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# ESSAY

## On Revolution and Wetland Regulations

MICHAEL J. GERHARDT\*

### INTRODUCTION

A great divide separates constitutional and environmental law. Most scholars in each field proceed with minimal reference to the work of their counterparts or developments in the other field. A useful example of this division is wetlands regulation. In the study of constitutional law, wetlands regulation is generally ignored, much less considered to have any relationship to the larger questions that constitutional scholars debate: the proper role of the judiciary in our constitutional system of government,<sup>1</sup> how the Constitution should be interpreted,<sup>2</sup> and the requisite conditions for revolutionary change in constitutional law.<sup>3</sup> Yet, wetlands regulation has been the subject of intensive, long-standing debate in the environmental community over the legitimacy of extensive federal regulations of commercial activity to protect the quality of the nation's air and water.<sup>4</sup> That intense debates about revolution occur in each field without any reference to the other reflects an unfortunate tendency among scholars, if not lawyers, to fall into a postmodern trap in which they resist recognizing, and therefore ignore, the possible interconnectedness of legal developments in different fields. The fields of constitutional and environmental law are not neatly divided in the world of practice, but they are artificially separated in the academy, the classroom, and legal scholarship. A significant consequence of these divisions—and the ensuing insularity of the scholars in the fields of

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1. See generally MICHAEL J. GERHARDT ET AL., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 2–5 (2d ed. 2000) (describing the evolution of constitutional theory as an effort to explain the “countermajoritarian difficulty”—or the problem of unprincipled judicial interference with democratic government (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 15–16 (2d ed. 1986))).

2. See generally GERHARDT, *supra* note 1, at 423–59 (providing an overview of interpretation theory and postmodernism).

3. See generally Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 YALE L.J. 1917 (1999) (discussing Bruce Ackerman's theory of constitutional revolution).

4. See, e.g., Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1243 (1995) (“Wetlands regulation may be the most controversial issue in environmental law. It pits America's most biologically-productive and most rapidly-diminishing ecosystems against rights of private ownership and property development in more than 10,000 individual permit decisions a year. . . .” (citing OFFICE OF THE CHIEF OF ENGINEERS FOR FISCAL YEAR 1994, U.S. ARMY CORPS OF ENGINEERS, *REGULATORY QUARTERLY REPORT* (Fifth Quarter, 1994))).

constitutional and environmental law—is the failure of many academics to appreciate the implications of a significant change in one field for the other.<sup>5</sup>

To be sure, there have been references to revolution by a few constitutional and environmental commentators. In especially dramatic fashion, Judge Douglas Ginsburg of the D.C. Circuit gave the prospect of revolution a name in 1995. In the course of condemning the direction of American constitutional law in favor of excessive deference to regulatory authorities, he declared:

So for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes.<sup>6</sup>

This is strong language, seemingly at odds with a judge reputed to be committed to the ideal of judicial restraint. His strong words, coupled with his own prominent position within the federal judiciary, suggest that he and other

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5. In the area of environmental law, the commentary on revolution has focused mostly on the continued viability of the environmental initiatives of the 1960s and 1970s and the frustrated hopes of some conservatives for a revolution that would roll back the regime of environmental protections implemented in accordance with these initiatives. See Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 241 (2001) (suggesting that environmental interests have not yet mounted a serious, revolutionary challenge to the Court's environmental jurisprudence but that the Court in the long run will have to confront the implications of its evolving federalism jurisprudence for environmental law because it will not always be able to avoid conflict by using ambiguity in statutory language or other means); Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 430 (1995) ("If we want to reach the goals set out when the environmental revolution started, we must modify, in very fundamental ways, the model for our control mechanism. The next wave of environmental law, to be effective, must be coordinated and comprehensive, instead of haphazard and piecemeal."); Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 105 (2001) ("With age . . . environmental law in the United States is also beginning to lose some of its color and its passion. Judges no longer routinely view environmental concerns as special, warranting enhanced judicial protection, but instead view them merely as another special interest in the lawmaking process. Environmental policymakers increasingly emphasize that environmental issues do not present clear black-and-white options or stark choices between good and evil. Instead they present difficult, grayer choices of social policy in the face of tremendous scientific uncertainty regarding environmental risk and the economic costs of pollution reduction. Incremental reform is occurring based on the need for less absolutism, greater compromise, and increased accommodation of competing concerns. Finally, those who practice environmental law are more and more those who view it as a mere menu of terms of legal compliance rather than the result of a legal revolution."); Thomas O. McGarity, *Deflecting the Assault: How EPA Survived a Disorganized Revolution By Reinventing Itself a Bit*, 31 ENVTL. L. REP. 11, 249 (2001) (detailing the failed Republican efforts at reform).

6. Douglas H. Ginsburg, *Delegation Running Riot*, 18 REG., No. 1, at 84 (1995) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)).

like-minded individuals may have a significant role to play in restoring the Constitution-in-exile.

In the very same year in which Judge Ginsburg made his dramatic appeal to recapture the Constitution-in-exile, the United States Supreme Court seemed to take a dramatic step in that very direction when, in *United States v. Lopez*,<sup>7</sup> it struck down a federal regulation of private activity for violating the scope of the Commerce Clause<sup>8</sup> for the first time in six decades.<sup>9</sup> At the time, no constitutional scholar had the temerity to claim *Lopez* signified the beginning of a revolution. Yet environmental scholars reacted differently, for the most part, particularly with respect to developments relating to the Takings Clause.<sup>10</sup> Shortly after *Lopez*, Professor Molly McUsic declared:

The similarity between the Court's current jurisprudence and the *Lochner* jurisprudence lies not in the amount or type of legislation at risk but the *proportion* of redistributive legislation put at risk. The *Lochner*-era jurisprudence targeted the major redistributive initiatives of liberal majorities in the late 1800s and early 1900s, primarily labor legislation, the regulation of prices, graduated taxes, and restrictions on entry into business. This Court's [Takings] jurisprudence targets the far more limited liberal agenda of the last twenty years. . . . The fresh redistributive efforts of this era are embodied in laws such as environmental regulations, local land use regulations, and tenant protection laws—the very laws under constitutional attack in the takings doctrine.<sup>11</sup>

If one needed more evidence of an impending revolution, one could find it in President William Jefferson Clinton's declaration within a year of *Lopez* that "the era of big government is over."<sup>12</sup> Coming from a president whose party was responsible for the New Deal and the Great Society, President Clinton's declaration signaled the possibility of the dawning of a new era. Indeed, the Republican leadership in control of the very Congress before which President Clinton made his declaration desired to bring about the dawning of a new age of constitutional law. Many of these desires seem to have been fulfilled over the past six years. By 1999, the Republican leadership had achieved more than sixty-nine percent of the goals of the Contract with America,<sup>13</sup> while two other

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7. 514 U.S. 549 (1995).

8. U.S. CONST. art. I, § 8, cl. 3.

9. *Lopez*, 514 U.S. at 561–68.

10. U.S. CONST. amend. V.

11. Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 608–09 (1996); see also Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591 (1998) (discussing alternative approach to analysis of modern Takings Clause jurisprudence).

12. William J. Clinton, *State of the Union 1996: The Age of Possibility*, 62 VITAL SPEECHES DAY 258, 258 (1996).

13. Gerald M. Pomper, *Parliamentary Government in the United States?*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 251, 258–60 (John C. Green & Daniel M. Shea eds., 3d ed. 1999). In the fall of 1994, the Republican leadership proposed the Contract

prominent goals of the Contract—a substantial tax cut and increases in defense expenditures—were met by the beginning of 2002. The most notable of the still unenacted provisions of the Contract are those dealing with federal regulation of environmental matters.<sup>14</sup> Moreover, the Supreme Court has struck down twenty-eight federal laws over the past six years.<sup>15</sup> One has to go back at least as far as the *Lochner* era to find a period in our history in which the Court has overturned a comparable number of federal laws. In other words, one needs to visit the very period in which the Constitution was presumably exiled to find a comparable period of judicial activism.

Interestingly, these developments have thus far caused at most only a modest ripple in constitutional analysis. One reason is that the field lacks a topology of revolution.<sup>16</sup> Only one constitutional scholar, Bruce Ackerman, has put forward

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with America in exchange for Americans' electing a majority of Republicans to both the House and the Senate. Republicans promised their newly elected leadership in Congress would introduce a series of legislative reforms that, if enacted, would restore the American people's faith in the Congress and Congress's accountability. These proposed reforms included a balanced budget amendment, the Taking Back Our Streets Act, the Common Sense Legal Reforms Act, and term limits.

14. The other provision of the Contract with America not yet adopted then was congressional term limits, the imposition of which would require a constitutional amendment. *See United States Term Limits v. Thornton*, 514 U.S. 779 (1995).

15. Jeffrey Rosen, *A Majority of One*, N.Y. TIMES MAG., June 3, 2001, at 32. This degree of judicial activism has not gone completely unnoticed. In a promising development, environmental scholar Chris Schroeder organized a symposium dedicated to assessing the significance of the Court's recent federalism decisions for recovering the Constitution-in-exile. *See Symposium, The Constitution-in-Exile*, 51 DUKE L.J. 1 (2001).

16. Constitutional scholarship lacks consensus on both a lexicon for and theory of revolution. A notable contrast is Thomas Kuhn's influential classic on the structure of scientific revolutions. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996). Kuhn demonstrated that the work of science is socially constructed much like other human endeavors, such as art and politics. He found that scientific communities used paradigms to organize their problem-solving efforts. In what he described as normal science, practitioners who "have undergone similar educations and professional limitations" use their shared paradigm as the determinant of "legitimate methods, problems, and standards of solution." *Id.* at 177. In normal science, the community rejects ideas inconsistent with the paradigm, often without evaluating their significance. At the same time that a paradigm constrains discourse, its problem-solving nature ensures the paradigm's eventual demise. The task of problem solving will inevitably result in identification of a problem that is not susceptible to problem-solving efforts under the paradigm. That problem becomes an "anomaly" that provokes a crisis. *Id.* at 6. A time of crisis is one of "extraordinary science" when the paradigm itself comes into question. *Id.* at 82. In this "period of pronounced professional insecurity," consensus regarding the constitution of the governing paradigm disintegrates, proposals for new paradigms proliferate, and the community turns to philosophy as it revisits first principles. *Id.* at 67–68. When the scientific community cannot resolve the crisis by solving the problem under the paradigm or bracketing the problem for the future, it resolves the old paradigm with a new one in what Kuhn calls a revolution. The new paradigm proposes to "solve the problems that have led the old one to a crisis." *Id.* at 153. Whether the new paradigm succeeds in a revolution depends more on the power of conversion than logical argument. No "logical" choice is available between competing paradigms that "disagree about what is a problem and what a solution." *Id.* at 109. Newer members of the community tend to be more open to new paradigms and more senior members tend to be more resistant. A revolution completes itself once the new generation outnumbers the old—"a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and new generation grows up that is familiar with it." *Id.* at 224 (quoting MAX PLANCK, *SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS* 33–34 (Frank Gaynor trans., Philosophical Library 1949)).

