The Scope of Congressional Authority to Protect the Environment

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Bruce Myers: I'm fortunate to be moderating a panel with three very distinguished experts. Bob Irvin is Senior Vice President for Conservation Programs with Defenders of Wildlife here in Washington, D.C. Bob leads Defenders' Conservation Programs, including field conservation, conservation policy, international conservation, and litigation. Prior to joining Defenders, Bob held a range of posts at major environmental nongovernmental organizations and in the federal government, including service as senior counsel for fish and wildlife on the Majority Staff of the U.S. Senate Committee on Environment and Public Works. Bob has written and lectured extensively on biodiversity conservation issues. He also teaches at Vermont Law School and has taught at the University of Maryland Law School.

Prof. Bill Buzbee is with the Emory University School of Law in Atlanta. Professor Buzbee directs the Emory Environmental and Natural Resources Law Program and the Emory Center on Federalism and Intersystemic Governance. Professor Buzbee's scholarship covers environmental law, administrative law, and other public law topics, with his most recent publications focusing on regulatory federalism and design issues. He has served as a visiting professor at Columbia University and at Cornell University, among other institutions. He launched Emory's Environmental Law Clinic, and he also is a founding member of the Center for Progressive Reform. Professor Buzbee has been recognized for both his legal scholarship and his teaching, and he has testified before the U.S. Congress and its committees about environmental and federalism issues.

Mike Evans is a partner at K&L Gates and is based in Washington, D.C. Mike's practice concentrates on legislation, including environmental and tax legislation, and he's published articles over the past several years regarding various aspects of legislative process. Mike previously worked for 18 years in the U.S. Senate. During this time, he served as chief counsel to two Senate committees, including eight years as chief counsel or Democratic chief counsel to the Senate Environment and Public Works Committee (EPW). At the EPW, Mike worked extensively on a wide range of environmental laws, including the Clean Water Act (CWA),[1] the Endangered Species Act (ESA),[2] the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[3] and the Clean Air Act (CAA).[4]

As you will remember from college, high school, Schoolhouse Rock cartoons, or whatever the case may be, our government is one of limited power, so Congress has to have some constitutional hook, some kind of basis to act. There is nothing that jumps out as a clear environmental hook in the U.S. Constitution. But, of course, there are enumerated powers that Congress has found and used for this purpose—and perhaps others it may be able to use.

Interstate commerce regulation is based on the Commerce Clause, which is the Article I, §8 power of Congress to regulate commerce among the several states. This is the foundation of the pantheon of modern environmental laws. It is also where there has been recent action in the courts. We may well see more action in the near future. But I also want to take a moment to mention another provision, Congress' Article I, §8 authority to make all laws that shall be necessary and proper for carrying into execution Congress' other powers, including the Commerce Clause. This is a critical constitutional provision, as it creates flexibility for Congress to deploy the means it sees fit to get the job done. And there are other constitutional hooks we'll touch on during today's discussion.

I want to mention briefly the two other significant categories of players we should be thinking about as we have this congressional power conversation. The first, of course, is the states. The Tenth Amendment to the Constitution tells us that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." We've got a Supreme Court decision in 1941 that says that this is a truism, that it doesn't really tell us anything.[5] And there is a comment in a footnote in a 1988 case that in fact uses the Tenth Amendment as shorthand for "any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution."[6] This tension between state and federal regulatory authority permeates the conversation about our environmental laws, and this is true both in the legal arena—as federal courts review

1. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
2. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
3. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
4. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
5. United States v. Darby, 312 U.S. 100, 124 (1941).
6. South Carolina v. Baker, 485 U.S. 505, 511 n.5 (1988).

these laws—and in the political arena—as folks on the Hill try to figure out what to say when they write the laws in the first place.

The other institutional player is obviously the federal judiciary, because we know that all environmental laws will have to run a gauntlet of legal challenges if they are to be effectively implemented and enforced. So, think in terms of this dialogue among the branches, among these various actors.

As environmental lawyers, we really have to remember that the issues at play here implicate much more than environmental law, and much more than the environmental movement. These arguments and issues really go back a great deal into the past, and I think we ignore that at our peril. I want to, for example, say that the relevant timeline may not start in 1970, that we may want to go back to founding, or perhaps before founding.

We have this ebb and flow of powers, an ebb and flow of articulation of congressional power, particularly with respect to the Commerce Clause. Justice John Marshall articulated a very broad view and strong view of the Commerce Clause in the early 1800s for the young nation. In the late 1800s and early 1900s, we had a certain paring back of that power by the federal courts. The Supreme Court was back in the business of deferring to Congress on interstate commerce regulation by the late 1930s, and then, of course, we had another pendulum swing more recently.

When you think about litigating over the constitutional reach of the ESA or amending the CWA or reforming the Toxic Substances Control Act (TSCA)[7] or enacting a new climate law, we have to keep in mind that we're tapping into a very long—and at times very contentious—history of institutional struggles over federal power.

Remember, too, that the pieces of the puzzle may at times seem to have absolutely nothing to do with the environment. One of the biggest areas of dispute we'll talk about is the extent to which federal power can reach into the states to touch on activities that traditionally would have been the province of state and local governments. As many people here know, in 1942, the Court ruled that the federal government could regulate the use of excess wheat grown in Ohio by farmer Roscoe Filburn,[8] and we found out more recently in 2005 that the feds could regulate another important cash crop—pot—used by Angel Raich and Diane Monson in California for medical purposes.[9]

So, here we are in 2010 with Supreme Court cases on wheat and weed decided half a century apart that may be informing what comes next in terms of environmental protection, or at least what we should be watching out for.

I. Constitutional Basis for Conservation

Robert Irvin: I'm going to give you an overview of the constitutional basis for federal wildlife conservation laws and in particular, the ESA, and I want to express my appreciation to two of Defenders' attorneys who work more regularly in this field than I do these days and who were very helpful to me, Jason Rylander and Glenn Sugameli.

I like to compare the challenges to the constitutionality of wildlife law and in particular, to the ESA, to the 17-year cicadas. Those of you who have lived around here for a while know that every 17 years, there is this emergence of cicadas. They live all their life underground and then for one brief glorious summer, in a cacophony of lust, they emerge from the ground to mate and to sing and then they go back underground.

I don't want you to think that I'm casting aspersions on any organizations that bring challenges to constitutionality, because in fact, I have a very special place in my heart for the 17-year cicada, as my son was born in the summer of one of these outbreaks, so I always remember him when I hear them. And I also keep a button above my desk at work that says: "Save the Ugly Animals Too," because that's important to keep in mind.

So, thinking about the cicadas, let's start underground. Let's go back all the way to 1896, the same year that the Supreme Court upheld the separate but equal doctrine.[10] The Court held, in the case of *Geer v. Connecticut*,[11] that a Connecticut state law that said that if you kill game birds in Connecticut, that's fine, but you can't ship them out of state. The Court held that was not a violation of the Commerce Clause, because the birds could only be articles of commerce if taken in accordance with state law. As you know, the Commerce Clause acts as both a restriction on state power and a grant of federal authority. Out of this case then came the notion of state ownership of wildlife. For more than 80 years, we had a period where the Commerce Clause was not really a limitation on state wildlife statutes and it was not a grant of federal authority, by and large. This was unlike other environmental laws, such as the CWA and the CAA, that developed during that period and were based on the Commerce Clause.

