The Constitutional Framework of Environmental Law

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The views expressed in this chapter are those of the author alone, and do not necessarily represent those of his place of employment, nor those of the Environmental Law Institute. Some of those who commented upon this chapter in draft form were consulted for the express reason that their views were known to be opposed to positions taken in the manuscript; the author acceded to some of the criticisms, and rejected others. Thus, the state of the law as interpreted by the author may diverge from the view taken by the commentators.
For federal and state legislators seeking legal solutions to environmental problems, "constitutional law" is a part of "environmental law" only in the indirect sense of providing the basic legal framework with which substantive environmental standards—like all legislative standards—must ultimately comport. When Congress, for example, enacts legislation to control pollution or to protect endangered species, the constitutional issue theoretically presented is whether such legislation exceeds limits placed by the Framers on federal legislative authority. These limits may result either from the lack of federal power to deal with the problem or from conflict between a federal regulatory scheme and the constitutional rights of affected individuals. A state legislature, in contrast, is free to wield the state's police power unrestricted by the limitations that theoretically face a government of limited powers; but the state in turn must observe not only the constitutional rights of affected individuals, but also the boundaries inherent in a constitutional scheme that gives supremacy to federal laws and programs over conflicting state efforts. In both of these cases, constitutional law sets potential bounds on the range of permissible legislative responses to environmental problems.

Constitutional law may also be seen as related to environmental law in another, more direct sense—one in which the latter term would include aspects of the former as a direct referent. In the same way that the Bill of Rights has been interpreted to prohibit certain governmental actions—such as unreasonable intrusions on privacy—that document under this interpretation would also serve to prevent certain governmental actions that unreasonably degrade the environment. Constitutional law in this sense would become an affirmative weapon of the private citizen to test environmentally harmful state action against alleged constitutional standards through direct court review.

Each of these perspectives—that of the federal legislator, the state legislator, and the private citizen—presents an occasion for reexamining familiar constitutional lore in the context of emerging environmental concerns.

I. THE CONSTITUTIONAL POWER OF THE FEDERAL GOVERNMENT

A. The Basis for Legislation

The Federal Government, according to familiar constitutional theory, is a creature of limited authority, able to act only on the basis of specific enumerated powers. Some commentators have suggested that these powers fall short of encompassing the breadth of concerns potentially subject to environmental regulation. In rejoinder, at least one commentator has

1 See Bermingham, The Federal Government and Air and Water Pollution, 23 Bus. LAWYER 467, 478-81, 487-89 (1968); Edelman, Federal Air and Water Control: The
forcefully argued that, though limited in number, the powers under which Congress may act have been so expanded in scope by judicial interpretation that no conceivable measure reasonably intended to protect the environment is beyond the reach of congressional authority. The force of this latter claim and the merits of these contrasting positions, can be better appraised by reviewing the sources of federal authority theoretically available to sustain environmental legislation.

1. The commerce power

Article I, §8 of the Constitution grants Congress the power “to regulate Commerce...among the several States.” The preposition “among,” with its evident reference to commerce between two or more states has served as the primary focus of judicial exploration into the limits of power conferred by the Clause. Three main areas of “interstate” regulation fall within the ambit of the Clause. First, Congress may prevent the misuse of channels of commerce, for example by preventing the shipment of stolen goods or the transportation of kidnapped persons. Second, Congress may protect the instrumentalities of commerce, forbidding, for example, the destruction of airplanes. Third, Congress may regulate certain activities “affecting” commerce — a phrase so broad that it threatens to engulf the first two categories and to raise doubt whether any limits can be set to the reach of the commerce power. As described by Chief Justice Marshall in Gibbons v. Ogden and reaffirmed by the Supreme Court nearly a century and a half later, those limits are reached in theory when Congress attempts to regulate activities:

which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the

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3. “The Congress shall have power... to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, §8, cl. 3.


purpose of executing some of the general powers of the government.\(^9\)

Although the rule as thus stated may have remained unchanged in its formulation, application of the rule has witnessed an expansive judicial development that contrasts sharply with the parallel judicial contraction of the range of interests protected by substantive due process as discussed below.\(^10\)

The story is a familiar one and need not be recounted here beyond briefly marking the high points of that development. Cases invalidating legislation on the ground that the activities regulated were purely local in nature, were subsequently repudiated in a series of decisions increasingly recognizing that such local activities can nevertheless affect interstate commerce.\(^11\) In *Wickard v. Filburn*,\(^12\) for example, congressional commodity regulations were upheld as applied to a local farmer producing wheat destined exclusively for use on his own farm. Conceding that the amount of wheat involved was "trivial by itself," the Court concluded that "taken together with that of many others similarly situated," home-grown wheat could have been considered by Congress to be sufficiently competitive with wheat in commerce to affect substantially the price of the latter, thus justifying regulation of all production, regardless of amount or ultimate destination.\(^13\) Similarly, in sustaining the validity of the Civil Rights Act of 1964 as applied to a local restaurant business, the Court found a "rational basis" for the asserted relationship to interstate commerce on the theory that because of the discrimination, restaurants refusing service to Negroes sold less interstate goods, obstructed interstate travel by Negroes, and deterred businesses from establishing in the area.\(^14\) The fact that Congress may have had other social motives in mind in passing the legislation was irrelevant, as long as the necessary relationship to commerce was established.\(^15\) Most recently, in *Perez v. United States*,\(^16\) the court upheld congressional power to enact criminal laws against "loan shark" activities, despite the objection that such legislation amounted to federal occupation of the field of general criminal law and the exercise of a general federal police power over "a typically State offense."\(^17\) The Court emphasized that as long as the class of activities — organized, interstate crime — was

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\(^10\) *See* text accompanying note 413 *infra.*

\(^11\) *See* *e.g.*, *United States v. Darby*, 312 U.S. 100, 118 (1941).

\(^12\) 317 U.S. 111 (1942).

\(^13\) *Id.* at 128.


\(^15\) Cases upholding legislation on the basis of the commerce power despite the absence of a "business" objective include Champion v. Ames, 188 U.S. 321 (1903) (lottery tickets), *Hoke v. United States*, 227 U.S. 308 (1913) (prostitution), and *Gooch v. United States*, 297 U.S. 124 (1936) (kidnapping).

\(^16\) 402 U.S. 146 (1971).

\(^17\) *Id.* at 149, quoting remarks of Congressman Eckhardt, expressing objections to the
within the scope of federal power, "the courts have no power 'to excise, as trivial, individual instances' of the class." 18

Application of this development of the Commerce Clause to the environmental context results in a picture of congressional power that appears practically unbounded at least as far as concerns control over the typical areas of pollution. The emission of air pollutants, for example, may be regulated on the theory that since "ambient air" cannot be confined to the borders of a state, emitted particles may be seen as themselves constituting articles moving in commerce and hence directly subject to regulation. 19 That theory has, in fact, been explicitly embraced by at least one federal district court in a decision sustaining the validity of the Clean Air Act as applied to air pollutants, including non-visible "odorous pollution." 20 Noxious gases, of course, do not conform to ordinary notions of what constitutes an article of commerce, but that fact need not be critical in light of cases sustaining similar regulation of the movement of articles across state lines despite the apparent lack of commercial value of use. 21 Equally irrelevant is the fact that the polluter did not intentionally direct the movement of the article across state lines. 22

Apart from the direct movement theory, air pollution regulation also seems sustainable on the more normal theory, illustrated in the cases discussed above, that such pollution has a substantial effect on other, obvious branches of interstate commerce. As reflected in the congressional findings in the Clean Air Act itself:

The growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation. 23

The effect of such pollution on interstate travel and on the location and operation of businesses hardly seems less substantial than the similar effect of discrimination considered in Katzenbach v. McClung. 24

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18 Id. at 154, quoting from Maryland v. Wirtz, 392 U.S. 183, 193 (1967).
19 See Rosenthal, supra note 2, at 223.
21 See note 15 supra.
Finally, under the approach illustrated in *Wickard v. Filburn* Congress may presumably regulate a manufacturing process either as an incident of its control over the interstate movement of the manufactured product, or on the grounds that the manufacturing process itself affects interstate commerce.\(^{25}\) This formula seems easily broad enough to cover the entire spectrum of industry; even the small polluter whose contribution is itself trivial may presumably be reached on a theory that considers his contribution in conjunction with that of many others similarly situated.

Similar theories are applicable to the case of water pollution. Under the Commerce Clause, Congress’ control over navigable waters as “highways for commerce” has long been established. Furthermore, the concept of navigability, like that of interstate commerce, has been the subject of similarly expansive judicial interpretation extending the phrase well beyond application to waters navigable in fact. Thus the concept has been applied to waters that were navigable only at some time in the past (and then only by canoe);\(^{26}\) to streams that could be made navigable with reasonable improvements;\(^{27}\) and to non-navigable tributaries that affect navigable streams.\(^{28}\) In addition, Congress’ control over such waters need not be limited to ensuring unimpeded movement on the waterway, but may be extended to control emission of pollutants even though such emissions do not directly obstruct navigation.\(^{29}\)

It would be a mistake, though, to conclude that navigability is the sole source of congressional power to control water pollution. Despite the broad interpretation of that phrase, presumably some streams and bodies of water remain beyond the reach of the term. In such cases, even though the water itself may be clearly unsuitable for actual use as a channel for trade or commerce, it may still be possible to find a basis for a congressional judgment that activities polluting such waters have a substantial effect on commerce. The possibility, for example, that a particular plant located on intrastate, non-navigable waters may enjoy a competitive advantage if allowed to escape national pollution control laws applied to competitors, should justify industry-wide regulation without regard to location, and without the need for case-by-case examination of the circumstances of each particular plant. Moreover, polluted waters are likely to affect recreational opportunities and related interstate travel and commerce without regard to the navigability of such waters. Thus, except perhaps for the isolated private lake or pond, not used in

\(^{25}\) *See United States v. Darby*, 312 U.S. 100 (1941); Rosenthal, *supra* note 2, at 221-22.


any manufacturing, farming, or recreational process and not connected, by
seepage or otherwise, with any other body of water, it is difficult to conceive of
a case beyond the reach of congressional water quality legislation.30

30 This conclusion raises an interesting problem of statutory construction concerning
the recently enacted Federal Water Pollution Control Act Amendments of 1972
(FWPCA), 33 U.S.C.A. §§1251 et seq. (Supp. 1973), ELR 41101. As described in
the chapter on water pollution control, the coverage of that Act extends to
"navigable waters," defined as "the waters of the United States" in contrast to the
previous Act's reference to "interstate or navigable" waters. Compare 1972
The Conference Report indicates that the term "navigable waters" was to be
"given the broadest possible constitutional interpretation . . . ." CONF. REP. No.
92-1236, 92d Cong., 2d Sess. 144 (1972). Taken literally, this suggests that
"navigability" is no longer the touchstone of the Act's coverage; the only question
is whether the particular discharge into U.S. waters is capable of "affecting
commerce."

EPA has apparently adopted this interpretation and has issued a memoran-
dum indicating that among waters included in the Act's coverage are three kinds
of "intrastate lakes, rivers, and streams": 1) those used by interstate travelers; 2)
those from which fish are taken for sale in interstate commerce; and 3) those
utilized by industries in interstate commerce. See ELR 46318. Although this list
does not purport to be exhaustive, it appears unduly limited in several respects.
The most important category of "waters of the United States" arguably omitted
from the list is that of "ground waters." Deep well disposals that affect ground
waters, whether or not those waters connect with surface "lakes, rivers, or
streams" would seem within the reach of congressional power if for no other
reason than to prevent industries using such disposal techniques from obtaining a
competitive advantage over firms discharging into surface waters covered by the
Act. There may, of course, be other hints from the legislative history from which
Congress' intent concerning the coverage of subsurface waters may be gleaned.
opposing an amendment introduced by Rep. Aspin—subsequently defeated—that
would have explicitly included groundwaters). But cf. FWPCA §402, 33 U.S.C.A.
§1342 (Supp. 1973), ELR 41121 (specifying that state permit programs shall not be
approved unless the administrator determines that adequate authority exists to
control the disposal of pollutants in wells, see §402 (b)(1) (D), 33 U.S.C.
§1342(b)(1)(D) (Supp. 1973), ELR 41121, and that EPA's permit program shall be
subject to the same terms and conditions as apply to a state permit program, see
defeat of the Aspin amendment on ground waters). Given the remedial purposes
of the Act and the conclusion that control over subsurface waters is within
Congress' constitutional powers, courts should require a clear showing that
Congress did not intend to exercise its full powers before limiting the Act's
coverage. Similarly, the qualification in the EPA memorandum that travelers, fish,
and industry using the waters be in "interstate commerce" seems unnecessary.
Similar conclusions apply to regulation of pesticides, solid wastes, noise, and other problems of pollution. In each instance, the test case is theoretically posed by regulation aimed wholly at intrastate activity, and in each instance, the effect on interstate commerce seems at least as easy to defend as in the cases discussed above. New amendments to the Federal Insecticide Act, for example, explicitly extend regulatory coverage to "actions entirely within a single State," on the basis of congressional findings that pesticides affect the water, air, food supply, and marketing and consumption patterns in states other than the state of application. Waste disposal programs confined to a single state, may be regulated as an incident of congressional control over goods that once moved in interstate commerce, or on the basis of findings that the techniques of disposal — incineration, open dumps, sanitary landfills — contribute to air and water pollution problems within Congress' power to control, or on the basis that such programs substantially affect the commerce in recyclable materials. The major sources of noise pollution are likely to be either products that move in interstate commerce; or commercial activities that either directly, or by means of the products produced or consumed, affect interstate commerce; or themselves the instrumentalities of commerce — planes, trucks, automobiles.

It is difficult, in short, to imagine potential problems of pollution that could not be reached by federal control. The interrelationship of environmental problems, the growing recognition that ecological damage in one area may well have "ecosystem" effects which extend well beyond the point of initial intrusion, and the inevitable economic impact of pollution control — with the possibility of competitive havens if "intrastate" activities are excepted from control — all combine to present an extremely broad Commerce Clause base for congressional control of pollution wherever and however it occurs. Whether similar authority exists in other areas of environmental concern besides pollution — e.g., land use control and management of wildlife resources — will be explored below after a brief review of other potential sources of congressional power.

2. The treaty power

In view of the broad reach of the commerce power, it is difficult to imagine examples of federal action that could be justified only on the basis of

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Under the theory of *Wickard v. Fillburn*, 317 U.S. 111 (1942), even if such waters are used only by local travelers, or local industry, or supply only a local fish market, "intrastate" commerce in the activity may be affected.  
35 See the chapter on noise pollution, infra.
some other constitutional authority. Nevertheless, a brief mention of such other sources of authority may be desirable if for no other reason than to indicate areas where overlapping bases for federal action in the environmental context may be found. One such area arises in the case of the president’s power under the Constitution to make treaties “by and with the Advice and Consent of the Senate.” Such treaties become “the supreme Law of the Land,” as do acts of Congress designed to implement the treaty—the latter on the theory that they are necessary and proper means to execute a specified federal power. This combination of constitutional provisions yields a potential formula for sustaining congressional legislation even where no other source of power would theoretically be available.

Application of the formula is appropriately illustrated by the leading case of *Missouri v Holland.* The United States had concluded a treaty with England (acting on behalf of Canada) that provided for the protection of migratory birds. Congress thereafter enacted legislation implementing the treaty by forbidding the killing, capturing, or selling of birds covered by the terms of the agreement. The Court sustained the validity of the statute even though an earlier, similar act of Congress—not based on a treaty—had been held to be beyond the scope of congressional power. *Missouri v. Holland* accordingly seems to stand for the proposition that Congress may do by statute and treaty what it has no power to do by statute alone.

The treaty power as thus defined in *Missouri v. Holland* offers a fairly extensive source of potential congressional power — although it must be admitted that Congress today could probably act in most cases directly under other powers as well. Thus the recognition that environmental problems have

36 U.S. Const. art. II, §2.
37 Id. art. VI, cl. 2.
38 See id. art. I, §8.
41 Stated thus broadly, the proposition in the text may deserve qualification to allow for the possibility that the treaty or the implementing legislation is an obvious sham, designed only to bootstrap Congress into the exercise of powers that would otherwise be denied it and that have little or no relation to foreign affairs. See Rosenthal, supra note 2, at 227 & n.44. For reasons suggested in the text, it is difficult to imagine this possibility becoming a real one in the environmental area. The increasing recognition that environmental problems, however local in origin, affect the world ecosystem in ways that legitimately concern foreign countries should make credible any attempt to deal mutually with such problems through appropriate treaties and implementing legislation.
world-wide significance has already led to considerable international activity, and specific agreements for cooperative research in a variety of areas have been concluded between the United States and the Soviet Union. Together with future more specific agreements concerning the conservation of endangered species, the preservation of natural and historic treasures, or the control of international aspects of water and air pollution, these agreements lay the foundation for a wide variety of environmental controls over domestic activity that would adversely affect the specified area.

3. The admiralty power

Although it does not by its terms appear to involve a grant of congressional power, "the admiralty and maritime" jurisdiction set out in Article III, §2 of the Constitution has been construed on a number of occasions to confer congressional authority to enact substantive maritime law. This authority is distinct from the power to control and improve the navigable waters under the Commerce Clause, and accordingly provides a theoretically additional basis for federal regulation of environmental problems arising within the area of maritime jurisdiction. It is not clear exactly how closely the latter concept restricts the exercise of power in this area: but even under traditional notions of what constitutes maritime law a wide variety of environmental controls over the shipping industry could be brought within the scope of this grant of authority. Thus legislation establishing standards of liability for oil spills, prescribing duties with respect to the dumping of

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42 See the chapters on wildlife and marine pollution.
44 See World Heritage Trust Convention, transmitted to Senate, Mar. 28, 1973.
46 "The judicial power shall extend to ... all Cases of admiralty and maritime jurisdiction..." U.S. Const. art. III, §2.
47 See, e.g., In re Garrett, 141 U.S. 1 (1890); Panama R.R. v. Johnson, 264 U.S. 375 (1924).
48 See 1 P. Freund, A. Sutherland, M. Howe, & E. Brown, Constitutional Law 355 (3d ed. 1967).
49 See Rosenthal, supra note 2, at n.21.
pollution-intensive materials, or even controlling the size and type of ships plying U.S. ports could presumably be based on powers derived from the admiralty clause.

4. The taxing power

Generally, the imposition of taxes by Congress does not raise questions of constitutional power. Even where the taxing scheme appears to be a disguised form of regulating primary conduct, its imposition is not invalid if some other power can be found to support the regulatory scheme. Thus, for example, much of the federal narcotics laws until recently, were based on a taxing scheme that acted to deter dealings in drugs without, however, directly proscribing such activity. Challenges to the scheme were usually rebuffed by a judicial willingness to accept Congress’ characterization of the tax as a revenue measure; but even when the scheme operated effectively to prevent all activity, the scheme has been upheld on the theory that the same result could have been reached directly under other congressional powers, such as the commerce power.

In the environmental area, the taxing power accordingly becomes a potential device either for completely discouraging undesirable, polluting activity or for requiring such activities to “pay their own way” in terms of the cost to the environment. Proposals for effluent charges and for taxes on certain classes of air emissions represent examples of the possibilities for congressional action based on Congress’ power “to lay and collect taxes.”

5. The power over federal property

Article IV of the Constitution grants Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other

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51 See Ocean Dumping Convention, supra note 45; chapter on marine pollution, infra.
53 See License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867) (The taxing power “is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.”).
57 See SELIG, EFFLUENT CHARGES ON AIR AND WATER POLLUTION, ELI Monograph No. 1 (1973).
Property belonging to the United States." Congress accordingly enjoys ample authority to regulate the use of federally held lands such as parks and forests in ways designed to protect and enhance the environmental conditions within such areas. Furthermore, this power, like the exercise of any other properly asserted federal power, takes precedence over conflicting state laws that might otherwise govern the use of the land. In *Hunt v. United States,* for example, the Supreme Court upheld the government's right to kill deer in the Kaibab National Forest despite state fish and game laws that forbade such killings. The ecological threat posed by the overpopulation of deer justified the government's action as a means of "protecting... the lands of the United States ... from serious injury."  