a grand theory of constitutional change,<sup>17</sup> though no one else agrees fully with his methodology.<sup>18</sup> Ackerman has taken great pains to demonstrate how the Court's recent activity does not constitute or portend a revolution in American constitutional law.<sup>19</sup> In contrast, Jack Balkin and Sanford Levinson construe the same activity as the culmination of a "constitutional revolution" by means of "partisan entrenchment."<sup>20</sup> Another prominent constitutional scholar, Mark Tushnet, construes the Court's recent activity as signaling the end, rather than the beginning, of a constitutional order.<sup>21</sup>

In this Essay, I attempt to bridge the gap in environmental and constitutional commentary on impending revolution. I consider the requisite conditions for revolution; whether they are being fulfilled in contemporary American constitutional law; and what current conditions relating to possible revolution portend for environmental law, particularly wetlands regulation. The vast majority of scholars, environmental or constitutional—have not yet posed—much less answered, this series of questions. Some environmental scholars talk of the possibility of revolution, but not in terms of any coherent theory of revolution,

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17. According to Professor Ackerman, there have been three noteworthy "moments" of constitutional change—the Founding, Reconstruction, and the New Deal. These three moments are distinctive because in each of them the American people, working in conjunction with the leaders of all three branches of the federal government, countenanced enduring changes in the Constitution that deviated from the formal provisions for constitutional amendment set forth in Article V of the Constitution. In Ackerman's view, these changes followed a pattern consisting of five stages—signaling, public shaping of proposals of change, triggering, ratification, and consolidation. See 2 BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 40–65 (1998) [hereinafter ACKERMAN, *WE THE PEOPLE*]. For a critical overview of Ackerman's ambitious theory, see Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 WM. & MARY L. REV. 1731 (1999). Ackerman is also distinctive for being one of the few constitutional scholars who has also written about environmental law. See, e.g., BRUCE A. ACKERMAN ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988). For three other constitutional scholars who also have bridged the fields of constitutional and environmental law, see DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (1999), Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999), and William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

18. For a symposium covering a wide variety of different views of Ackerman's theory of constitutional change, see Symposium, *supra* note 3.

19. See Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2340–47 (1999) (explaining why the so-called Republican Revolution of the 1990s was not a revolution in constitutional law).

20. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001). Balkin and Levinson explain that "[p]artisan entrenchment is an especially important engine of constitutional change. When enough members of a particular [political] party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law. If more people are appointed in a relatively short period of time, the changes will occur more quickly. Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties." *Id.* at 1067–68.

21. See Mark V. Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 31 (1999).

while some constitutional scholars debate theories of revolutionary change, but rarely incorporate within their analyses developments that cut across the wide expanse of constitutional adjudication. In my view, a revolution in constitutional law would entail three elements: (1) a significant shift in fundamental constitutional understanding or law that (2) is supported at the highest levels of all three branches of the national government and (3) is enduring. All three of these elements must be satisfied in order for a genuine constitutional revolution to occur.

However, none of the developments in constitutional law over the past few decades satisfy any of these three elements. For instance, I see no new ideology implemented with the blessings of all three branches of the national government, at least to the extent of restoring something as sweeping as a Constitution-in-exile.<sup>22</sup> The activity of late in constitutional law, as developed by all the branches and the states, largely consists of fortifying certain national powers and otherwise defining outer boundaries to the pre-existing constitutional order rather than forming a new constitutional regime. Prior to the formation of a new constitutional order, the preceding regime must end, and the old order must be dismantled. Though there are some signs of dismantlement, they lack any clear direction, much less a direction in favor of rejecting core provisions and entitlements of the New Deal and Great Society as they have generally come to be understood. Nor is there any reason to suppose that to the extent these have arguably been changes in constitutional understandings the altered state of constitutional law is enduring.

In Part I of the Essay, I briefly consider the requisite conditions for a revolution in constitutional law. These entail three elements, which can be collectively understood as requiring that the leadership of all three branches of the national government unify around both a significant and enduring shift in the direction of constitutional law. None of the current developments in constitutional law satisfy any of these elements. Nor, for that matter, is there any consensus among the institutional leaders of all three branches or shift in constitutional understandings or practices either underway or on the horizon.

In Part II, I explain why the Supreme Court's two most recent decisions overturning environmental regulations, including the controversial Migratory Bird Rule,<sup>23</sup> do not signal revolutionary change. In neither decision does the Court develop new doctrine, nor does the Court deploy radical extensions or interpretations of existing doctrine. Moreover, the Court leaves untouched some critical features of the present constitutional order. To the extent that the existing order seems destined to change, the change depends on the Court's resolution of three tensions in Commerce Clause doctrine concerning the respec-

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22. I refer to "a Constitution-in-exile" for a reason. There is no apparent consensus among conservative or Republican scholars, pundits, and leaders on (1) what such a constitution would look like, and (2) how it could be implemented. See Michael J. Gerhardt, *The Constitution-in-Exile and the Crisis in Constitutional Theory* (2000) (unpublished manuscript, on file with the author).

23. 33 C.F.R. §§ 320–30 (2001).

tive boundaries between: (1) national subjects appropriate for federal regulation and localized activities that only states may regulate, (2) economic activities that may be aggregated in assessing impact on interstate commerce and noneconomic activities that may not be aggregated, and (3) regulatory schemes whose comprehensiveness reflects a substantial relationship to interstate commerce and those which lack such comprehensiveness. Even if all of these tensions were to be resolved in ways that limit federal authority and preserve state sovereignty,<sup>24</sup> the ensuing doctrine would likely reflect, at most, the demarcation of the outer boundaries of the existing constitutional order.

In the final Part, I examine the significance of federal and state responses to the Court's decision overturning the controversial Migratory Bird Rule. These responses do not confirm a revolution in American environmental law generally, much less in the realm of wetlands regulation. Indeed, federal and state authorities are trying to fill the void left by the Court's decision. This activity indicates further more of a fine-tuning of the constitutional status quo rather than its abandonment. When one further considers these developments combined with the federal government's aggressive war against terrorism and ambitious new program on education,<sup>25</sup> it is clear that national authorities are fortifying many aspects of the existing constitutional regime and not engaging in a revolution to restore or implement a radically different constitutional order.

### I. CONSTITUTIONAL REVOLUTION

It is not possible to assess the revolutionary significance of any of the Court's recent environmental decisions, including last Term's dramatic overturning of the Migratory Bird Rule,<sup>26</sup> without initially pondering what a constitutional revolution entails. The most common definition is the process by which certain elites—presumably the leaders of national political institutions—seek to radically change a constitutional order.<sup>27</sup> One problem with such elite management is that it is unclear which institutional leaders—and therefore whose activities—are relevant for predicting revolutionary change. Another problem is that the efforts of these elites may not produce outcomes that they either desired or expected. Yet another problem is the absence of consensus over which outcomes even qualify as revolutionary. For example, consider two events the significance of which as revolutions are commonly debated: constitutional changes surrounding the Civil War and the New Deal. No doubt, the Civil War and its aftermath, including the adoption of three significant constitutional amendments, is hard to

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24. See discussion *infra* section II.D.

25. See *infra* note 150 and accompanying text.

26. See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

27. Ackerman, *supra* note 19, at 2279 (describing "a model of elite management [in which] the analyst eavesdrops on elite deliberations to determine and critique the way objectives are defined. . . . [and] then considers the factors that facilitate and frustrate elite efforts to shape social reality, before reaching a final causal and normative assessment").



characterize as falling short of a revolution in constitutional law.<sup>28</sup> Nevertheless, many scholars still debate what the revolution entailed, including its beginning and especially its end.<sup>29</sup> Similarly, something dramatic obviously occurred in and around the year 1937 in Commerce Clause doctrine, though constitutional scholars continue to debate not only what happened but whether it constitutes a genuine revolution.<sup>30</sup>

In 1980, President Reagan began an eight-year incumbency during which he challenged the interest group-dominated institutions of the New Deal–Great Society order.<sup>31</sup> While there are some clear signs that this order is ending or already over,<sup>32</sup> I agree with Professor Tushnet that it is “less clear . . . that the New Deal system has been replaced with a coherent new political and constitutional system, rather than with a random collection of institutions and decisions lacking any unifying theme.”<sup>33</sup> While Tushnet ultimately suggests that a new constitutional order has been implemented,<sup>34</sup> I reject his conclusion.<sup>35</sup> To be sure, regime transformation requires, as Stephen Skowronek suggests, a President to articulate the principles of a new constitutional order and to begin the process of institutional transformation that will ultimately produce a new constitutional regime.<sup>36</sup> President Reagan undoubtedly tried to begin such a transfor-

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28. Initial contemporary doubt about the significance of Reconstruction was reflected in the Supreme Court's decision in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

29. For some different viewpoints on the meaning and significance of Reconstruction, see, for example, ACKERMAN, *WE THE PEOPLE*, *supra* note 17, at 173–78, 187–91 (arguing, *inter alia*, that a series of presidential and congressional actions in the 1860s constituted special “constitutional moment” in which enduring constitutional changes relating to civil rights took effect); Gerhardt, *supra* note 17 at 1759–66 (questioning the extent of the constitutional revolution Ackerman claims took place in the 1860s and 1870s); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115 (1994) (suggesting there was a possible constitutional moment to undo Reconstruction in contrast to Ackerman's account of Reconstruction consolidation).

30. For two different views, compare ACKERMAN, *WE THE PEOPLE*, *supra* note 17, at 279–311 (describing the New Deal as a revolutionary constitutional “moment”), with G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000) (suggesting that in 1937 the Court did not make a radical break with the past but rather resolved a struggle among the Justices of the Supreme Court to come to terms with the application of the Due Process and Commerce Clause to the modern world).

31. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 415–29 (1997) (analyzing the significance and success of Ronald Reagan's efforts as the “great repudiator”).

32. See, e.g., *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980* (Steve Fraser & Gary Gerstle eds., 1989).

33. Tushnet, *supra* note 21, at 30.

34. *Id.* at 33 (suggesting the existence of a new constitutional order “in which the aspiration of achieving justice directly through law has been substantially chastened” and in which “justice is to be achieved not by national legislation identifying and seeking to promote it, but by individual responsibility and market processes”).

35. Tushnet claims that the new constitutional order's distinguishing characteristics include major declines in both public participation in and the influence of political parties over politics. *Id.* at 43. These declines have had many consequences, including but not limited to allowing “relatively small groups of voters” to “dominat[e] national politics,” weak party organizations, and an apparent preference among most of the voting public for divided government (ensuing in generally chastened aspirations for the national government). *Id.*

36. SKOWRONEK, *supra* note 31, at 36–38.

mation, and President Clinton's triangulation could be construed as helping to consolidate what President Reagan started;<sup>37</sup> however, it is a major mistake to read too much into President Clinton's rhetoric. A more accurate understanding of Clinton's presidency is to see it either as he intended it or in terms of the consequences of his actions: He tried to oppose any further erosion of the old New Deal–Great Society constitutional order, and he was essentially successful.<sup>38</sup>

As described by Skowronek, the hallmark of President Clinton's "third-way politics" was that it was "preemptive rather than reconstructive. While suggesting of a new middle ground, his third way, as a practical matter, was located on a field largely defined by his opponents, and this . . . infused his opposition stance with an indeterminate, ad hoc character."<sup>39</sup> In other words, many of President Clinton's efforts, such as preserving millions of acres of federal land as national monuments<sup>40</sup> and issuing an executive order to require all federal agencies to coordinate with the National Wildlife Service to develop protocols for the protection of migratory birds,<sup>41</sup> were not designed to end big government but rather to frustrate efforts to undo the New Deal–Great Society order.