But despite that limitation, in the years that followed, the need for federal laws to protect wildlife became more and more apparent. Four years after the *Geer* case, in 1900, Congress adopted the Lacey Act,[12] which said that violations of state, tribal, or federal laws protecting wildlife and any resulting interstate commerce in that wildlife was itself a violation of federal law. But the violation of federal law was premised, in part, on there being a violation of an underlying state law. In other words, the Lacey Act was not premised on an independent basis for federal authority over wildlife.

In 1920, the Supreme Court in *Missouri v. Holland*[13] upheld the constitutionality of the Migratory Bird Treaty Act,[14] not on Commerce Clause grounds, but as a valid exercise of the Treaty Power, and to the extent that Missouri state law conflicted with federal law as an exercise of the Supremacy Clause, the federal law preempted state law. And although the Court couldn't quite come out just 24 years after *Geer* and say: "We're overruling *Geer* and its conclusion

7. 15 U.S.C. §§2601-2692, ELR Stat. TSCA §§2-412.
8. Wickard v. Filburn, 317 U.S. 111 (1942).
9. Gonzales v. Raich, 545 U.S. 1 (2005).
10. Plessy v. Ferguson, 163 U.S. 537 (1896).
11. 161 U.S. 519 (1896).
12. Lacey Act, ch. 553, 31 Stat. 187 (1900).
13. 252 U.S. 416 (1920).
14. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918).

that there was no interstate commerce involved in the sale of birds out of state," Justice Oliver Wendell Holmes Jr. did write: "To put the claim of the state upon title is to lean upon a slender reed."[15] Now, I've concluded from that eloquent statement that it is always helpful to be the son of a famous poet if you're going to be on the Supreme Court, because your opinions will read much better.

In 1976, in *Kleppe v. New Mexico*,[16] the Supreme Court further expanded the basis for federal wildlife law. The Court upheld the constitutionality of the Wild Horse and Burro Act,[17] under the authority of the Property Clause, finding that the power to regulate the property of the United States, in that case, the federal lands, was sweeping and it included the power to regulate the wildlife on those lands as an attribute of the federal property. The Court specifically did not decide whether Congress' authority extended to regulation of wildlife that might be off federal lands at a particular time but would cross back and forth between federal and state and private lands.

So, the Court was finding constitutional bases other than the Commerce Clause for federal wildlife law. In 1979, in *Hughes v. Oklahoma*,[18] there was an Oklahoma law that said it's okay to catch minnows in the state, but you can't sell them out of state. If you look at the facts of that case and the facts of *Geer*, aside from one being birds and one being fish, they're virtually indistinguishable. So, as the Attorney General of Oklahoma, you're feeling pretty good about your case until the Court grants certiorari, at which point, you say: "Oh crap," because there is only one reason that the Court is granting cert, and that's, in fact, what it was doing: to overrule *Geer*. Basically, the Court said it's time to treat wildlife conservation the same way we treat other types of natural resources and apply the same standards under the Commerce Clause to state laws regulating wildlife that we apply to test state laws over other natural resources. The Court concluded that the law was unconstitutional in light of the Commerce Clause. As a result of that case, the Commerce Clause operates as a limitation of state power over wildlife, but it is also viewed more generally now as a grant of federal authority over wildlife.

Even before *Hughes*, in 1973, when Congress adopted the ESA, it made specific findings that species were endangered as a result of economic development untempered by adequate concern for conservation. It also said that a purpose of the law was to implement our treaty obligations for endangered species, and it created all kinds of provisions involving conservation of endangered species by federal agencies and particularly on federal lands. Congress was laying various foundations for the ESA, and things seemed pretty settled at that point that this law was constitutional. But the cicadas were growing restless and they were beginning to emerge from their long slumber underground.

In 1995, when the Supreme Court in *United States v. Lopez*[19] struck down the guns in school zones law as unconstitutional, not justified by the Commerce Clause, suddenly opportunity was there, and the cicadas emerged into the treetops singing loudly. Challenges to the constitutionality of the ESA proliferated as industry groups sought favorable rulings or at least a split among the circuits so they could get to the Supreme Court. But their efforts were unavailing.

In 1997, in *National Association of Homebuilders v. Babbitt*,[20] the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit upheld the ESA against the challenge that the protection of the Delhi Sands flower-loving fly found only in Riverside in San Bernardino County in California violated the Commerce Clause. Now, I had the pleasure of participating in drafting an amicus brief in that case, and one of the biggest challenges was, how do you refer to the Delhi Sands flower-loving fly, because the National Association of Homebuilders, throughout their briefs, of course, referred to it as "The Fly," which brings to mind 1950s horror movies. How do you counter that? Well, we thought about what the Delhi Sands flower-loving fly did in the ecosystems of which it was a part, and so we referred to it throughout our amicus brief as "a native pollinator akin to a honeybee."

When we wrote our amicus brief, we took inspiration from the amicus briefs in *Brown v. Board of Education*,[21] where a lot of sociological data was presented to the Court that proved instrumental in persuading the Court to strike down the separate but equal provisions. We brought information to the D.C. Circuit that while the case focused on this one particular species, the reality was that more than one-half of all of the listed species under the ESA occur in a single state. The fact that they're endangered means they have limited ranges, so the implications of striking down the ESA went much further than this particular native pollinator. The court of appeals noted these facts, both at argument and in the opinion.

In 2000, the U.S. Court of Appeals for the Fourth Circuit in *Gibbs v. Babbitt*[22] rejected a challenge to the ESA on constitutional grounds. This case involved red wolves in North Carolina and in that case, the Court clearly recognized that Congress could regulate activities harmful to endangered species in order to promote a healthy environment as part of a congressional determination that was important to a healthy economy.

And similarly, in 2003, the U.S. Court of Appeals for the Fifth Circuit upheld the constitutionality of the ESA in a case called *GDF Realty Investments Ltd. v. Norton*.[23] That case involved Texas cave invertebrates, and the Court recognized specifically that the protection of endangered species to promote a healthy environment and economy was a valid exercise of the Commerce Clause.

The Ninth Circuit had ruled back in 1981, in *Palila v. Hawaii Department of Land and Natural Resources*,[24] that the ESA passed constitutional muster under the Commerce

15. 252 U.S. at 434.
16. 426 U.S. 529, 6 ELR 20545 (1976).
17. Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649 (1971).
18. 441 U.S. 322, 9 ELR 20360 (1979).
19. 514 U.S. 549 (1995).
20. 130 F.3d 1041, 28 ELR 20403 (D.C. Cir. 1997).
21. 347 U.S. 483 (1954).
22. 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000).
23. 326 F.3d 622 (5th Cir. 2003).
24. 639 F.2d 495, 11 ELR 20446 (9th Cir. 1981), *aff'g* 471 F. Supp. 985, 9 ELR 20426 (D. Haw. 1979).

Clause. So, there was an unbroken string of circuits upholding the ESA against constitutional challenges. In 2005, with the Supreme Court's decision in *Gonzales v. Raich*[25] upholding the federal government's authority to regulate production of medical marijuana, it seemed that maybe the summer for challenging the constitutionality of the ESA was finally coming to an end and it was time for the cicadas to go back underground. But a few stragglers remained.