Combined with the Necessary-and-Proper Clause, the government's power to protect its own property conceivably also provides a basis for imposing reasonable restrictions on the use of adjoining, non-federal lands. In the *Hunt* case, for example, the Court permitted not only the killing of the animals, but also the transportation of the carcasses to other parts of the state outside the boundaries of the forest — again despite a contrary state law. Similarly, in a series of cases the courts have upheld federal regulations effectively requiring private landowners to erect fences to prevent livestock from entering and damaging a neighboring national forest. Again, in each case, relevant state laws would instead have placed the burden of property protection on the property owner rather than on those putting livestock out to graze. As one court explained, Congress has the power "to make its own rules and regulations as to the use and control of its own lands, and however hard and unjust it may seem to be to the citizens owning lands adjoining those of the [government], they must comply with those rules and regulations." Under this theory, then, Congress could presumably protect the scenic, recreational, and other environmental values of its federal lands by imposing any restriction on surrounding property reasonably designed to prevent inconsistent land uses that might otherwise threaten such values.

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59 U.S. Const. art. IV, §3.
60 *See* Tennessee v. United States, 256 F. 2d 244, 258 (6th Cir. 1958); 36 Ops. Att'y. Gen. 527, 530 (1932).
61 278 U.S. 96 (1928).
62 *Id.* at 100.
65 *Compare* United States v. Hanson, 167 F. 881 (9th Cir. 1909) *with* Burley v. United States, 179 Fed. 1 (9th Cir. 1910) (upholding congressional power under reclamation laws to improve private lands as an adjunct to the operation of a program to improve adjoining public lands). For further discussion, suggesting
6. Other powers

Additional theories affording a potential base for federal environmental legislation may conceivably be constructed from a number of constitutional provisions that, however, appear only indirectly or quite speculatively related to the environmental context. The power to provide for the common defense and security of the United States,\textsuperscript{66} for example, is explicitly cited as a basis for congressional control over the development and utilization of atomic energy.\textsuperscript{67} Given the obvious national security interest in controlling the use of nuclear materials, it is a fairly straightforward matter to justify virtually any environmental controls that Congress may choose to impose on the use of such materials for energy production or other purposes on the basis of the national defense power. Whether other environmental legislation could also be based on the national defense power probably depends on the extent to which one can establish a similar connection between defense interests and the particular subject matter whose attendant environmental effects are the object of the legislation. Alternatively, environmental controls would presumably be justified where the pollution effects of an activity impinge on defense interests, whether or not the polluting activity is itself defense related. In either case, however, whenever such a connection is established (e.g., in the case of military aircraft or ships, or the effects of local pollution on military facilities), other bases of authority (e.g., control over federal property or interstate commerce) will usually be so clearly available that recourse to the national defense power will prove superfluous.\textsuperscript{68}

Even less direct is the potential basis for federal control over environmental activities through judicious use of the power to approve interstate compacts.\textsuperscript{69} Growing recognition of the area-wide impact of pollution problems has led to increased emphasis on interstate agreements as a means of dealing with multijurisdictional activities.\textsuperscript{70} Since under the Constitution congressional approval is required for these agreements, an indirect handle is provided for imposing minimum federal environmental standards by conditioning approval of such agreements on the compatibility of the compact’s

\textsuperscript{66} See U.S. Const. art. I. §8, cl. 11-16.
\textsuperscript{68} See Rosenthal, supra note 2, at n.45.
\textsuperscript{69} U. S. Const. art. I, §10 (“No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State.”).
\textsuperscript{70} See generally Grad, Intergovernmental Aspects of Environmental Controls, in ENVIRONMENTAL CONTROL 130-45 (1971).
terms with the federal standards.\textsuperscript{71} The effectiveness of this possibility for exerting federal leverage is, of course, limited by the extent of the compacting states' incentive to conclude the agreement.

More direct, but considerably more speculative, is a theory that would find congressional power to enforce environmental standards through §5 of the Fourteenth Amendment. The foundation for the theory stems from the Supreme Court's decision in \textit{Katzenbach v. Morgan},\textsuperscript{72} upholding congressional legislation that forbade state requirements for literacy in English as a qualification for voting by Spanish speaking citizens of Puerto Rican descent. Even though earlier decisions had suggested that such requirements did not violate the Equal Protection Clause,\textsuperscript{73} the Court indicated that Congress could reach a different conclusion and enforce its judgment through the power conferred by §5 of the Amendment.\textsuperscript{74}

Applied to the environmental context, this theory would presumably support congressional legislation aimed, \textit{e.g.}, at "equalizing" the provision of various state "environmental services" throughout specified geographical or political subdivisions of the state. Thus, the discussion in the final section of this chapter concerning the potential availability of the Equal Protection Clause as a means of securing direct constitutional protection for certain environmental values\textsuperscript{75} becomes relevant as well in the context of congressional power to legislate in the environmental area. Moreover, under the theory of \textit{Katzenbach v. Morgan}, an adverse judicial opinion on the requirements of equal protection in this area, need not preclude a reasonable contrary judgment by Congress, which is then used as the basis for enacting appropriate legislation.\textsuperscript{76}

7. \textit{Summary: two test cases}

The above survey of sources of authority for federal environmental legislation indicates the difficulty involved in any attempt to describe areas outside the scope of such authority. Accordingly, it may be helpful by way of summary to apply the preceding, general discussion to two particular cases of environmental concern that are increasingly commanding federal attention despite a long tradition of primary, if not exclusive, state and local responsibility.
a. Endangered species legislation

One area, long thought to furnish a prime example of a subject reserved by the Constitution for exclusive state control is the general management of fish and wildlife. "Black-letter law" has it that:

As a general rule, the Federal Government is without power, aside from the power to enact statutes to carry out treaties respecting migratory birds, to prescribe regulations for the protection of fish and game while within the boundaries of a State. 77

Reflecting this tradition, federal involvement in the protection of wildlife until recently has been limited primarily to those aspects of wildlife management that involve either the direct use of federal lands — as in the establishment of wildlife refuges or rules protecting species on federal property 78 — or the use of federally controlled channels of trade. The Endangered Species Conservation Act of 1969, for example, provides for the identification of "endangered species," but regulates, not the actual taking, but only the importation of such species. 79

In light of this traditional role of the Federal Government, questions may arise concerning the constitutionality of recently proposed legislation that would prohibit the killing or taking of endangered species anywhere within the United States. 80 Even the more limited Act protecting bald and golden eagles has already led to doubts concerning the Act's constitutionality of sufficient

77 See 35 AM. JUR. 2d, Fish and Game §32 (1967).
78 See Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942).
79 See 16 U.S.C. §§668cc-2 (1970), ELR 41806. The few federal statutes that directly prohibit the taking of wildlife outside of federal lands, all appear premised on the existence of certain special circumstances. For example, the Migratory Bird Treaty Act of 1918, 39 Stat. 1702, as discussed above, see text accompanying note 39 supra, was upheld in Missouri v. Holland, 252 U.S. 416 (1920), as an appropriate implementation of a treaty designed to protect bird species that almost by definition involved national and international interests not easily accommodated to regulation on a state-by-state basis. The Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (1962), amended, ELR 41814 (1972), protects the former species, presumably on the narrow theory that Congress has a legitimate interest in preserving the country's national symbol, see enacting clause of Act, June 1, 1940, 16 U.S.C. §668 (1940), and extends similar protection to the golden eagle on the theory that because of the similarity of the birds and the likelihood of confusion, such protection is necessary in order effectively to protect the bald eagle, see Joint Resolution of October 24, 1962, Pub. L. No. 87-884. Finally, recent legislation forbidding the shooting of animals from aircraft, 16 U.S.C. §§742j-1 (Supp. 1, 1971), is apparently based on Congress' broad regulatory powers to control the use of the airspace and instrumentalities of commerce under the Commerce Clause, see H. R. REP. No. 92-421, 92d Cong., 1st Sess. 5-6 (1971). See the chapter on wildlife.
seriousness to have reportedly influenced the Justice Department’s prosecu­
tion strategy under the Act.\textsuperscript{81}

These doubts, it is submitted, are unjustified. The Federal Government’s
power to protect by any necessary means species threatened with extinction by
inadequate state protective schemes can be independently based on either the
commerce power or the treaty power, without regard to the relationship of
such species to national symbols of fauna or flora.

Under the Commerce Clause, for example, several theories can be
advanced to justify congressional prohibition of the taking of endangered
species. First, wildlife, like air particles, cannot easily be confined to state
boundaries. Thus cases supporting congressional control over objects solely on
the basis of potential movement across state lines would conceivably also
support regulation of “ambient animals.”\textsuperscript{82}

Second, and perhaps more convincing, control over endangered species
could be based on the effect of intrastate takings on related aspects of
interstate commerce. Indeed, wherever extermination of a species is threatened
as a result of intentional human killings, the very reasons which prompt such
action—desire for food or fur, for sport, or for protection of crops and
livestock—will usually reveal a theoretical connection between such takings
and an underlying interstate economic activity. Hunting, for example, is
pursued by millions of Americans who spend billions of dollars on equipment
and supplies, and who typically resort to widespread interstate travel in
pursuit of the sport.\textsuperscript{83} Actions which reduce the size of a species accordingly
also reduce the volume of commerce in the hunting and travel industry.
Similarly, where species are taken on the basis of their value as food or fur
products, the effect on the interstate market in such commodities, even if they
do not themselves move in interstate commerce, is little different from that
which justified congressional regulation of “local” wheat in \textit{Wickard v.
Fillburn}.\textsuperscript{84} Finally, where species are killed as a means of pest control, the
basis for congressional regulation is not unlike that which justifies general
regulation of the intrastate use of chemical pesticides: removing a natural
predator has effects both on the quantity of nonnatural pesticides which must
then be used to achieve similar production results, and on consumption and
marketing habits outside the state where the takings occur.\textsuperscript{85}

Even with respect to species not threatened because of their value as game
or their nuisance as pests — flora, for example, or animals facing extinction

\textsuperscript{81} See N. Y. Times, Nov. 26, 1972, at 66, col. 1.
\textsuperscript{82} See cases cited note 20, supra; Note, \textit{Federal Protection of Endangered Wildlife
\textsuperscript{83} See Note, supra note 82, at 1302.
\textsuperscript{84} 317 U.S. 111 (1942); see text accompanying note 12 supra.
\textsuperscript{85} Cf. note 31 supra.
only as an unintended and indirect consequence of habitat destruction — the effect on interstate commerce can be rationally hypothesized. The very fact that a species is threatened with extinction can increase the value of the species as a potential subject for medical or scientific studies, or as an item of interest for tourists, arguably affecting both interstate travel and interstate "scientific" commerce. Thus Congress could presumably prohibit not only the taking of such species, but also the destruction of the habitats crucial to their survival.

Some of these arguments, it must be conceded, might be thought to establish something less than the "substantial" effect on interstate commerce that past judicial rhetoric seems to require in order to support Commerce Clause regulation. But if "substantial effect" is mainly a matter of finding a rational basis for the congressional judgment, it is not easy to see why these kinds of considerations yield any less a rational basis than in the case of congressional prohibitions of discrimination by a local restaurant on the basis of the effect, e.g., on the interstate movement of Negroes. More disturbing perhaps is the implication that congressional power to control animal takings need not be confined to the case of endangered species, but could, under some of the above arguments, be extended to include the entire spectrum of fish and game laws currently imposed by state and local governments. A conclusion that so completely reverses traditional roles should give cause for pause, unless the expansion of the Commerce Clause is to be finally admitted as having forever laid to rest the view that there is some substance to the Tenth Amendment and the theory of a Federal Government of limited powers. Thus, it is worth pursuing a theory of congressional power that would link the asserted authority in this area to the fact that the species is endangered, thereby avoiding the unnecessary assertion of unlimited regulatory authority.

Some of the arguments sketched above do suggest that the fact of potential extinction aggravates the effect on interstate commerce, and hence, may for that reason both justify and at the same time set limits to the asserted power to regulate takings under the Commerce Clause. But a potentially better candidate for justifying such congressional control may be the treaty power — or the treaty power combined with some of the above Commerce Clause arguments. *Missouri v. Holland* indicates that the protection of endangered species is a legitimate matter for international concern. And although the precise facts of that case involved a species migrating between the United States and a foreign country, the threatened extinction of a species today is increasingly recognized as a matter of legitimate concern and interest throughout the world, even though the species may be found only in a single

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87 Id. at 303.
88 252 U.S. 416 (1920).
country. Accordingly, where a state's protective scheme has proven inadequate — as indicated by the very threat of extinction — protection of the species pursuant to a treaty expressing the international interest becomes in the language of Missouri v. Holland a "matter requiring national action."90

The proposed Amendment to the Endangered Species Conservation Act,91 explicitly illustrates this treaty power theory. Section 2(a) of the proposal restates the findings of the 1969 Act that the United States has pledged itself in a number of treaties to "conserve and protect ... the various species of fish and wildlife ... that are threatened with extinction," adding that "the conservation, protection, restoration, and propagation of such species will inure to the benefit of all citizens." Previously, the most comprehensive of the treaties thus referenced was the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.92 The 18 signatories to the treaty are pledged to attempt to set up national parks and wilderness areas for the preservation of wildlife,93 but, in addition, they agree in Article V, "to adopt, or to propose such adoption to their respective appropriate law-making bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries," that are not within their national parks or reserves.94 The treaty further provides an annex for the listing by each signatory country of those species needing urgent protection. Such species "shall be protected as completely as possible" and their taking shall be allowed only by government permission.95

Just as the 1969 Act was supported in part as an implementation of this treaty,96 so too, the extension of federal power to prohibit generally the taking of endangered species can be supported on the basis of the treaty. Although not, perhaps, as specific in its obligations as the Migratory Bird Treaty, the Convention at least defines sufficiently the general United States commitment to prevent species extinction to justify as necessary and proper virtually any legislation aimed at protecting such species, wherever taken, or however threatened. While the basis for such legislation will become even clearer when the Senate ratifies the recently concluded Convention on Endangered

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89 See note 43, supra.
90 252 U.S. at 433.
92 October 12, 1940, 56 Stat. 1354 (1942), T.S. No. 981, ELR 40346 (effective April 30, 1942).
93 Id. art. II.
94 Id. art. V.
95 Id. art. VIII.
Species, Congress' present power to act in this field does not seem open to serious doubt.

b. Land use regulation

Even more perhaps than wildlife management, land use decisions have traditionally been viewed as belonging to the states as part of their police power. Increasingly, however, the Federal Government's interest in pollution control and the rational use of limited resources subject to conflicting user demands has led to recognition of a corresponding federal interest in decisions concerning the permissible uses of land. New coastal zone legislation, for example, as well as proposals for a national land use policy contain extensive congressional findings concerning the relationship between "the increasing and competing demands" upon areas of critical environmental concern and the resulting impact on pollution control programs, and on "important ecological, cultural, historic, and esthetic values ... which are essential to the well being of all citizens [and which] are being irretrievably damaged or lost." While both of these examples involve only the limited federal control inherent in a grant program, the question of federal authority to impose direct substantive land use controls, where grant programs prove insufficient, may become increasingly important. Indeed present power plant siting proposals would in effect require federal approval of, and hence ultimately, direct federal control over state land use plans related to the siting of new "electric entities." And existing provisions of the Clean Air Act embrace a similar concept of federal control over land use decisions by requiring that state implementation plans, submitted for federal approval, include "land use and transportation controls" as necessary to meet air quality standards.

At least three theories might be advanced to support these and similar assertions of federal authority over land use decisions. In the first place, the government's power to control the use of its own federally owned lands may justify, as suggested earlier, the imposition of reasonable restrictions on conflicting uses of adjoining lands that might otherwise interfere with the intended use of the federal property. One potential drawback of this theory is that it asserts prerogatives for the Federal Government qua property owner that are not generally enjoyed by other property owners: normally in order to

97 See note 43 supra, and the chapter on wildlife.
99 See the chapter on land use, infra.
100 Coastal Zone Management Act of 1972, 16 U.S.C.A. §§1451 (c) and (e) (Supp. 1973), ELR 41701 (1972).
103 See text accompanying note 65 supra.
ensure control over the use of adjoining property one must seek a voluntary sale or other relinquishment by one's neighbor of his property interests.

A second and more palatable theory may thus be one which rests federal land use authority not on the relationship to the government's interest as property owner, but on the connection between land use controls and the government's power to control other aspects of pollution. The Clean Air Act, mentioned above, provides an illustration. Given federal power to control air quality under the Commerce Clause, any means "necessary and proper" to achieve that end would presumably also fall within the reach of the federal authority, including land use measures designed to reduce the level or concentration of emissions. Other illustrations can easily be imagined. The need for effective pesticide regulation, for example, could conceivably justify regulations controlling the extent and location of lands devoted to pesticide-intensive farming uses. The power to protect water quality can be used as a basis for controlling land uses which have a high potential for water pollution through sedimentation and non-point source runoffs. The power to protect endangered species, as mentioned above, could theoretically be used to protect the habitats of such species, as well as to prevent their taking. In short, given the increasing recognition of the interrelatedness of the problems of ecosystem management, a wide variety of federal land use controls could be justified on a theory that views such controls as necessary and proper to the exercise of federal power over other aspects of the environment.

Finally, federal land use controls may in many cases be justified directly under the Commerce Clause, without the need for indirect reference to other kinds of permissible environmental regulation under that clause. Among the most significant land-use decisions are those that involve the siting of certain basic facilities that are either directly involved in interstate commerce or whose location can otherwise be said to have "substantial effect" on interstate commerce as that term has been interpreted in the Supreme Court cases discussed above. Proposals for national land use legislation that rely on such a "key facility" concept — defined to include major airports and highway interchanges — and proposed power plant siting legislation furnish examples of the kind of land use decisions over which the Federal Government could theoretically exercise control on the basis of the effect of the siting decision on interstate commerce.

B. The Limits on Legislation

Even though particular environmental objectives may be within the reach of congressional regulatory power, the means by which those objectives are attained must still comply with specific constitutional limitations imposed by

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104 See text accompanying note 85 supra.
105 See note 101 supra; the chapter on land use infra.
various provisions of the Bill of Rights. In fact, the potential clash between federal regulatory schemes in the environmental context and individual constitutional safeguards promises to be a more active area for future judicial attention than the logically prior question of congressional power for at least two reasons. First, the extreme breadth of potential congressional power in this area makes it likely that political rather than constitutional considerations will prove to be the limiting factor in determining the proper federal-state balance, thus avoiding the need to probe judicially the ultimate limits of federal authority. Second, the imposition of governmental controls, whether state or federal, over essentially private activities raises issues that have received a considerably greater degree of respectful judicial attention in recent years than is the case with respect to claims that Congress has invaded areas reserved to the states by the Tenth Amendment. Accordingly, new initiatives in the environmental area that regulate the use of property or impose criminal and civil sanctions on environmentally undesirable conduct are more likely to lead to questions concerning, e.g., the “taking” of property or the observance of required procedural safeguards than to claims that Congress has exceeded enumerated powers.

I. Fourth Amendment issues

A regulatory scheme that imposes minimum standards on certain activities or premises in order to protect public health, safety, or environmental values will usually depend for its success on periodic checks for compliance by appropriate administrative officials. This need for administrative inspection must be accommodated to the provisions of the Fourth Amendment concerning the government’s right to conduct searches and seizures. That Amendment has consistently been construed to mean that “except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” Furthermore, such warrants are not to be issued except “upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The leading Supreme Court decisions construing the application of those two requirements in the case of routine administrative inspections are Camara v. Municipal Court and See v. City of Seattle. In the former, the Court,

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106 “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .” U.S. Const. amend. IV.
108 U.S. Const. amend. IV.
110 387 U.S. 541 (1967).
overruling an earlier contrary decision, held that the warrant requirement applied to a municipal health inspector's search of a private residence. In a similar conclusion was reached with respect to a fire inspector's attempted search of a commercial warehouse. But while thus extending the warrant requirement, the Court also indicated that a lesser degree of "probable cause" would be required for an administrative search warrant than for the typical criminal search warrant, thus allowing in the former case, e.g., routine, periodic searches of all structures in a given area based on an appraisal of conditions in the area as a whole rather than on a knowledge of conditions in any particular building. The reasonableness of such inspections is to be determined "by balancing the need to search against the invasion which the search entails," considering such factors as the history of judicial and public acceptance of such inspections, whether inspection is the only reasonable means of abating a dangerous condition of legitimate public concern, and the extent of invasion of the citizen's privacy — the invasion presumably being less where the inspection is "neither personal in nature nor aimed at the discovery of evidence of crime." Specifically excluded from the warrant requirement, however, were traditional "emergency situations;" in addition, the observation that "warrants should normally be sought only after entry is refused" was modified to permit immediate entry in the case of "a citizen complaint, or ... other satisfactory reason." such as where surprise is crucial.

