for dormant Commerce Clause cases involving state regulation of the environment. First, the Court asks “whether the challenged statute regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce. . . .”78 If the statute regulates evenhandedly, it is generally upheld unless the burden on commerce is excessive.

But when a statute discriminates, it is usually struck down unless the state can show that it is seeking to accomplish a legitimate local purpose that cannot be accomplished by less discriminatory means.79 For example, the Court upheld Maine’s restrictions on the importation of bait fish when the state demonstrated that such fish might carry undetectable diseases that could adversely affect native fish species.80 By contrast, the Court struck down an additional fee that Alabama imposed for the disposal of hazardous waste generated outside the state on the ground that the fee discriminated against interstate commerce.81 The Court found that although the state may have had legitimate concerns about the amount of waste disposal in Alabama, less discriminatory means were available to address those concerns.

The Court has also recognized that when a state acts as a market participant rather than as a market regulator, the dormant Commerce Clause places no limits on state activities. But this exception does not allow the state to burden commerce beyond the market in which it participates. For example, Alaska was not allowed to invoke the market participant exception for the sale of state timber that was subject to the requirement that the buyer partially process the timber prior to shipping it out of state.82

Public facilities that regulate the environment for public benefit may enjoy wider latitude under the dormant Commerce Clause. In *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*, a plurality of the Court de-
cided that a county’s flow control ordinance that required all solid waste generated within the county be delivered to the county’s publicly owned solid waste processing facility does not violate the dormant Commerce Clause. Rellying on *Pike v. Bruce Church, Inc.*, the plurality concluded that facilities operated by public hands for “public good” directed at goals other than mere protectionism have greater leeway to control the flow of wastes. Cases applying *United Haulers* thus far suggest that the constitutional prospects of local flow control regimes involving publicly owned facilities have been enhanced. *United Haulers* may also signal judicial receptivity to local flow control ordinances not involving “clearly public facilities.” For example, relying on *United Haulers’* focus on safety, a federal district court in Georgia recognized broad state discretion to identify legitimate state ends respecting waste disposal.

The Supreme Court’s skepticism toward state regulation of the flow of natural resources and energy is unlikely to change anytime soon, and may become an even more problematic issue as states address climate change and the development of renewable energy sources. Only the late Chief Justice Rehnquist regularly dissented from the string of cases applying the dormant Commerce Clause to strike down state natural resource laws. He chided his colleagues for failing to “acknowledge that a safe and attractive environment is the commodity really at issue,” reasoning that “[s]tates 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.” Rehnquist also argued that federal courts should presume—as with quarantine laws—that state conservation laws are rational means to achieve legitimate state ends that have but incidental effects on interstate commerce. Moreover, Rehnquist believed that federal courts should defer to both state legislative and judicial findings supportive of a nonprotectionist impetus behind state waste control laws. No current member of the Court seems to embrace Rehnquist’s view of upholding state environmental laws in the face of challenges brought under the dormant Commerce Clause.

**Preemption**

The Constitution’s Supremacy Clause, which chapter 7 describes in detail, provides that “[t]he Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land.” Thus, the Constitution authorizes federal environmental laws to displace inconsistent state laws. In 1819, in a case involving use of navigable waterways, the Court made its earliest pronouncement on the subject and held that federal law usurps inconsistent state laws that may “retard, impede, or burden” federal operations. Absent specific intent to preempt, the modern Court has held that Congress may preempt state law implicitly by “field” preemption, when Congress occupies a field of interest so pervasively that preemption is
assumed, or when state law conflicts with federal law. Although the Court has held that a comprehensive regulatory scheme involving environmental protection may occupy the field and thus implicitly preempt federal common law,93 it has generally been receptive to state efforts to supply common law causes of action involving the use or protection of the environment.94