In 2007, the U.S. Court of Appeals for the Eleventh Circuit, in a case called *Alabama-Tombigbee Rivers Coalition v. Kempthorne*,[26] upheld the ESA against a Commerce Clause challenge. Now, this case involved the protection of the Alabama sturgeon, which the Eleventh Circuit referred to as "one homely looking fish."[27] So, just remember, if you're going to challenge the constitutionality of the ESA, you have to find a really ugly critter to use. Don't use the big, beautiful, furry animals.

But in *Alabama-Tombigbee*, the Court held that the ESA was part of a general regulatory scheme bearing a substantial relationship to interstate commerce, and that case was relied on just this past year, in 2009, in a challenge in California involving water allocation for the Delta smelt. Those are a series of consolidated cases: the Delta smelt consolidated cases. The first one is *San Luis and Delta Mendota Water Authority v. Salazar*,[28] and the Court basically just borrowed heavily from the Eleventh Circuit's decision in *Alabama-Tombigbee.* That case has had a partial final judgment entered, and the plaintiffs recently announced that they are appealing to the Ninth Circuit, so they're continuing to look for that elusive split in the circuits.

I would venture to say that while a few mournful cicadas continue to sing out there, the landscape is overall once again becoming quiet for challenges to the ESA. The question of the ESA's constitutionality seems largely settled in every circuit that has addressed it. But as the cicadas know, there will always be another summer.

II. The Supreme Court, Congress, and the Battle Over Historical, Factual, and Policy Underpinnings of U.S. Environmental Laws

William W. Buzbee: I'm going to focus on the Court and its clash with Congress over environmental laws. In particular, I will focus on who has primacy over the adequacy and import of underlying factual, historical, and policy justifications for environmental laws.

If you look at a number of the Commerce Clause cases, preemption cases, and standing cases, a fundamental issue for legislators, litigators, and ultimately judges and justices is who, in the end, controls the facts? Who, in the end, controls the way you categorize things? Who, in the end, controls the historical foundations and policy predictions and priorities underpinning environmental laws? And if you look in all three of these areas—again, Commerce, standing, and preemption—what you find is a highly divided court and very unsettled law, with this as the dividing question: who has control over facts, historical foundations, and policy predictions and priorities reflected in these laws?

This divide exists both within the Supreme Court, which, as usual, generally splits 4-4, with Justice Anthony Kennedy wobbling in the middle, and also in the lower courts. It is also a hot issue on the Hill in drafting climate legislation. This kind of divide largely tracks what I describe as deferential, sympathetic attitudes toward environmental ends on one hand, and on the other hand, a more skeptical and intrusive, antiregulatory or anti-environmental tilt of some judges and justices.

So, I will talk through the Commerce, standing, and preemption areas to show how this battle over factual and historical primacy and policy control plays out, and then briefly, I will talk a little bit about legislative strategies in light of this divide.

Let me turn first to the commerce and federalism power cases from a historical perspective. If you go back and look at the New Deal cases, when Congress started expanding its subject domain and its reliance on the Commerce Clause, a critical change occurred when Congress started providing more in the way of hearings and facts to justify its new assertions of authority. As the Supreme Court moved away from categorical prohibitions on areas of federal legislation, supportive congressional facts usually ended up translating into judicial deference.

As factual justifications became more prominent in legislative handiwork, the Court backed down and adopted a far more deferential posture. And, predictably, over time, Congress perhaps became more sloppy in establishing the grounds for its assertions of authority. Judicial deference approaching a rubber stamp basically remained the law until the *Lopez* case. So, during this New Deal to 1995 period, Congress was largely the master of factual justification. This changed in and after *Lopez*, at least in areas where federalism is implicated and especially in areas that are claimed to be the primary turf of a state. And in these areas, if you look at the *Lopez* case and a few of the subsequent cases I'll mention, Congress basically now has to justify its assertions of power better or at least structure the law so that, in proving the government's case, it establishes an adequate commercial and sometimes interstate link.

Probably the more important case than *Lopez* is the *United States v. Morrison*[29] case. That is a post-*Lopez* case involving violence against women, and in that case, reading the warning signs from *Lopez*, Congress provided extensive hearings and findings about the economic implications and harms of violence against women. This was an effort to ensure Congress, and this legislation satisfied the newly strengthened third prong of Commerce Clause analysis, where you look to see if Congress has the power to regulate those activities and whether the activities substantially affect interstate commerce.

25. 545 U.S. 1 (2005).
26. 477 F.3d 1250, 37 ELR 20040 (11th Cir. 2007).
27. *Id.* at 1272.
28. No. 1:09-CV-00407, 2009 WL 1575169, 39 ELR 20120 (E.D. Cal. May 29, 2009).
29. 529 U.S. 598 (2000).

Morrison changed the key language in a way important to environmental battles and federal authority over things like wetlands or endangered species and perhaps climate, because the Court became more expressly focused on economic linkages if the federal government was to have power. The Court rejected federal regulation of what it said was "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect."[30] The extensive hearings and supportive materials were, in the Court majority's view, simply inadequate.

It is not clear that any hearings and supportive materials could have sufficed, because the *Morrison* case also, in a way important to environmental law, revived a strongly dualist perspective. Under a dualist perspective, there are subject areas that are truly federal and areas that are truly state, and that the Court should be enforcing those boundaries. The Court said: "The Constitution requires a distinction between what is truly national and what is truly local."[31] In the *Morrison* case, as in the subsequent case most people refer to as *Garrett*,[32] it hinted that a much more thorough legislative record would be needed to justify federal regulation, although it also said findings were not required.[33] This has now become a common refrain: the Court needs more of a record, and findings would help, but they're not required.

Bob Irvin just mentioned the *Raich* case, another important precedent for understanding this ongoing battle over factual and policy primacy. *Raich* does give some reason for optimism about the ongoing viability and constitutionality of our environmental laws, since its discussion reflects a less intrusive and hostile approach to how the Court and courts should look at Commerce Clause challenges. However, I actually don't see *Raich* as settling very much. I think the Court is fundamentally divided and the law still unsettled. If precedent still matters on the Supreme Court, then *Raich* is of great importance, but *Raich* nowhere rejected or limited the earlier cases justifying more intrusive review. Also, perhaps more importantly, *Raich* really concerned the issue of excising individual acts from a law that has larger justification. It didn't get much into the issue of economic or noneconomic activity and federal power. Lower courts, which still need to sort out and reconcile the Supreme Court's somewhat confused Commerce Clause doctrine, will—if they see this as the latest clarification of Commerce Clause doctrine—need to adopt a more deferential posture toward Congress. Doctrinal grounds to invalidate or limit the reach of the ESA or the CWA are now weaker.

Two other important cases for thinking about commerce power and this battle over historical, factual, and policy justifications are *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs* [34] and *Rapanos v. United States*.[35] In *SWANCC*, there was an explicit constitutional challenge to the reach of the CWA. On the Commerce Clause grounds, the majority of Justices declined to invalidate the CWA's provisions protecting wetlands, as challengers hoped. Instead, the Court limited the reach of the CWA by saying that if the federal government is going to reach isolated waters due to their use by migratory birds, then the government needs to point to a more explicit, congressional clear statement of the intent to expand the CWA so far. So, once again, the Court put the onus on Congress to justify its rationale in a more thorough way.