Although and thus establish the basic framework for accommodating inspection needs to Fourth Amendment requirements, three subsequent Supreme Court decisions appear to have expanded somewhat the area of permissible warrantless entries in this context. In the Court interpreted statutes regulating the inspection of federally licensed liquor dealers to preclude forcible entries without a warrant. In the course of its opinion, however, the Court seemed to agree that such entry would not amount to a constitutional violation, distinguishing on the basis of the historically broad authority of the government to regulate the liquor industry.

In the Court upheld warrantless home "visits" by welfare workers on the grounds that such visits were not "searches" and that even if they were, the absence of a warrant did not make them "unreasonable." was distinguished in reaching the latter conclusion primarily on

112 Camara v. Municipal Court, 387 U.S. at 537.
113 Id.
114 See Id., at 539.
115 Id. at 539, 40.
the basis of the community welfare, rather than criminal, context of the home visitations. Finally, in United States v. Biswell, the Court upheld a warrantless search of a locked storeroom under provisions of the Gun Control Act that authorized official entry during business hours for the purpose of conducting inspections of federally licensed dealers in firearms. While conceding that federal regulation of the firearms industry was not as deeply rooted in history as was control of the liquor industry in Colonnade, the Court nevertheless refused to extend primarily on the ground that warrantless inspections were essential to the effective enforcement of the regulatory scheme. In See, the Court observed, the building code violations that the inspection was designed to discover could not easily be corrected or concealed in a short time. "Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system ...." In the case of firearms, on the other hand, unannounced, even frequent inspections were crucial to the success of the system; "and if the necessary flexibility as to time, scope, and frequency is to be preserved, then the protection afforded by a warrant would be negligible." Other factors leading to this result were the "urgent" nature of the federal interest, and the limited threat to "the dealers' justifiable expectations of privacy":

When a dealer chooses to engage in this pervasively regulated business and to accept a Federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection.

These decisions become particularly relevant in the environmental context in view of the extensive reliance of existing and proposed federal pollution control schemes on an adequate system of inspection. The Clean Air Act, for example, bluntly declares that in order to implement and enforce the requirements of the Act appropriate officials:

shall have a right of entry to, upon, or through any premises in which an emission source is located ... [and] may at reasonable times have access to and ... inspect any monitoring equipment or method ... and sample any emissions ...

Virtually identical provisions are contained in the recently enacted Federal Water Pollution Control Act Amendments of 1972. In both cases, questions of the need to secure a warrant and of the grounds that will support entry are

119 Id. at 316.
120 Id.
121 Id.
apparently left for subsequent judicial resolution.\footnote{In contrast, the new Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973 (codified in scattered sections of 7, 15, 21 U.S.C.), ELR 41301, after authorizing entry by appropriate officials at “reasonable times” and “for the purpose of inspecting and obtaining samples,” proceeds to describe in somewhat more detail the procedures to be followed in exercising this right of entry. “Before undertaking such inspection” according to §9(a), the official: must present to the owner, operator, or other agent in charge of the establishment . . . appropriate credentials and a written statement . . . as to whether a violation of the law is suspected. If no violation is suspected, an alternate and sufficient reason shall be given in writing. The immediately following subsection discusses “warrants” but only to the extent of declaring that officials are “empowered” to obtain such documents authorizing entry, inspection, and seizure “upon a showing to an officer or court of competent jurisdiction that there is reason to believe that the provisions of the Act have been violated.” As an attempt to integrate Fourth Amendment requirements with the special needs of an administrative inspection system, these provisions leave a great deal to be desired. In the first place, the standard employed in §9(b) for securing a warrant does not appear distinguishable from the traditional “probable cause” standard which would be applicable in any normal context. See Carroll v. United States, 267 U.S. 132 (1925). (“Probable cause exists where the facts and circumstances within [the officers’] knowledge and over which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that” an offense has been or is being committed.) Thus if §9(b) were interpreted as more than simply an enabling provision, conferring search power on certain officers and employees of EPA, one might conclude that Congress has erected higher standards here than would have been required by the Fourth Amendment: whenever a warrant is necessary, it can only be issued on a showing of probable cause, and not on the lesser showing that would traditionally justify routine inspections as in \textit{Camara} and \textit{See}. Under this view, it becomes all the more important to ascertain just when inspections must be preceded by warrants.}

The latter issue — whether “administrative probable cause” will support routine inspections in the environmental area — should, it seems, be answered in the affirmative by comparison with the factors referred to as decisive in this respect in \textit{Camara} and \textit{See}. Historically, perhaps, routine pollution inspections have not been as traditional as inspections for housing and safety code violations. But if construed broadly enough, one can view the former type of inspection as simply a modern version and recently recognized species of the latter. Moreover, the court’s retreat in \textit{Biswell} from \textit{Colonnade’s} emphasis on history as crucial to the Fourth Amendment inquiry, suggests that this factor should not be decisive in any event. With respect to the other factors, the urgency of the federal interest, the limited nature of the invasion, and the need
for periodic routine inspection do not seem distinguishable from the situations in *Camara* and *See*.\(^{125}\)

The more difficult issue is whether *Biswell* should be viewed as substantially modifying the result in *See* with respect to the need to secure a warrant at all. The factors emphasized in *Biswell* to justify the warrantless search — the urgent (or historical) federal interest, the limited nature of the invasion, and the necessity for random inspections — seem to be the same factors relied on in *See* but only to justify a less than traditional showing of probable cause and not to dispense with the warrant requirement altogether. Explanation for the difference in result seems to lie in the fact that what in *See* appeared to be only an occasional possibility — resort to unannounced surprise inspections — appeared in *Biswell* to be a frequent and vital element of effective enforcement.\(^{126}\) Under this view, the critical factor determining the applicability of the warrant requirement in the environmental context becomes the question of whether frequent, unannounced inspections are essential to effective enforcement of the pollution control scheme. If they are, then as in *Biswell*, requiring prior recourse to such "routine warrants" seems unlikely to result in sufficient additional protection of privacy to make the warrant essential to the "reasonableness" of the search under the Fourth Amendment.

Application of this general test appears very much to depend on the particular kind of pollution control scheme at issue. For example, where the inspection is not random, but is aimed at a particular polluter whose emission into the air or discharges into the water can be measured by an external observer, it seems quite likely that the traditional standard of probable cause to suspect a violation may be met and thus ought to withstand prior judicial testing under a normal warrant procedure. At the other extreme, it is possible that pollution control schemes, e.g., a system of effluent charges which depends on reliable self-monitoring by the affected polluter, can be enforced only by random and frequent inspections. Whether such inspections must also occur unannounced depends on the ease with which the polluter, in the short period following a refusal to permit the search and the securing of a warrant, can remedy the unlawful pollution practice or disguise tampering with self-monitoring equipment.\(^{127}\)

\(^{125}\) *See* [[Note, The Effluent Fee Approach For Controlling Air Pollution, 1970 Duke L. J. 943, 975-76.]]

\(^{126}\) *See* [[text accompanying note 120, supra. For a review of this apparent exception as employed by lower courts since *Camara* and *See*, see *Note, Law of Administrative Inspections: Are *Camara* and *See* Still Alive and Well, 1972 Wash. U. L.Q. 313.]]

\(^{127}\) For further discussion of these possibilities *see* [[Comment, *Camara* and *See*: A Constitutional Problem with Effect on Air Pollution Control, 10 Ariz. L. Rev. 120 (1968); *Note, supra* note 125 at 943. A variety of pollution control schemes appear to require random and even unannounced inspections, although it is not clear that they must be so frequent that prior resort to a warrant where surprise is crucial]]
According to this analysis, the focus of the constitutional inquiry in this area will be very much on the particular regulatory scheme at issue. Since it is not always easy for a court to draw the necessary factual conclusions from an inspection of the substantive provisions of the statute alone, one might expect this field to become increasingly a matter for congressional attention as reflected in the "findings" relied on to support a particular enforcement system. Indeed in both *Colonnade* and *Biswell*, the Court virtually extended an invitation to Congress to define for itself the requirements of "reasonableness" as regards administrative inspections, with the Court impliedly playing a more limited reviewing role in measuring the congressional determination against the demands of the Fourth Amendment. The provisions of the new pesticide legislation which require written notice of the purpose of the inspection\(^{128}\) might, for example, be viewed as just such an attempt to strike a legislative balance between the privacy interests of the owner of the establishment and the enforcement interests of the Government. But this emphasis on an increased congressional role also suggests a possible counterpresumption to protect the interests that underlie *Camara* and *See*: where Congress has not attempted explicitly to set reasonable boundaries to the situations calling for warrantless inspections, and where the facts of the inspection do not otherwise clearly indicate that the warrant requirement would frustrate enforcement, *Camara* and *See* should be viewed as controlling.

2. Fifth Amendment (self-incrimination) issues

In addition to inspection schemes, the effectiveness of governmental regulation of private or commercial activity often depends on the ability to impose record keeping and reporting requirements on those subject to the regulation. Environmental legislation is no exception in this respect, as evidenced by the very similar provisions in both the Clean Air Act and the new amendments to the Federal Water Pollution Control Act, authorizing the administrator of EPA to:

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\text{require the owner or operator of any [emission or point] source to} \\
\text{[1] establish and maintain such records, [2] make such reports ...} \\
\text{and [5] provide such other information as he may reasonably} \\
\text{require} \ldots \]

would frustrate the system. Inspection to ensure that pesticides stored for commercial distribution comply with labeling and use restrictions, for example, seem similar in concept to inspections that have long been conducted under various provisions of the Food and Drug Acts. See, e.g., United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968); cf., United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir. 1970), cert. denied, 400 U.S. 926 (1970).

See note 124, *supra*.

In one respect, the potential Fifth Amendment problems may prove less serious than the just-discussed Fourth Amendment concerns; for although the Fourth Amendment protections apply to the corporate entity as well as the private citizen,\textsuperscript{130} the privilege against self-incrimination applies only to the latter.\textsuperscript{131} Nevertheless, an individual manufacturer or an officer of a corporation required to submit data indicating the amount and kind of pollutants he or his company is introducing into the air or water may find that he has given the government information that incriminates him under provisions imposing criminal sanctions on individuals for such polluting activity. A potential conflict then arises between the government's need for information to implement the regulatory scheme, and the provision of the Fifth Amendment that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The history of the Supreme Court's resolution of this conflict is one that appears clearer in result than in the rationale explaining the result. On the one hand, the Court has consistently rejected the Fifth Amendment argument in connection with routine record keeping requirements such as the required filing of income tax returns\textsuperscript{132} or self-reporting schemes essential to the furtherance of a clearly non-prosecutorial governmental goal.\textsuperscript{133}

On the other hand, in a fairly recent series of cases the Court appeared to give new breadth to the scope of the privilege by invalidating on Fifth Amendment grounds registration and reporting requirements aimed at members of the Communist Party,\textsuperscript{134} gamblers,\textsuperscript{135} owners of proscribed firearms,\textsuperscript{136} and dealers in drugs.\textsuperscript{137} In these cases the Court concluded the reporting requirements were aimed at "a highly selective group inherently

\textsuperscript{131} George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968).
\textsuperscript{133} Shapiro v. United States, 335 U.S. 1 (1948). The refusal to hold the privilege applicable in these contexts, despite the potentially incriminating nature of the information, has resulted in the so-called "required records" doctrine: [The privilege] ... cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established."
\textsuperscript{134} Id. at 33, quoting Davis v. United States, 328 U.S. 582, 590 (1946).
\textsuperscript{135} Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).
\textsuperscript{137} Haynes v. United States, 390 U.S. 85 (1968).
suspect of criminal activities," thus forcing those who complied to run a "real risk" of self-incrimination.

The Court's most recent decision in this area both illustrates the difficulty of articulating a consistent rationale for determining when the privilege is applicable in the self-reporting context and at the same time suggests that the Court is prepared to accord more weight in future cases to the government's asserted information needs than to the individual risk of incrimination. At issue in California v. Byers was the validity of the state's hit-and-run statute, requiring any driver involved in an accident resulting in property damage to stop at the scene and leave his name and address. Convicted for failing to comply with this requirement, defendant Byers succeeded in convincing the California Supreme Court that his conviction was invalid: to comply would have presented him with a "real risk" of self-incrimination under state traffic regulations making illegal the particular driving behavior that had caused the accident. The United States Supreme Court reversed. Four justices, in an opinion by Chief Justice Burger, insisted that under the test enunciated in Albertson, Marchetti, Grosso, and Haynes, drivers involved in accidents were not a "highly selective" group or "inherently suspect of criminal activities." Furthermore, the Court noted, the purpose of the reporting requirement was noncriminal, and self-reporting was essential to fulfillment of that purpose. Only Justice Harlan, whose concurring opinion was necessary for the result, directly faced the fact that from the individual's viewpoint the risk of incrimination under such reporting statues was equally "real" whether or not the general class of accident participants was "inherently suspect." For Justice Harlan, the legitimacy of the reporting requirement was to be determined by balancing this individual risk of incrimination against "the assertedly noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required."*141

Under the plurality opinion in Byers, it seems clear that routine record keeping requirements of the kind imposed in the provisions from the federal air and water pollution control acts, set out above, are not likely to lead to cognizable Fifth Amendment claims. Unlike gamblers and communists, the class of manufacturers subject to these provisions can hardly be said to be inherently suspect of criminal activity, and the disclosures required are in "an essentially noncriminal and regulatory area of inquiry" rather than an "area

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140 See notes 134 to 136, supra.
141 402 U.S. at 454 (1971) (Harlan, J., concurring).
permeated with criminal statutes."142 In this respect the filing requirements appear to fall squarely within the “required records” doctrine, which the Court even in *Marchetti* and *Grosso* took great pains to keep alive143 and which in light of *Byers* now seems destined for a robustly healthy existence. Indeed in his plurality opinion in *Byers*, Chief Justice Burger explicitly referred to the fact that “industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere”144 to illustrate the “many burdens” an organized society imposes (presumably legitimately) on its constituents.

To be distinguished from such routine record keeping requirements, however, are self-reporting provisions triggered by specific, non-routine events that may in turn lead to criminal liability. An example is provided by the oil spill reporting requirements of the Federal Water Pollution Control Act (FWPCA), which require certain persons to notify appropriate officials immediately upon discovery of the spill.145 Since such spills constitute discharges without permits, persons charged with the reporting obligations under the FWPCA could discover that they have been forced to supply information useful to their criminal conviction under provisions of the Refuse Act.146 The potential Fifth Amendment problem is in fact avoided by an explicit use restriction incorporated into the FWPCA's notification requirement. It is nevertheless useful to consider whether under the theory of *Byers* such a use restriction has a constitutional basis as well.

At first glance, the self-reporting scheme in the case of oil spills is similar to that upheld in *Byers*. In both cases, “real risks” of criminal liability may result from the individual’s viewpoint only as an incident to what is primarily a non-prosecutorial governmental interest: ensuring a system of personal financial responsibility for automobile accidents in the one case, and ensuring quick and effective cleanup (as well as civil liability) in the other. Interestingly, however, an argument might be made to suggest that under the plurality opinion in *Byers* the Fifth Amendment privilege would apply. The peculiarity of the Refuse Act is that all discharges without permits are declared criminal, thus making all spills — particularly if scienter is not an element of the offense—147 almost by definition, criminal acts. Accordingly, the class of those required to report such spills, unlike the class of drivers involved in accidents, might be thought to be “inherently suspect” of related criminal activity.

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142 Id. at 430.
143 See *Marchetti* v. United States, 390 U.S. 39, 55-57 (1968); note 133 supra.
144 402 U.S. at 428.
Unless one were to make an exception for statutes like the Refuse Act, which are so seldom enforced as to draw into question the “criminal” character of the activity, *Marchetti*, rather than *Byers*, would appear to be the controlling case. Under Justice Harlan’s opinion, on the other hand, the Fifth Amendment privilege would seem to be equally unavailable in either case: the non-prosecutorial interest in quick clean-up is obvious and strong; immediate self-reporting is even more crucial in achieving that interest than in the hit-and-run case; and the information that must be disclosed is minimal.

Whatever plausibility the above argument may have in the case of oil spills, it is not clear that self-reporting schemes in most pollution contexts would run afoul of the *Marchetti* rationale. After all, it is only after a close examination of the peculiarity of the Refuse Act that one is able even to suggest that those in charge of vessels which spill oil are “inherently suspect” of criminal activity; in most cases the class of persons responsible for such discharges would not be any more suspect of criminal violations than persons responsible for automobile accidents, particularly since proof of scienter or proximate causation are likely to be necessary elements of any potentially related offenses. But the confusion caused by the cases in this area, culminating in the split-rationale of the opinions in *Byers*, lends strong support to the suggestion of a number of commentators that the entire problem be avoided by the use of appropriate statutory use restrictions on compelled information.148 Factors relevant to deciding when such restrictions are appropriate are similar to those which bear on the constitutional question: the strength of the government’s non-prosecutorial interest, and the need for self-reporting in order to further that interest must be considered along with the burden to law enforcement that would result from an immunity grant.149

Applying these factors to the reporting requirements of the oil-spill type, the case for a use restriction is a strong one. In the first place, the interest in immediate and effective clean-up is sufficiently strong and sufficiently dependent on an effective self-reporting scheme to warrant removing any possible obstacle that might result from the fear of self-incrimination, or from a decision not to make the reporting requirement applicable in cases of potential self-incrimination. Indeed, the importance of the incentive of a use restriction in this context influenced the Fifth Circuit in *United States v. Mobil Oil*150 in deciding that the immunity provision of the FWPCA applied to a


"corporate person" even though such corporate entities do not enjoy the privilege against self-incrimination. Second, with respect to the potential burden on related criminal law enforcement goals of the government, a use restriction should also appear unobjectionable in most cases of the "oil-spill" type. Given the limited nature of the disclosures inherent in the reporting requirement, criminal prosecutions for the transaction, unlinked by taint to the required information, need not be significantly diminished. Even if they are, civil penalties and requirements for restitution, which may constitute the more basic governmental interest, could still be imposed.

3. "Taking" issues

Of constitutional obstacles likely to confront future environmental legislation none looms potentially larger than the problem of determining when compensation is required in order to sustain regulations restricting the use of private property. The problem, which arises from the Fifth Amendment's provision that "private property" shall not "be taken for public use without just compensation," is likely to become increasingly important for two reasons. First, despite extensive scholarly discussion and literally thousands of state court opinions on the issue, the line between constitutional "takings," which require compensation, and exercises of "the police power," which do not, has never been drawn clearly enough to justify confident prediction of the outcome of the issue in all cases. Second, although the resulting uncertainty would perhaps be less significant if the issue were to arise only infrequently, such is not likely to be the case in the environmental context. New interest in a wide variety of land use regulations points to potential conflict on a broad front between society's desire to preserve certain resources or to regulate environmentally critical features of land, and the desire of private landowners to maximize the economic value of such land. While easy resolution of this

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151 The discussion in this section reflects the results of a similar exploration of the "taking issue" prepared by the author as a staff member of the Council on Environmental Quality (CEQ) for use in the Council's fourth Annual Report. See CEQ, Fourth Annual Report, chapter 4 (September 1973).


153 See the chapter on land use.
conflict can hardly be expected, a brief review of the dominant themes in the judicial approach to the “taking” issue may furnish a basis for anticipating or suggesting directions for the future.

a. The standard judicial approach: “no set formula”

Among the earliest Supreme Court decisions construing the takings clause of the Fifth Amendment is the Court’s decision in the latter part of the 19th century in Mugler v. Kansas. The Court in that case upheld a Kansas ordinance forbidding the manufacture and sale of intoxicating liquors without requiring compensation of the existing brewery owners for the resulting ruin of their business. Nearly 100 years later, in Goldblatt v. Town of Hempstead, the extent of the Court’s progress in developing a consistent takings theory seemed aptly expressed in the Court’s statement that “[t]here is no set formula to determine where regulation ends and taking begins.” Like Mugler, Goldblatt also upheld the challenged governmental regulation, which prohibited certain mining practices and required owners to fill mined areas, without providing compensation for the resulting economic loss.

The mine owners in Pennsylvania Coal Co. v. Mahon on the other hand — perhaps the best known Supreme Court takings decision — were more fortunate. There the Court held invalid state legislation forbidding the mining of coal in a manner that would undercut the surface land on which homes, public buildings, and streets had been built. Since the mining companies had previously enjoyed the right to mine in such manner (and homeowners and the public had presumably purchased only surface rights), subsequent legislation, the Court held, could not undo the economic relationship to the disadvantage of one side without providing compensation for the resulting loss.