Without national leaders uniformly building on the Reagan rhetoric to dismantle the New Deal and Great Society, one of the necessary ingredients of revolutionary change in the constitutional order is absent. For a revolution to occur, one essential element is that it must occur openly, indeed brazenly across the spectrum of national leadership. It must reflect not only the support of the leadership of all three branches of the federal government for radical change but also the explicit acknowledgment by each of the leaders of those institutions. The second essential element is that the leadership of all three branches must support a significant break with or shift from existing constitutional understandings, and the third critical element is that this shift must be enduring. In other words, a constitutional revolution requires all three branches to come together in support of enduring change. Such was the case with the New Deal programs of the 1930s and 1940s and the Great Society programs of the 1960s. In each of these eras, the Democrats came to dominate the leadership of all three branches.<sup>42</sup>

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37. See Michael Kelly, *The 1992 Campaign: The Democrats: Clinton Says He Is Not Leaning Left But Taking a New 'Third Way'*, N.Y. TIMES, Sept. 26, 1992, at A7; see also David Dahl, *Old or New Democrat*, ST. PETERSBURG TIMES, Aug. 25, 1996, at 1A (evaluating President Clinton's performance throughout his first term against his "third-way" pledge).

38. SKOWRONEK, *supra* note 31, at 448–49 (describing the significance of Clinton's "third-way politics").

39. *Id.* at 449.

40. See *infra* notes 138–44 and accompanying text.

41. Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3,853 (Jan. 10, 2001).

42. Of course, there is serious disagreement about the significance of the Court's decision in *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937) (employing a deferential rational basis test to assess the constitutionality of state economic regulations under the Due Process Clause), which was decided while Republican appointees still dominated the Court. Nevertheless, my point is that whatever happened in that particular decision, its real significance is not apparent standing alone. The decision

Each era was also ultimately marked by concerted, or convergent, action of the leaders of all three branches in support of a clear constitutional ideology that continues to endure.<sup>43</sup>

At present, no such unification seems apparent, much less possible. The Republicans did control all three branches for a few months at the beginning of the presidency of George W. Bush, but they no longer do.<sup>44</sup> Moreover, when one branch balks at what the other two are trying to do, much as the Rehnquist Court apparently did in *Lopez*<sup>45</sup> and *United States v. Morrison*,<sup>46</sup> the most that can be said is that the deviant institution—the Court—is refusing to uphold an expansion of the old order. Indeed, the present Court appears to be resisting further implementation or expansion of some aspects of an old constitutional order, rather than establishing a new one. The point can be made more dramatically: of the twenty-eight federal laws struck down by the Supreme Court as unconstitutional over the past six years, not a single one involved any provision or entitlement that could fairly be described as falling within the core of the New Deal or the Great Society.<sup>47</sup> Nor has a single one of the legislative

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alone did not secure the foundations of the New Deal but instead was merely one step in a process that was completed (or, in Ackerman's word, consolidated) subsequently when Democratic appointees joined the Court. In his second term, President Roosevelt appointed five Justices to the Supreme Court. These appointments were crucial for emphatically removing any doubt about the firmness of the foundations of the New Deal.

43. By 1968, there was significant social and political backlash to the Great Society. See JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 676–77 (1997) (describing the relatively widespread backlash in American society to the Great Society, which “exposed a fragmentation of society and culture that seemed if anything to grow in the next thirty years. . . . [The b]acklash also threatened the Democratic party. This had been apparent as early as the 1964 and 1966 elections, and it grew more ominous as the presidential election of 1968 approached. Many Americans blamed Johnson and the Democratic party not only for mismanaging the Vietnam War but also for creating the social turmoil that disturbed the nation after 1965. They especially resented liberals. . . . In an increasingly fragmented and polarized society these angry people were a political force to be reckoned with”).

44. On May 24, 2001, Senator James Jeffords announced that he would leave the Republican party to become an independent and that, as an independent, he would vote to support the Democrats in organizing the leadership of the Senate. With the Democrats in control of the Senate, it is inconceivable that Congress would support any significant cutback in the scope of federal environmental law. The Democrats in the Senate are simply opposed to any such cutback. Thus, the possibility of a revolution to be led by President Bush, if there ever was one, ended less than four months from the date of his inauguration.

45. See Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 ENVTL. L. REP. 10,980, 10,981–82 (2000).

46. 529 U.S. 598, 619 (2000) (striking down the civil remedy provisions of the Violence Against Women Act).

47. Jack M. Balkin and Sanford Levinson construe the implications of recent decisions differently; they suggest that “[w]e are in the middle of a paradigm shift that has changed the way people write, think, and teach about American constitutional law.” Balkin & Levinson, *supra* note 20, at 1051. In their view, “[i]n the past ten years, the Supreme Court of the United States has begun a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights that, if fully successful, will redraw the constitutional map as we have known it.” *Id.* at 1052–53. They recognize, however, “[a]t least up until now, the Court’s federalism decisions have more struck an ideological blow for limited federal government than truly put a significant damper on federal regulatory power. As scholars

enactments the Court has struck down as unconstitutional in the past six years been an environmental regulation.<sup>48</sup> While the Migratory Bird Rule decision involved the invalidation of a federal environmental regulation on statutory grounds,<sup>49</sup> I will argue in the next Part that this decision signals neither the end of the old order nor the implementation of a new one.

## II. THE SIGNIFICANCE OF *SOLID WASTE AGENCY v. U.S. ARMY CORPS OF ENGINEERS*

In this part, I analyze the *Solid Waste Agency v. U.S. Army Corps of Engineers*<sup>50</sup> decision along two lines—the first is statutory, and the second is constitutional. The first involves examining the Court’s approach to two important doctrines in modern statutory construction (the nondelegation doctrine<sup>51</sup> and *Chevron* deference<sup>52</sup>), while the second involves considering the likely direction of Commerce Clause doctrine in the aftermath of the decision. Before I begin both lines of analysis, I briefly describe the opinion and its dissent.

### A. *SOLID WASTE AGENCY*

The case involved the attempt of the Solid Waste Agency of Northern Cook County (Solid Waste Agency), a consortium of Illinois municipalities, to use a 533-acre area as a depository for municipal waste.<sup>53</sup> The consortium applied to the United States Army Corps of Engineers (Corps) for a permit under section 404 of the Clean Water Act<sup>54</sup> to fill a substantial number of acres of ponds and small lakes on the property.<sup>55</sup> After the Corps denied the requested permit because migratory birds use the ponds and lakes as habitat, the consortium challenged the Corps’s jurisdiction over those ponds and lakes.<sup>56</sup>

The Seventh Circuit rejected the challenge. In an opinion by Judge Diane Wood, the court held that the Corps had jurisdiction over the intrastate ponds

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on both the right and left have demonstrated, a Court truly committed to reinvigorating state autonomy must engage in far more active monitoring of conditional federal spending, the series of doctrines through which the federal government can get states to do things by threatening to withhold federal funds.” *Id.* at 1058. They also recognize “[a]ny significant reinvigoration of state autonomy would also require a reversal of the present capacious notions of preemption.” *Id.* at 1059. I not only concur with these latter acknowledgments but also point to the current agendas of national and state political leaders as fortifying important elements of the existing constitutional order.

48. During this period of arguable judicial activism, the Court has overturned only a single Commerce Clause precedent. See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist’s Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429, 433, 433 n.18 (2002). Moreover, the only federal environmental regulations struck down during this period have been overturned on statutory grounds. See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001); *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001).

49. See *Solid Waste Agency*, 531 U.S. at 166–73.

50. 531 U.S. 159 (2001).

51. See discussion *infra* section II.B.

52. See discussion *infra* section II.C.

53. See *Solid Waste Agency*, 531 U.S. at 162–63.

54. 33 U.S.C. §§ 1251–1387 (1994 & Supp. V 1999).

55. See *Solid Waste Agency*, 531 U.S. at 163.

56. See *id.* at 165.

and lakes at issue because (1) those waters were used as a habitat for migratory birds, (2) destroying the habitat and thus reducing the population of migratory birds would substantially affect interstate commerce (because it would harm bird-watching and hunting businesses dependent on the birds' existence), and (3) protecting the habitat was within Congress's authority under the Commerce Clause.<sup>57</sup> The Solid Waste Agency petitioned for a writ of certiorari, and the Supreme Court granted the petition<sup>58</sup> and reversed the Seventh Circuit.<sup>59</sup>

Writing for the five-member majority, Chief Justice Rehnquist first reviewed the relevant statutory and regulatory provisions.<sup>60</sup> While recognizing that the purpose of the Clean Water Act was "restor[ing] and maintain[ing] . . . the Nation's waters,"<sup>61</sup> he explained the Court's finding that the term "navigable waters" constituted the basis for the Corps's jurisdiction under the act and held that waters that are neither navigable waters nor adjacent to navigable waters are simply not within the Corps's jurisdiction.<sup>62</sup> Thus, the Solid Waste Agency needed no Corps permit to fill in the lakes and ponds for its municipal waste depository.<sup>63</sup>

The Chief Justice distinguished the Court's earlier, unanimous opinion in *United States v. Riverside Bayview Homes, Inc.*,<sup>64</sup> on the ground that the Corps had jurisdiction over the wetlands at issue in the latter case because the wetlands abutted a navigable waterway, whereas the ponds at issue in *Solid Waste Agency* were not "adjacent to open water."<sup>65</sup> To allow jurisdiction to extend to a nonnavigable pond, the Court figured, would "read[] the term 'navigable' out of the statute."<sup>66</sup>

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57. See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 191 F.3d 845 (7th Cir. 1999).

58. See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 529 U.S. 1129 (2000).

59. See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

60. *Id.* Chief Justice Rehnquist's majority opinion noted that section 404(a) of the Clean Water Act "grants the Corps authority to issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites," and that the Act defines "navigable waters" as "'waters of the United States, including the territorial seas.'" *Id.* at 163 (quoting 33 U.S.C. §§ 1344(a), 1362(7) (1994 & Supp. V 1999)). The Chief Justice then quoted the Corps's regulation defining the term "'waters of the United States'" as "'waters such as intrastate lakes, rivers, streams . . . or natural ponds, the . . . destruction of which could affect interstate or foreign commerce.'" *Id.* (quoting 33 C.F.R. § 328(a)(3) (Supp. V 1999)). Finally, the Court quoted the Corps's Migratory Bird Rule, under which the Corps asserted jurisdiction over intrastate waters "'[w]hich are or would be used as habitat by birds protected by Migratory Bird treaties; . . . [w]hich are or would be used as habitat by other migratory birds which cross state lines; . . . [w]hich are or would be used as habitat for endangered species; or . . . [u]sed to irrigate crops sold in interstate commerce.'" *Id.* at 164 (quoting 33 C.F.R. §§ 320-30 (2001)). The most controversial assertions of jurisdiction made within the Migratory Bird Rule were those covering intrastate waters "used as habitat by birds protected by the Migratory Bird Treaties" or "used as habitat by other migratory birds which cross state lines." 33 C.F.R. §§ 320-30 (2001).