In the Commerce area, to summarize and expand these points a bit, there are several judicial resistance norms that use facts and history as a way to constrain what Congress can do. First, in these cases, you see a heightened demand for Congress to have a justifying record, something that previously was not required under rational basis review at all, a strong recommendation of findings, incentives for creation of a supportive legislative record. And, very importantly, the Court has revived categorical distinctions about the nature of federal law, with the Court arrogating to itself authority to label what is truly federal and what is truly for the states.

Second, and relatedly, you see another sort of labeling that's important to these cases. You have judicial labeling of the overarching nature of the legislation at issue and then the use of that label to question the reach of federal power. Those who are CWA experts know that in the *SWANCC* case, the majority said the federal government can't go this far, because this is land use legislation, to which the dissent said this is not land use legislation, this is anti-pollution legislation and an area in which the federal government has long been active. But for the majority in *SWANCC*, by labeling the legislative subject as "land use," and saying this is more an area of state turf, the Court justified imposition of new limitations on federal power. This use of categorical prohibitions and limitation also perhaps was used to justify minimal attention to contrary doctrinal approaches evident in the earlier *United States v. Riverside Bayview Homes, Inc.*[36] case that broadly upheld federal authority and drew jurisdictional lines under the CWA.

Third, a strain in these cases is a norm against shared federal and state turf. This is not purely a federal power issue, but I think a strong strain among at least four Justices on the Supreme Court. They don't like regulatory overlap, and they don't like plural regulatory structures. They don't like to have multiple laws applicable. They don't like multiple regulators. They don't like citizens and the states and the feds all playing enforcement roles. And there are a whole slew of cases where you see this playing out. But then cleaning up a little bit on the Commerce Clause discussion, you do have an increased use of clear statement presumptions and requirements, which, of course, is putting the onus on Congress to do its work more thoroughly and really justify federal legislation. This may now seem second nature to environmental and constitutional law experts, but this is a major change from prevailing law during the period from the New Deal era to 1995.

30. *Id.* at 617.
31. *Id.* at 617-18.
32. Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
33. For a critical analysis of the Court's growing insistence on a justifying "record," see William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 Stan. L. Rev. 87 (2001).
34. 531 U.S. 159, 31 ELR 20382 (2001).
35. 547 U.S. 715, 36 ELR 20116 (2006).
36. 474 U.S. 121, 16 ELR 20086 (1985).

Lastly, in the commerce area, an additional issue that may prove important in the environmental area is what counts as the relevant activity for Commerce Clause analysis? If you look back at some of the key post-New Deal era cases, Congress would uphold federal legislation when there were numerous types of activities that were implicated. The Supreme Court, in several recent cases, has seemed to look for a single activity that is relevant and then confined its analysis to that single perspective. The Court has not, however, said that such a single or "unidimensional" perspective is required.[37] Struggling with tensions between the Supreme Court's doctrinal language and its recent modes of review that have disempowered the federal government, some lower courts have gone back to Supreme Court cases like *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*[38] and *Holland* and said several activities can justify assertions of federal power under the Commerce Clause: you look at the harmful activity, the thing protected, and also benefits of regulation. A good example is the Fourth Circuit's decisions in *Gibbs*. In several of these recent cases, however, the Supreme Court itself has at times taken a sort of one-dimensional perspective about what activities matter. In *SWANCC,* for example, the Court focused on the wetlands and migratory birds themselves, not considering how a municipal and hence commercially linked landfill operation was the source of threat to the wetlands, or how migratory birds have long-recognized commercial importance on their own.

Let me turn briefly to standing law and show how there too we see a battle between the courts versus Congress over the control of what kind of history, facts, and policy priorities and policies matter. When you look at the actual laws that have been the subject of standing litigation, especially with citizen suits, you have extremely explicit broad grants of causes of action in statutes that, in their findings and policy provisions, as well as in their protective substantive provisions, could not be more clear about their broad environmental goals. And Congress' decision to put in citizen suit provisions reflects a judgment that such suits further these policy goals. But for several Justices, including at times the wavering Justice Kennedy, these legislative provisions have not been enough. At times, a Supreme Court majority simply denies the efficacy of these regulatory structures or the importance of the underlying environmental threat or injury that legislation seeks to minimize. Justice Kennedy has indicated a need for Congress to state with greater clarity who is supposed to have standing.[39]

I've always wondered what more is supposed to be done, since these laws already contain supportive language and explicit legislative authorization. I guess maybe Congress would say "we really mean it" in the citizen suit provision, but it appears that for several Justices, Congress simply can't use language in a way that determines standing battles. It appears that for Chief Justice John Roberts, Justice Antonin Scalia (the architect of much of these new standing hurdles), and Justices Clarence Thomas and Samuel Alito, Justices, not Congress, decide on the adequacy of an injury claimed to justify standing. But due to Justice Kennedy's wavering and firm opposition of the so-called liberal wing of the Court (historically including Justices John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer, and David Souter), cases in this area too have revealed a divided Court. There is an unresolved battle going on in the Supreme Court about who determines what counts as an injury. For Justice Scalia and his three main allies, standing analysis involves a common-law sort of toe-stubbing approach to injury. If there is injury, it's got to be injury in a very common-law palpable, tangible sort of way. And it is for the Court to decide on the adequacy of the injury.

The so-called liberal wing looks at injury with attention to what Congress has said matters—what is the legislation trying to achieve, or trying to protect? How is the law structured? And then, as usual in the middle, Justice Kennedy. But if you remember, Justice Kennedy, in key language in the *Lujan v. Defenders of Wildlife*[40] case, joined by Justice Souter, said that "Congress has the power to define injuries and articulate chains of causation," and "new rights of action" do not need to have "clear analogs in our common-law tradition." And then he goes on to say: "I do not read the [majority] to suggest a contrary view," which of course it was.[41] Go figure.

There has been a seesaw on the Supreme Court meeting right up to today about this issue, about Justices Kennedy and Souter and this language, and whether there was ever really a majority in the Supreme Court in *Lujan* that thought you had to have common-law-like injury. Very importantly, in *Massachusetts*,[42] the majority brought that key concurring language by Justice Kennedy into a majority opinion, saying: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[43] That language has now become a majority doctrinal view.

Several other cases, like *Fed. Election Comm'n v. Akins*[44] and *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,[45] all are similar in their approach, undertaking standing analysis with close attention to what Congress says counts as something protected. Injury is defined in relation to congressional goals and the policies animating the federal legislation. But there remain warning signs that this battle is not over. Chief Justice Roberts, in *Massachusetts*, wrote a dissent reveal-

37. For a critique of this emergent "unitary" perspective in Commerce Clause cases, see Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 Cornell L. Rev. 1199 (2003).
38. 452 U.S. 264, 11 ELR 20569 (1981).
39. For a more in-depth of changing standing doctrine, as it stood through 2005, see William W. Buzbee, *The Story of* Laidlaw*: Standing and Citizen Enforcement*, *in* Environmental Law Stories 201 (Richard J. Lazarus & Oliver A. Houck eds., 2005); for an ELI roundtable discussion of standing doctrine after *Massachusetts v. EPA*, including related analysis by Professor Buzbee, see Panel Discussion, *Access to Courts After* Massachusetts v. EPA: *Who Has Been Left Standing?*, 37 ELR 10692 (Sept. 2007).
40. 504 U.S. 555, 22 ELR 20913 (1992).
41. *Id.* at 580 (Kennedy, J., concurring)
42. 549 U.S. 497 37 ELR 20075 (2007).
43. *Id.* at 516.
44. 524 U.S. 11 (1998).
45. 528 U.S. 167, 30 ELR 20246 (2000).

ing that for him the only case that existed in the entire standing world was the *Lujan* case. He did not devote analysis to any precedents at all between *Lujan* and *Massachusetts*. Then you have the *Earth Island*[46] decision last year. In that case, Justice Scalia, trying to revive the judicial gatekeeper role, says: "The requirement of injury, in fact, is a hard floor of Article III jurisprudence that cannot be removed by statute."[47] So, you have this battle in standing as well as over who controls the facts, historical underpinnings, and the policy priorities reflected in federal legislation. Justice Kennedy has wavered and been decisive in many of these cases, but with the recent addition of Justices Sonia Sotomayor and Elena Kagan, we will have to await the next major standing case to see if these latest precedents and new Justices will begin to bring order to Supreme Court divisions regarding judicial versus congressional power to determine citizen standing.