Courts have been skeptical of claims that a federal law implicitly preempts state environmental laws. In Exxon Shipping Co. v. Baker, the Supreme Court held that the federal CWA does not preempt punitive damages under maritime law.95 Other courts have concluded that federal law does not expressly or impliedly preempt state-imposed fleet fuel efficiency requirements96 or tailpipe restrictions on greenhouse gas (GHG) emissions.97

Moreover, the Court often tends to find that state actions concerning energy production, water allocation, and disposition of natural resources are not preempted absent an express preemption provision, a clear indication of a pervasive federal regime, or some actual federal-state conflict. In 1983, for example, the Court held that congressional regulation of the field of nuclear safety did not preempt California’s moratorium on new nuclear power plants absent safe and reliable methods for disposal of high-level radioactive waste.98 And in 1978, the Court held that Congress did not intend to displace the application of state water law to the distribution of water behind a federally constructed dam.99

On the other hand, state activities that impinge on federally occupied spheres of activity may be implicitly preempted. For example, the Court has held that federal legislation governing the issuance of fishing licenses preempts a state’s effort to limit the ability of outsiders to fish in the state’s territorial waters.100 And although the Court held that the Federal Power Act comprehensively regulates hydroelectric power and preempts a state’s ability to set minimum stream flow requirements and protect fish populations,101 it nevertheless refused to restrict a state’s effort to regulate hydroelectric development and protection of the environment when acting under the CWA.102

Looking ahead, the prospect of preemption continues, given the swath cut by federal environmental laws. Numerous state laws fill in both the wide and the interstitial fissures left by federal environmental law. Most states have myriad environmental laws that apply to activities that adversely affect ecosystems or diminish property values. Also, most states have comprehensive statutory programs that regulate water, air, and soil pollution; restrict the use of state natural resources such as wildlife, minerals, and forests; and use common or codified laws, such as nuisance, trespass, and negligence, to provide remedies for those harmed by excess pollution or imprudent land use resulting in injury to persons or property. Further, many local governments have laws governing the use of natural resources. Therefore, preemption issues will continue to influence the development of environmental laws at the state level.
Judicial Review

The two constitutional doctrines that most dramatically influence the prospects for judicial review are standing and political question.

Standing

The doctrine of standing, as described in chapter 8, has had a pervasive and deeply imbedded influence on environmental law. The standing doctrine constrains the extent to which litigants can enforce federal environmental laws. Article III extends “judicial authority” to “Cases . . . and Controversies.” In general, the Supreme Court has construed this provision to require that a plaintiff show a personal injury that can be traced to the defendant’s conduct and redressed by a judicial remedy. In 1972, the Court recognized noneconomic, aesthetic, and environmental interests as legally cognizable “injuries” that can serve as a sufficient basis for constitutional standing under Article III. More recently, in *Friends of the Earth v. Laidlaw Environmental Services*, the Court made clear that it is injury to a person, and not the environment, that matters, thus obviating any need to show environmental degradation to support constitutional injury. An association has standing when (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization’s purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Despite these limits, standing doctrine should not prove an insurmountable bar to plaintiffs in environmental cases. For example, a federal appeals court found that a citizen group whose members regularly use Yellowstone National Park has constitutional standing to challenge construction of a coal-fired electric plant whose emissions reduce visibility. Some courts have found that plaintiffs concerned about the effects of climate change have standing to enforce compliance with the NEPA. And still others have shown receptivity to standing based on governmental failure to abide by statutorily required procedures in environmental laws.

However, a recent ruling from the Supreme Court suggests standing is still a real obstacle. In *Summers v. Earth Island Institute*, the plaintiffs contended that certain regulations established by the U.S. Forest Service are invalid because they were not preceded by advance notice and an opportunity for comment and administrative appeals as mandated by the Forest Service Decisionmaking and Appeals Reform Act. The Court held that Earth Island lacked standing to challenge the application of these regulations nationwide because it had voluntarily settled the portion of the lawsuit pertaining to its only member who suffered an actual injury-in-fact that was “concrete and particularized.”
Regardless of how standing doctrine applies to organizations and individuals, states appear to enjoy wider latitude to demonstrate constitutional standing in cases involving environmental law. In *Massachusetts v. EPA*, the Court held that states are entitled to “special solicitude” in standing analysis in cases involving state efforts to protect natural resources.111 There, the Court recognized Massachusetts’s potential shoreline loss as a legally cognizable injury in allowing it to challenge EPA’s failure to regulate GHG emissions. Individuals, on the other hand, must still show a tight “geographic nexus” between the claimed injury and the federal action.112 While standing jurisprudence can be both uncertain and fact-intensive, one sure bet is that it will continue to be a significant issue in the enforcement of environmental law.