61. *Solid Waste Agency*, 531 U.S. at 166 (quoting 33 U.S.C. § 1251(a) (1994 & Supp. V 1999)).

62. *Id.* at 166-68.

63. See *id.* at 165.

64. 474 U.S. 121, 134 (1985) (holding that the Corps's interpretation of navigable waters to include wetlands adjacent to navigable water ways was reasonable).

65. *Solid Waste Agency*, 531 U.S. at 166-68.

66. *Id.* at 172.

The Court further explained the majority's reluctance to accept the EPA's arguments that Congress, in the 1977 amendments to the Clean Water Act, was aware of the Corps's expansive definition of "navigable waters" and had acquiesced in that definition by rejecting a House of Representatives bill confining that term to waters that are "susceptible" to use for transporting interstate or foreign commerce and by adopting section 404(g), which specifically referred to "navigable waters."<sup>67</sup>

The Chief Justice also explained the Court's holding that the Corps's construction of its jurisdiction failed to satisfy the first prong of *Chevron* analysis, under which the Court defers to an agency's reasonable interpretation of an ambiguous statute.<sup>68</sup> The problem with the Migratory Bird Rule was that it "push[ed] the limit of congressional authority."<sup>69</sup> The Chief Justice noted that the Court's "concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."<sup>70</sup> Citing his previous opinions in *Morrison* and *Lopez*, Chief Justice Rehnquist stated, "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited."<sup>71</sup> He elaborated that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."<sup>72</sup>

On behalf of himself and three other justices, Justice Stevens dissented.<sup>73</sup> His dissent challenged the Court's interpretation of the Clean Water Act and the Court's refusal to grant *Chevron* deference to the Corps's interpretation of it. The dissent examined the history of the definitions of the key statutory terms "navigable waters" and "waters of the United States"—the crucial jurisdictional terms of the Clean Water Act. Justice Stevens explained that in the 1972 Act and the 1977 amendments, Congress diverged from its traditional role of regulating discharges into the nation's waterways to protect their use as highways for commerce and focused instead on protecting the quality of waters for "esthetic,

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67. *Id.* at 169–72. Section 404(g) is codified at 33 U.S.C. § 1344(g)(1) (1994 & Supp. V 1999). The section provides, in relevant part: "The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . , including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." *Id.*

68. *Solid Waste Agency*, 531 U.S. at 172 (discussing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

69. *Id.* at 173.

70. *Id.*

71. *Id.*

72. *Id.* at 174.

73. *Id.* at 174 (Stevens, J., dissenting).

health, recreational and environmental uses.”<sup>74</sup> Thus, Congress deleted the term “navigable” from the definition of “waters of the United States” and no longer required either actual or potential navigability as a basis for the Corps’s jurisdiction.<sup>75</sup> In the dissenters’ opinion, the Court had recognized and approved Congress’s acquiescence in the Corps’s broad definition of its jurisdiction in the Court’s broad ruling in *Riverside Bayview Homes*.<sup>76</sup> And “once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute’s protection to those waters or wetlands that happen to lie near a navigable stream.”<sup>77</sup>

In addressing the majority’s federalism argument, the dissenters pointed out that the Corps’s interpretation of the Clean Water Act did not encroach on the traditional state power over land use because environmental law does not mandate particular uses of land but requires only that the use of the land not unduly damage the national environment.<sup>78</sup> The dissent then analyzed the Migratory Bird Rule under the *Lopez* test, which outlines three categories of activity that Congress may regulate under its Commerce Clause power, and stated that the activity in this case—discharge of fill into water—fell squarely within the third category: activities that “substantially affect” interstate commerce.<sup>79</sup> Moreover, the dissent noted, “protection of migratory birds is a textbook example of a national problem,” not a merely local issue.<sup>80</sup>

#### B. SOLID WASTE AGENCY AND THE NONDELEGATION DOCTRINE

To begin with, one may wonder, “why talk about the nondelegation doctrine<sup>81</sup> at all, as the case says nothing about it!” That’s precisely my point. The problem in the case had nothing to do with the delegation of authority to the Corps. The Court never questions whether Congress could make delegations to the Corps; hence, the case implicitly accepts the continued legitimacy of the modern understanding of the nondelegation doctrine. The problem in the case concerned the Corps’s interpretation of its delegated authority, not whether authority could be delegated to the Corps in the first place.

Understood from this point of view, the case is consistent with the Court’s other significant environmental decision of the Term, *Whitman v. American Trucking Ass’ns*.<sup>82</sup> In an important portion of that decision, the Court unani-

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74. *Id.* at 175.

75. *Id.* at 180–81.

76. *Id.* at 176.

77. *Id.*

78. *Id.* at 191.

79. *Id.* at 192.

80. *Id.* at 195.

81. Under the nondelegation doctrine, delegations are acceptable as long as an “intelligible principle” is provided to the agency receiving the delegated power. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 372 (1989).

82. 531 U.S. 457 (2001).

mously reversed the D.C. Circuit's unusual application of the nondelegation doctrine—used to strike down the EPA's most recent revision of the National Ambient Air Quality Standards.<sup>83</sup> In reversing the D.C. Circuit, the Supreme Court stated that the scope of discretion that Congress accorded to the EPA to set forth standards for ground-level ozone and particulate matter “is in fact well within the outer limits of our nondelegation precedents.”<sup>84</sup>

Justice Scalia noted that the Court had found the requisite “intelligible principle” lacking in only two federal statutes, both times in 1935, and that the Court has “‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”<sup>85</sup> Further, he stated that “even in sweeping regulatory schemes we have never demanded . . . that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’”<sup>86</sup> I cannot say that the Court will refuse to revisit the nondelegation doctrine at some future date, but for the time being this language sounds as if this Court has shut the door on any such argument. Moreover, *Solid Waste Agency* suggests no different outcome in the context of the Clean Water Act. In short, there is no sign of a revolution thus far in the realm of environmental regulation.<sup>87</sup>

### C. CHEVRON DEFERENCE

The Supreme Court's refusal to defer to the Corps's construction of its jurisdiction under the Clean Water Act<sup>88</sup> raises a question about whether *Solid Waste Agency* involves a radical departure from the usual approach to *Chevron* deference. In particular, the question is whether the Court, in spite of its

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83. As precedent for this unusual ruling, the D.C. Circuit relied on the nondelegation doctrine set forth in the 1935 case *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935), which invalidated New Deal poultry regulations.

84. *Whitman*, 531 U.S. at 474.

85. *Id.* at 474–75 (quoting *Mistretta*, 488 U.S. at 416).

86. *Id.* at 475 (quoting *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

87. The two other issues addressed in *American Trucking* concerned the EPA's authority to implement the revised ozone standard in areas where ozone levels currently exceed the maximum level permitted by that standard. First, the Court rejected the EPA's argument that the appellate court had no jurisdiction to review the EPA's implementation policy because that policy was not final agency action. *Id.* at 479. Second, on the merits of the implementation issue the Court held that the statutory provision at issue was sufficiently unclear that the EPA had discretion to interpret it, but that the EPA's interpretation was unreasonable and the EPA's implementation policy was thus unlawful. *Id.* at 481–86. Accordingly, the Court remanded this second issue. *Id.* at 486.

It is probably not a coincidence that in both *American Trucking* and *Solid Waste Agency* the Court's skepticism over the reasonableness of agency constructions of delegated authority led to the same outcome—striking down federal environmental regulations under the first step of *Chevron* analysis. This outcome reflects the Court's resistance to expansive construction of and deference to contested federal exercises of authority. Nevertheless, the Court's approach in both cases avoided constitutional issues and, in *American Trucking*, included the significant step of unanimously embracing the modern understanding of the nondelegation doctrine. See *supra* notes 85–87 and accompanying text.

88. See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166–68 (2001).



adherence to *Chevron* deference in principle, may nevertheless have recognized an important exception by requiring clear congressional authorization for agency interpretations of statutes that would stretch congressional authority to its outer limits and impinge on traditional state functions.<sup>89</sup> The Court's refusal to accept the EPA's interpretation as a reasonable interpretation of the governing federal statute, however, is not unique. The *Chevron* doctrine requires two analytical steps. The first step asks whether Congress has "directly spoken to the precise question at issue,"<sup>90</sup> or if the statute interpreted by the agency is "silent or ambiguous."<sup>91</sup> If the Court concludes that the statute is "silent or ambiguous" with respect to the interpretive question at issue after employing the usual tools of statutory construction, then the reviewing court proceeds to the second step, which is to ask whether the agency's interpretation of the statute is "reasonable" or "permissible."<sup>92</sup> Step one is usually the critical step in *Chevron* analysis. Indeed, in a study of the *Chevron* doctrine in 1997, Professor Ronald Levin concluded that "the Court has not proved to be much more deferential in the post-*Chevron* era than it was before; but when it utilizes the *Chevron* framework, it either upholds the agency or reverses on the strength of step one."<sup>93</sup>

Earlier in the same term as *Solid Waste Agency*, the Court similarly refused to accept the FDA's interpretation of its jurisdiction as extending to the regulation of tobacco as a drug in *FDA v. Brown & Williamson Tobacco Corp.*<sup>94</sup> *Solid Waste Agency* and *Brown & Williamson* are alike in the Court's unequivocal embrace of the *Chevron* doctrine and in its refusal to question either the basic legitimacy of Congress delegating to federal agencies or of federal agencies exercising delegated authority.<sup>95</sup> A significant theme shared by the two cases is the Court's refusal to allow an extension of federal authority by means of statutory construction or agency action beyond a certain point—a point that would either exceed the scope of constitutional authority vested in Congress or invade a constitutionally protected domain, such as state sovereignty. Perhaps most importantly, this theme does not emerge through radical or implausible applications of current doctrine. To the contrary, agency action is held to exceed

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89. See *supra* text accompanying notes 68–73.

90. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

91. *Id.* at 843.

92. *Id.* at 842–44.

93. Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHL.-KENT L. REV. 1253, 1261 (1997).

94. 529 U.S. 120 (2000). For another recent decision, see *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1998) (holding that National Credit Union Administration did not have power to approve applications for expansion of Credit Union membership under Federal Credit Union Act). For another case involving an environmental regulation, see *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994) (holding that the regulatory scheme of the Resource Conservation and Recovery Act addressed the issue of ash produced by resource recovery facility's burning of municipal waste).

95. See, e.g., *Brown & Williamson*, 529 U.S. at 132.

the standards and rules of basic doctrine.<sup>96</sup> In other words, the Court refuses to allow the extension of the present constitutional order beyond certain limits. This hardly seems revolutionary because it does not constitute an attack on, or rejection of, the basic order itself.