Now, let me close by turning to preemption law. This is a body of law seldom raised in the environmental law arena, because Congress only rarely enacts preemptive provisions in environmental laws apart from setting regulatory floors precluding greater state laxity than set by federal standards. State and local authority to provide greater protections is typically explicitly stated. However, environmental preemption law has now become a more important issue due to California climate law initiatives and their arguable clash with the one major preemptive provision in the CAA regarding motor vehicle emissions. Preemption and environmental federalism have also become a major dividing line in climate legislation. Most of the major preemption cases from recent years have had to do with a federal law preempting state law, and especially state common law, but this complicated line of cases illuminates strategies to use and avoid in climate legislation.

First, in this area as well as in the others, you have a see-saw instead of stable and clear doctrine. It remains hard to predict from one case where you're going to go with the next case. But some clear conclusions and lessons exist. First, the pro-preemption wing of the Supreme Court gives very little attention to what statutes actually say. So, statutes can have explicit Savings Clauses preserving concurrent state domain, and the majority may not even mention the fact that there is a Savings Clause. In other cases, the Supreme Court will confront explicit statutory clauses stating what particular things are preempted and other types of conduct that are not preempted, or perhaps impliedly not preempted given lack of express preemptive language. Despite the growing prominence of the *expresio unius* canon of statutory construction, close statutory parsing is often lacking, although congressional language preempting some things would imply an intent not to preempt areas going unmentioned.

So, there too, the Court does not give close attention to what the laws actually say. The same pro-preemption wing of the court pays little or no attention to the fact that statutes almost never mention the intent to preempt common law, and nevertheless in several cases finds common law preempted. Similarly, obstacle preemption doctrine has become increasingly powerful and is often used to strike down state law when the Court looks at federal law and state law and concludes that state law strikes a different balance from federal law. Obstacle preemption is used even in the face of Savings Clauses and very limited Preemptive Clauses. In a potentially significant development, Justice Thomas in the *Wyeth* case stated his across-the-board opposition to obstacle preemption doctrine (which he also refers to as "purposes and objectives" doctrine), due to how it empowers courts to second-guess legislative choices and preempt many sorts of state actions.[48] We will see if he makes this an enduring objection.

What are the implications of these Commerce Clause, standing, and preemption law developments, especially for legislative drafting in climate legislation? In all of these areas, the precedents are incredibly weak, in the sense that with the law's vacillation or fluctuation, it is hard to predict what will happen in the next case. It is thus hard to recommend how to legislate in a way that is rock-solid and resistant to judicial revisiting of facts, historical underpinnings, and policy priorities. Still, there is no doubt that Congress needs to legislate with a lot greater clarity than it did from the New Deal era to 1995. And in particular, it is important to take evidence as part of the legislative process. Ideally, statutory findings and policy statements will allude to legislative proceedings and other supportive data. To maximize the odds that a federal law will have its intended reach and surmount constitutional challenges, legislators and their counsel should create a record and include findings.

Now, I say all that despite conceding that there are some Justices and lower court judges who will not give much attention to those kinds of findings and evidence and policy statements. And no Justices or judges have ever said that they are required. However, in this kind of battle between Congress and the courts over who controls history, facts, and policy predictions and priorities, even over the category of the subject that is being regulated, the more Congress legislates with clarity, the more it raises a hurdle for courts and hostile politicized judges to overcome.

If you actually look at some of the cases that have been problematic, Congress made it easy for the courts by not saying, in many instances, what it was doing and why it was doing it. So, if Congress wants to achieve its statutory goals, it probably needs to legislate with greater clarity and use policy statements and findings more frequently.

Now, thinking about climate legislation in particular and the Clean Water Restoration Act or other bills that had been around intending to fix the mess left by *SWANCC* and *Rapanos*, Congress should take several steps. One is to include more language about the rationale for the choices made in legislation. In opening policy statements and finding statements, explain why certain choices are made as far as particular means to ends and empowerment of, say, citizens or perhaps the decision to retain important roles for the states. Don't just state overarching statutory purposes, but explain why the procedures chosen are in the statute.

46. Summers v. Earth Island Inst., 129 S. Ct. 1142, 39 ELR 20047 (2009).
47. *Id.* at 1151.
48. Wyeth v. Levine, 129 S. Ct. 1187, 1204 (2009) (Thomas, J., concurring).

Similarly, if you want regulatory concurrence, if you want states to retain authority to work as well on a social challenge like climate change, it's important to state that goal explicitly. In light of all these preemption cases, especially the growing body of obstacle preemption law, silence or ambiguity is extremely risky. Uncertainty about state roles will breed judicial and agency-setting preemption battles right away.

Similarly, if Congress values citizen roles, Congress always does better to identify why it values citizen roles. So, in addition to adding a cause of action, Congress should try to respond to Justice Kennedy's call for explanation of a citizen enforcement role.

In the end, if the Court were listening, I would plead with the Justices to remember that their knowledge is derivative. They don't have perfect radar or know what social ills are pressing and how best to accomplish legislative goals. The world of history, facts, policy predictions and priorities is not for the courts to control. I don't think many of the Justices who are quite obstinate on this front would listen. On the other hand, if Congress did better in anticipating these sorts of battles over historical, factual, and policy primacy, it would make it more difficult for Justices to push their own views.

III. The Legislative Process and the Commerce Clause

Michael W. Evans: The question I'll address is how, when Congress is considering new environmental legislation, *Lopez*, *Morrison*, and other cases that define the scope of congressional power should be taken into account.

This is a surprisingly fresh issue. During the development of the major environmental laws from 1970 to 1990, the Commerce Clause was, in essence, a non-issue. This was the era in which the Commerce Clause was referred to, only half-jokingly, as the "Hey, you can do whatever you want clause."[49] As a result, it's not surprising that there seems to have been little consideration, during the development of the landmark environmental laws, of the constitutional basis for those laws. It was taken for granted. For example, neither the CWA nor the ESA contained express findings regarding the impact of the regulated activity on interstate commerce.

Now, with Congress considering significant expansions of environmental laws, from amendments to the CWA to major climate change legislation, the *Lopez* line of decisions is indeed an issue. For the first time, Congress is writing laws that expand environmental protection, against a legal background that may call into question whether the laws are within the scope of congressional power.