The absence of a “set formula” to explain these differences in result does not mean that no rational distinctions can be made. Indeed the greater danger is that too many and apparently conflicting formulas will be found to fill the resulting void.

Such, in fact, appears to be the current status of takings theory in the courts. Instead of a single formula, at least four theories for deciding when a “taking” occurs emerge from the court opinions, with no single theory providing either a consistent or acceptable explanation for the results in all cases. These four theories may be described as: the “physical invasion” theory; the “nuisance abatement” theory; the “diminution of value” theory; and the “balancing” (of public good v. individual loss) theory. A brief review of the role these theories have played in the development of the judicial

154 123 U.S. 623 (1887).
156 Id. at 594.
157 260 U.S. 393 (1922).
158 Much of the discussion in the text draws on the identification and analysis of
approach to the takings issue may help illustrate why the issue remains a troublesome one.

i. The physical invasion theory

In some respects, the physical invasion theory is at once the most obvious test for taking, and at the same time the least satisfactory. The attractiveness of the theory lies in the fact that it seems to embody the paradigm case of governmental confiscation. Where public agents, for example, assume actual legal control over private property, for instance, by compelling transfer of title from the former owner to the government, a classic case of the use of the eminent domain power seems to be presented requiring compensation. The difficulty arises once one attempts to transform this theory from a sufficient "test for taking," into a necessary test. It takes little reflection to realize that actual transfer of title is not needed in order effectively to appropriate the use of a person's property. In an early Supreme Court decision, for example, *Pumpelly v. Green Bay Company*, 159 the Court agreed that a taking had occurred where the complainant's land had been flooded pursuant to state law providing for the construction of dams for the purpose of flood control. "It would be a very curious and unsatisfactory result," explained the Court:

> if ... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use. 160

At the very least, it seems, the essence of the classic case must lie, not in the actual transfer of title, but in the physical appropriation, by whatever means, of the right otherwise enjoyed by the owner to use and enjoy his property.

ii. The nuisance abatement theory

Once started down this path of reasoning, however, it is not easy to stop. It is not easy, for example, to explain why the appropriation of the owner's right to control the use of his property must be the result of a physical intrusion. 161 The typical case of government impairment of a property owner's

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159 80 U.S. (13 Wall.) 166 (1871).
160 Id. at 177.
161 These four theories as presented in Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964), and Michelman, supra note 152.

The anomalies that result if one assumes that a physical invasion must accompany the restriction on property use are perhaps nowhere better illustrated than in the "inverse condemnation" cases involving airport noise. Those cases are explored at greater length in the chapter on noise. Like the water flooding complainant's land in *Pumpelly*, the noise of aircraft flying over one's land can reduce use opportunities to the point where compensation is required, as the Supreme Court
use opportunities, certainly in the modern context, arises from the use of the simple but effective technique of enacting legislation limiting the uses to which such land can be put.

Accordingly, three additional judicial theories have emerged for determining whether compensation is required in the case of regulations that do not result in actual physical invasions. The first theory, which might be called the nuisance abatement theory, is illustrated by *Mugler v. Kansas*, mentioned above. In explaining why compensation was not required in *Mugler*, in contrast to *Pumpelly*, Justice Harlan observed that in the former case the state was only acting to prohibit a publicly offending use of the property in question:

> The power which the States have of prohibiting such use by individuals of their property ... cannot be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use ... In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.162

This theory, also called the “noxious use theory”163 or “private fault”164 theory, expresses the idea that where private property is used in a manner that harms the general public, compensation is not required when the public reacts to protect itself from the nuisance-like use.165

The nuisance abatement theory has been relied on by courts to sustain a wide variety of regulations. Particularly where health or safety is involved, regulations requiring individuals to bear the expense of conforming to public standards in the area have been treated almost as if they enjoyed “a special

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162 123 U.S. at 669.
164 Michelman, *supra* note 152, at 1196.
165 *See* E. Freund, *The Police Power* §511 (1904).
presumption of constitutionality.\textsuperscript{166} Cases supporting the uncompensated destruction of diseased trees,\textsuperscript{167} animals,\textsuperscript{168} and crops,\textsuperscript{169} or upholding food and drug laws, occupational safety standards, fire regulations and the like\textsuperscript{170} without compensating owners for the resulting expense are typical examples of the theory in operation.

The nuisance abatement theory is, however, subject to criticism to the extent that the application presupposes that the individual subject to the regulation is somehow to blame for the nuisance caused by his activities and hence is \textit{for that reason} in no position to complain of the economic loss that mandatory abatement entails.\textsuperscript{171} The problem with this line of reasoning is illustrated by Justice Sutherland's widely quoted statement that "a nuisance may be merely a right thing in the wrong place."\textsuperscript{172} In many cases, the use that is being made of private property may have been lawful and inoffensive when begun, only to be turned into a "nuisance" because of changed conditions resulting from new growth or new use patterns in the surrounding area. A classic illustration is \textit{Hadacheck v. Sebastian},\textsuperscript{173} where the complainant's brick manufacturing operation was drastically reduced in value as the result of a city ordinance forbidding the use of brick kilns in a residential neighborhood. The Supreme Court sustained the ordinance without requiring compensation even though whatever nuisance was caused from the smoke and fumes of the operation was the result of subsequent residential development significantly postdating the manufacturer's operation. To say who in such a case is "in the wrong place" and hence a "nuisance" — is to announce a result rather than to explain it.

The point is not that cases upholding land-use controls on a nuisance theory are wrongly decided, but only that some better rationale is needed to explain the result than one that denies compensation on the ground that a private owner is to blame for an activity that has become a "nuisance" to

\textsuperscript{166} United States Water Resources Council, Regulation of Flood Hazard Areas, 389 (1971).
\textsuperscript{167} See, e.g., Miller v. Schoene, 276 U.S. 272 (1928); State Plant Bd. v. Smith, 110 So.2d 401 (Fla. 1959).
\textsuperscript{168} See, e.g., Jones v. State, 240 Ind. 230, 163 N.E. 2d 605 (1960) (and cases cited).
\textsuperscript{169} See, e.g. Wallace v. Feehan, 206 Ind. 522, 190 N.E. 438 (1934).
\textsuperscript{170} See generally, United States Water Resources Council, supra note 166, at 389, and cases cited.
\textsuperscript{171} Evidence of this presupposition at work is particularly clear in the so-called "grade crossing" cases, in which railroads have consistently been required to bear the expense of separating railroad tracks from intersecting highways. See, e.g., Erie Railroad v. Board of Public Utility Comm'rs., 254 U.S. 394, 410-11 (1921); Sax, supra note 158, at 49.
\textsuperscript{172} Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).
\textsuperscript{173} 239 U.S. 394 (1915).
neighboring owners or the public. One such rationale, proffered by Professor Sax, suggests that compensation should never be required as a constitutional matter when the courts are acting, as in the above cases, solely in an “arbitral capacity” to resolve conflicting land use desires of private property owners. This suggestion will be explored briefly below.

iii. The balancing theory

A third taking theory (and a second formula for determining when regulation requires compensation) employs what might be called a general balancing test. Under this test competing interests, as evidenced by the particular facts of each case, are weighed against each other. On one side of the balance, presumably, would be the extent of the government’s intrusion as measured by the economic or physical loss to the individual; on the other side would be the public benefit derived from the government action, including, for example the alleviation of a nuisance-like activity. A number of courts and commentators have explicitly embraced some such balancing test.

While this approach at least has the merit of being able to accommodate almost any example of alleged governmental taking, the doctrinal basis for the theory is somewhat questionable. Presumably the theory would make the need for compensation inversely proportional to the degree of public gain: the greater the gain, the less likely that a taking will be found and vice versa. But the public benefit to be gained from the action, while it may be relevant in deciding that government action is proper at all, does not seem obviously relevant to whether compensation is required. Private property is not to be taken at all except “for a public purpose,” and one might well argue that the more evident the public purpose, the more willing the public ought to be to bear the expense of realizing its interest, rather than shifting the burden entirely to a single individual.

Furthermore, the fact that the balancing theory is seldom applied in the converse case, to permit uncompensated physical appropriation where the public gain far outweighs the economic loss to the individual, also casts doubt on the validity of the theory’s basic rationale.

iv. The diminution of value theory

The theory that seems to figure most prominently in judicial opinions on the taking issue centers the analysis on the extent of the economic loss that governmental action has caused to the complaining landowner. The persistence of the theory is perhaps explained by at least two factors. First, as

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176 See, e.g., Kratovil & Harrison, supra note 152, at 609.
177 See Michelman, supra note 152, at 1194.
noted above, discomfort with the logic of the physical invasion theory is most notable when cases otherwise identical in terms of impairment of the owner's use of his property are treated differently solely on the basis of whether a physical invasion occurred. Thus the natural step is to abandon physical invasion as a necessary test for taking, and to focus instead on what appears as the remaining crucial element: destruction of the economic value of the landowner's property, however it occurs.

Second, perhaps the most prominent Supreme Court decision in this area, *Pennsylvania Coal Co. v. Mahon*,\(^{178}\) seems to support the view that a drastic reduction in the economic value of property necessarily triggers the need for compensation. As noted above, the case involved a statute prohibiting the mining of coal in such a way as to cause the subsidence of surface structures. Justice Holmes explained the Court's decision that the coal companies were entitled to compensation for the resulting loss of mining rights as follows:

> One fact for consideration in determining [the limits of the police power] is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.

...  
...  

The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.\(^{179}\)

It should be noted that the diminution of value theory seems to serve at best only as a sufficient, not a necessary, test for taking. Thus, actual physical appropriation of land almost always remains a taking even though the intrusion is economically slight.\(^{180}\) Furthermore, even as a sufficient test for taking, the diminution of value theory is not easily reconciled with the "nuisance abatement" theory discussed above under which courts have not hesitated to uphold legislation prohibiting a "noxious" use, even though the result is virtual destruction of economic value. Indeed, Justice Brandeis' dissenting opinion in *Pennsylvania Coal* indicates that resolution of the taking issue in a particular case will often depend on which theory a court decides.

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178 260 U.S. 393 (1922).

179 *Id.* at 413, 415. Recent literature on the taking issue describes *Pennsylvania Coal* as a case employing a balancing test. See studies cited in note 209, *infra*. If that description were accurate, there would be much less need to worry about the case as a potential obstacle to needed land use regulation. But as the quoted passages in the text suggest—and as the contrasting approach of Justice Brandeis illustrates—Justice Holmes' opinion seems to leave no room for countervailing interests, however strong, to tip the balance against compensation, once the diminution in value has reached "a certain magnitude."

180 *See* Michelman, *supra* note 152, at 1184-85, 1191.
should take precedence. Apparently relying on the nuisance abatement theory, Justice Brandeis would have sustained the Pennsylvania statute:

> Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use .... Whenever the use prohibited ceases to be noxious, — as it may because of further change in local or social conditions, — the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.¹⁸¹

Although the diminution of value theory has been criticized both on historical grounds and in terms of its basic rationale,¹⁸² the most troublesome aspect of the theory is its failure to provide a clear guide to the magnitude of the harm that must be inflicted before compensation is required. Justice Holmes' explanation that a taking occurs when the diminution in value reaches "a certain magnitude" or when regulation goes "too far," leaves unresolved the critical issue of how much is too much. In consequence, a number of subsidiary formulas have been devised by lower courts. Thus cases fairly consistently agree that a taking does not occur merely because a landowner is not allowed to make the most profitable use of his land,¹⁸³ or is not allowed to realize speculative investment potential.¹⁸⁴ At the other end of the scale, regulations depriving property of all potential value or use are often condemned solely on the diminution of value theory.¹⁸⁵ Most cases, however, lie somewhere between these extremes, with the result that courts typically resort to a formula that awards and denies compensation depending on whether a "reasonable use" of the property remains in the face of the restricting legislation. Furthermore, a "reasonable use" in most cases seems to mean some economically profitable use, rather than any possible use.¹⁸⁶

In addition to the practical problems of deciding whether an owner has been left with a "reasonable" remaining use, the diminution in value theory suffers from certain inherent definitional problems. As Justice Brandeis

¹⁸¹ 260 U.S. at 417.
¹⁸² See Sax, supra note 158, at 50.
¹⁸⁴ 260 U.S. at 417; see generally I ANDERSON, THE AMERICAN LAW OF ZONING §2.20 at 85 et seq.
¹⁸⁵ See UNITED STATES WATER RESOURCES COUNCIL, supra note 166, at 398 n.91 and cases cited.
pointed out, dissenting in *Pennsylvania Coal*, the degree of loss will differ depending on whether one simply calculates the value of the coal rendered inaccessible, or compares that value with the total value of the mining companies' property. In the former case, one might conclude that the mining rights have been totally destroyed; in the latter case, one might conclude that the relative economic harm, and hence the owner's ability to bear the loss, is not so significant as to require compensation. These ambiguities in deciding what the particular "thing" is that has been adversely affected and in deciding what consequent proportion of its value is thus destroyed have led commentators to question the adequacy of the theory. 187

b. The "standard approach" in the modern context: illustrative recent controversies

As might be expected, the absence of a single theory to determine when regulation amounts to a "taking," has led to a parallel lack of uniformity among states in resolving the issue in essentially similar fact situations. A good example is provided by the "wetlands" cases, 188 testing the validity of regulations restricting an owner's right to fill or otherwise develop low-lying marsh or coastal lands. Such restrictions, prompted both by flood control concerns and by a desire to preserve resources critical for the conservation and development of wildlife, often result in depriving the private owner of such land of all potential development value.

The tendency of some courts, in such cases, seems to be to require compensation solely on the diminution of value theory. The Supreme Court of Maine, for example, in *Maine v. Johnson* 189 held the State Wetlands Act invalid as applied to the particular land at issue on the basis of lower court findings that appellants' land absent the addition of fill "has no commercial value whatever."190 Although the *Johnson* opinion also elaborates in some detail on the public interest in preserving the valuable marshland resource, such elaboration appears to be little more than window dressing in light of the court's reliance on a formula that automatically equates the extreme loss of commercial value with a constitutional taking. 191

To similar effect is the New Jersey decision in *Morris County Land Improvement Co. v. Parsippany-Troy Hills* 192 holding invalid a meadow

187 See Michelman, supra note 152, at 1192; Sax, supra note 174, at 151-55.
188 See the chapter on wetlands.
190 Id. at 716.
191 The continued validity of the decision in *Maine v. Johnson* may, however, be in doubt in light of the more recent decision of the State's supreme court upholding provisions of Maine's Site Location of Development Law. See In Re Spring Valley Development, Me., 300 A.2d 736, 3 ELR 20589 (1973).
development zone as applied to certain swamp lands. Although the zoning legislation in that case allowed a wide variety of explicitly stated uses, the court noted that many of these uses were "public or quasi-public in nature, rather than of the type available to the ordinary private landowner as a reasonable means of obtaining a return from his property ..." In the court's view, "about the only practical use which can be made of property within the zone is a hunting or fishing preserve or a wildlife sanctuary, none of which can be considered productive." The court accordingly concluded that a taking had occurred under a theory requiring compensation where:

the ordinance so restricts the use that the land cannot practically be utilized for any reasonable purpose or when the only permitted uses are those to which the property is not adapted or which are economically infeasible.\(^{193}\)

Two recent Connecticut cases follow a similar pattern. In *Dooley v. Town Plan & Zoning Comm'n* of the Town of Fairfield\(^{194}\) legislation placing land in a flood plain zone where no improvements were permitted was held invalid. The case admittedly involved an additional complicating factor: the land at issue had only recently been assessed with an $11,000 special levy for a sewage district, thus adding to the apparent harshness of the subsequent land-use restriction. In *Bartlett v. Zoning Commission* of the Town of Old Lyme,\(^{195}\) however, the court left little doubt that it was following a straightforward diminution of value theory. Tidal wetland restrictions in that case were held invalid on the basis of a finding that as a result of the restrictions "the plaintiff's use of his property is practically nonexistent."\(^{196}\)

In contrast to these cases, decisions in Massachusetts and California, apparently employing a more flexible balancing test, have upheld similar wetland regulations despite the resulting destruction of commerical value. The Massachusetts court, in *Turnpike Realty Co. v. Town of Dedham*, explained its decision as follows:

Although it is clear that the petitioner is substantially restricted in its use of the land, such restrictions must be balanced against the potential harm to the community from overdevelopment of a flood plain area.\(^{197}\)

In *Candlestick Properties, Inc. v. San Francisco Bay C. & D. Comm'n*,\(^{198}\) the California Court of Appeals reached a similar result in upholding the denial of a permit to fill bay lands, but the rationale for the result was less

\(^{193}\) *Id.* at 557, 193 A.2d at 242.

\(^{194}\) 151 Conn. 304, 197 A.2d 770 (1964).

\(^{195}\) 161 Conn. 24, 282 A.2d 907, 1 E.L.R. 20177 (1971).

\(^{196}\) *Id.* at 31, 282 A.2d at 910, 1 E.L.R. at 20178.


explicit. Complainant's evidence showed that the land in issue, which was submerged at high tide by the waters of San Francisco Bay, had been acquired in 1964 at a cost of $40,000 specifically "as a place to deposit fill from construction projects." Thus the land had no value "except as a place to deposit fill and as filled land."199 Without disputing this evidence, the court nevertheless upheld the fill restriction, apparently relying on two considerations. First, the court noted the strong public interest in the restriction:

[T]he Legislature has determined that the bay is the most valuable single natural resource of the entire region and changes in one part of the bay may also affect all other parts; that the present uncoordinated, haphazard manner in which the bay is being filled threatens the bay itself and is therefore inimical to the welfare of both present and future residents of the bay area; and that a regional approach is necessary to protect the public interest in the bay.200

Second, the court agreed that "an undue restriction" could amount to a taking, citing Pennsylvania Coal Co. v. Mahon,201 but concluded that "it cannot be said that refusing to allow appellant to fill its bay amounts to an undue restriction on its use."202

It is this latter conclusion that provides the contrast with the Connecticut and New Jersey decisions, noted above, and it is interesting to note how the California court attempted to distinguish both the decision in Dooley and in Parsippany-Troy Hills. In Dooley, the court explained:

the restrictions placed upon the use of the plaintiff's land were so extensive that the land could be used for no other purpose than for a flood control district, with the result that the land was depreciated in value by 75%.203

In view of the undisputed evidence of the effect of the fill restriction on the value of the plaintiff's land in Candlestick, this attempt at distinction seems questionable. More to the point, perhaps, is the courts explanation of how the case differed from Parsippany-Troy Hills:

The purpose of the regulations and restrictions imposed in the instant case is not merely to provide open spaces. Rather, they are designed to preserve the existing character of the bay while it is determined how the bay should be developed in the future (emphasis added).204

199 Id. at 562, 89 Cal. Rptr. at 899, 3 ELR 20447.
200 Id. at 571, 89 Cal. Rptr. at 905, 3 ELR at 20447.
201 260 U.S. 393 (1922).
202 11 Cal. App.3d 572, 89 Cal. Rptr. at 906.
203 Id.
204 Id.
The *Candlestick* opinion thus seems to suggest three possible theories for upholding legislation despite extensive or complete destruction of economic value. The court may be saying: (1) that "reasonable remaining uses" are not to be measured solely in economic terms; (2) that however severe the restriction, it is not "undue" where the public interest is sufficiently great; (3) that a taking does not occur where a mere moratorium is placed on development, pending the completion of a comprehensive plan for rational and controlled future development of the area. In the last case, of course, resolution of the taking issue may simply have been postponed until the formulation of a more complete conservation and development plan. But under any of these theories, the "diminution of value" test of *Pennsylvania Coal* appears to have been modified significantly to allow the public interest in preserving existing features of the bay to outweigh the conflicting interest of the private owner in making an economically profitable use of his land.

c. Updating the standard approach: the relevance of new environmental concerns

It is not the purpose of this discussion to develop a single, consistent theory for dealing with the taking issue in all cases. Indeed, despite the criticisms that have been aimed at various judicial formulations, it may well be that no single formula is either possible or desirable. All such formulas, for example, may prove to be only extrapolations from what is basically an ethical judgment about the fairness of refusing to distribute across a broad base the costs entailed in implementing certain public programs perceived to have positive net benefits.205 As such, the taking clause, like the Due Process Clause and other constitutional expressions of broad, social policy may be expected to reflect changes in society in a way that allows doctrinal development to keep pace with shifting priorities in societal values. It is in this sense that the judicial approach to the taking clause bears re-examination in light of emerging environmental concerns.