**Political Question Doctrine**

As chapter 9 explains, although the political question doctrine has not traditionally impeded implementation of natural resource laws, recent decisions suggest it deserves to be watched closely in the future, at least concerning climate change. In *Marbury v. Madison*, Chief Justice Marshall lamented the “irksome” and “delicate” questions that are inherently political and out of reach to the judiciary.113 And in 1962, the Court observed that matters demonstrably committed to a coordinate branch of government, or that lack ascertainable standards, or that could otherwise result in judicial embarrassment are “formulations” of nonjusticiable “political questions.”114 For example, the Court has recognized that executive powers over foreign affairs, impeachment, and treaty abrogation are political questions into which courts “ought not . . . enter [the] political thicket.”115

The Court has declined to engage arguments inviting analysis under the political question doctrine in holding that the federal CAA provides EPA with authority to regulate emissions of GHGs from new motor vehicles.116 Nonetheless, several federal courts have turned recently to the political question doctrine in deciding that cases involving climate change are nonjusticiable. For example, federal district courts in California, Louisiana, and New York have dismissed state public nuisance actions brought to address the effects of climate change against U.S. auto manufacturers,117 coal-burning power plants,118 and the oil and gas industry,119 electing not to “enter the global warming thicket.”120

**Individual Rights**

Individual rights to private property, due process, and, to a lesser extent, a quality environment have profound impacts on environmental law.
Takings

As chapter 10 discusses more fully, the Fifth Amendment, which the Fourteenth Amendment incorporates to the states, forbids the government from “taking private property for public use without just compensation.” The concept of “regulatory” takings first arose in Pennsylvania Coal Co. v. Mahon, which prohibited coal mining that might cause surface subsidence. Justice Holmes, writing for the Court, held that a state’s regulation that goes “too far” could amount to a taking.

Determining whether a law constitutes a regulatory taking involves a balancing approach that turns on how closely the impact of the challenged regulation resembles a physical occupation of the regulated property. In Penn Central Transportation Co. v. New York City, the company argued that the New York City Landmarks Preservation Law of 1965 constituted a regulatory taking. The law allowed the city to designate structures and neighborhoods as “landmarks” or “landmark sites,” thus preventing Penn Central from building a multistory office building atop Grand Central Terminal. The Court disagreed, finding that the city’s restriction was substantially related to the general welfare of the city. In Penn Central, the Court weighed three factors to determine whether a government regulation triggers the obligation to compensate the property owners: (1) “the economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) the “character of the governmental action,” that is, whether it amounts to a physical invasion or merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good.”

The Court has applied the Penn Central factors in a series of environmental cases. In Lucas v. South Carolina Coastal Council, Lucas bought two beachfront residential lots on which he intended to build single-family homes. Shortly thereafter, the state enacted a law aimed to protect barrier islands that barred Lucas from erecting permanent residences. The Court held that depriving a landowner of all economically viable use of property goes too far and constitutes a regulatory taking per se, unless such use constitutes a nuisance under the state’s traditional common law.