As a threshold matter, I do not believe that this poses an existential crisis for environmental legislation. Most federal environmental proposals, by their very nature, address the stresses that economic activity creates on interrelated environmental media, and they easily fit within the scope of current Commerce Clause doctrine. That said, *Lopez* has a significant practical impact on the legislative process. Also, there are particular situations in which Commerce Clause problems become acute, with the ESA and §404 of the CWA the most obvious examples. As a result, those working on environmental legislation now have to take constitutional issues into account. How can this be done? I suggest five practical points.

First, of course, those who are drafting environmentalist legislation must carefully consider the source of congressional authority for the legislation. When I worked at the Senate EPW Committee, I had a checklist of issues to consider when I was reviewing draft legislation. One of them, which I must confess I added only after the *Lopez* decision, was: "What is the constitutional authority for this legislation?" Elementary, perhaps, but a useful reminder.

Second, and perhaps also elementary, a careful consideration of the constitutional limitations on congressional action may sometimes affect what Congress decides to do. For example, during the consideration of amendments to the Safe Drinking Water Act (SDWA)[50] in 1995 and 1996, a court of appeals held that Congress could not constitutionally require states to regulate the lead content of water coolers in public schools.[51] The holding was primarily under the Tenth Amendment, but it also had Commerce Clause overtones. Rather than reformulate the water cooler provision to try to pass constitutional muster, Congress decided not to respond at all, leaving the regulation of water coolers in schools to the states. In other words, in some cases, a careful consideration of the constitutional source of authority for a proposed law may lead to the conclusion that the proposed law is not appropriate.

Third, in some cases, it is helpful to establish a clear jurisdictional nexus for the exercise of regulatory authority. The SDWA amendments that I just mentioned did this with respect to several other aspects of the law, such as by clarifying that the sale of lead water pipes and fixtures is regulated only to the extent that they're sold on interstate commerce.[52] Likewise, the current House and Senate climate change bills include several provisions establishing an express nexus to interstate commerce.[53]

Fourth, it is helpful to develop careful congressional findings. This point is particularly important. It's been discussed well thus far, and I'd like to add some further thoughts. As a threshold matter, findings are not a necessary element of congressional legislation. A congressional bill is not a pleading, and ordinarily it is not necessary to lay out factual findings to support each regulatory provision. Indeed, findings often are omitted from legislation or included only as an afterthought. That may change for legislation that faces a serious Commerce Clause challenge, particularly one in which the

49. *See* Alex Kozinski, *Introduction to Volume 19*, 19 Harv. J. L. & Pub. Pol'y 1, 5 (1995).

50. 42 U.S.C. §§300f to 300j-26, ELR Stat. SDWA §§1401-1465.

51. ACORN v. Edwards, 81 F.3d 1387, 26 ELR 21257 (5th Cir. 1996).

52. Pub. L. No. 104-182, §118, 110 Stat. 1613, 1645-47 (codified as amended at 42 U.S.C. §300g-6).

53. *See, e.g.,* H.R. 2454, 111th Cong., §312 (2009) (adding CAA §700(6), defining an "attributable greenhouse gas" as one that is, among other things, "produced or imported . . . for sale or distribution in interstate commerce"); S. 1733, 111th Cong. §102 (2009) (same).

question is whether, under *Raich*, there is a rational basis for Congress' conclusion that the regulated activity, taken in the aggregate, substantially affects interstate commerce.

In such a case, the Supreme Court has made clear that, although congressional findings are neither absolutely necessary nor always sufficient, they are important, and they may be given deference. In fact, in the *Raich* decision itself, the court gave substantial deference to congressional findings, noting that "[f]indings in the introductory sections of the Act explain why Congress deemed it appropriate to encompass local activities within the scope of the [Act]."[54]

So, when environmental legislation is being developed in a post-*Lopez* world, there is likely to be greater attention in Congress to the development of findings regarding the interstate commerce impact of the regulated activity. We have a recent example in the pending Clean Water Restoration Act, which challenges the Supreme Court's §404 decisions in *SWANCC* and *Rapanos*. Similar bills have been introduced in the House and Senate over the last two Congresses, and the Senate bill has been approved by the EPW Committee.[55] The version of the bill that's been approved by the EPW Committee is 12 pages long. The first eight pages consist of purposes and findings. Then there is an amendment to the definition of "waters of the United States," followed by conforming amendments and a Savings Clause. Thus, the bill consists mostly of findings.

There are 24 findings. Some are a response to the unique situation surrounding §404, in which the Supreme Court has interpreted the statute to avoid the Commerce Clause question; in response, the findings make clear that Congress intends to apply §404 to the full extent of its Commerce Clause power. But most of the findings are designed to buttress the argument that such a broad application of §404 is within the scope of Congress' Commerce Clause power. For example, one of the findings is that: "Protection of intrastate waters, including geographically isolated waters, is necessary to restore and maintain the chemical, physical, and biological integrity of all waters in the United States."[56] Another that: "The regulation of discharges of pollutants into intrastate waters is an integral part of the comprehensive clean water regulatory program of the United States."[57] Another, in essence quoting *Raich*, is that: "The pollution or other degradation of waters of the United States, individually and in the aggregate, has a substantial relation to and effect on interstate commerce."[58] There are others in a similar vein. The bill also makes a series of factual findings with respect to drinking water, tourism, recreation, and other economic effects, and also makes findings relevant to Congress' treaty power and to the Property Clause. All told, the bill is virtually a seminar on how to make an express and compelling showing under *Lopez*, *Morrison*, and *Raich*.

One final point about findings: this is not simply a technical exercise. In cases where congressional findings matter, they may become, appropriately, politically contentious. Before *Lopez*, the drafting of findings may have been left mainly to staff; now, it matters to members of Congress themselves. Thus, in the development of the Clean Water Restoration Act in the EPW Committee that I just mentioned, there were a series of amendments to the findings during the consideration of the bill (although the amendments related mostly to the *SWANCC/Rapanos* issues).

My fifth and final point is that, in addition to findings, it can be helpful to address the Commerce Clause issue using the tools of legislative history, such as committee reports, hearings, and floor statements. Here, my point is somewhat speculative, and it may seem counterintuitive. After all, Commerce Clause arguments are aimed ultimately at the members of the Supreme Court who are most skeptical of the existence of an adequate Commerce Clause connection. These happen to be the Justices, particularly Justice Scalia, who also are the most skeptical, to put it lightly, of the consideration of legislative history.[59]

But there may be a logical distinction. Justice Scalia has strongly opposed the use of legislative history to interpret the words of a statute. In a Commerce Clause case, however, the question is *not* statutory construction. The court is, in essence, reviewing the record to determine whether there was a rational basis for Congress' conclusion that the commerce power supports the regulatory program. In conducting such a review, there is no reason for the court to exclude the conventional elements of legislative history, such as hearings, committee reports, and floor statements. In other words, in a Commerce Clause case, even Justice Scalia should be willing to read the committee report.

There are examples of courts considering the legislative history in this way, at least in the courts of appeal. For example, in the *Gibbs* and *Alabama Tombigbee* cases that have been discussed, the appeals court considered the legislative history, including committee reports.[60] So, it makes sense to explain the Commerce Clause connection not only in legislative findings but also in relevant legislative history, including the committee report.