The most obvious starting point for conducting such a re-examination is the concept of private property itself. It has never been the law, of course, that title to land automatically entitled the owner to use the land however he pleased. The common law of nuisance, for example, has long placed limits on the means by which one may realize economic gain from land. Property rights, in short, do not exist independently of the protections and responsibilities linked with such rights by the law. As those legal protections and responsibilities change to reflect new social and economic perceptions of society, so also does the concept of private property. It is not an exaggeration to state that in determining when a taking occurs a "definition and redefinition of the institution of private property is always at stake."206

205 See generally Michelman, *supra* note 152.
With one exception, each of the four standard judicial taking theories described above should be able to accommodate new environmental concerns within this process of defining and re-defining “property.” Thus, the physical invasion theory, to the extent that it serves as a sufficient test for taking, can be adjusted to recognize that air, noise, or water pollution can result in physical invasions just as surely as actual entry on land.\(^{207}\) Similarly, the nuisance abatement theory has long recognized that public concern over pollution effects justifies restricting land use practices that threaten environmental values.\(^{208}\) In like manner, the balancing theory’s notion of the public good can easily be broadened to embrace concerns over pollution and the protection of natural resources as additional factors weighing in favor of particular land use regulations.

The single apparent exception is the diminution of value theory. Apparently endorsed by the leading, if somewhat dated, Supreme Court decision in *Pennsylvania Coal*, the idea that extreme reduction in the value of land results in a taking of property seems to leave little room for consideration of countervailing public interest. The question to be explored in the following pages is whether a rationale can be developed for rejecting in some cases the apparent automatic equation of destruction of commercial value with a constitutional taking.

1. **Distinguishing “regulation” from taking**

   It is possible to view the development that extended compensation for restrictive regulations as well as for actual physical appropriations of property as the result of a refinement of what it means to take property rights. The upshot of that development, as noted above, has largely been to increase the occasions for compensation as distinctions between destruction by regulation and by direct takeover came to be discarded as superficial. At least one recent study suggests that this development is supported neither by history nor logic, and considers whether courts might not do better to abandon *Pennsylvania Coal* and return to the “simple and unsophisticated principle” that a taking occurs only when the government physically appropriates property.\(^{209}\)

   While there is some evidence that this result may already have been reached in part, at least as far as the continued vitality of *Pennsylvania Coal* is concerned,\(^{210}\) — the conclusion that regulation can never amount to a taking

\(^{207}\) See text accompanying notes 159-60, *supra*.


\(^{210}\) See Sax, *supra* note 158, at 42-43 (“the opinion [in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)] leaves some doubt about whether the Court is following, or repudiating, the Holmesian [diminution of value] doctrine”).
seems to sweep with a brush too broad for intellectual comfort. Although one may admit a wide range of disagreement over what is essential to the concept of "property," the mere fact that one can boast record title to a physical parcel of land is by itself the least important ingredient; it is the legal effect of such ownership, as reflected in one's ability to use and enjoy such land that gives material content to the purely formal fact of ownership. Where the practical effect is to deprive an owner of all such possibilities for use of the land, it is not easy to see why different legal consequences should attach solely on the basis of whether the government chose to act by way of condemnation or by regulation.\footnote{See Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (Ct. App. 1938) ("The only substantial difference . . . between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden").}

More promising than a categorical exclusion of all restrictive regulations from the purview of the takings clause is an approach that excludes only certain kinds of regulation. A good example of this approach is illustrated in a recent proposal\footnote{See Sax, supra note 174.} to redefine property rights in a way that takes account of the inextricable relationships between discretely owned parcels of land, and that accordingly limits any single owner's inherent "right" to use his land in ways that adversely affect others. According to this theory, when one person's use of his property has spillover effects that impose costs on other landowners (for example, the erosion effects of strip mining on lower-lying land) or that impinges on public rights (for example, the pollution of common resources such as air or water) neither owner can be said to have an a priori right to insist on his choice of property use; hence both owners should be treated alike with respect to compensation when one use or the other is restricted. When the government arbitrates in the case of such conflicting uses — for example, by imposing slope limitations on strip mining — compensation should not be constitutionally required for the mine owner's loss, any more than it would have been for the erosion losses suffered by adjoining landowners (or the
water quality losses suffered by the more diffuse public) if the mining practices had been left unregulated.

This theory, while it has the merit of providing a ready solution to most of the present taking problems, is only slightly less broad than the previous theory. For in almost every case of current concern — wetlands preservation, airport noise, strip mining, billboard regulation, flood plain zoning — the issue will involve conflicting uses having spillover effects, with the result that any potential constitutional problem of compensation is eliminated whichever way the conflict is resolved.

In addition, it is not completely clear that the theory explains why current judicial emphasis on providing compensation where economic value has been severely destroyed is unsatisfactory. In the strip mining example, for instance, if one should decide to resolve the conflict in favor of the mining operator by leaving his operation unregulated, the spillover effects which adjoining landowners or the public would be forced to suffer as a result are not likely in the typical case to prevent all further reasonable or economic use of the land. If the converse is not the case, i.e., if regulation of the mining operation destroys all potential economic value, then to restore “relative positions of equality”\(^{213}\) seems to require that this choice be tempered by providing some compensation — thus placing the mining operator in a roughly similar position as would have been enjoyed by the competing landowners if the arbitration had gone the other way. While each landowner may be said to have an “equal” right to determine the use of his property, the effect of giving up that right in a particular case may have quite unequal consequences in terms of a landowner’s remaining property rights. It is this relative inequality of the magnitude of the spillover effects, as seen from the viewpoint of the party that must bear them, that appears to give the diminution of value theory its initial plausibility.

ii. The nuisance theory revised

One need not resort to the theory that regulation can never (or seldom ever) amount to a taking in order to find a substantial body of judicial precedent for the proposition that in some cases regulation will not amount to a taking despite the diminution in value.

As noted earlier, the nuisance abatement theory has often functioned in the past as just such an exception to the rule that extreme loss in value results in a taking. A good example is provided by the case of Hadacheck v. Sebastian,\(^ {214}\) discussed above, in which the Supreme Court upheld an ordinance prohibiting the manufacture of bricks despite evidence that the property owner’s land was diminished in value by over 90 per cent, from $800,000 to $60,000. This case was relied on by Justice Brandeis in his dissenting opinion

\(^{213}\) Id. at 166 n.32.

\(^{214}\) 239 U.S. 394 (1915).
in *Pennsylvania Coal*. Six years after *Pennsylvania Coal*, the Supreme Court in *Miller v. Schoene*\(^{213}\) upheld a Virginia statute that required the destruction of a landowner's red cedar trees infected by cedar rust. The rust infection was not dangerous to the cedar trees, but was fatal to the fruit and foliage of nearby apple orchards. Relying on *Hadacheck* without even citing *Pennsylvania Coal*, the Court agreed that the paramount public concern justified the state's decision to protect apple trees even though it impaired the value of the complaining landowner's property. "Where the public interest is involved," the Court noted, "preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."\(^{216}\) Thirty-four years later, the Court also cited *Hadacheck* as a precedent for its result in *Goldblatt v. Town of Hempstead*.\(^{211}\) As described above, that case upheld prohibitions on mining activity that appeared to deprive the owner of all further economic use of his land.

The above cases indicate that there is considerable judicial precedent for upholding state regulation even where the effect is substantial impairment of economic value. The problem lies in articulating an underlying rationale for the nuisance abatement theory followed in these cases. As noted earlier in this chapter, the theory is sometimes tied to the notion that the landowner is somehow to blame for activities determined to be harmful and is for that reason in no position to complain of the loss in value when his activity is restricted. But the implication of fault is not essential to the theory. In all of these cases the same results can be reached simply by asserting the paramount public interest in preventing certain kinds of activities that are particularly likely to invade the interest of a significant segment of the public or of surrounding landowners. By thus shifting the focus to the relative priorities society has assigned to competing interests one need not rely on make-weight arguments about which of two or more landowners is primarily "at fault" for a problem.

Even with this articulation, however, a conceptual problem still exists in explaining just when the nuisance abatement theory should be applicable. Every legitimate exercise of the police power implicitly involves an assertion of paramount public interest in prohibiting certain private activities. If the nuisance abatement theory is to be used to determine when such assertions of public interest do not require compensation, it must be because the theory reflects more objective standards of society concerning the rights that one can expect to accompany the ownership of property. In *Hadacheck v. Sebastian*, for example, the noise, smoke, and fumes emitted by the brick manufacturing

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\(^{216}\) 276 U.S. 272 (1928).

\(^{216}\) Id. at 279, 280 (emphasis added).

\(^{217}\) 369 U.S. 590 (1962).
operation corresponded fairly closely to the traditional kind of activity subject to abatement under common law theories of nuisance; thus to refuse to allow the concept of property to embrace rights that accompany property ownership. In contrast, application of the theory in *Mugler v. Kansas*\(^{218}\) is somewhat more questionable. In that case, to label the brewery business a nuisance it seems, is little more than to announce a reordering of values that the complaining property owners could scarcely have anticipated when their businesses were established. This defect is avoided if the nuisance abatement theory is limited to cases where some objective standard limits the scope of property rights in accordance with implicit — if not yet legally embraced — expectations of society. The nuisance abatement theory then is a means of determining those types of cases in which an owner's expectations concerning the use of his land can be said to be unjustified, requiring him to take the risk that such uses will be subsequently restricted.\(^{219}\) Under this approach, one avoids the objection that property has been redefined in new directions that could not have been anticipated.

The nuisance abatement theory, thus understood, could uphold a wide variety of land use regulations based on environmental concerns. Restriction of land use practices that entail obvious adverse pollution effects, threatening the safety and health of the public or adjoining landowners, for example, (as in the case of many mining activities) would not normally require compensation regardless of the resulting economic impact. Whether the theory also has

\(^{218}\) 123 U.S. 623 (1887).

\(^{219}\) Whether the brickmaker in *Hadacheck* can in fact be expected to be on notice that his activities, "innocent" at the outset, are subject to later restriction may appear an historical question that limits the usefulness of the theory to cases where society's ordering of priorities has been made fairly clear. See Michelman, *supra* note 152, at 1242-45. However, where the effects of the activity in question have unquestionable potential for harm (the only question being whether subsequent development will place persons in sufficient proximity for the harm to be realized), subsequent regulation should not be viewed as upsetting legitimate expectations. It should not come as a total surprise to the prudent entrepreneur to think that activities with obviously harmful spillover effects may have to be insulated from other property owners through purchase of a buffer zone or be discontinued. Only where society subsequently discovers "harm" in activities previously thought innocent, as in *Mugler*, does the claim of unfair surprise have initial appeal. Even then, however, if one translates the "fairness" issue into the question whether the prudent investor, warned in advance of the fact that he must assume the risk of changes in society's values, would have significantly altered his investment decision, it is not clear that cases like *Mugler* should be differently decided.
application outside of the pollution context is discussed in the following section.

iii. The critical natural features theory

One recent approach, limiting the right to make profitable use of private land, builds on the above rationale of refusing to recognize as legitimate, expectations of economic profit that are inconsistent with widely prevailing standards of society.

As understanding of the interrelatedness of environmental concerns increases, so also does the identification of what might be called critical, "natural" features of the land, the alteration of which will drastically affect areas of vital public concern. The wetlands cases provide a good example. Population and urban expansion pressures have presented developers with opportunities to realize profits through expensive fill or reclamation techniques designed to overcome natural limitations in land. Such land, in its undeveloped state, serves a number of important functions, including flood control and ecological balance. To assume that one has an inherent right to make such alterations ignores or distorts an obvious relationship between such activity and interests of the public that have long existed, but that until recently, have been taken for granted. To declare in such cases that the public interest limits what would normally be accepted as property in a typical case of conflicting interests should not seem an undue restriction on the concept.

As with the nuisance abatement theory, the "critical natural features" theory does not depend on one's particular subjective view about what is or is not "natural" or on elevating the natural features of land to special protective status. The emphasis on the functions that particularly vital lands serve in their natural state is meant to explain why a declaration of paramount public interest, limiting the right to alter such features, need not be seen as overturning legitimate prior expectations of property owners. To require an owner to assume the risk of changing notions of property in the case of land that exhibits on its face, as it were, its publicly crucial nature seems a significantly lesser imposition than the risk assumed, for example, by the brewery owners in Mugler v. Kansas concerning possible changing public attitudes toward alcoholic beverages.

Judicial support for this theory can be found in the wetlands decision of the Wisconsin Supreme Court in Just v. Marinette County. Faced with a taking challenge to prohibitions on the filling of land similar to the prohibitions that had led to conflicting results in other jurisdictions, the Wisconsin court upheld the restriction expressing dissatisfaction with "the basic rationale which permeates the decision that an owner has a right to use his property in any way and for any purpose he sees fit." Especially important

220 56 Wis.2d 7, 201 N.W.2d 761, 3 ELR 20167 (1972).
to the court were the important public interests served by the land in its natural state:

In the instant case we have a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property .... What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of the shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty.....

Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes? An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.

The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural states but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of land at the expense of harm to public rights is not an essential factor or controlling.221

Just v. Marinette County thus stands as an explicit judicial recognition of an exception to the diminution of value theory in the case of regulations preserving publicly critical natural features of land.

iv. The moratorium theory

In addition to the above theories, one additional theory deserves mention as a special exception to the idea that severe diminution of value automatically constitutes a taking. The basis for this theory is the new awareness that natural systems are interrelated in complex ways that often make it extremely difficult to predict the full range of consequences likely to follow from changes in any single part of the system. The literature of the past ten years is replete with examples of adverse effects caused by changes in land use that were recognized only after the fact. Swamps were drained and aquatic production was reduced. Houses were built on steep slopes and landslides occurred. Flood plains were occupied and aquifers were depleted. Examples such as these

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221 Id., at 16-17, 201 N.W.2d at 767-71, 3 ELR at 20168.
provide pressure in some cases to place what might be called a legislative moratorium over alteration in certain critical ecological systems pending a fuller understanding of the potential consequences of such alterations. If such pressures are resisted because of the potential compensation problem, then valuable public benefits may be lost for which society would have been willing and able to pay if only it had had opportunity to calculate accurately those alterations that could be permitted and those that should be avoided at the price, if necessary, of public compensation.

In such cases, to prohibit private development, even if economic value is thus temporarily destroyed, does not seem a drastic invasion of private expectations about the rights that accompany ownership of land. Economic value may after all eventually be restored in such cases. Furthermore, such a prohibition in effect only requires an owner to give up the right to run the risk that the unforeseen consequences of his activities may turn out to be disastrous.

As noted previously the California decision in Candlestick Properties seems to rely in part on this theory in explaining why a prohibition on fill in the San Francisco Bay did not result in a taking of property. In a somewhat different context, a recent opinion of the United States Court of Appeals for the First Circuit in Steel Hill Development, Inc. v. Town of Sanbornton, provides a more explicit illustration of the moratorium theory in operation. At issue in the case was the validity of a zoning amendment enacted by a New Hampshire town, imposing a six acre minimum lot requirement on 50 per cent of the town's area. The amendment, designed to preserve the rural nature of the town and to avoid environmental and growth problems threatened by proposed recreational home development, resulted in rezoning 70 per cent of the appellant development company's land. In upholding the lot size restriction, the court first recognized the legitimacy of the general purpose which was the object of the amendment:

We recognize, as within the general welfare, concerns relating to the construction and integration of hundreds of new homes which would have an irreversible effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change

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222 See text accompanying note 198 supra.
224 469 F.2d 956, 3 ELR 20018 (1st Cir. 1972).
225 The developing company relied in its challenge to the lot size restriction on cases in other jurisdictions that seemed to establish that such restrictive, growth-resisting devices were impermissible exercises of the police power. The First Circuit found these cases distinguishable on the basis of the different problems involved in controlling suburban as opposed to rural expansion. Compare In Re Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970), with Steel Hill Development, Inc. v. Town of Sanbornton 469 F.2d at 961, 3 ELR at 20020.
the rural character of this small town, pose substantial financial 
burdens on the town for police, fire, sewer, and road service, and 
open the way for the tides of weekend "visitors" who would own 
second homes.\textsuperscript{226}

Although the court admitted that it was "disturbed" by the lack of evidence to 
show that the town had carefully related this general environmental concern to 
the specific six acre limitation, it nevertheless upheld the limitation:

\[\text{[A]t this time of uncertainty as to the right balance between \}
\text{ecological and population pressures, we cannot help but feel that \}
\text{the town's ordinance, which severely restricts development, may \}
\text{properly stand for the present as a legitimate stop-gap measure.} \]
\[\text{In effect the town has bought time for its citizens not unlike the} \]
\[\text{action taken in referendum by the City of Boulder, Colorado to} \]
\[\text{restrict growth on an emergency basis until an adequate study can} \]
\[\text{be made of future needs.}\textsuperscript{227}\]

The moratorium theory in this case was admittedly used to resolve the issue of 
whether the town's ordinance was a legitimate exercise of governmental power 
at all, rather than the taking issue of whether compensation was required;\textsuperscript{228} 
but under the suggestion presented here the same theory should be equally 
dispositive of the taking claim, however great the resulting reduction in the 
value of the land.

\[d. \text{ A concluding postscript: the importance of the legislative role}\]

The thrust of the preceding analysis has been to suggest that the occasions 
requiring compensation as a constitutional matter should be considerably 
fewer in number than might be thought to result from an initial review of 
traditional judicial formulas. Indeed, even without lengthy analysis, one might 
conclude that the relative scarcity of Supreme Court decisions on the issue\textsuperscript{229} 
is a sign that legislatures should be left considerable room for experimenting 
with land-use controls and that state courts should be slow to invalidate such 
experiments on federal constitutional grounds for failure to provide compensa-
tion. It is important, however, to note that this conclusion in no way 
diminishes the responsibility of legislatures to devise appropriate statutory 
schemes for allocating between affected individuals and the public the costs of 
new land use initiatives. Removing the constitutional barrier only sets the 
stage for a variety of possible legislative formulas for providing compensation.

\textsuperscript{226} 469 F.2d at 961, 3 ELR at 20020. 
\textsuperscript{227} Id., at 962, 3 ELR 20020. 
\textsuperscript{228} The latter challenge was quickly dismissed under traditional theories with the 
observation that "although the value of the tract has been decreased considerably, 
it is not worthless or useless so as to constitute a taking." Id., at 963, 3 ELR at 
20201. 
\textsuperscript{229} The relative infrequency of Supreme Court decisions on the issue is noted in 
Dunham, supra note 152, at 65.
many of which have received considerable attention in the literature.  

Even more important, a responsible and careful approach to the problem on the part of the legislature may itself be an important factor in the resolution of the constitutional issue. The Connecticut decisions in Dooley and Bartlett, for example, both of which invalidated fill prohibitions, might have been decided differently if the legislation had provided for a procedure through which individual development applications could be evaluated. The use of just such a "special permit technique" favorably influenced the Wisconsin court in Just v. Marinette County. By contrast, much of the concern of the First Circuit in the Sanbornton decision resulted from the apparent arbitrary selection, without supporting explanation, of the six acre limitation. The lesson of such cases is that increased constitutional accommodation of needed land-use controls should not be taken as an invitation to ignore completely the resulting burden on individual landowners. By providing procedures to adjust regulations on a case-by-case basis, and by carefully tailoring restrictions to keep them as closely commensurate as possible to the problem that justifies the restriction in the first place, the burden on property owners can be reduced and the potential constitutional obstacle more easily surmounted.

4. Other issues

a. Delegation

While the three issues discussed above are likely to provide the most fertile field for judicial attention in the immediate future, other constitutional problems of somewhat more speculative current status deserve brief mention. One such problem potentially arises when Congress delegates power to establish policy or make law to the Executive Branch or the judiciary. The problem of delegation in the former case is today virtually conceded to have taken its place along with other Supreme Court doctrines that at one point in history enjoyed considerable sway, but that appear now to have been virtually discarded. Although Supreme Court decisions near the end of the 19th century began flatly to declare that Congress could not delegate legislative power, culminating in such cases as Panama Refining Co. v. Ryan.

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231 See text accompanying note 194 supra.
232 See text accompanying note 195 supra.
233 56 Wis. 2d 7, 201 N.W.2d 761, 770, 3 ELR 20167, 20169 (1972).
234 469 F.2d at 960, 3 ELR at 20019.
235 See K. Davis, Administrative Law 30 (1965 ed.).
236 293 U.S. 388 (1935).
and *A.L.A. Schechter Poultry Corp. v. United States*\(^{237}\) the dominant opinion today is that "nothing but a congressional abdication or clear abuse is likely to be held an invalid delegation."\(^{238}\) Certainly examples abound today of legislation that invests federal agencies with broad powers to determine standards and set policy in areas only generally defined by Congress. Current and future environmental legislation that similarly entrusts specified federal agencies with the responsibility to determine acceptable levels of pollution or otherwise set environmental policy should be no more vulnerable on delegation grounds than these.