Even preexisting state laws can go too far and constitute a compensable taking. In Palazzolo v. Rhode Island, Anthony Palazzolo owned a waterfront parcel of land in Rhode Island, most of which was salt marsh subject to tidal flooding. State law enacted prior to his acquisition of the property designated state salt marshes as protected “coastal wetlands.” Palazzolo claimed that the state’s subsequent denial of his multiple requests to develop the property constituted a regulatory taking because it had deprived him of “all economically beneficial use” of his property. The Court upheld his claims, even though he acquired the property after the state law went into effect. Jus-
tice Kennedy, writing for the Court, held that a contrary ruling would, “in ef-
fect, put an expiration date on the Takings Clause . . . [depriving] [f]uture gen-
erations [of] a right to challenge unreasonable limitations on the use and
value of land.”127

Normal regulatory delays that temporarily deprive an owner of all eco-
nomically beneficial use of property do not necessarily constitute a taking. In
Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency
the gov-
ernment imposed two moratoria on development while it prepared a compre-
hensive land use plan.128 The moratoria lasted a total of about thirty-two
months. The landowners claimed that during that time the moratoria consti-
tuted a deprivation of all economically viable use of land. The Court dis-
agreed. Applying the Penn Central factors, it concluded that the delay did not
constitute a taking, noting that a categorical rule that any temporary depriva-
tion of all economic use constitutes a taking—no matter how brief—would im-
pose unreasonable financial burdens due to normal, foreseeable delays in pro-
cessing land use applications.

The Court has wrestled with how closely its takings jurisprudence ought
to track substantive due process jurisprudence. In Agins v. City of Tiburon, the
Court declared that government regulation of private property constitutes “a
taking if [it] does not substantially advance legitimate state interests.”129 This
standard is analogous to substantive due process analysis.

After applying it for two decades, the Court subsequently abandoned the
standard of review endorsed in Agins. In Nollan v. California Coastal Commis-
sion, the Court struck down a state requirement that certain beachfront prop-
erty owners in California maintain along their property a public pathway that
provided access to the beach.130 The Court held that while maintaining public
access is a legitimate state interest, the means chosen did not substantially
advance this end and constituted a compensable regulatory taking. Likewise,
in Dolan v. City of Tigard, the Court rejected the City’s effort to require Dolan
to set aside part of her land for a greenway along a nearby creek to help allevi-
ate surface runoff and for a pedestrian/bicycle path to relieve traffic con-
gestion, in exchange for allowing her to expand her store and pave her park-
ing lot.131 The Court held that the City had failed to show an “essential nexus”
between the ends (reducing erosion and traffic) and the means chosen to
achieve them.

More recently, in Lingle v. Chevron U.S.A., the Court considered a takings
challenge arising from a cap on the rent oil companies could charge dealers
leasing company-owned service stations.132 Chevron and others argued the
cap constituted a regulatory taking because the means chosen (limiting rent
charges) did not “substantially advance” a legitimate state aim. Writing for a
unanimous Court, Justice O’Connor denied the claim. In an effort to “correct
course,” the Court held that the “substantially advances” test announced in
Agins is limited to substantive due process analysis and does not apply in the takings context. Instead, takings challenges should be assessed based on the severity of the burden caused by the regulation, not how well the regulation furthers governmental interests, which seems to make upholding regulation more likely.

Looking ahead, takings jurisprudence will continue to impact environmental law significantly, especially in constraining state actions. Government agencies are acutely aware of the potential to pay large compensatory awards for denying or delaying permission to develop property or for imposing conditions on property use. For example, the U.S. Court of Claims awarded $14 million to farmers who alleged that federal limits on water withdrawn from the Sacramento–San Joaquin Delta to conserve Chinook salmon and delta smelt and their habitat constituted a compensable regulatory taking. The same court, however, recently rejected a claim that prohibiting the development of jurisdictional wetlands constitutes a compensable taking of the most economically valuable use of the property.