There is another way to construe the Court's approach to *Chevron* deference as nonrevolutionary. To begin with, the Court's decision allowed it to refrain from addressing the constitutionality of a delegated authority to extend federal jurisdiction over isolated wetlands.<sup>97</sup> By avoiding the central constitutional question that would be raised if Congress were to have enacted a regulation like the Migratory Bird Rule, the Court took anything but a radical step. In fact, this act was one of classic judicial restraint rather than revolution.

Moreover, one should note the Supreme Court's acceptance of *Chevron* deference itself. Accepting *Chevron* deference strikes me as something quite at odds with the dismantlement of the New Deal and Great Society. The very existence of such deference is hard to square with the restoration of a Constitution-in-exile.<sup>98</sup>

The refusal to accord *Chevron* deference is no small matter, but is, as I have indicated, hardly unprecedented. Indeed, the refusal is linked in *Solid Waste Agency*, as it was in *Brown & Williamson*,<sup>99</sup> with a reluctance to allow federal agencies to extend federal authority over areas that, in the majority's view, fall within traditional state domains.<sup>100</sup> It is no great surprise to find the Court's federalism concerns driving these decisions;<sup>101</sup> these of course are the very

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96. I refer to both standards and rules because *American Trucking* seems to turn on the EPA's violation of a standard (reasonableness) and *Solid Waste Agency* on the Corps's violation of a rule—prohibiting impingement on a state's sovereignty.

97. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). The Court noted:

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result . . . This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. . . . This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. . . . We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.

*Id.* at 172–74 (internal citations omitted).

98. *Cf. supra* notes 6, 15, 22 and accompanying text.

99. *See Brown & Williamson*, 529 U.S. at 125–26.

100. *See Solid Waste Agency*, 531 U.S. at 173–74.

101. A plausible contrary argument is that, at the very least, the Court sets forth a new principle—or at least a major exception to *Chevron* deference—that if Congress intends for an agency to have the authority to operate at the outer limits of Congress's power, then Congress must "indicat[e] that it intended that result." *Id.* at 171. This principle effectively defines an outer limit to the *Chevron* doctrine itself. Ambiguity will not serve as a basis for some agency interpretations when those interpretations exceed certain limits of congressional authority. Moreover, the only way for agencies to operate at the outermost limits of congressional authority (as they have been defined by the Court) is under the unlikely circumstance in which Congress expresses its legislative will clearly and boldly. Nevertheless, at least one interesting reading of recent Commerce Clause decisions posits that they are likely to have

same concerns driving the Court's recent Commerce Clause opinions. The critical issue is the extent to which the concerns are driving the Court to develop new standards or rules that will be used to produce revolutionary results, in particular results that would restrict or overturn long-standing federal efforts to protect the environment. I turn to the implications of these concerns for the future of constitutional law in the next section.

#### D. THE FUTURE OF COMMERCE CLAUSE JURISPRUDENCE

The Court's explicit reference to federalism concerns is no accident. It is hard not to appreciate the possibility that if Congress passed a law as far-reaching as this regulation it would not survive constitutional muster. While the Court stressed that Congress did not seem to authorize such extensive regulations as the Migratory Bird Rule (perhaps implying that if the Congress had done so clearly, the problem in the case would have been eliminated), the Court's reference to the scope of state sovereignty extending over the land and activity in question leaves very little to the imagination.<sup>102</sup>

So, let's take the next step and suppose the Court were to strike down, as it seems to imply it would, a federal law that had the same content as the Migratory Bird Rule. On what basis would the Court strike down such a law, and what would its decision tell us both about the direction of Commerce Clause doctrine and about the possibility of a revolution in American constitutional law? The majority and dissenting opinions both allude to the basic issues that would arise from a decision on the constitutionality of a federal law that embodied the Migratory Bird Rule. There are three such issues. I will discuss briefly the significance of each in turn.

##### 1. National vs. Local Problems

One line of analysis in *Solid Waste Agency* involves the distinction between a

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the unintended or perverse consequence of producing broader, more comprehensive enactments than the ones struck down. See discussion *infra* section II.D.3.

102. See *Solid Waste Agency*, 531 U.S. at 173. The Court stated:

Respondents argue that the "Migratory Bird Rule" falls within Congress' power to regulate intrastate activities that "substantially affect" interstate commerce. They note that the protection of migratory birds is a "national interest of very nearly the first magnitude," . . . and that . . . millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now . . . focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." . . . But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.

*Id.* Moreover, the Court held that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

problem of national dimension, which would allow for congressional regulation, and a purely local problem, which would fall uniquely within state sovereign authority to solve. For example, the majority refers to the respondents' argument "that the protection of migratory birds is a 'national interest of very nearly the first magnitude,'" which cites Justice Holmes's famous opinion in *Missouri v. Holland*.<sup>103</sup> In dissent, Justice Stevens refers to "Justice Holmes[s] cogent[] observat[ion] in *Missouri v. Holland* that the protection of migratory birds is a textbook example of a *national* problem."<sup>104</sup> He adds:

The destruction of aquatic migratory bird habitat, like so many other environmental problems, is an action in which the benefits (e.g., a new landfill) are disproportionately local, while many of the costs (e.g., fewer migratory birds) are widely dispersed and often borne by citizens living in other States. In such situations, described by economists as involving "externalities," federal regulation is both appropriate and necessary.<sup>105</sup>

In support of this conclusion, Justice Stevens relies in part on a 1981 decision in which the Supreme Court "deferr[ed] to Congress' finding that nationwide standards were 'essential' in order to avoid 'destructive interstate competition' that might undermine environmental standards."<sup>106</sup>

The national-local distinction is hardly new to Commerce Clause jurisprudence,<sup>107</sup> though it seems to have dissolved (at least for a while) with the advent of the New Deal. The Court plainly evidences its own recognition of a local condition that is beyond federal regulation by refusing to grant any deference to the Corps's construction of its authority because it "would result in a significant impingement of the States' traditional and primary power over land and water use," after having considered but implicitly rejected respondents' appeal to the "national" subject matter of the Migratory Bird Rule.<sup>108</sup> While the national-local distinction collapsed in part because of its very artificiality—and as a result of the Court's recognition that Congress would be better able to figure out whether something was a national problem requiring a national solution—the Rehnquist Court seems disposed to come at this distinction from the direction of clarifying what is not national rather than the direction of defining what ought to

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103. *Id.* at 173 (citing *Missouri v. Holland*, 252 U.S. 416, 435 (1920)).

104. *Id.* at 195 (Stevens, J., dissenting).

105. *Id.* at 195–96 (citing Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race-to-the-Bottom' Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992)).

106. *Id.* at 196 (citing *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 281–82 (1981)).

107. The Taney Court first recognized the distinction in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) ("Whatever subjects of [the Commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.").

108. *Solid Waste Agency*, 531 U.S. at 174.

be treated as national. This is not a new direction for the Court.<sup>109</sup> The Court undertook such an effort in *National League of Cities v. Usery*<sup>110</sup> (albeit arguably dealing with a different problem—federal regulation of state activity). But this is not a different matter from the Court's perspective, for here as in *National League of Cities*, I am confident, especially given that the same Justice wrote both opinions, that the Court has been trying to protect the very same domain: state sovereignty. In environmental cases, the Court has recognized a realm of local activity into which federal power may not extend, while in *National League of Cities* the Court recognized a realm of state governmental activities into which federal power may not extend. The Court's recognition of formal realms into which federal power may not extend raises a question about how bright or clear the national-local distinction is. While a majority may want a very bright line, its brightness depends on the resolution of at least two other issues.

## 2. Economic vs. Noneconomic Objective or Activity

As set forth in *Lopez*, the basic framework for evaluating the constitutionality of Commerce Clause enactments allows Congress to regulate a channel of interstate commerce (water, for example), an instrumentality of interstate commerce (a steamboat, for example), or an activity that could substantially affect interstate commerce.<sup>111</sup> In *United States v. Morrison*, the Court indicated that not every kind of private activity would be considered to have the potential to affect interstate commerce substantially. The Court explained that the primary kind of private activity that the Commerce Clause allowed Congress to aggregate for purposes of determining whether it substantially affected interstate commerce was "economic" activity.<sup>112</sup> In *Morrison*, the Court struck down the civil remedies provision of the Violence Against Women Act because the activity that it sought to regulate, gender-motivated violence, was "not, in any sense of the phrase, economic activity."<sup>113</sup> The Court stated: "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that

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109. For support of its finding that the domain into which the Rule extends falls within the sovereignty of the states, the Court quotes a 1994 decision. *Id.* at 174 ("Regulation of land use [is] a function traditionally performed by local governments." (quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994))).

110. 426 U.S. 833, 852 (1976) (holding that the Commerce Clause did not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act against the states "in areas of traditional government functions").

111. See *United States v. Lopez*, 514 U.S. 549, 559–60 (1995).

112. *United States v. Morrison*, 529 U.S. 598, 608, 610–11 (2000) ("[T]he noneconomic, criminal nature of the conduct at issue was central to [*Lopez*]. . . . *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.").

113. *Id.* at 613.

activity is economic in nature.”<sup>114</sup>

Accordingly, one important question for the future of Commerce Clause jurisprudence is what kinds of private activity the Court will treat as economic. The dissent in *Solid Waste Agency* argued, for example, that the objective of the Migratory Bird Rule was to regulate “the discharge of fill material into the Nation’s waters” and that such activity was plainly “undertaken for economic reasons.”<sup>115</sup> However, the majority was skeptical because the federal government had not previously defended the Rule on this rationale.<sup>116</sup> That a law regulates commercial activity does not mean that the relevant activity for aggregation purposes is economic, for what seems to matter primarily to the Court for purposes of demarcating the scope of congressional authority under the Commerce Clause is the law’s *objective*, rather than the means by which this objective is achieved. In *Solid Waste Agency* and *Morrison*, the Court seems to suggest that what matters for purposes of aggregation in Commerce Clause cases is whether the basic purpose of the law is economic, not whether some economic activity is the means to achieve a noneconomic objective, such as clean water or air.<sup>117</sup> If the Court means to focus on the former inquiry, the obvious question is: How much difficulty does this understanding of the Commerce Clause pose for the modern administrative state?

The answer is: not much. First, aggregation is a relevant consideration under *Lopez*’s third prong where the Court considers whether an activity bears a substantial relationship to interstate commerce. It is entirely conceivable that the Court would accept that regulation of the nation’s water and air is permissible under the Commerce Clause because air and water are channels of interstate commerce that the federal government is trying to preserve. Moreover, *Lopez* accepts regulation of instrumentalities of interstate commerce as valid congressional exercises of Commerce Clause power.<sup>118</sup> It is possible to stretch the analysis further to characterize both air and water as essential commodities for human existence and to argue that their protection makes a national economy possible. Without these commodities, we ultimately cease to exist as economic (or any other kind of live) actors. The latter construction admittedly seems strained, especially given the Court’s apparent disdain in *Solid Waste Agency* for the government’s post hoc justification of the Migratory Bird Rule in economic terms.<sup>119</sup>

Second, the economic-noneconomic distinction may be more prospective than retroactive. In other words, the Court may be reluctant to use this distinc-

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114. *Id.*

115. *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 194 (2001) (Stevens, J., dissenting).

116. *Id.* at 173.

117. *Cf. id.* at 193 (Stevens, J., dissenting); *Morrison*, 529 U.S. at 610–12.