To summarize, we're in a situation in which Congress, considering laws that expand environmental protection, faces Commerce Clause issues that were not apparent when the landmark environmental laws were drafted a generation ago. In light of this, those working on such legislation must carefully consider the constitutional authority for the leg-

54. 545 U.S. 1, 20 (2005).
55. S. 787, 111th Cong. (2009). *See also* H.R. 2421, 110th Cong. (2007).
56. Baucus-Klobuchar Amendment §3(6).
57. §3(7).
58. §3(9).
59. *See* Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring).
60. *See* Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F. 3d 1250, 1275, 37 ELR 20040 (11th Cir. 2007) (citing a Senate committee report to support the proposition that "Congress . . . reasoned that protection of an endangered species could 'permit the regeneration of that species to a level where controlled exploitation of that species can be resumed,'" thereby allowing commercial exploitation of that species); Gibbs v. Babbitt, 214 F.3d 483, 494 n.3, 30 ELR 20602 (4th Cir. 2000):

> In evaluating whether there is a rational basis for the promulgation of a statute or regulation under the commerce power, we often consider congressional committee findings. Here Congress has provided numerous sources of informal findings. Committee reports and legislative debates have emphasized the importance of endangered species to interstate commerce. We independently evaluate the constitutionality of this regulation, but we also take account of congressional judgment.

islation. They can take several steps, including limiting the scope of the legislation, adding jurisdictional elements, making detailed congressional findings, and using the tools of legislative history.

In her dissent in *Raich*, Justice Sandra Day O'Connor wrote that "[i]f the [majority] is right, then *Lopez* stands as nothing more than a drafting guide."[61] Regardless of whether one agrees with Justice O'Conner's view of *Raich*, those involved in the legislative process should take from her the point that *Lopez* represents, at the very least, a drafting *caution*, and one that deserves close attention.

William W. Buzbee: You also see in these cases the Supreme Court revival of the use of categorical labels, and then use of those labels to say the federal government is overreaching. Do you think legislative findings or a record establishing a contrary historical basis about the category of regulation would be effective or would have little effect before the court?

Michael W. Evans: Well, I think that they should be effective, and the question of course is whether they will be, which takes us to the issue that you talked about, which is the nature of the court's inquiry. Is it a rational basis assessment? Are they making an independent judgment? Are they going to pay attention to findings? Are they going to pay attention to legislative history? These remain open questions. As we see in the Clean Water Restoration Act, Congress has taken, or at least the EPW Committee has taken, a very aggressive position, which you might call a "kitchen sink" approach, which is to make as many of these points as possible.

William W. Buzbee: I guess my sense is that, like so much of the rest of our political life, the courts have become increasingly polarized themselves and the weight that they give to findings and legislative history and stuff seems, in some ways, predetermined by judges and attitudes and perhaps their political predilections. This of course highlights once again the importance of judicial appointments.

I think it's important to make the findings. I think it's important to have the legislative history and to have the colloquies on the floor to do everything that Congress can do to establish that it is in fact operating within the scope of its constitutional authority.

Michael W. Evans: I would like to add a legislative policy point about why the court should defer to findings. If findings matter, Congress will pay more attention to findings. If findings don't matter, Congress won't. And not only does a deferential approach show appropriate respect, in my view, to the institutional authority of the Congress, it also facilitates the more careful, deliberate, appropriately political focus on findings, and we see that in the case of the Clean Water Restoration Act. These are not a series of findings that some staff counsel drafted and stapled to the beginning of a bill when the committee was done. They've been a focus of the committee's work. That is a good thing.

61. 545 U.S. 1, 46 (2005) (O'Connor, J., dissenting).

IV. Audience Questions

Audience Member: You've talked a lot about the need for congressional authority for implementing environmental statutes. Our biggest concern in New York has been the industrywide exemptions for oil and gas in practically every environmental statute, and I'm wondering, my primary hope actually in coming here was to hopefully get some ideas on potential constitutional challenges to Congress' exemptions to these laws. I don't know if you have any thoughts on sort of how that might be accomplished, sort of the flipside of what you've been talking about.

Robert Irvin: I'm skeptical that there are any, for the simple fact that it seems to be a clear case of regulating an economic activity and, under the Commerce Clause, that can be both a positive thing and negative in terms of congressional action on environmental questions.

William W. Buzbee: To strike down federal legislation that has exemptions for a particular industry would be very difficult. Your question triggers for me an additional wrinkle that environmental advocates should keep in mind. State laws sometimes will give local power generators and extraction industries special powers and abilities to shut down competition. A Georgia law with this effect is now under scrutiny due to how it can chill efforts to develop alternative sources of energy. Federal laws regarding energy-efficiency goals might provide a basis to strike down state laws that stand as a barrier.

Michael W. Evans: Likewise, I'm skeptical. The question is whether there was a rational basis for Congress' conclusion to create the exemption, and that is reviewed on a very deferential basis by the courts. I'm not aware of a case in which a challenge like that has succeeded.

Audience Member: What thoughts do you have on TSCA-related enforcement involving products that are being characterized as outside of the scope of commerce?

Robert Irvin: There actually is a parallel with the challenges to the ESA under the Commerce Clause because one of the arguments that has been raised by those challenges is if the product is illegal to use, you can't have commerce then. It's illegal to trade in them so, therefore, they can't be articles of commerce, and that actually harkens back to the Court's analysis in *Geer* in 1896, where the Court found that the birds were not actually an article of commerce. And so that challenge has been raised but it hasn't been successful because the courts have looked at the overall regulatory scheme and the category of endangered species protection and the purpose of that in terms of promoting a healthy economy rather than the particulars of the species at issue. However, I do have to note that in the *National Association of Homebuilders* case, there was evidence that the Delhi Sands flower-loving fly had once been sold by a biological supply house for high school

biology classes, and so there actually was evidence of it being an article of commerce.

William W. Buzbee: The only thing I'd add is that *Raich* has that language that says the Court has no power to excise those trivial individual instances of the class; that is, if legislation regulates a class of activities to stop harms or create benefits, you don't excise a portion of the law because it itself is small, and *Raich* is very important for that. So, I would find it hard to see how authority under TSCA would be challenged.

Michael W. Evans: I agree.

Robert Irvin: I just want to add one thing though. It is wise to be thinking of those potential challenges because one of the things that I've observed is, in particular, in criminal enforcement cases where the defendant is basically caught red-handed, the only defense may in fact be to challenge the constitutionality of the law. So, whether you are likely to ultimately prevail or not, you need to be ready for it.

Audience Member: In the Delta smelt case, the district court actually basically cuts and pastes *Alabama-Tombigbee* but also makes a rather interesting aside that *Raich* possibly presents a fourth prong for Commerce Clause purposes for congressional authority because of its heavy emphasis on the nature of the regulatory scheme rather than the activity that's being regulated. So, in *Lopez* and *Morrison*, you have fairly specific one-off criminal statutes being declared unconstitutional, but almost all of our environmental laws are in fact comprehensive regulatory schemes. Does that provide, in your view, an independent fourth basis for the constitutionality of environmental statutes?

Michael W. Evans: I'm not sure that it's a fourth basis, but I think that it's a principle reason why, as Bob might put it, the cicadas are gone. I think environmental statutes generally do regulate economic activity. It seems to me that these laws clearly fit within the framework of *Raich*. I'm not sure that I categorize it as a fourth category though. It depends on whether you see *Raich* as a fourth category, or, instead, whether it's just a further explanation and refinement of the third test in *Lopez*.