Many takings cases have been decided by a bare majority. Therefore, changes on the Supreme Court could substantially impact the Court’s takings jurisprudence. Takings cases thus far from the Roberts Court suggest some hesitation to expand takings jurisprudence. In John R. Sand & Gravel Co. v. United States, the Court rejected claims that EPA’s installation and repositioning of fences around a contaminated site constituted a taking of the plaintiff’s leasehold rights for its adjacent mining operation, although it did so on a technicality, finding that the claimant had failed to file the claim within the statute of limitations provided by federal law under the Tucker Act. Likewise, in Wilkie v. Robbins, it rejected a claim by a Wyoming ranch owner who asserted that the Bureau of Land Management’s treatment of him following his refusal to grant the agency an easement across his property constituted a compensable taking. The Court found that alternate remedies were available and that it lacked standards for determining when the government’s tactics “demanded too much and went too far.”

Due Process

The Fifth Amendment, which applies to the federal government, and the Fourteenth Amendment, which applies to the states, provide that no individual “shall be deprived of . . . property without the due process of law.” Due process, discussed more fully in chapter 11, generally protects only traditional property rights. Nonetheless, because environmental law frequently involves the issuance of permits and enforcement actions for violating permits or other legal requirements, due process rights abound. How much process is due varies with the scope of the right, but most federal and state agencies that regulate natural resources afford parties who are directly affected by agency
decisions with procedural rights to contest those decisions. Less process is usually due when the regulated activity poses a threat to health or safety.

In *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, the Court upheld several provisions of SMCRA against procedural due process challenges. SMCRA permits the secretary of the interior to issue an order for immediate cessation of mining when he or she determines that conditions pose a serious threat to public health and safety or the environment. The Court held that this process did not violate the coal producers’ procedural due process rights to an expedient hearing prior to issuance of the order.

Furthermore, failure to meet statutory requirements can extinguish a claim of deprivation of procedural due process. In *United States v. Locke*, the Court upheld the constitutionality of statutes providing for the automatic termination of vested property rights on the failure to comply with statutory conditions. The Federal Land Policy and Management Act requires mining claimants to rerecord claims every year with the Bureau of Land Management “prior to December 31” (emphasis added). When a mining claimant rerecorded a claim on December 31, the owner lost the claim that he had worked for more than twenty years. The Court held that no further process is required.

**Rights to a Quality Environment**

As discussed in the foreword, the federal Constitution does not explicitly address environmental concerns. To the extent it reaches environmental issues implicitly or indirectly, it tends to hamper state efforts to operate as laboratories of innovative environmental policy or causes of action, in the ways described throughout this book. Yet the U.S. Constitution is not the sole source of constitutional influence on the practice of environmental law. State and national constitutions worldwide have been specially crafted to address local environmental concerns, be they preservation, redevelopment, sustainability, pollution abatement, climate change, energy reform, or environmental rights. These have the potential to provide additional avenues for influencing environmental law.

**State Constitutional Law**

As chapter 12 explains, more than one-third of U.S. states explicitly recognize environmental concerns as an overarching state policy or purport to provide a basic civil right to a quality environment. These subnational constitutional attributes have untapped potential to shape environmental law. Indeed, about twenty-one states have constitutions that address parochial environmental and natural resource issues. Some constitutions express a general policy of preserving natural areas and controlling pollution. For instance, Alabama’s constitution says that it is “necessary and desirable” to conserve land for ecological value. Other state constitutions declare state authority
to manage state resources. For example, Idaho’s declares that “[t]he use of all waters . . . [is] subject to the regulations and control of the state in the manner prescribed by law.”

Some state constitutions are directed at protecting those natural resources especially important to that particular state. California’s, for example, provides a right to “reasonable” access to, and use of, the state’s limited water resources. Some state constitutions expressly recognize a right to environmental quality as a basic civil right, including Hawaii, Illinois, Massachusetts, Montana, and Pennsylvania. Amid the myriad manifestations of constitutionally embedded environmental provisions, one commonality stands out: They are seldom subject to substantive interpretation, leaving some dormant and awaiting implementation through advocacy. This dearth in applicable jurisprudence is due to judicial concerns about recognizing and enforcing emerging constitutional features, to restraining economic development and property rights, to entering what are often political thickets, and to providing causes of action that may displace other legislative prerogatives granted to affected persons, as may be the case with state citizen suits to enforce state pollution control requirements.