118. *See United States v. Lopez*, 514 U.S. 549 (1995).

119. *See Solid Waste Agency*, 531 U.S. at 173.

tion to reopen debate about the legitimacy of long-standing laws.<sup>120</sup> One possibility is that through this distinction the Court may be giving lower courts and Congress the means to justify pre-existing laws that would otherwise have difficulty fitting within the *Lopez* framework and be prepared to defer to congressional and other judicial efforts to use these means to effectuate that purpose. This is one—albeit quite generous—way to construe the significance of the Court's refusal to grant certiorari in a case involving a question about the constitutionality of federal regulation of the small red wolf population via the Endangered Species Act.<sup>121</sup>

Third, another category of permissible legislation may be conceivable under the *Lopez* framework, though it has to date been neglected. While environmental and particularly wetlands regulations arguably do not fit easily within the *Lopez* framework because they do not purport to have an economic purpose, they conceivably have a comprehensive objective. In the next section, I consider whether comprehensiveness is a relevant factor for determining the constitutionality of Commerce Clause enactments.

### 3. Comprehensive vs. Noncomprehensive Regulatory Schemes

In an interesting Essay, Professor Adrian Vermeule suggests that the Supreme Court in *Lopez* and *Morrison* failed to take into account that Commerce Clause review will promote not the intended effect of decentralization, but rather more comprehensive regulation.<sup>122</sup> Professor Vermeule notes that this prospect is evident in *Hodel v. Indiana*,<sup>123</sup> “which stated that challenged provisions not valid in themselves will be upheld if they are an ‘integral part of [a] regulatory program’ that is valid when taken as a whole.”<sup>124</sup> Moreover, Professor Vermeule directs attention to language in *Lopez* already taken seriously by lower courts, in which the Court finds that the act struck down in the case:

“[I]s not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained in our cases upholding regulations

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120. This position depends on the lower courts not only upholding federal laws but also expanding on the rationales for upholding them, thereby making it easier for the Court to avoid questions of constitutional law arising from the laws being struck down.

121. See *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding application of the Endangered Species Act by a divided panel), *cert. denied*, 531 U.S. 1145 (2001). In *Solid Waste Agency*, Justice Stevens cited approvingly to *Gibbs* as an analogous circumstance to demonstrate the “causal connection between the filling of wetlands and the decline of commercial activities.” *Solid Waste Agency*, 531 U.S. at 195 (Stevens, J., dissenting) (“The relationship between red wolves takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf tourism.” (quoting *Gibbs*, 214 F.3d at 492)).

122. See Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325 (2000).

123. 452 U.S. 314 (1981).

124. Vermeule, *supra* note 122, at 1331 (quoting *Hodel*, 452 U.S. at 329 n.17 (1981)).

of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”<sup>125</sup>

For a recent example of this reasoning, look no further than the dissent in *Solid Waste Agency*. At one point, Justice Stevens defends the Migratory Bird Rule by referring no less than six times in a single paragraph to the Clean Water Act (CWA) as a comprehensive regulatory scheme of which the Rule was an integral part.<sup>126</sup> Justice Stevens drives this point home two pages later: “By 1972, Congress’ Commerce Clause power over ‘navigation’ had long since been established. . . . The activities regulated by the CWA have nothing to do with Congress’ ‘commerce power over navigation.’ Indeed, the goals of the 1972 statute have nothing to do with *navigation* at all.”<sup>127</sup> He explains further in the next paragraph:

[T]he interests served by the statute embrace the protection of “significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites” . . . For wetlands and “isolated” inland lakes, that interest is equally powerful, regardless of the proximity of the swamp or the water to a navigable stream. Nothing in the text, the stated purposes, or the legislative history of the CWA supports the conclusion that in 1972 Congress contemplated—much less commanded—the odd jurisdictional line that the Court has drawn today.<sup>128</sup>

In short, the Corps’s jurisdiction is no longer limited by the term “navigation,” but rather extends to “waters over which federal authority may properly be asserted.”<sup>129</sup>

The major problem in the dissent’s argument is readily apparent. The Clean Water Act plainly limits the Corps’s jurisdiction to “navigable waters,” however one construes these explicit terms. As long as these terms are in the statute, it is

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125. *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). Two lower court opinions figure prominently in Vermeule’s analysis: *Gibbs* and *United States v. Kirk*, 105 F.3d 997 (5th Cir. 1997).

126. In his dissent, Justice Stevens noted:

The Act . . . was universally described by its supporters as the first truly comprehensive federal water pollution legislation. The “major purpose” of the CWA was “to establish a *comprehensive* long-range policy for the elimination of water pollution.” . . . And “[n]o Congressman’s remarks on the legislation were complete without reference to [its] ‘comprehensive’ nature.” . . . A House sponsor described the bill as “the most comprehensive and far-reaching water pollution bill we have ever drafted,” . . . and Senator Randolph, Chairman of the Committee on Public Works, stated: “It is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment.” . . . This Court was therefore undoubtedly correct when it described the 1972 amendments as establishing “a comprehensive program for controlling and abating water pollution.”

*Solid Waste Agency*, 531 U.S. at 179 (Stevens, J., dissenting) (internal citations omitted).

127. *Id.* at 181 (emphasis in original) (internal citations omitted).

128. *Id.* at 182 (internal quotations and citations omitted).

129. *Id.* (citation omitted).



hard to deny their plain meaning. Perhaps even more devastating for Professor Vermeule's provocative point is that the dissent's argument regarding comprehensiveness seems to have had no apparent impact on—or recognition in—the majority's analysis.

Moreover, it is hard to read *Lopez* as creating an exception for comprehensive regulatory measures. For one thing, *Lopez* does not explicitly refer to comprehensiveness as a category of permissible regulation. Moreover, the Court's statement in *Lopez* to which Professor Vermeule alludes is likely predicated on the assumption that the regulatory scheme has an economic objective or that the private economic activity it seeks to regulate is central to the objective of the regulatory scheme. *Morrison* and *Solid Waste Agency* accept the economic character of an act as a prerequisite for its serving as a subject of Commerce Clause regulation.<sup>130</sup> Hence, a comprehensive scheme will probably not pass constitutional muster simply because it is comprehensive. It will pass muster only if it falls within one of the three formal categories recognized in *Lopez*. An essential element appears to be that either a statute's objective must be economic or the activity at which it is directed must be economic. This conclusion brings us back not just to one new formalism in the Court's doctrine—the economic-noneconomic distinction—but also to the inquiry into just how much this distinction requires dismantling environmental regulation.

### III. THE NONREVOLUTIONARY RESPONSES TO *SOLID WASTE AGENCY*

In this final Part, I examine the significance of recent nonjudicial developments relating to the protection of the environment, including responses to the Court's overturning the Migratory Bird Rule. As I will argue, I do not view these as signaling any significant alteration in federal environmental policy.

To put these responses in perspective, one must first consider the implications of at least three signs of revolutionary posturing on the part of the Bush Administration. The first and most significant of these are the tax cuts passed by Congress in early 2001<sup>131</sup> and those proposed by the President in the aftermath of the terrorist attacks against the United States.<sup>132</sup> By removing over \$1.3 trillion from potential federal expenditures over the next decade, the Bush Administration has guaranteed less money for a wide variety of federal programs and initiatives, though at this stage we can only speculate as to which

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130. See discussion *supra* section II.D.2.

131. See David Rosenbaum, *Congress Agrees on Final Details for Tax-Cut Bill*, N.Y. TIMES, May 26, 2001, at A1. One problem that is already apparent with the tax cut is the possibility of subsequent adjustments in its size as Congress nears the outer boundary of the implementation period. Of course, this situation became further complicated by a national recession and the aftermath of the terrorist attacks against the United States.

132. See *Congress Leaves Without Stimulus*, RICH. TIMES DISPATCH, Dec. 21, 2001, at A2 (reporting that "[t]his year's economic stimulus bill officially died when Senate Republicans tried yesterday to bring up a bill that President Bush backed to cut taxes and expand benefits for the unemployed. . . . Majority Leader Tom Daschle, used his power to block a vote, saying the bill contained too many tax cuts for business and the wealthy and not enough aid for the unemployed.").

specific federal programs and initiatives will be weakened or eliminated as a result.

Second, no sooner had President Bush taken office than he executed three major shifts in environmental policy from the prior administration: (1) his order on Inauguration Day delaying for sixty days the implementation of all regulations adopted by the Clinton Administration in its waning days (including, among other things, regulations to protect the environment);<sup>133</sup> (2) his authorization of the United States to pull out of the 1997 Kyoto Protocol;<sup>134</sup> and (3) his decision to withdraw pending rules on the acceptable levels of arsenic in drinking water.<sup>135</sup> Together, these decisions raised the specter of the new Bush Administration as the antithesis of the Clinton Administration in the field of environmental regulation.

Third, President Bush seemed to remove further doubt about the possible revolutionary direction of his Administration on environmental matters when he clearly evidenced his intent to nominate to various environmental posts individuals who not only have come from the industries that they will be charged with overseeing, but who also have been outspoken advocates for expanded legal protections of property rights.<sup>136</sup> If confirmed, these individuals will join others in the administration, including Vice President Cheney, Attorney General Ashcroft, and Interior Secretary Norton, all of whom, prior to joining the Administration, expressed similar hopes for shrinking federal interference with local land use that might in some ways threaten the environment.<sup>137</sup>

The implications of these three developments are potentially misleading, for there are even stronger indications of the absence of a revolution in environmental policy. Perhaps most importantly, the current administration has upheld numerous initiatives and rules adopted in the closing days of the Clinton Administration to protect the environment, including, among others, rules con-

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133. Regulatory Review Plan, 66 Fed. Reg. 7,702 (Jan. 24, 2001).

134. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22. See President's Letter to Senators Helms, Craig, Roberts, and Hagel, 37 Pub. Papers 431, 431-61 (Mar. 13, 2001) (discussing the Kyoto Protocol and the Bush Administration's intention not to implement the treaty's provisions).

135. See National Primary Drinking Water Regulations, 66 Fed. Reg. 16,134 (Mar. 23, 2001) (delaying the effective date of the Clinton Administration arsenic rules); National Primary Drinking Water Regulations, 66 Fed. Reg. 20,580 (Apr. 23, 2001) (announcing the intention of the Bush Administration EPA to propose revised regulations on arsenic levels in drinking water).

136. See, e.g., Katharine Q. Seelye, *Bush Is Choosing Industry Insiders to Fill Several Environmental Positions*, N.Y. TIMES, May 12, 2001, at A10.