One final point about *Alabama-Tombigbee*: there are no findings with respect to the ESA, but in that case, the court, the appeals court focused on findings, with respect to the importance of the ESA regarding biodiversity, in the various committee reports.

William W. Buzbee: I see *Raich* as perhaps a return to an earlier, somewhat more deferential approach. But I actually think the *Alabama-Tombigbee* case is important. The Fourth Circuit's decision in *Gibbs*, is similarly a sound, more deferential case. In both of those cases, the courts discuss what activities are regulated, the activity causing the harm, the possible value of the thing itself that is a subject of the harm, and then they talk about the economic benefits of providing protections. They look at all of this as relevant to the activities analysis, and *Raich* is consistent with that, although I reiterate that it ultimately focuses more on the "excising" language analyzed earlier. *Gibbs*, although pre-*Raich*, illuminates how one should frame legislative findings about activities that are relevant to Commerce Clause analysis.

Robert Irvin: The only thing I would add is another factor that has been important in several of the cases, the ESA cases anyway, has been the notion that Congress can choose to preserve species to preserve the potential for future commerce and then to bring them back to the point where there can again be commerce in them. In the case of sturgeon, there was 100 years ago a thriving commercial fishery in sturgeon. The idea of the ESA is that you recover them to the point where that might be possible again and so Congress has the authority, under the Commerce Clause, to preserve the potential for future commerce as well.

Bruce Myers: I think there is some disagreement over whether *Raich* in fact disposes of the Commerce Clause challenges to the ESA and perhaps other statutes, or at least makes it less likely that those challenges will succeed. Is there reason to believe, based on Chief Justice Roberts' former comments about the "hapless toad,"[62] or based on other evidence, that this particular Court will, at some point, be tempted to take up the ESA issue or one similar to it—regardless of how the case is ultimately decided? Is there going to be a temptation for this Court?

Robert Irvin: Well, clearly, that's what the folks who continue with these challenges are hoping, that they will end up with a decision that's their ticket to the Supreme Court. Despite the way the case law has gone in the circuits and despite the *Raich* case, I think there is always a significant risk with the current configuration of the Court that they would choose to take it up, and from the perspective of the conservation community, the result would not be good.

William W. Buzbee: If precedents really matter, *Raich* should be extremely important in defeating an ESA challenge, but mainly in the lower courts. At the Supreme Court level, little is being settled.

Bruce Myers: There was a point at which it seemed in the 1930s to 1940s that the Court simply said: "Well, with respect to economic regulation and Commerce Clause issues, if there is a rational basis, we defer. We don't want to get into it. We don't need the facts." And now, we're learning, wow, based on what happen in the 1990s, you don't need to show your homework but yes, probably you should. Where is the rational basis test? It seems to have reemerged

62. Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 33 ELR 20163 (D.C. Cir. 2003), *reh'g en banc denied*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting) ("The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'").

a bit in *Raich*, as I recall, but how much can we depend on that going forward?

Michael W. Evans: It seems to me that the nature of the test remains unsettled. If you look at *Morrison*, the opinion suggests that the Court reaches an independent judgment about whether there is a sufficient connection to interstate commerce. In other cases, and in Justice Breyer's dissent in *Morrison* and in some appeals court cases, there is this talk about a rational basis test in which there is deference. So, I think that it's unsettled.

William W. Buzbee: Yes. I guess my sense is that if the Court affixes a label to the underlying body of regulation and especially if the Court concludes that the subject involves an area where the states have long had traditional turf or perhaps regulatory primacy, then even if the case appears to involve a rational basis setting, it will end up being rational basis with teeth or some form of intermediate scrutiny. If federalism is implicated, then four or five Justices look for a strong justifying underlying record and facts and clearer legislating.

Robert Irvin: When I started teaching at Vermont Law School in the early 1990s, I would teach the constitutional basis of wildlife law just because you sort of had to, but I remember thinking, "I'm teaching this but nobody is ever going to deal with it." And boy, did that change. I mean my sense is that you have a shift in the judiciary. You have a shift in the political branches of government, and growing skepticism about the reach and power of government that's reflected in the judiciary as well. As a result, what you're seeing to a large degree is results-oriented judging. And depending on your perspective, it's either a welcome change or very disturbing.

William W. Buzbee: In some cases, especially *Morrison v. Olson*, the Court quite clearly is not willing to supply a rationale it can't find. If anything, it seems to be engaging in something that looks like closed record review, like you have in formal proceedings or a regular trial or a formal agency setting. They look at legislative materials and they in effect say: "We don't see this. These statements are unconvincing. These aren't adequate," and they go through them in great detail; it's a very unusual form of review.

Audience Member: With all the attention on *Raich*, I feel compelled to point out that the medical marijuana trade is alive and well in at least a dozen states and that's because the Obama Administration has essentially announced that it's not going to enforce the prohibition, irrespective of whether it was upheld in *Raich*. And so we in the environmental law field are quite familiar with the problem of even valid upheld federal laws suffering from underenforcement in the executive branch. The ESA is a key example.

My understanding is that the Obama Administration has approved far fewer species listings at this juncture than even the Bush Administration, so this is not necessarily a problem of partisanship. And we've typically, in legislative drafting, dealt with this through statutory deadlines or authorizing challenges to agency inaction and through the appropriations process and various mechanisms like that, all of which have had mixed success. So, I guess I'm wondering with the attention to legislative drafting, the focus of our discussion has been on bulletproofing this before the Supreme Court, but is there creative thinking going on as to how to improve executive recalcitrance when it comes to legislative drafting?

Robert Irvin: I wouldn't read too much into the number of species listings that have occurred. I actually spoke to a reporter last week doing a one-year assessment of the Obama Administration and what I said to him was it's a four-year marathon, not a one-year sprint. And the fact is that it's taken them a long time to get their people in place. They had quite a backlog of listings to deal with, and they have completely inadequate resources to do it.

That said though, I'm a firm believer that Congress has a role to play regardless of who sits in the White House and that Congress ought to use that role in terms of oversight and using the tools at its disposal to nudge, or in some cases shove, an Administration to do what they're supposed to do. And you see it all the time, the appropriations committees, when they do their reports, they often will ask the Administration to report back to them on how they're doing in implementing something that they've been given money to do. That's one of the tools that can be used and should be used.

William W. Buzbee: You identified some of the best means to deal with executive inaction or intransigence. One strategy is the use of regulatory hammers such as default regulatory outcomes if there is delay, as well as use of congressionally set deadlines for action. Retaining citizen enforcement is also obviously an important legislative strategy. And in climate legislation, retaining state and local roles can leave room for innovation and would allow states and the federal government to learn from those innovations. Retaining state and local climate roles would also make it less likely that executive branch delay or inaction would kill developing green economy businesses and the carbon allowance and offset market.

Michael W. Evans: In my experience, it's extremely difficult to respond to agency recalcitrance legislatively, at either the federal or the state level. Congress can play a role through the appropriations process and through oversight hearings, and by maintaining the tools of enforcement, including citizen suits. But legislative "hammers" are really hard to draft in a way that works and is not counterproductive, and so I think it's best a tool of last resort.