The question of the validity of the delegation of environmental standard-setting authority to the judiciary is potentially more serious, at least as the issue is presented in the context of recent proposed federal legislation. Modeled after the Michigan "Sax Act,"\(^{239}\) this legislation would broadly empower courts to determine whether a defendant's actions constitute an "impairment or degradation of environmental quality."\(^{240}\) Although this determination may be made on the basis of specific environmental standards contained in other legislation, the court under the proposal is not limited to relying on such standards, but is empowered generally to determine whether "the environmental and economic costs of the action exceed the benefits to be derived from such action."\(^{241}\) In essence, such legislation places the court in the position of making the balancing judgment concerning the relation of adverse environmental effects to countervailing social and economic benefits alleged to justify such effects, that is presently made in the typical case by Congress or designated federal agencies. Lower state courts in Michigan have reached differing conclusions concerning the constitutionality of the Michigan Act\(^{242}\) and leading administrative law scholars have suggested that the constitutional problem is at least not trivial.\(^{243}\)

\(^{237}\) 295 U.S. 495 (1935).
\(^{238}\) K. Davis, supra note 235, at 44.
\(^{239}\) MICH. STAT. ANN. § 14.528(201), ELR 43001 (1970).
\(^{240}\) S. 1104, 93d Cong., 1st Sess., §§302(a).
\(^{241}\) S. 1104, 93d Cong., 1st Sess., §§820(b)(2)(B) 301(c)(2).
\(^{243}\) See Jaffe. Book Review, 84 HARV. L. REV. 1562, 1568 (1971); *Hearings on
The distinct role of the judiciary in our constitutional scheme lends some support to these suggestions of possible constitutional infirmity. The task that such legislation requires of a court is to perform an intricate balancing operation with respect to competing societal values that, unfortunately, do not have readily verifiable weights. The question of whether certain social or economic objectives outweigh adverse environmental effects depends on how much importance one attaches to such objectives. It is precisely because this judgment varies from one individual to the next that resolution of such competing value judgments has been thought most appropriately a matter for the democratic process of legislative or administrative decision making, rather than for adjudication in the courts.\textsuperscript{244}

At least two countervailing considerations, however, suggest that the constitutional problem may not be as serious as might seem the case at first glance. In the first place, it is not the case that the judiciary today is left with no guidance concerning the relative weights to be assigned competing values in making the required balancing judgment. A wide variety of sources of standards governing environmentally degrading activity is already available in federal, state, and common law for help in fashioning such standards. Second, partly as a result of legislation such as the National Environmental Policy Act of 1969 (NEPA), courts may already be said to be in the business of checking the balancing judgment made by federal agencies in environmentally significant cases, as they have long been in the business of assessing the reasonableness of actions challenged under antitrust or nuisance laws.\textsuperscript{245} To be sure, the judicial standard for reviewing the substantive decision in NEPA cases appears to date to be limited to the "arbitrary and capricious" test of the Administrative Procedure Act.\textsuperscript{246} But to make even that judgment requires a minimum judicial ability to weigh alleged benefits against environmental costs. To extend that requirement to encompass what amounts to de novo review of such decisions may be a difference more of degree than of kind, lessening the force of the constitutional objection.

b. \textit{Equal protection}

For the most part, legislative regulation of environmentally harmful activities of individuals or business concerns should not be vulnerable to claims that others, "similarly situated", have not been dealt with equally

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\textsuperscript{244} But see Sax and Conner, supra note 242.

\textsuperscript{245} See Sax and Conner, supra note 242, at 1068 and notes 259-60.

\textsuperscript{246} See, e.g., Conservation Council v. Froehlke, 473 F.2d 664, 3 ELR 20132 (1973); see generally the chapter on the National Environmental Policy Act.
harshly. In this respect, as discussed elsewhere in this chapter, environmental regulation resembles economic regulation and should similarly require only a rational relationship to a legitimate legislative objective in order to withstand attack on equal protection grounds. Familiar principles in this context — a statute is not invalid under the Constitution because it might have gone farther than it did; a legislature need not “strike at all evils at the same time;” “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind” — should operate to provide wide leeway for legislative initiatives. Recent cases that have considered the issue in the environmental context have had little trouble rejecting the equal protection argument.

A potentially more troublesome issue arises when environmental measures clash with more personal or fundamental interests or appear to involve “suspect classifications.” Considerable attention, for example, has recently been focused on urban zoning techniques which operate to exclude large, typically poor segments of a city’s population from surrounding suburbs or other urban areas. Such exclusionary zoning, it is argued, operates in practice to discriminate on the basis of wealth or race, and hence runs afoul of the strict equal protection doctrines applicable in such cases.

To some extent this problem may be avoided where the context clearly indicates that the purpose of such zoning techniques is closely related to legitimate environmental objectives, or where any incidental restrictions on movement do not fall disproportionately on a single, identifiable class. The Sanbornront decision, for example, as mentioned previously, seemed to rely on distinctions of this sort in upholding large lot size restrictions in a rural setting that had been invalidated in other jurisdictions — though not on equal protection grounds — in suburban and urban contexts.

c. Fundamental personal rights

i. Growth restrictions and the right to travel

The potential equal protection problem associated with exclusionary zoning serves to highlight a more general problem that may confront the environmental movement, particularly as that movement comes to embrace problems of limiting or controlling growth. Recent state cases invalidating exclusive zoning techniques seem to express the view that local governments

247 See text accompanying notes 464-76, infra.
248 See Miller v. Wilson, 236 U.S. 373, 384 (1915).
must learn to deal with the problems of growth without resorting to arbitrary methods designed to limit such growth. An example is provided by the Pennsylvania Supreme Court's decision in *In Re Kit Mar Builders, Inc.* which held invalid a minimum three acre lot restriction:

The implication of our decision ... is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any township to say who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.

While the precise issue confronting the court was the legitimacy of growth control as an object of the exercise of municipal police power, the quoted passage seems to convey a broader concern for protection of individual freedom to choose where one shall move or live or establish one's residence. This concern finds additional constitutional support in a number of Supreme Court decisions affirming the "right to travel" as a fundamental liberty subject to infringement only on the showing of compelling state reasons. *Shapiro v. Thompson,* provides a recent example. In that case, the Court held invalid minimum durational residence requirements imposed by state law as a condition precedent to the receipt of welfare benefits on the ground, in part, that such restrictions operated to penalize an individual's exercise of the right to travel. If the indirect effect of such residence requirements on an individual's freedom to travel can be said to be sufficiently inhibiting to raise a constitutional issue, then a fortiori, it would seem, a similar conclusion must be reached with respect to measures specifically designed to control growth by limiting ingress.

Although no court seems yet to have faced this issue, commentators have not been slow to see in the right to travel a potential weapon for challenging exclusionary zoning. Although the target of such attacks are urban zoning schemes which usually also have equal protection overtones, it should be recognized that the discrimination issue is not easily separated from the right to travel issue in this context. Efforts to protect a desirable environment by limiting the number of people who may live in the area will result in higher

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254 Id. at 474-75; 268 A.2d at 768-69.
prices for the available housing or lots with a consequent regressive effect on people of lower income. This very relationship, however, should caution against extending the logic of the right to travel argument to its apparent extreme. For every attempt of a state to enhance its environment — from the construction of parks to the provision of quality schools — could lead to higher property values relative to other states, thus inhibiting ingress by lower income groups. The absurdity of interpreting the right to travel in a way that would penalize state diversity and self-improvement and ultimately require conformity to the lowest common state denominator suggests that something more than mere economic envy must serve as the touchstone for determining applicability of the argument.

These considerations suggest that similar factors might be relevant in dealing with both the right to travel issue and the equal protection issue whenever either is raised in the growth restricting context. Thus, for example, where the facts of a particular legislative scheme reveal a strong environmental objective closely related to the growth restricting legislation — as where growth is limited to what can reasonably be supported in terms of the existing features of the land or the available sewage and other essential services — and where the effect of the restriction is to limit travel only in the sense of making property economically inaccessible to a segment of the state (for residents and non-residents alike), the legislation should be upheld.\footnote{257}

\textit{ii. Population control and the right to privacy}

This chapter concludes by noting the potential support commentators have found in \textit{Griswold v. Connecticut}\footnote{258} for arguments urging recognition of a constitutional right to a decent environment. That same decision, however,

\footnote{257} It should be noted that \textit{Shapiro v. Thompson} involved a legislative distinction between migrants and non-migrants that operated to penalize interstate travel. A state concerned to protect particular environmental values from over-use could thus arguably avoid the right to travel problem by restricting access, not on the basis of length of residency, but by reference to criteria that are neutral with respect to length of time spent within the state. \textit{See Dunn v. Blumstein, 405 U.S. 330, 342 n.12 (1972)} (varying age requirements for drivers' licenses do not raise right to travel issues). \textit{But cf. King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir 1971), cert. denied, 404 U.S. 863 (1971)} (right to travel between states requires acknowledgement of "correlative constitutional right to travel within a state"). Whether a state could afford preferential treatment to established residents in providing access to parks and the like (on a "past tax contribution" theory) is unclear, \textit{see Vlandis v. Kline, 412 U.S. 441 (1973) (Marshall, J., concurring), but may find an implicit affirmative answer in the logic of cases upholding higher tuition for non-resident students. Compare Starns v. Malderson, 326 F.Supp. 234 (D. Minn. 1970), aff'd mem. 401 U.S. 985 (1971), with Vlandis v. Kline, 441 U.S. 441 (1973).}

\footnote{258} 381 U.S. 479 (1965).
and more notably the recent Supreme Court decision in *Roe v. Wade*, which invalidated most state abortion laws, operate equally as potential limits on the means by which objectives that may in the future be thought environmentally desirable are to be achieved. Although the precise result of those decisions is to establish that the right of personal privacy prevents complete state control — absent a compelling justification — over the abortion decision, the logic of the cases must be seen as equally establishing individual control over the converse decision — not to abort. Indeed the “right to procreate” can trace its constitutional status to decisions antedating *Roe v. Wade* by at least 30 years. The issue thus posed is the extent to which potential population control measures may be affected by the need to avoid infringing on the autonomy of the individual with respect to the birth decision.

It is not the purpose of this chapter to do more than make note of this issue here, although discussions of the general problem have already made their expected appearance in the literature. Since the type of legislation that would most dramatically pose the issue — mandatory birth control — seems a political unreality at present, speculation concerning the issue may be better postponed until, if ever, the need for some such control becomes more generally admitted.

II. CONSTITUTIONAL LIMITS ON THE STATE ROLE: PRE-EMPTION PROBLEMS AND RELATED ISSUES

A. The Precedential Framework

The fact that the Federal Government enjoys and is increasingly exercising broad power to protect the environment has recently brought to center stage another familiar constitutional issue: the proper allocation of roles between state and federal levels of government in controlling pollution concerns common to both. Thus put, of course, the problem in one sense is easily solved. The scheme of our federal system, as set forth in the Supremacy Clause of the Constitution unambiguously assigns to the Federal Government the upstage role by making the Constitution and federal acts “the Supreme Law of the Land.” Thus solved, however, the problem is only shifted from

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259 410 U.S. 113 (1973).
262 U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall
one of determining who shall play the lead in cases of conflict to one of determining when such conflict must be seen to exist.

An outline of the basic constitutional script may be briefly given. Congress on the one hand enjoys specified powers described for the most part in Article I, §8 of the Constitution. The states, although expressly forbidden by Article I, §10, to exercise certain kinds of powers, retain all other powers "not delegated to the United States ... or to the people." These broadly encompass the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." It is not surprising that powers so broad in scope should overlap with some of the specific powers ascribed to Congress, most notably the power to regulate foreign and interstate commerce. Where state legislation enacted pursuant to its police powers affects such commerce, a potential for conflict arises in two contexts. First, where Congress has not exercised its overlapping power in the same area, the question whether such power is vested exclusively in Congress, potentially barring state attempts at regulation, is presented. Second, where Congress has acted, one must determine how much room, if any, has been left for further legislation in the same area by the states.

While "pre-emption" normally refers only to the latter question of the effect of federal legislation on state power, similar reasoning appears to be used by the courts in answering this question as in deciding whether the commerce clause by itself, in the absence of a contrary congressional indication, prevents state regulation. This section will briefly review the historical approach of the Supreme Court in resolving these problems, and will then compare that development with several recent court decisions on this issue in the environmental area.

1. The state role in the absence of legislation

In 1851, in the case of Cooley v. Board of Wardens, the Supreme Court invoked a formula for determining when states may regulate interstate commerce in the absence of congressional consent that still serves as the

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263 U.S. CONST. amend. X.
264 Barbier v. Connolly, 113 U.S. 27, 31 (1885).
266 53 U.S. (12 How.) 299 (1851).
apparent touchstone for Supreme Court analysis today. The question, according to Cooley, is whether the subject matter of the state legislation is "in [its] nature national, or admit(s) of only one uniform system or plan of regulation." If so, the area requires "exclusive legislation by Congress." 268

While Cooley thus seemed to establish that some state regulations otherwise within the scope of the state's police power would be invalid due to conflict with the Commerce Clause, the "need-for-national-uniformity" standard did not provide a very illuminating test for determining which regulations fell into that class. Since the turn of the century, the Supreme Court has reviewed numerous state regulatory and taxing schemes to determine whether they violated the Commerce Clause. Between 1921 and 1930 alone, for example, 38 such laws were held invalid because they conflicted with the Commerce Clause, and 34 were sustained. 269 Sprinkling these opinions are a variety of standards that may or may not be meant to be synonyms for the Cooley test: validity, for example, has been said to hinge on whether the state regulation is imposed "on" interstate commerce itself; whether the effect on commerce is "direct" or "indirect," or whether the state law is a "burden" or a "substantial" or "undue" burden on commerce. 270

In 1943 the Supreme Court's opinion in Parker v. Brown 271 marked a move toward what some commentators have called "a more adequate standard." 272 The Court referred to its previous Commerce Clause tests as "mechanical" and upheld the state legislation under a more flexible, balancing test, "accommodat[ing]... the competing demands of the State and national interests involved." 273

268 53 U.S. (12 How.) at 319.
272 W. LOCKHART, Y. KAMISAR, and J. CHAPIN, supra note 269, at 194.
273 317 U.S. at 362 (1943). This development may be only a more careful articulation of what is implicit anyway in applying the Cooley test, as had previously been suggested by some members of the Court, see Di Santo v. Pennsylvania, 273 U.S. 34, 44, 47 (1927) (Stone, J., dissenting in an opinion joined by Justices Holmes and Brandeis), and by other commentators, see Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 20-22 (1940); see W. LOCKHART, Y. KAMISAR, J. CHAPIN, supra note 269, at 194-95, 201, 215; Stern, supra note 270, at 455.
A recent 1970 Supreme Court decision, *Pike v. Bruce Church, Inc.* summarizes this balancing test as follows:

Although the criteria for determining the validity of State statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In order to convey a better sense of the substantive content of these various formulas, it may help to review a few Supreme Court decisions of the last quarter century illustrating how the balance between local and national interests has been struck in particular fact situations.

*Southern Pacific Co. v. Arizona, ex rel Sullivan* involved the validity of a state law limiting the number of cars on railroad trains, assertedly as a safety measure to reduce accidents. The Supreme Court held the law invalid, finding that the limit on train length had dubious value as a safety measure, whereas the burden on commerce was substantial since trains would have to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its train pass, whose laws thus control the carriers' operations both within and without the regulating state.

A similar conclusion was reached one year later in the case of a Virginia law governing the seating arrangement in buses and ten years later in 1959, in the case of an Illinois statute requiring special “contour” mudflaps for trucks. In both of these cases the state interest seemed slight, while the impact on interstate transportation appeared serious since the affected vehicles were potentially subject to disturbance at every state line in order to comply with varying state standards. In contrast, a state law requiring that cabooses be placed at the end of freight trains was upheld as involving less impact on commerce.

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275 Id. at 142.
276 325 U.S. 761 (1945).
277 Id. at 773.
The constitutional framework: adding or subtracting a caboose at the state lines is presumably less troublesome (and reflects a stronger state interest) than changing mudflaps or seating arrangements.

Particularly relevant, in the present context, is the Supreme Court's decision in 1960 in Huron Portland Cement Co. v. Detroit. In that case the Supreme Court upheld local regulation of smoke pollution from ships licensed to operate in interstate commerce. The Court emphasized the strong local interest in protecting the health of its citizens, and found the burden on commerce permissible. Of particular interest is the Court's rejection of the argument that conflicting state regulations, as in the transportation cases noted above, could lead to differing requirements in different states. Apparently rejecting hypothetical arguments based on potential conflict, the Court seemed to require evidence of actual conflict, as revealed by existing competing state or local laws hampering the complainant's operations.

One final issue in this area of constitutional law concerns the effect of a Supreme Court decision that a particular state law is invalid. Does such a decision mean that the Commerce Clause prevents any regulation of the area except by Congress, or only that states may not act unless Congress consents? The latter interpretation, which receives strong support from commentators, would free states from any absolute constitutional disability, allowing Congress to rebut in any particular case the judicial presumption of "unreasonable interference with national interests."

2. The state role in the face of federal legislation

Even where a state law would otherwise be valid, despite its overlap with areas of federal authority, it may conflict with congressional legislation in the same area. In such cases, of course, the Supremacy Clause requires that the state law yield to the federal legislation. Congress, thus, is always in the driver's seat in terms of its ability to decide whether or not concurrent state

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282 362 U.S. at 448. In all of these cases, the assumption is that the state regulation at issue is nondiscriminating in its impact on interstate commerce. Where this is not the case—as, for example, where the state law appears aimed at favoring local industry or commerce over foreign or interstate commerce—the Court has found it considerably easier to invalidate the state law. See, e.g., Hood & Sons v. DuMond, 336 U.S. 525, 535-37 (1949). That, for example, was the result in Pike v. Bruce Church, 397 U.S. 137 (1970), mentioned in the text, where the Court held invalid an Arizona requirement that all cantaloupes grown in the state also be packaged in the state; the primary purpose of the law appeared to be to further the State's own economic interests at the expense of other potential exporting and packaging markets.

283 See, e.g., Dowling, supra note 273, at 20.
legislation should be permitted. Where Congress' decision is made explicit, the pre-emption question is settled accordingly. In most cases, however, courts must decide whether pre-emption is to be inferred from a federal statutory scheme that does not clearly evidence Congress' intent.

In one sense, the pre-emption problem may thus seem primarily a problem of statutory interpretation, requiring resort to all the normal aids of legislative history, purpose, and the like to determine whether concurrent state legislation should be allowed to stand. As might be expected, however, Congress' intent is often a fictional label characterizing the end result of the judicial examination of a congressional statute that was passed without much attention being given at the time to the question of the effect on state legislative powers. In such cases, the extent to which the state legislation interferes with the federal scheme becomes a critical factor in the analysis, just as in the analogous area of challenge under the Commerce Clause.

Application of this test has similarly resulted in a judicial thesaurus of "critical" concepts — "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference" — leading to an eventual admission that "in the final analysis there can be no one crystal clear distinctly marked formula." Pennsylvania v. Nelson, a 1956 Supreme Court decision holding a state sedition law invalid in the face of similar federal legislation, illustrates the tests of pre-emption that a court commonly uses, ranging from the "pervasiveness" of the federal scheme, to the "dominance" of the federal interest, to the likelihood of conflict or interference with the administration of the federal program. In addition, one other factor that has received particular judicial emphasis in deciding whether pre-emption should be implied, is whether or not the area has traditionally been one of state and local, rather than federal control. "We start with the assumption," the Supreme Court explains, "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Perhaps even more than in the case of Commerce Clause analysis, these various formulas are meaningless without reference to the specific "history, terms, purposes and effect of particular legislation." A review of current judicial solutions to the pre-emption issue in specific environmental contexts accordingly seems in order.