137. See, e.g., *Dick Cheney's Political Resume*, N.Y. TIMES, July 26, 2000, at A22 (describing Dick Cheney's conservative record and its possible effect on 2000 election); Douglas Jehl, *The 43rd President: Interior Choice Sends Signal on Land Policy*, N.Y. TIMES, Dec. 30, 2000, at A1 (noting the selection of Gale Norton as indicative of President Bush's views on Alaskan drilling); Deirdre Shesgreen, *Senators Say Ads Won't Alter Stand on Road Rules*, ST. LOUIS POST-DISPATCH, Apr. 28, 1999, at A11 (discussing John Ashcroft's environmental record as a Senator).

cerning lead;<sup>138</sup> the recognition by executive order of eighteen national monuments designated by President Clinton under the Antiquities Act;<sup>139</sup> a ban on snowmobiles in two national parks in Wyoming;<sup>140</sup> the pending regulation to put almost sixty million acres of public forest off-limits to road building;<sup>141</sup> and a ruling that requires developers to obtain permits under the Clean Water Act before carrying out certain earth-moving activities that harm protected wetlands.<sup>142</sup> Of particular interest for our purposes is the fate of the executive order

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138. Lead and Lead Compounds, 66 Fed. Reg. 4,500 (Jan. 17, 2001) (to be codified at 40 C.F.R. pt. 372); see also Julie Mason, *Bush Keeps Tough Plan to Cut Lead*, HOUSTON CHRON., Apr. 18, 2001, at A1.

139. See Dana Milbank & Eric Pianin, *Bush to Counter Environmental Criticism; Outrage over Regulatory Changes Pushes Administration to Tout Green Policies*, WASH. POST, Mar. 31, 2001, at A6. While Interior Secretary Norton requested that state and local governments indicate their desired "boundary adjustments" to allow commercial activity in some of the areas designated as national monuments. See *Watching Mr. Bush on Earth Day*, N.Y. TIMES, Apr. 22, 2001, at A24 (quoting Interior Secretary Norton). However, the Director of the White House's Domestic Policy Council emphasized the administration's intention to "keep these monuments in place." Milbank & Pianin, *supra*, at A6.

140. Changes to Proposed Rule, 66 Fed. Reg. 7,260 (Jan 22, 2001); see also Eric Pianin, *Bush Backs Ban on Snowmobiles in 2 Wyoming Parks*, WASH. POST, Apr. 24, 2001, at A3.

141. See Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001). The Clinton Administration's so-called "Roadless Forest Rule" has posed several difficulties for President Bush. After an initial order requiring a review of this and other last-minute measures adopted by the Clinton Administration, President Bush put a sixty-day hold on the implementation of the rule to consider whether to uphold the regulation in question. Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8,899 (Feb. 5, 2001). The Bush Administration's review of this rule was further complicated by a lawsuit brought by a major timber company and the State of Idaho to secure an injunction against its implementation. Subsequently, the district judge in the case nullified President Bush's May 12, 2001 order to allow the rule to be implemented and issued a preliminary injunction. See Katherine Pfleger, *Judge Axes Forest Road-Building Ban*, CHI. TRIB., May 11, 2001, at A14. More recently, the Bush Administration failed to take further action to impede or delay issuance of the preliminary injunction. See *Feds Won't Fight Ruling Against Forest-Road Ban*, SEATTLE TIMES, July 11, 2001, at B3. The notice and comment has also attracted other expressions of significant opposition to further delay in implementing the rule. See Mike Ferullo, *Scientists Urge Bush to Move Forward on Clinton-Era Ban on Forest Roads*, DAILY ENV'T REPORT (BNA), 174 DEN A-2 (2001), Sept. 10, 2001. The case is now on appeal to the Ninth Circuit. See *Panel Is Asked to OK Roadless Rule*, SEATTLE TIMES, Oct. 17, 2001, at B4.

142. See Douglas Jehl, *E.P.A. Supports Protections Clinton Issued for Wetlands*, N.Y. TIMES, Apr. 17, 2001, at A1. A challenge to the rule is pending. See *id.* There are many other Clinton Administration initiatives and rules ultimately adopted or ratified by President Bush, including: a rule mandating a massive reduction in the level of sulfur in diesel fuel, Control of Air Pollution from New Motor Vehicles, 66 Fed. Reg. 5,002 (Jan. 18, 2001); a rule amending the rules on construction on wetlands that result in the discharge of dredged materials, Further Revisions to the Clean Water Act Definition of "Discharge of Dredge Material," 66 Fed. Reg. 4,550 (Jan. 17, 2001); the implementation of a rule seeking to reduce haze in national parks and proposing, inter alia, new guidance on controlling pollution from power plants, Proposed Guidelines for Best Available Retrofit Technology Determinations Under the Regional Haze Regulations, 66 Fed. Reg. 38,108 (July 20, 2001); an agreement to implement all Clinton-era rules not subject to pending litigation governing the exposure of miners to diesel fumes, Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners, 66 Fed. Reg. 35,518 (July 5, 2001); and the decision to publish unchanged a rule dealing with the reduction of hazardous waste air pollution emission from iron and steel plants, National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing, 66 Fed. Reg. 36,836 (July 13, 2001). In addition, the Bush Administration has expressed its willingness (1) to publish unchanged a rule proposed by the prior administration regarding bioengineered crops, Premarket Notice Concerning Bioengineered Foods, 66 Fed. Reg. 4,706 (Jan. 18, 2001), see Karen L. Werner, *EPA Plant Incorporo-*

issued by President Clinton in response to *Solid Waste Agency* requiring federal agencies to consider the impact of their activities on migratory birds.<sup>143</sup> The order directed federal agencies to develop within two years a memorandum of understanding with the Fish and Wildlife Service if their actions might have a "measurable negative effect on migratory bird populations."<sup>144</sup> To date, President Bush has done nothing to alter, much less indicate an intention to rescind, this order.<sup>145</sup>

Moreover, another important force in constitutional law is stare decisis. Though not often recognized, there are at least two significant kinds of stare decisis for constitutional law purposes. One kind has to do with the Supreme Court's decisionmaking. In this realm, it is telling that in only one of the cases in which the Court has struck down a federal law in the past six years did the Court overturn a Commerce Clause precedent.<sup>146</sup>

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rated *Protectant Rules Expected to Exempt DNA from Tolerances*, DAILY ENV'T REPORT (BNA), 135 DEN A-4 (2001), July 16, 2001; and (2) to facilitate a cleanup effort begun under President Clinton to repair damage done by General Electric's dumping of PCBs into the Hudson River, see *Mrs. Whitman Stays the Course*, N.Y. TIMES, Aug. 2, 2001, at A20. Last but not least, after various delays, the Bush Administration eventually agreed to the standards initially adopted by the Clinton Administration to govern acceptable levels of arsenic in drinking water. See Edward Walsh, *Arsenic Drinking Water Standard Issued; After Seven-Month Scientific Review, EPA Backs Clinton-Established Levels*, WASH. POST, Nov. 1, 2001, at A31.

143. Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3,853 (Jan. 17, 2001).

144. *Id.* In addition, the Corps has developed a new definition of "wetlands" in response to the *Solid Waste Agency* decision. At a meeting on March 1, 2001, the Corps changed its working definition of wetlands for purposes of Clean Water Act jurisdiction. Interestingly, the new definition confirms Professor Vermeule's theory about the possibility of Commerce Clause doctrine producing perverse effects, for the new definition reflects the Corps's effort to adopt a broader or more comprehensive jurisdiction rather than a narrower one in response to the Court's decision. This final impact of the Corps's action is called into question, however, by the continued activity post-*Solid Waste Agency* in defining federal jurisdiction by the federal courts. See, e.g., *Rice v. Harken Exploration Co.*, 250 F.3d 265 (5th Cir. 2001) (refusing to extend federal statutory protection of navigable waters to groundwater in absence of statutory language or evidence of congressional intent); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (extending federal statutory protection to artificially constructed canals as waters of the United States).

145. Opening the Arctic reserves to oil exploration poses the possibility of significant harm to the migratory birds that use the reserves as habitat. Indeed, this possible harm was just one of the reasons leading to the Senate's refusal to endorse the plan. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d107;SPO3132> (reporting Senate's rejection of amendment that contained the plan on April 18, 2002). At this time, it is unclear how much of the reserves will be opened to exploration and how much of the exploration itself will pose a risk to migratory birds.

146. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) (overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and holding, for the first time, that Congress has no authority to override Eleventh Amendment immunity as part of an otherwise valid exercise of an Article I power, including the power to regulate interstate commerce). I hasten to add that the Court has overturned at least two precedents on the scope of congressional authority under Section Five of the Fourteenth Amendment. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 235 (1995) (overturning *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980)). Moreover, I expect it will be just a matter of time before the Court overrules *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976). A series of Commerce Clause decisions, including *New York v. United*

A second significant realm of *stare decisis* is political. In this realm, one should recall that the twin monuments of modern environmental law—the Clean Air and Clean Water Acts—do not owe their origins, strictly speaking, to the Democratic Party; they are Republican legacies, dating back to none other than Republican President Richard M. Nixon.<sup>147</sup> I do not doubt that there are powerful forces in the Republican party seeking to dismantle these legacies, but I seriously doubt that this Republican President and this Republican House possess the resolve and political support to proceed with, and be held accountable for, their dismantlement.

In addition, the shift in control of the Senate back to the Democrats in May 2001, resulting from Senator James Jeffords's decision to leave the Republican party to become an Independent and vote with the Democrats in organizing the Senate leadership,<sup>148</sup> will hinder retrenchment of environmental and constitutional law in both expected and unexpected ways.<sup>149</sup> This shift will almost certainly ensure that Congress will not approve any significant legislative curtailment of current environmental laws. The Democratically led Senate is highly unlikely to approve any legislation that would weaken federal environmental policies.

Nor do I imagine that Congress, as it is presently constituted, will expand environmental laws. The Democrats' majority is razor-thin in the Senate; the party is not ideologically unified; and even if the Democrats were able to get ambitious environmental legislation passed in the Senate, they seem unlikely to get a favorable reception in the more conservative House.

These prospects leave a fairly clear playing field for President Bush. He will be relatively free to bypass Congress through issuing executive orders to effect or promote his preferred environmental policies, whatever they may be. Once he issues an order, the prospect of reversal is almost nil. Even if majorities could be mustered in both chambers to fashion legislation to overturn his orders, President Bush may veto the legislation, and Congress's ability to override the veto, given the composition of both chambers, is quite remote. Thus, President Bush seems to have a significant advantage in shifting environmental enforcement in directions that he prefers. Ironically, such shifts are not likely to evince

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*States*, 505 U.S. 144 (1992), have whittled away the ruling in *Garcia*. It is hard to say whether the overruling of *Garcia* will be a seismic event in constitutional law, in part because the line of decisions of which it is a part has been unstable for decades.

147. See generally ENVTL. POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 (1974); ENVTL. POLICY DIV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1973).

148. See Katharine Q. Seelye & Adam Clymer, *Balance of Power: The Power Shift; Senate Republicans Step Out and Democrats Jump In*, N.Y. TIMES, May 25, 2001, at A1.