Global Constitutional Laws

Constitutional provisions from roughly five dozen countries embed individualized rights to some form of healthy, adequate, or quality environment. Foreign domestic courts and international tribunals are enforcing constitutionally enshrined environmental rights with growing frequency, recognizing basic human rights to clean water, air, and land, and environmental opportunity. As chapter 13 describes, these provisions are inherently complex for five reasons involving form, scope, parties, remedies, and justiciability.

First, does the constitution embed an environmental right? While the constitutions of some countries do so explicitly, other provisions, such as a “right to life,” have been read to confer similar rights implicitly. Second, there are issues of scope. Not only is the scope of the interest ill defined, but the very content of the right has no clear boundaries or definition. This leaves open questions, such as what is environment and what does it mean to have a “right” to a clean environment? Third, who possesses and who is obligated to respect environmental rights? Fourth, courts face significant challenges in fashioning and enforcing remedies for environmental harms. Last, particularly in constitutional democracies, under what conditions should courts enter the fray of vindicating generalized grievances of environmental harm or claims whose remedies have wide-ranging political consequences?

Domestic constitutions tend to reflect environmental principles in one of four ways: (1) as a policy directive, (2) as a procedural right or duty, (3) as an explicit substantive right, or (4) as an implicit substantive right derived
from another enumerated right, such as a “right to life.” Policy directives are often not directly judicially enforceable, but they are intended to influence governmental decision making and can therefore be instrumental in providing environmental norms that guide policy makers. Environmental procedural rights normally involve requirements for environmental assessment, access to information, or rights to petition or participate. While procedural rights can be enforceable, they do not impart a substantive right to a quality environment. About 130 countries have constitutional provisions that reflect policy directives and/or procedural rights.

About 60 countries have included or added constitutional provisions that expressly recognize a substantive right to a quality environment. Two recent examples of these are Kenya, which in 2010 amended its constitution to provide that “[e]very person has the right to a clean and healthy environment,” and Ecuador, which in 2007 amended its constitution to impart a basic “[r]ight to live in an environment that is healthy and ecologically balanced.”

Environmental rights have been read into constitutions even when they are not explicitly mentioned or when judicial enforcement has been withheld. Courts in southern Asia, for instance, have inferred environmental rights from other constitutionally entrenched rights, most commonly a “right to life.” Most notably, the highest courts in India, Pakistan, Bangladesh, and Nepal have each read a constitutional “right to life” in tandem with directive principles aimed at promoting environmental policy to embody substantive environmental rights.

**Displacement of Federal Common Law**

The “displacement doctrine,” as addressed in some detail in chapter 14, is grounded in separation of powers. It stands for the proposition that federal law enacted by Congress or implemented by the executive can displace the role that federal courts have to hear federal common law causes of action. In *American Electric Power Co. v. Connecticut* (AEP), the Court held that the discretionary authority that the Clean Air Act provides to EPA to regulate greenhouse gases under *Massachusetts v. EPA*, coupled with the corresponding regulatory actions EPA has taken since 2009, displaces the federal common law for public nuisance actions concerning climate change.

Writing for an eight–zero majority of the Court (Justice Sotomayor recused herself), Justice Ginsburg was unwilling to vest federal judges with the task of performing what the Court viewed to be primarily regulatory roles subject to democratic processes:

The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme Congress enacted. The Second Circuit
erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action “arbitrary, capricious, . . . or otherwise not in accordance with law.” 174

Thus, the Court concluded that “[a]ny such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.” 175

The Court’s ruling in Massachusetts that the CAA provides EPA with discretionary authority to regulate greenhouse gases as “air pollutants” loomed large: “We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Massachusetts made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally plain that the Act ‘speaks directly’ to emissions of carbon dioxide from the defendants’ plants.” 176

The Court was unconvinced that federal courts should play a role in competing with EPA’s regulatory authority: “It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.” 177