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284 See Stern, supra 273, at 460.
286 Id.
288 W. LOCKHART, Y. KAMISAR, J. CHAPIN, supra note 273, at 337.
B. Application to the Environmental Context

1. Illustrative controversies

a. Pre-emption: ships and planes and nuclear plants

That the pace of federal and state initiatives to control pollution has led to increased concern over potential pre-emption problems is evidenced by two full Supreme Court opinions and one summary affirmance on the issue in the 1972 term alone. In each case, the question involved the power of states to enact stricter pollution control legislation than the Federal Government — legislation aimed, respectively, at controlling radiation effects from nuclear plants, oil spills from ships, and noise from jets. The Supreme Court found that state efforts were pre-empted in the first and third cases, but not in the second.

i. Northern States Power Co. v. Minnesota

The first case (in order of the Supreme Court’s action) involved a state attempt to impose radiation emission standards on a nuclear power plant stricter than those required under federal law by the Atomic Energy Commission (AEC). Both the district court and the court of appeals concluded that the state effort was pre-empted by the Atomic Energy Act. The Supreme Court, without opinion, summarily affirmed the decision, with Justices Douglas and Stewart noting their dissents.

In reaching its conclusion, the court of appeals relied primarily on four factors: the legislative history of the Act, the pervasiveness of the federal regulatory scheme, the need for exclusive federal regulation in the area, and the potential for state interference with the federal purpose.

Not all of these factors, it should be noted, persuade with equal force in the direction of the court’s decision. On the question of state interference with the federal scheme, for example, an argument can be made that Minnesota’s law, confined as it was “to the narrow area of pollution control over the radioactive effluents” discharged from the plant, was not inconsistent with the primary purpose of providing nuclear power. Thus, AEC could retain exclusive control over the actual construction and operation of nuclear plants, while still allowing state regulation of certain aspects of the operation — such

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290 447 F.2d 1143, 1 ELR 20451 (8th Cir. 1971), aff’d. 405 U.S. 1035 (1972).
293 447 F.2d at 1154, 1 ELR at 20459.
as siting decisions or radioactive emission levels — which reflect special state
and local interests. Such a result is very close to that reached in the Huron
Cement Co. v. City of Detroit\(^\text{294}\) decision, described above, where the state’s
interest in controlling pollution justified controls over smoke pollution from
federally licensed ships. The court of appeals’ answer to this argument — that
control over construction and operation is “inextricably intertwined” with
regulation of emissions, and that state standards might be so overprotective as
to “stultify” development\(^\text{295}\) — departs from the Huron approach which seems
to require more than hypothetical interference with federal interests. There
was, after all, no evidence that either the Minnesota law or similar efforts in
other states actually hampered AEC efforts to promote and control industrial
development of atomic energy.\(^\text{296}\) Indeed, the legislative history indicated that
Congress was fully aware of the Minnesota regulation at the time it was
considering amendments to the Act and chose not to word the amendments to
provide expressly for pre-emption.\(^\text{297}\)

Despite these considerations, the result reached in the case is perhaps
explainable because of the uniquely federal nature of the subject matter
involved. Unlike smoke, noise, and water pollution, which have been objects
of state concern long before federal involvement, atomic materials and related
radiation and defense interests have been primarily a creation and concern of
federal activity since the nuclear age began. This fact, coupled with a clear
administrative interpretation of pre-emption\(^\text{298}\) and a legislative history that,
at best, is ambiguous, could explain why the normal presumption in favor of
upholding state initiatives in the absence of a clear congressional expression to
the contrary would be inapplicable. But this explanation also suggests that a
different result would be in order in other areas of pollution control where
Congress has not expressly opted to pre-empt concurrent state efforts.

\(\text{ii. Askew v. American Waterways Operators, Inc.}\text{299}\)

Apparently bearing out the above suggestion, the Supreme Court in April
1973 unanimously reversed a lower court opinion that had held invalid

\(^{294}\) 362 U.S. 440 (1960), see text accompanying notes 281-82, supra.

\(^{295}\) 447 F.2d at 1154, 1 E.L.R. at 20458.

\(^{296}\) The Illinois Pollution Control Board had placed similar conditions on the
operation of a nuclear plant while the Minnesota case was still pending in the
courts. The Illinois Appellate Court subsequently reversed the Board’s decision in
light of the Supreme Court’s summary affirmance of the Minnesota decision. See
Commonwealth Edison v. Pollution Control Board, 5 Ill. App.3d 800, 284 N.E.2d
342, 2 E.L.R. 20560 (1972).

\(^{297}\) See 447 F.2d at 1156, 1 E.L.R. at 20460 (Van Osterhout, dissenting). For a review of
the pertinent legislative history see Note, Jurisdiction — Atomic Energy, 68 Mich.

\(^{298}\) See 10 C.F.R. §8.4 (1973); 447 F.2d at 1152, 1 E.L.R. at 20457.

Florida's attempt to control oil spill pollution by the shipping industry in waters within the territorial jurisdiction of the state.

The Florida Act applied both to terminal facilities (any waterfront facility used for drilling for oil or handling the transfer or storage of oil from ships) within the state, and to all ships destined for or leaving such facilities. The Act in essence subjected both ships and terminal facilities to unlimited liability without fault for oil spill damages and clean-up costs, and further provided for a comprehensive regulatory scheme concerning the equipment to be carried by both ships and facilities.

The extent to which these provisions conflicted with related federal legislation, including the Federal Water Quality Improvement Act of 1970 (WQIA) was discussed in an amicus brief filed by the solicitor general on behalf of the United States. According to the solicitor general, pre-emption problems were presented with respect to only two provisions of the Florida Act. First, that Act did not specify a limit on liability for shipowners, whereas the Federal Limitation of Liability Act limits recovery to the "value of such vessels and freight pending." Since the Florida Act could, however, be interpreted to include this limitation, the solicitor general argued that it need not be held unconstitutional until the state courts had interpreted the Florida Act. Second, the solicitor general argued that states had no power to specify equipment requirements for ships, since such requirements could substantially hinder vessel commerce from state to state — an argument reminiscent of the reasoning used in the "mudflap" and "train length" cases discussed above. In all other respects, the Florida requirements in the solicitor general's view were compatible with the federal scheme: (1) unlimited liability for terminal facility owners was not inconsistent with the Limitation of Liability Act, since that Act applies only to shipowners; (2) furthermore, although the WQIA limited terminal owners' liability to the United States for clean-up costs, such limitation did not purport to affect liability to states for their own clean-up costs or damages; (3) finally, the fact that the standard of recovery under the Florida Act was based on liability without fault was not fatally inconsistent with the more lenient negligence standard that appeared to be applicable under general maritime law for two reasons: first, the current trend of maritime law appeared to be moving in the direction of imposing liability without fault in any event; second, even if that trend did not become established, imposing a stricter standard of liability under state law would not necessarily affect shipowners' primary conduct or disrupt the financial planning of shipowners or their insurers, particularly since the amount of

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300 33 U.S.C. §§1161-75 (1970). For further discussion of the federal water pollution control legislation and of the Askew decision see the chapters on water pollution.


recovery would still be limited by the Federal Limitation of Liability Act.\(^303\)

Compared to this rather persuasive parsing of the federal and state statutes involved, the Supreme Court's opinion by Justice Douglas is disappointing. Although the Court agreed that a case for pre-emption had not been made out, and that the lower court's decision, holding the entire Florida Act invalid, must accordingly be reversed, one will search the opinion in vain for any guidance concerning the precise allocation of state and federal responsibility in this area of environmental regulation. In essence, the Court simply postponed a ruling on most of the potential pre-emption problems until a more concrete case involving actual application of the Florida Act. Thus, with respect to the problem of reconciling unlimited recovery under the Florida Act with the provisions of the Federal Limitation of Liability Act and the maximum dollar amounts recoverable for clean-up costs under the WQIA, the Court had this to say:

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\text{Whether the amount of costs [Florida] could recover from a wrongdoer are limited to those specified in the [WQIA] and whether in turn this new Federal Act removes the preexisting limitation of liability in the Limitation of Liability Act are questions we need not reach here. Any opinion on them is premature. It is sufficient for this day to hold that there is room for State action in cleaning up the waters of a State and recouping, at least within Federal limits, so far as vessels are concerned, her costs.}
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\text{If the coordinated Federal plan in actual operation leaves the State of Florida to do the cleanup work, there might be financial burdens imposed greater than would have been imposed had the Federal Government done the cleanup work. But it will be time to resolve any such conflict between Federal and state regimes when it arises.}^{304}\text{ (emphasis added).}
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While the emphasized language suggests that the Court was in fact accepting the solicitor general's views on this issue, that result could certainly have been more clearly stated.

Similarly, although the Court found that Florida provisions for recovering damages due to oil spills did not conflict with the WQIA, which dealt only with cleanup costs, the possible conflict between the state standard of liability without fault and the federal standard was never explored.\(^305\)

\(^{303}\) See Brief for U.S. as Amicus Curiae at 7-12, 25, 411 U.S. 325, 3 ELR 20362 (1973).

\(^{304}\) 411 U.S. at 332, 36, 3 ELR at 20364 (1973) (emphasis added).

\(^{305}\) The only discussion of the state standard appears aimed at establishing that the imposition of absolute liability is within the state's police power, rather than at the
Finally, even with respect to the potential problems arising from state-imposed equipment or licensing requirements, the Court simply stated that "resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations promulgated on 21 December 1972 ... should await a concrete dispute under applicable Florida regulations."\textsuperscript{306}

Despite this apparent postponement of the critical issues, two themes emerge from the \textit{Askew} decision with potential importance for future pre-emption cases. First, the postponement strategy of the Court may itself be a strong signal that actual concrete proof of conflict, rather than imagined hypotheticals, should be the key to resolving pre-emption claims. This approach, which was also apparently endorsed in the \textit{Huron}\textsuperscript{307} case, leaves maximum room for state experimentation.

The second important aspect of the decision arises, not from the Court's handling of the pre-emption issue, but from the disposition of the constitutional question of whether states have any power at all over maritime activities that affect their territorial jurisdiction concurrently with the Federal Government. The three-judge federal court held that power over such activities belonged exclusively to Congress. In fact, provisions in the WQIA that explicitly declared that states were not preempted by the Act from establishing "any requirement or liability" respecting oil spills\textsuperscript{308} were held invalid by the lower court to the extent such provisions purported "to confer on the states authority to legislate within the admiralty jurisdiction."\textsuperscript{309} This decision was based on early Supreme Court precedents that appeared to hold that Congress alone could legislate remedies in the admiralty area.\textsuperscript{310}

Half of the Supreme Court's opinion in \textit{Askew} was directed at reversing this aspect of the lower court's opinion. Pointing out that subsequent decisions of the Court had permitted concurrent jurisdiction in areas traditionally within the competence of the states, the Court similarly declined "to oust State law from situations involving shoreside injuries by ships on navigable waters."\textsuperscript{311} The effect is to place the constitutional question in the case of state regulations that overlap the admiralty power on a par with the question that arises when the overlap is with the Commerce Clause power: except where there is a need for uniformity (i.e., an unreasonable interference with the federal interest),

\begin{itemize}
\item \textsuperscript{306} Id. at 337.
\item \textsuperscript{307} 362 U.S. 440 (1960).
\item \textsuperscript{308} 33 U.S.C. \S 1161(o) (2) (1970).
\item \textsuperscript{309} American Waterways Operators v. Askew, 335 F. Supp. 1241, 1249, 2 ELR 20072, 20076 (M.D. Fla. 1971).
\item \textsuperscript{310} Compare Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), with Knickerbacher Ice Co. v. Stewart, 253 U.S. 149 (1920).
\item \textsuperscript{311} 411 U.S. at 344, 3 ELR at 20367.
\end{itemize}
concurrent state jurisdiction should be upheld. In logic, this result seems far more satisfactory than the lower court's decision which would have erected an unexplainable distinction between the commerce power and the admiralty power in terms of constitutionally compatible state jurisdiction.

iii. City of Burbank v. Lockheed Air Terminal, Inc.\textsuperscript{312}

If further evidence were needed of the fact that the pre-emption question "turns on the peculiarities and special features" of each particular case,\textsuperscript{313} the Court's most recent decision in this area should prove finally convincing. Writing this time for a bare five-man majority, Justice Douglas again searched the relevant federal regulatory scheme and concluded, in contrast to \textit{Askew}, that Congress had left no room for the City of Burbank to control airport noise by placing a curfew on night time jet takeoffs. In particular, the recently enacted Noise Control Act of 1972\textsuperscript{314} convinced the majority that "pervasive" federal control over noise had been vested in EPA and the Federal Aviation Administration,\textsuperscript{315} to the exclusion of state and local efforts.

Since it was conceded that federal laws pre-empted the area of "airspace management," the majority argued that noise regulation was so interdependent with safety and efficiency factors involved in such management that control over the one area required control over the other as well:

"The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during those hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the Federal statutory and regulatory scheme."\textsuperscript{316}

This latter argument is reminiscent of the reasoning used in the case of radiation effects of nuclear plants — control over the basic facility requires control as well over the incidental effects of operating the facility. There, however, the resemblance ends. For the pre-emption argument in all other respects is much less persuasive in the case of local attempts to control aircraft noise through such devices as curfew ordinances than in the case of state control of nuclear plant emissions.

\textsuperscript{312} 411 U.S. 624, 3 ELR 20393 (1973).
\textsuperscript{313} \textit{Id.} at 638, 3 ELR 20397.
\textsuperscript{314} 42 U.S.C.A. §§4901 \textit{et seq.} (Supp. 1973), ELR 41501. For a further discussion of federal noise requirements and an evaluation of the \textit{City of Burbank} decision see the chapter on noise pollution.
\textsuperscript{316} 411 U.S. at 627, 3 ELR 20394 \textit{quoting from} the district court opinion, 318 F. Supp. 914, 927 (C.D. Calif. 1970).
In the first place, as the dissenting opinion elaborates, the congressional history contains strong support for the view that local regulation in this area was to be allowed. Explicit statements in committee reports accompanying the Federal Aviation Act of 1958, the 1968 Noise Abatement Amendment to that Act, and the 1972 Noise Control Act indicated that the federal acts were not intended to alter the existing roles of the federal and state and local governments as respects aircraft noise control. That existing relationship seemed to draw a distinction between noise control exercised as part of a state's police power on the one hand, and similar control exercised by the state or local public agency in its capacity as proprietor of the airport. Lower federal courts had suggested that noise regulations were pre-empted in the former case, but not in the latter, and this distinction, explicitly preserving the right of “airport owners acting as proprietors [to] deny the use of their airports on the basis of noise considerations,” received repeated confirmation in the legislative history.

Applied literally, this distinction between local government as proprietor and local government as wielder of the police power would support the majority's decision. For the Hollywood-Burbank Airport, it appears, is “the only nonfederal airport in the country used by federally certified air carriers that is not owned and operated by a state or local government.” However, since to accept such a distinction would mean that all other airports in the country could enact curfews, the dissenting opinion took the logical approach of assuming that the exceptional case should be included with all other airports in Congress' general intent not to pre-empt the field. The troubling question is whether the majority in reaching the opposite result has meant conversely to include all other airports along with the Burbank “exception” in

321 S. REP. NO. 90-1353, 90th Cong., 2d Sess. 6-7 (1968).
322 The only evidence to the contrary cited by the majority appears to be conflicting statements of individual congressmen made on the floor during debates on the 1972 bill—normally one of the least reliable indices of legislative intent. See 411 U.S. at 642 n.1, 3 ELR at 20398n.1 (Rehnquist, J., dissenting).
323 See id. at 651 n.4, 3 ELR at 20401n.4 (dissenting op.).
its pre-emption ruling. Justice Douglas' opinion explicitly purports to leave the question undecided. But that disclaimer only emphasizes the anomaly of the Supreme Court's deciding an issue of nationwide interest in a way that leaves the question theoretically unresolved for the vast majority of airports in the country.

In two respects the majority opinion in *City of Burbank* appears to depart from pre-emption precedent. First, noise regulation, unlike radiation control, has long been a traditional concern of state and local governments and has only recently become a matter of federal attention. Thus, even if the legislative history were otherwise ambiguous, the normal presumption that the exercise of "the historic police power of the state" should be upheld in the absence of a "clear and manifest" congressional intent to the contrary lends support to the dissenting opinion. Second, *City of Burbank* seems to represent a departure from the *Huron* theory that it is only actual, not hypothetical conflict, that requires invalidating state legislation as inconsistent with federal interests. The majority opinion refers more than once to what might happen if all municipalities enacted ordinances similar to Burbank's, without indicating why such a "predicted proliferation of possibilities" is any more a critical test for pre-emption than for invalidity under the Commerce Clause.

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324 See id. at 635 n. 14, 3 ELR at 20396n. 14.
325 The majority opinion does point out that many airports are owned by one municipality but are physically located in another. 411 U.S. at 635, n. 14, 3 ELR 20396, n.14. Thus the decision that the police power alone cannot be used to regulate noise will have effects beyond the case of the Hollywood Burbank airport.
326 See CEQ, 3D ANN. REP. at 206 (1972).
327 See 411 U.S. at 643, 3 ELR at 20398 (Rehnquist, J., dissenting).
330 See 411 U.S. at 627, 639, 3 ELR at 20394, 20397.
331 411 U.S. at 654, 3 ELR at 20401 (Rehnquist, J., dissenting).
332 The district court held the Burbank ordinance invalid on both pre-emption and Commerce Clause grounds, but neither the court of appeals nor the Supreme Court reached the latter issue. It may be that where federal legislation already exists, the possibility of conflict under imagined future scenarios is more relevant in determining Congress' intent on the pre-emption issue than in the parallel Commerce Clause case where Congress, through its silence, has never focused on the area in question. But this suggestion still does little to explain the apparent difference in approach between the *Askew* and *Burbank* opinions, both of which involved pre-emption issues.
b. "Commerce Clause" cases

As federal environmental legislation expands, "pre-emption," rather than "interference with commerce" is likely to provide the dominant framework for judicial analysis. Quite commonly, however, both issues may be raised in the same suit. In addition, where federal legislation in the area is sparse or nonexistent or appears directed at other objectives than the state scheme under challenge, the Commerce Clause question often becomes the critical issue. Three recent cases illustrate potential problems presented by this issue in the environmental context.

i. The case of the endangered crocodiles

The question of state power to protect endangered species not indigenous to the state was recently decided in favor of the state by the Court of Appeals for the Second Circuit in *Palladio, Inc. v. Diamond.*333 At issue in the case was the validity of New York's Mason Act which prohibited the sale of products made from the skins of certain animals, including alligators, determined to be in danger of extinction.334 The plaintiff corporation, 30 per cent of whose business consisted of selling men's shoes made from the skins of African crocodiles, challenged the Act unsuccessfully on both pre-emption and Commerce Clause grounds, and the court of appeals affirmed the decision in a per curiam opinion. Both courts relied in part on an earlier decision of the New York Court of Appeals, rejecting similar attacks on the Mason Act in a ruling that on appeal to the Supreme Court was dismissed summarily.335

Despite the relative ease with which these courts dismissed the constitutional challenge, a number of peculiar features of the New York legislation deserve mention. In the first place, since alligators are not indigenous to New York, the aim of the state legislation is necessarily directed at controlling extraterritorial behavior — contributing to the conservation of world wildlife by discouraging the killing of endangered species by other countries and states. Thus, the overlap in this case is not simply with interstate commerce, but with foreign commerce and Congress' power generally over foreign affairs. In such cases, the Supreme Court has traditionally been particularly alert to prevent state interference with the foreign relations concerns of the Federal Government.336 Second, in addition to the peculiarly sensitive area of federal concern, the burden imposed by the Mason Act is not one of mere regulation of an item of commerce, but of outright prohibition of

all trade in the designated categories of goods. Considerations such as these have led to the conclusion in one recent law review comment on the case, that "the court in Palladio should clearly have held the New York legislation to be unconstitutional." 337

Although some of these issues seem substantial enough to have warranted further discussion by the court, support for the court's decision is not entirely lacking. The federal interest in this area of wildlife conservation at the time of the court's decision is reflected in the Endangered Species Conservation Act of 1969, prohibiting importation of species determined by the secretary of Interior "to be threatened with worldwide extinction." 338 At the time of the court's decision in Palladio, the secretary's list of endangered species, in contrast to the New York Act, did not include all species of crocodilia. Since, however, the purpose of both acts is the same — namely the protection of endangered species — the stricter New York standards do not, on their face, conflict with the federal Act. And although it may be suggested that the federal Act represents a compromise that would be jeopardized by stricter state regulations, 339 there is no explicit evidence that Congress was concerned about this possibility. Indeed as the Palladio court pointed out, Congress had explicitly provided not only for the enforcement of the federal Act, but also for penalties for transporting or taking wildlife "in violation of any law or regulation of any State or foreign country." 340 While it has been suggested that this legislation was designed only to allow stricter state regulations in protecting local endangered species, 341 the fact that Congress was not concerned with the effect of varying state laws controlling access to the supply of game animals supports the inference that similar control over access to a state's market for such game animals is also not sufficiently burdensome to require uniform regulation.