149. Indeed, no sooner had the news of the shift been made public than the media declared effectively dead President Bush and Vice President Cheney's intention to open some of the Arctic Wildlife Refuge for oil exploration. See, e.g., Alison Mitchell, *Daschle Quick to Explain What New Senate Math May Mean for the Bush Agenda*, N.Y. TIMES, May 28, 2001, at A9; Robert Schlesinger, *A Shift in Power Energy Legislation; Move Gives Democrats More Muscle on Environment*, BOSTON GLOBE, May 25, 2001, at A25.

a revolution, but rather just the opposite. With every effort he takes as President to consolidate executive power, he merely reinforces the growth of the executive branch and particularly executive power that is a legacy of the New Deal.<sup>150</sup> Moreover, I would expect this shift to put even more pressure on President Bush's appointees to environmental and other sensitive posts to make reassuring pledges of their intentions to enforce fully and fairly all federal laws for whose enforcement they will be responsible—and not just the laws with which they previously expressed agreement.<sup>151</sup>

If we take these appointees at their word (and why shouldn't we?), they intend no revolution in environmental law. Even more important are the words of the President. Thus far, Bush is a President who has made recourse to the bully pulpit on only a few select issues: his announcements of nominations, his tax cut, his support for faith-based charities, his energy policy, and, most importantly, the war against terrorism. In none of his public rhetoric on these or any other issues has he hinted at, much less called for, as revolution. He has assiduously avoided grounding any public policy in an underlying ideology, except perhaps for his references to the now well-worn but amorphous concept of compassionate conservatism. Even in the aftermath of Senator Jeffords's defection, the President did not defend any ideology, but rather spoke simply of getting "results" for the American people.<sup>152</sup> Without national leaders across all three branches advocating or supporting revolution, there can be no revolution, and at present, there are no such leaders.

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150. I am inclined to view the consolidation of presidential authority to combat terrorism over the past few months—by virtue of unilateral orders authorizing military tribunals for noncitizens accused of terrorism and the provisions of the USA Patriot Act of 2001, Pub. L. No. 107-56 115 Stat. 272 (2001) and the proposed Department of Homeland Security under the Homeland Security Act of 2002, H.R. 5005, 107th Cong. (2002)—as reinforcing the broad authority already exercised by President Bush in the environmental realm. To be sure, the former authority relates to national security, which traditionally has been viewed as distinct from domestic policymaking. That the war on terrorism is being fought not just abroad, but also domestically, has placed the President in the special position of employing his broadened national security authority at home and even more than perhaps is usual, at the expense of Congress. See, e.g., R.W. Apple, Jr., *Big Government Is Back in Style*, N.Y. TIMES, Nov. 23, 2001, at B2; Edwin Chen, *Bush Refuses to Turn Over Justice Records to Congress*, L.A. TIMES, Dec. 14, 2001, at A1; Dana Milbank, *In War, It's Power to the President*, WASH. POST, Nov. 20, 2001, at A1. One possible consequence is an increasing receptivity to executive acquisition or consolidation of administrative authority. Thus, George W. Bush, who campaigned for smaller government, has ironically taken the lead in consolidating domestic authority over a wide range of areas, including but not limited to, homeland security. Such consolidation is only likely to accelerate with division or indecision in Congress. See Ryan Lizza, *Power House*, NEW REPUBLIC, Dec. 24, 2001, at 10; see also Stephen Breyer, *Our Democratic Constitution* (Oct. 22, 2001) (James Madison Lecture delivered at the New York University Law School) (suggesting, among other things, that "trust in government has shown a remarkable rebound in response to last month's terrible tragedy"), available at [www.supremecourtus.gov/publicinfo/speeches/sp\\_10-22-01.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_10-22-01.html).

151. See Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001) (discussing, inter alia, the relationship between such reassuring rhetoric and smooth confirmation).

152. Frank Bruni & David E. Sanger, *Bush Defends His Stance Despite Stinging Defection*, N.Y. TIMES, May 25, 2001, at A20.

Another critical development has to do with state responses to *Solid Waste Agency*. Interestingly, several states responded quickly to the decision by either enacting or recommending the enactment of laws to fill the void left as a result of the Court's decision. These states include California, Connecticut, Illinois, North Carolina, Ohio, Oregon, South Carolina, Virginia, and Wisconsin.<sup>153</sup> Of course, this reaction is a clear illustration of environmental federalism in action.<sup>154</sup> However, it should not be taken as a sign of the restoration of a Constitution-in-exile. References to such a constitution presuppose a state of affairs, presumably one in which there was widespread support for property rights and general hostility to progressive regulation of property interests. As such, the Constitution-in-exile bears no real resemblance to the actual state of the law prior to 1937. Even during the so-called *Lochner* era, states did not enact progressive regulations of the environment, though the doctrine in existence at the time would have been supportive of such enactments.<sup>155</sup> Thus, we are left to wonder precisely what a revolution aimed at restoring some long lost ideal would truly be aimed at recapturing. The problem is that there is nothing to recapture. There is no Constitution-in-exile, for there never was prior to 1937 a single, dominating conception of the Constitution. A revolution purportedly aimed at restoring such a constitution would be directed at nothing. As a character in Robert Penn Warren's *All the King's Men* eloquently declares, "[Y]ou cannot lose what you have never had."<sup>156</sup>

Last, but far from least, the dynamic of our constitutional universe has changed after September 11, 2001. The war on terrorism has already pushed many items, particularly those likely to divide the political parties intensely, off the national agenda at least for the foreseeable future. This dynamic has left

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153. See Assemb. B. 949, 2001–2002 Assemb. Reg. Sess. (Cal. 2001); H.B. 5949, 2001 Gen. Assemb., Reg. Sess. (Conn. 2001); H.B. 3060, 2001–02 Gen. Assemb. Reg. Sess. (Ill. 2001); H.R. 200, 2001–02 Gen. Assemb., Reg. Sess. (Ill. 2001); H.B. 1344, 2001 Gen. Assemb., Sess. 2001 (N.C. 2001); Exec. Order 8, 124th Gen. Assemb., Reg. Sess. (Ohio 2001); S.B. 172, 71st Legis. Assemb., Reg. Sess. (Or. 2001); S.B. 223, Gen. Assemb., 114th Sess. (S.C. 2001); H.B. 2292, Gen. Assemb., 2001 Sess. (Va. 2001); Assemb. B. 215, 2001–01 Leg., 95th Legis. Sess. (Wis. 2001); S.B. 1A, 2001–02 Leg., Spec. Sess. (Wis. 2001).

154. Depending on the issue, states sometimes respond to limitations, failures, and gaps in federal enforcement by calling for more federal involvement rather than develop solutions of their own. See, e.g., James Sterngold, *State Officials Ask Bush to Act on Global Warming*, N.Y. TIMES, July 17, 2002, at A12.

155. See HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, 201 (1991) ("Both [Professor] Cooley and the Supreme Court read into substantive due process doctrine a theory of externalities much like Pigou's. The Court approved regulatory legislation if it was convinced that market exchanges produced negative externalities for which the bargaining parties would not account."); Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 19 (1999) ("Against this background, all firms were subject to two forms of regulation, regardless [of] whether they received any special aid from the state. First, like anyone else's liberty, the liberty of firms was circumscribed by the duty not to interfere with someone else's rights, summed up by the . . . maxim . . . one ought not use one's property to harm another. This duty, in turn, gave rise to the police power, which authorized the state to prevent such harms.") (citation omitted).

156. ROBERT PENN WARREN, *ALL THE KING'S MEN* 301 (Bantam Books 1974) (1946).

many domestic issues to be addressed by the President unilaterally, including environmental regulation. It also has made national political leaders eager to pass domestic legislation in which there is significant national interest, as Congress did with its ambitious legislation mandating educational testing nationally.<sup>157</sup> Moreover, the consolidation of executive authority, even over national security, is likely to further reinforce our existing constitutional order. President Bush seems bent on limiting his innovations to the national security realm. In other realms, he seems disposed to preserve the constitutional status quo, as is already evident in his tracking of his predecessors, from Richard Nixon to Bill Clinton, in taking the lead on national environmental enforcement and regulation.

#### CONCLUSION

The absence of a Constitution-in-exile does not mean that revolution is implausible. It means that a revolution aimed at restoring such a constitution has no clear direction. Nevertheless, I suspect, but admittedly without hard evidence, that more than a few community leaders, legal scholars, and several high-ranking officials in our national government—including the Vice President if not the President—desire radical change in the realm of environmental law. You can already see the first steps in this direction: in the concurring opinions of Justice Clarence Thomas;<sup>158</sup> in the Rehnquist Court's Commerce Clause, Eleventh Amendment, and Fourteenth Amendment jurisprudence over the past six years making it considerably more difficult for the federal government to regulate state or private activity for the sake of protecting the environment or civil rights;<sup>159</sup> in the Court's mode of statutory construction designed to curtail or at least impede the extension of federal authority over isolated wetlands—and perhaps other aspects of the environment;<sup>160</sup> in the President's massive tax cut and other further desired tax cuts, which will undoubtedly restrict spending on environmental initiatives; and in the combative rhetoric of many of President Bush's judicial, cabinet, agency, and sub-cabinet appointees on behalf of property and state rights and against the ideals of the New Deal and Great Society.<sup>161</sup>

Yet, none of these signs point to the initiation of a new constitutional order. It is relatively apparent that they indicate a concerted effort to define limitations to the present constitutional order. That they portend any more radical change is far from clear, for they do not satisfy the requisite conditions for a constitutional

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157. See Karen Hosler, *Sweeping Education Bill Passes*, BALT. SUN, Dec. 19, 2001, at 1A.

158. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); *Printz v. United States*, 521 U.S. 898, 936 (1997) (Thomas, J., concurring); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

159. See Linda Greenhouse, *Benchmarks of Justice*, N.Y. TIMES, July 1, 1997, at A1; Linda Greenhouse, *Justices Bar Wider U.S. Role Under Clean Water Act*, N.Y. TIMES, Jan. 10, 2001, at A15.

160. See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166–74 (2001).

161. See *supra* notes 136–37 and accompanying text.



revolution. First, they do not signal, much less constitute, a shift in any of the basic foundations of the current constitutional order, including but not limited to the nondelegation doctrine, *Chevron* deference, and the recognition of the police power within states and localities and the subjection of federal and state regulations of economic interests under the Due Process Clause to something more exacting than the rational basis test. Moreover, recent developments do not entail revisiting, much less altering, the incorporation doctrine, which has not been modified for decades.<sup>162</sup> Nor do they entail any direct challenge to the core tenets of the principal federal enactments designed to protect the environment, including the Clean Water Act, the Clean Air Act, and the Endangered Species Act, all of which are still fully in force. Even *Lopez* allows Congress, under the Commerce Clause, to fashion federal legislation of even the most localized activity as long as private economic activity is being regulated. When one views the developments in environmental law in conjunction with other efforts to fortify, if not broaden, authority to combat terrorism and to improve education, it is even harder to spot a constitutional revolution in the making. To the contrary, these developments strongly reinforce the modern administrative state, which is the New Deal's legacy. A constitutional revolution further requires significant degrees of consensus and cooperation among national, political, and judicial officials for an enduring, new constitutional outlook. Such consensus and cooperation are, at least in my judgment, not yet evident. And it is of course absurd to suggest the change in constitutional understandings is enduring without any such shift having yet occurred or even begun.

For those interested in a revolution in constitutional or environmental law, there is considerable work left to be done, not the least of which is to mobilize national leaders to give voice to the need and content of a revolution. And for those who wish to preserve the present constitutional order, all I can suggest is that you be sure during the next presidential election to read the instructions on your ballots with great care.

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162. See generally Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990).