The Court explained that its ruling does not affect state common law causes of action, which would be subject to a more exacting demonstration of congressional intent: “In light of our holding that the Clean Air Act displaces federal common law, the availability vel non of a state lawsuit depends, inter alia, on the preemptive effect of the federal Act.” 178 It noted that “[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.” 179

Four justices—including Justice Kennedy—accepted that the states possess constitutional standing under Massachusetts v. EPA. Justice Sotomayor, who recused herself from the AEP case, has never questioned whether states have standing to sue concerning climate change. 180 This suggests that five members of the Court (including Justice Sotomayor) accept that states possess constitutional standing in this context. None of the eight justices engaged either the political question or prudential standing arguments, suggesting that they do not consider these issues salient in the climate context.

Justice Alito (joined by Justice Thomas) issued a brief concurrence, it appears for no other reason than to question the outcome in Massachusetts: “I agree with the Court’s displacement analysis on the assumption (which I
make for the sake of argument because no party contends otherwise) that the interpretation of the Clean Air Act, adopted by the majority in *Massachusetts v. EPA*, is correct."^{181}

### Conclusion

Constitutional law represents the foundation on which modern environmental law is built. It provides the sources of and limits to federal and state environmental laws. Under the Commerce, Spending, General Welfare, Treaty, and Property Clauses and the Eleventh Amendment, it outlines the extent to which Congress may enact laws, and agencies may promulgate regulations, that govern environmental protection. Under the nondelegation doctrine, the Take Care Clause, and the unitary executive theory, it specifies the role of the president and his adjuncts to implement environmental laws. The Tenth Amendment and the dormant Commerce Clause help delineate what states can and cannot do. The Due Process Clause and the standing and political question doctrines guide courts in matters involving jurisdiction, process, and justiciability. The First and Fifth Amendments, and countless constitutional provisions at the subnational level in the United States and around the globe, provide explicit environmental rights, many of which have yet to be tested.

As the pages that follow show, constitutional law will continue to be of primary importance to environmental law, it appears, for as long as environmental law exists.

### Notes

The comments of Erin Daly to a draft of this chapter are noted with gratitude.


4. Research conducted with “Lexis Focus Search,” searching “Environment and Natural Resource and Energy,” date restricted to “previous five years.” Within these cases, an additional search was conducted using the search terms “Environment and Natural Resource and Energy” along with the particular constitutional issue “and [constitutional issue].” For instance, to search Eleventh Amendment issues, “Environment and Natural Resource and Energy and Eleventh Amendment” was used. Of the results, cases were examined individually to confirm the constitutional issue. Last searched August 1, 2010.


17. *Id. at 311* (Rehnquist, J., concurring).


25. *Id. at 19*.


27. *Id. at 1272*.

28. *Id. at 1276*.


33. *Id. at 783* (Kennedy, J., concurring).

34. *U.S. Const.* art. II, § 2, cl. 2.


43. Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525 (1885).
44. Midwest Oil Co. v. United States, 236 U.S. 459 (1915).
55. See also, e.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) (upholding standing to bring qui tam action under False Claims Act for false submissions to EPA, but dismissing the action on statutory grounds); Taylor v. U.S. Dep’t of Labor, 440 F.3d 1 (1st Cir. 2005).
56. R.I. Dep’t of Env’tl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002).
57. Ex parte Young, 209 U.S. 123 (1908) (ordering a state official to comply with federal law on ground that he lacked constitutional authority to commit unconstitutional act).
61. See also Wong v. Bush, 542 F.3d 732 (9th Cir. 2008) (concerned Coast Guard’s “security zone” that prohibited plaintiff from blockading certain waters surrounding Kauai, Hawaii; finding that restriction was content-neutral; that time, place, and manner restriction left ample alternative channels of expression; and that demonstrators could not “cordon off” an area and “force” others to listen).
63. See also Access Fund v. U.S. Dep’t of Agric., 499 F.3d 1036 (9th Cir. 2007) (affirming lower court’s upholding of the U.S. Forest Service’s ban on climbing a sacred rock by members of a Native American tribe because the ban had a secular purpose and lacked impermissible religious motivation).
65. U.S. CONST. art. I, § 10, cl. 3.
68. Muys et al., supra note 66, at 27.
79. Id.
83. United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007).
85. See, e.g., Lebanon Farms Disposal v. County of Lebanon, 538 F.3d 241 (3d Cir. 2008) (county flow control ordinance requiring waste generated within the county be carried to a specific, publicly owned disposal facility does not contravene dormant Commerce Clause).
86. See, e.g., Quality Compliance Servs. v. Dougherty County, Ga., 553 F. Supp. 2d 1374 (M.D. Ga. 2008) (ordinance requiring disposal within county limits—excluding the plaintiff’s out-of-state station—does not violate the dormant Commerce Clause).
87. Id.
89. See Dismantling of Environmental Law, supra note 6, at 10597–99.
90. Id.
91. U.S. Const. art. VI, cl. 2.
96. Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1091 (9th Cir. 2007).
112. Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm’n, 457 F.3d 941 (9th Cir. 2006).
119. See, e.g., Comer v. Murphy Oil, USA, No. 1:05-cv-436 (S.D. Miss. Aug. 30, 2007) (dismissing under the political question doctrine state law nuisance cause of action based on enhanced effects of climate change), rev’d, 585 F.3d 855 (5th Cir. 2009), vacated, Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010) (en banc dismissal of panel decision and reinstallation of district court decision due to lack of quorum), petition for writ of mandamus denied sub nom. In re Ned Comer, No. 10-294 (U.S. Jan. 10, 2011). The plaintiffs subsequently refiled the case; see case study in chapter 9.
124. Id. at 124.
127. Id. at 627.
137. Id. at 2601.
138. U.S. CONST. amends. V & XIV.
141. See Richard O. Brooks, A Constitutional Right to a Healthful Environment, 16 VT. L. REV. 1063, 1103–5 (1991) (supporting “decentralization” of constitutional provisions that address the environment, observing “[s]tate judges [would] . . . be more sensitive in weighing the state’s values.”).
143. Eurick, supra note 142, at 201.
144. See ALA. CONST. art. XI, § 219.07.
145. IDAHO CONST. art. XV, § 1.
146. See CAL. CONST. art. X, § 2.
149. See ILL. CONST. art. XI, § 2.
150. See MASS. CONST. art. XLIX.
152. See PA. CONST. art. I, § 27. See generally Thompson, The History and Future of Montana’s Environmental Provisions, supra note 142, at 158 (discussing Montana’s finding of a fundamental right to a “healthful environment”); Wilson, supra note 151.
153. Constitutional provisions are found in the appendix.
154. See, e.g., Sierra Club v. Dep’t of Transp., 167 P.3d 292, 313 n.28 (Haw. 2007) (explaining that “[a]lthough this court has cited this amendment as support for our approach to standing in environmental cases, . . . we have not directly interpreted the text of the amendment.”).


158. See generally May & Daly, supra note 155.


163. Ernst Brandl & Hartwin Bungert, Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad, 16 Harv. Envtl. L. Rev. 1, 82 tbl. 1 (1992) (discussing constitutional environmental policies of Austria, Brazil, Germany, Greece, the Netherlands, Portugal, Spain, Switzerland, and Turkey).

164. See May, supra note 157, at app. B.


171. See Bruch et al., supra note 168, at 166–67 (discussing constitutional interpretation in India, Pakistan, Bangladesh, Nepal, Colombia, Ecuador, Costa Rica, and some countries in Africa including Tanzania).


174. Id. at *12.

175. Id. at *8.

176. Id. at *9.

177. Id. at *11.

178. Id. at *12.

179. Id.

180. Id. at *13 n.2.

181. Id. at *13 (Alito, J., concurring).