The Palladio case does illustrate, however, an ambiguity in the balancing test that courts have developed for deciding the Commerce Clause question. As described above, the test involves weighing the harm to the federal commerce interest against the objectives sought to be obtained by the state legislation. It might be thought that this test requires a court in considering the state half of the balance to make a judgment about the relative importance of the goal that the state law seeks to achieve. Thus, where the aim is to promote safety or health, a different balance might be struck than when the aim is "merely" to protect ecological features, morals, or other aspects of the general welfare. This kind of inquiry, however, pitting the court's judgment against

341 See 85 Harv. L. Rev. 852, 858 (1972).
that of the legislature in terms of ranking the importance of various legislative objectives, is not a very happy one for a court to undertake. Although courts in other contexts seem to have undertaken such an inquiry — deciding, for example, that aesthetic preservation might not justify uncompensated land use regulations that would be justified where the aim was to protect safety or health — other courts seem properly reluctant to undertake such a reordering of legislative priorities. A court may question whether a particular objective is within the compass of the police power of a state at all; but having answered that question in the affirmative it is not clear that courts have any further role to play in assigning relative weights to such objectives.

The Commerce Clause cases discussed above have not measured the state law against some such scheme of judicially ordered ends. Rather, accepting the end as legitimate, the Court has evaluated the effectiveness of the means chosen by the state to reach that end. For example, in both the mudflap and train length cases, the Court noted that the regulations at issue did not significantly increase the safety of train and truck operations within the state and, in fact, entailed additional safety hazards that would not exist in the absence of the state law.

In the case of New York’s Mason Act, this refinement of the balancing theory adds further support to the Court’s decision and avoids distinctions that rest upon a state’s interest in protecting its own species as opposed to the state’s interest in protecting endangered species in foreign countries. If the latter objective is properly within the state’s police power — as it is if, for example, the Act is beneficial to New York’s citizens by maintaining ecological balance or by protecting the welfare of the New York community through preventing citizens from contributing to ecological imbalance — then the only remaining question on this side of the scale is whether the state has chosen an effective means for attaining this end. And on this score New York’s Act achieves a fairly high rating since the most effective (if not the only) means of preventing New York’s participation in the destruction of endangered species is the prohibition of all trade in such species. This explanation also suggests that the fact that total prohibition of trade is involved in the Mason Act, rather than a licensing, taxing, or other less restrictive scheme, need not be seen as adding a significant extra dimension to

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343 See cases cited id. at 833.
345 See 85 HARV. L. REV. 852, 859-60 (1972). For a general discussion of the extent to which protection of such ecological goals can be seen as a proper subject for the exercise of the police power, see Note, Constitutional Problems in Environmental Legislation—The Mason Law, 12 B.C. IND. & COM. L. REV. 657 (1971).
the constitutional problem. Finally, in the New York case, as in other cases previously discussed, the danger of conflicting state schemes that would interfere with the federal interest is at this point primarily a hypothetical rather than an actual one, again suggesting that the balance struck by the Court in this case was not necessarily improper.

ii. The case of the returnable cans

Another recent judicial decision upholding state regulations in the face of a Commerce Clause challenge is *American Can Co. v. Oregon Liquor Control Commission,* a lower state court decision that has been affirmed on appeal. 

At issue in the case was the validity of a recently enacted Oregon statute requiring a minimum refund value of not less than five cents on most soft drink and other beverage containers sold in the state. This minimum five cents deposit requirement was reduced to the sum of two cents in the case of any beverage container that is certified for reuse. The Act further prohibited the use of containers employing pull top openers. The purpose of these provisions, as stated explicitly in the Act, was to promote the use in the state of reusable beverage containers of a uniform design and to facilitate the return of such containers to manufacturers for recycling. The plaintiffs, representing can manufacturers, brewers, and soft drink manufacturers and packers, brought suit claiming among other things that the statute represented an unconstitutional interference with federal commerce interests.

To support their challenge, plaintiffs relied principally on the Supreme Court’s 1970 decision in *Pike v. Bruce Church.* That case, as described earlier, held invalid an Arizona requirement that cantaloupes grown within the state also be packed within the state. As the Oregon circuit court pointed out, however, the *Pike* case involved legislation aimed at furthering local financial interests by confining parts of the marketing process to the boundaries of the state. No such attempt to give preferential treatment to the state’s own economic interest could be imputed to the Oregon legislation. More to the point, in the court’s view, was an earlier Supreme Court decision in another Oregon case, *Pacific States Box & Basket Co. v. White,* in which the Supreme Court sustained a regulation of the size and shape of berry containers to be used in Oregon. Justice Brandeis in that opinion observed:

> Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government ...
In support of its interpretation of these Supreme Court precedents, the Oregon court also noted that federal district courts in Indiana and Florida had recently sustained legislation regulating the sale of phosphates and detergents despite a claim that such laws unreasonably burdened interstate commerce. As in those cases, the court concluded that Oregon's very real interest in preserving environmental quality by controlling the solid waste problem outweighed whatever additional financial burden the regulations involved for beverage container manufacturers.

The decision was affirmed on 17 December 1973 by the Oregon Court of Appeals. Although similar in many respects to the lower court's opinion, the opinion of the appellate court refused to read *Pike v. Bruce Church* as requiring a "weighing process" in all cases. Resolution of the Commerce Clause issue, in the court's view, did not require the judiciary to assume the role of a super legislature, repeating the same weighing process already performed by the legislature in balancing economic and environmental interests. While this concern over the proper judicial role in reviewing the legislative judgment seems appropriate, *Pike v. Bruce Church* does not suggest that the court perform the same role as the legislature in assessing the impact on commerce. It is only where the burden imposed on commerce "is clearly excessive in relation to the putative local benefits" that the legislative balance becomes vulnerable on Commerce Clause grounds. Thus, some judicial comparison of the state interest and means selected to achieve that interest with the burden on interstate commerce (which the state legislature may have considered only scantily, if at all) seems called for, even though the judicial standard will still be sufficiently flexible to accommodate legislative judgments that do not clearly distort the balance in favor of the local interest.

For the most part these two opinions appear persuasive in distinguishing and applying the relevant Supreme Court cases to a fairly recent area of state environmental concern. While it might have been desirable for the Oregon courts to conduct a more explicit balancing of the state interest against the burden on commerce, the elements of that balancing test, as described above, are found throughout the opinions and generally appear to support the result. On the one hand, that the Act would result in a significant increase in plaintiffs' cost of doing beverage business in Oregon can hardly be denied. The effect of regulating the use of one-way non-returnable containers would

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351 Id. at 182, 184.

substantially reduce can manufacturers' market for metal containers, resulting no doubt "in the closing of some portion of some of these plaintiffs' plants or at least curtailing their production."353 Brewers under the Act would be required to prepare a new package for the Oregon market, and the "contract canners' manufacturing business for the Oregon soft drink bottlers would be greatly curtailed as would some contract canners' business because their distribution system would probably be eliminated."354 In addition, manufacturers of soft drinks "would incur additional capital and operating expense because of a restructuring of their present system of production, distribution, and sales from the one-way, non-returnable containers to returnable bottles."355

The fact, however, that additional costs are entailed because of the state regulation does not necessarily lead to the conclusion that the area is one that requires national uniformity. Unlike, for example, attempts to regulate actual modes of transportation, which continuously move from state to state, there was little evidence that a system of varying state laws concerning the use of throwaway containers would significantly impair the national beverage business. In contrast, evidence before the court indicated that Oregon had chosen highly appropriate means for effectuating its interest in preventing waste and litter. Exhibits, for example, demonstrated that roadside litter of glass and tin containers came mainly from malt beverage and soft drink cans and bottles, which were the object of the Oregon legislation, rather than from other types of containers, which accounted for only a small portion of such litter. In addition, the Oregon consumer, it appeared, "is more interested in the economy of his purchase than in its convenience ... and admittedly, the cheapest way to purchase on a per ounce basis either a malt beverage or a soft drink is in a returnable container."356

One additional note of some interest in the courts' opinions is the reference to apparent congressional policy, despite the absence of specific congressional legislation on the subject that would have raised a possible pre-emption problem. In the findings and declaration of policy contained in the Federal Solid Waste Disposal Act of 1965,357 the Environmental Quality

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353 American Can Co. v. Oregon Liquor Control Comm'n, 2 ELR at 20642.
354 Id.
355 Id.
356 2 ELR at 20646. Although the real test of the effectiveness of Oregon's "bottle law" will come during the summer months, Governor Tom McCall of Oregon has cited recent surveys indicating that beverage containers on 25 randomly selected roadside areas declined almost 75 per cent between 1 Oct., when the law went into effect, and 1 Jan. See Christian Science Monitor, May 22, 1973. See generally Comment, Oregon's Bottle Bill Survives Challenges, Produces Results, 3 ELR 10112 (1973).
Improvement Act of 1970, and the Federal Water Pollution Control Act, the courts found evidence of a federal policy "which favors the state's exercise of its own authority over the environment." This reference to a broad, general federal policy offers a potentially useful device for tipping the balance in favor of state legislation in close cases.

iii. The case of the phosphate detergents

In contrast to the above decisions, the Federal District Court for the Northern District of Illinois has recently held invalid on Commerce Clause grounds an attempt by the City of Chicago to forbid the sale within the city of detergents containing phosphates. The court's opinion illustrates how the by now familiar balancing test can work against as well as for the state in the environmental area. As in the Oregon case, evidence of the financial burden on interstate commerce was fairly extensive. Since the normal distribution system for detergents is areawide, not citywide, the effect of the Chicago ordinance was a drastic revision of the plaintiffs' normal manufacturing and distribution processes:

Some of the plants which had manufactured only one detergent formulation now must be scheduled to manufacture two; other plants have been devoted to manufacturing nonphosphate detergents which had previously been manufactured for a much larger area. This requires obtaining raw materials from different sources, shutting down the plants more frequently for cleaning and changeover operations, changing shipping patterns to accommodate the Chicago market, and many other uneconomical makeshifts.

Annual losses or expenses resulting from these effects amounted to several millions of dollars.

Unlike Oregon, however, Chicago's interest in prohibiting the use of such detergents did not, in the court's view, offset this burden on commerce. While the goal of the Chicago ordinance was the completely laudable one of preserving water quality, the court, in effect, found that the ban on phosphate detergents, as far as Chicago waters was concerned, was superfluous in reaching that goal. The potential danger presented by excessive phosphate lies in the fact that it can cause nuisance algae to flourish, the long-range effect of which is to accelerate natural eutrophication and, by over-abundance, ultimately to destroy the value of a body of water. The maximum amount of phosphate, however, which nuisance algae can use is about .02 milligrams per...
liter; “any amount above this is surplus, having no effect on the growth of algae.” Evidence, however, showed that the Illinois River at Peoria contained at least 25 times this minimum amount of phosphate, of which the Chicago detergents contributed only 25 per cent. These facts, and the result of actual samplings taken by one of the plaintiff’s witnesses, apparently convinced the court “that the elimination of phosphates from detergents had had no effect on the growth of algae and was not justified for this objective.”

While this analysis appears to correspond with the balancing test described above, two aspects of the court’s opinion appear troublesome. First, as noted above, several other jurisdictions have enacted similar legislation controlling the sale of phosphate detergents, some of which have been upheld by other district courts against similar Commerce Clause attacks. The court in this case did not suggest that these decisions were incorrect, and in fact, explicitly noted that its reasoning “does not necessarily mean that similar ordinances in other jurisdictions cannot be sustained, where the effects of discharging phosphates into the public water supply may outweigh the interference with interstate commerce.” This conclusion, of course, seems to follow from the standard used by the court to measure the Chicago ordinance. The question was not whether phosphate detergent regulation in general contributed to the improvement of water quality, but whether in the particular case of the City of Chicago, the waters affected by that city’s sewerage system stand to benefit from the ordinance.

The peculiarity of this test, however, is that, far from indicating that the subject is one that requires national uniformity, the court has explicitly accepted the possibility of varying state ordinances on the subject depending on the particular nuisance algae level in the waters of the affected state or locality. If this result is permissible, then the incremental burden on commerce represented by the Chicago ordinance may be fairly small. For, if the plaintiffs (representing companies selling throughout the country) may constitutionally be required to adjust marketing and distribution processes to meet valid state regulations on phosphates elsewhere, then to arrange that system to include Chicago as one of the areas to receive detergents without phosphates may be a less drastic adjustment than appears from the court’s opinion.

This regional or local approach to the problem of measuring the effectiveness of the Chicago ordinance contrasts with the test applied in the Supreme Court cases discussed above. In both the train limit and the truck mudflap cases, for example, the Court’s conclusion that the regulations did little to accomplish the objective of increased safety would appear to apply

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363 357 F. Supp. at 49, 3 ELR 20230.
364 357 F. Supp. at 50, 3 ELR 20230.
365 357 F. Supp. at 51, 3 ELR 20231.
equally to any state attempting to enact similar legislation. In view of these distinctions, one might suggest that Chicago ought not to be prevented from “starting somewhere” in attempting to reduce the level of phosphates below that needed to support nuisance algae.

C. Summary and Conclusions: Future Directions

It bears repeating that the resolution of pre-emption and Commerce Clause issues very much depends on the facts of each particular case. While this makes it difficult to devise general theories applicable to all cases, one theme that dominates many of the judicial decisions in this area deserves emphasis. That theme concerns the presumption of validity in favor of state and local regulations, requiring those who challenge such legislation to present a convincing case in order to succeed.

The force of this presumption is more than the normal presumption of validity that accompanies legislative enactments, or the favorable position that the state, as defendant in a case, may enjoy vis-a-vis the plaintiff with respect to the burden of proof on contested issues of fact. The presumption stems in part from the theoretical question of the propriety of judicial review in this area in the first place. Since the question presented by these cases is whether the state has acted in a way that interferes with legitimate federal interests, Congress presumably is always in a position to override any local or state initiatives that threaten such interests. At times, individual members of the Supreme Court, including Justice Douglas and the late Justice Black, have suggested that the role of the courts in supervising this division of responsibility between the federal and state governments should be an extremely limited or even nonexistent one.366 The influence of these views can also be seen in leading Supreme Court cases that urge judicial hesitancy in invalidating state and local legislation for the added reason that “the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.”367

In the environmental context, these observations operate with particular force. To a great extent, awareness of environmental problems, as a matter for federal attention, is a relatively recent phenomenon compared with a tradition of state and local efforts at controlling pollution. In addition, attempts to cope with environmental problems have led to increasing recognition of the complexity of the solutions and of the often inadequate knowledge base for providing such solutions. These facts strongly support an

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367 Penn Davies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943); see City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 643, 3 ELR 20398 (1973) (dissenting opinion).
approach to interpretation of the Commerce Clause that preserves maximum flexibility for state experimentation in the absence of explicit contrary directions from Congress. As already noted, one court has, in fact, gleaned just such a general policy direction from a variety of federal legislation in the environmental area.\textsuperscript{368} This trend should be continued and reenforced as courts continue to face questions of pre-emption and claims of undue interference with federal interest in the environmental area.

III. CONSTITUTIONAL PROTECTION FOR ENVIRONMENTAL VALUES

One indication of the importance attached by a significant segment of society to environmental concerns can be found in the recent proliferation of articles\textsuperscript{369} and lawsuits\textsuperscript{370} urging recognition of a constitutional right to a decent environment. Conceptually, two distinct approaches emerge from the arguments. The direct approach, leaning heavily on \textit{Griswold v. Connecticut}\textsuperscript{371} and the expanded Ninth Amendment doctrine in Justice Goldberg's concurring opinion in that case, seeks to establish an independent environmental right that would presumably take its place along with other specifically enumerated items in the Bill of Rights as a protected liberty, secure from invasion except under the most carefully defined and judicially controlled circumstances. The second approach begins with one or more specific constitutional guarantees — such as the Fifth Amendment's prohibition on the taking of property without just compensation — and then seeks to

\textsuperscript{368} See text accompanying notes 357-60, \textit{supra}.


\textsuperscript{371} 381 U.S. 479 (1965).
demonstrate that the particular environmental intrusion at issue — e.g., the uncompensated loss in property value caused by a polluting facility — amounts to a violation of the Amendment. The strategical advantages and disadvantages of each approach should be obvious. The direct approach, like most frontal assaults, promises a much more extensive victory if successful, but runs a correspondingly greater risk of being headed off by a judiciary reluctant to accept the implications of a “do justice” theory of the Bill of Rights. Conversely, the indirect approach may more easily command judicial acceptance in a particular case because of its closer adherence to established textual support, but for that very reason is also likely to yield a less than total victory from the viewpoint of some of its proponents. A more thorough evaluation of each of these approaches will be possible after a closer examination of the arguments and precedents on which each relies.

A. The Right to a Minimally Protected Environment

1. Griswold v. Connecticut

The invariable cornerstone of arguments seeking constitutional recognition of an independent environmental right is the Supreme Court’s decision in 1965 in Griswold v. Connecticut. That decision held invalid Connecticut provisions forbidding the distribution and use of birth control devices, as applied to married couples. At the very least, the case seems to establish that in describing the rights protected by the Constitution one is not confined solely to the language used in the enumeration of specific guarantees in the first eight amendments. Not that that proposition by itself should come as a particular surprise. As Justice Douglas’s majority opinion observes, the “right of association” is not specifically mentioned in the Bill of Rights either, but that fact has not prevented the phrase from securing judicial acceptance as an accurate description of values protected by the First Amendment’s more specific guarantees for “freedom of speech.” Similar observations could be made for “the right to travel,” the “right of privacy,” “the right to marry,” or “the right to educate one’s children in a school of the parent’s choice.”

The novelty of Griswold and at the same time its precedential value in the environmental context lies in the process by which the court concluded that the “right to marital privacy” deserved inclusion in this list of unenumerated

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372 Id.
373 Id. at 482.
rights. For unlike the right of association and some of the other rights referred to by Justice Douglas, no single specific constitutional guarantee was singled out as the source of the protected liberty that required invalidating Connecticut's ban on counseling the use of contraceptives. For Justice Douglas, the right of marital privacy was to be found in the penumbra of several specific amendments creating a "zone of privacy": the privacy of association under the First Amendment; the privacy implicit in the Third Amendment's prohibition against the quartering of soldiers in "any house;" the Fourth Amendment's guarantee against unreasonable searches and seizures; the Fifth Amendment's creation of a barrier against compelled self-incrimination; and the Ninth Amendment's assurance that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

In a separate concurring opinion, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan agreed that "the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights," but went on to describe the Ninth Amendment as an apparent independent source of protection for "fundamental personal rights" not specifically listed elsewhere.

Justices Harlan and White, in separate concurring opinions, chose to rely directly on the Due Process Clause, finding that the Connecticut enactment violated basic values "implicit in the concept of ordered liberty." Since this

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378 To refer to these various formulations as examples of unenumerated "rights" protected by the Constitution can be misleading. In many instances, these "rights" may represent little more than a verbal recasting of a judicial decision applying specifically enumerated rights to a particular fact situation. The "right to vote," for example, may be seen as simply a shorthand reference to the fact that a state that has adopted an elective process may not prevent an individual's participation in that process on an equal basis with other qualified voters. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 n.78 (1973). By the device of casting the holding of a particular case into the language of "rights," one could theoretically extend the list of such rights indefinitely—the "right to picket," (see Thornhill v. Alabama, 310 U.S. 88 (1940)), the "right to distribute a pamphlet" (see Talley v. California, 362 U.S. 60 (1960)), the "right to receive instruction in the German language" (see Meyer v. Nebraska, 262 U.S. 390 (1923)), etc. But this technique of describing the results reached in particular cases should not be confused with a substantive expansion of the basic rights protected by the Constitution.

379 381 U.S. at 487.

380 381 U.S. at 488.

381 381 U.S. at 500. The idea that the Due Process Clause protects substantive as well as procedural rights occupies a persistent, if tenuous position in Supreme Court history. Originally invoked to overturn state limitations on the "freedom to contract," see e.g., Lochner v. New York, 198 U.S. 45 (1905), the concept was
approach to the problem, as Justices Goldberg and Black explicitly recognized,\textsuperscript{382} seems indistinguishable in substance from an approach that relies on the Ninth Amendment, \textit{Griswold} emerges as offering two apparently distinct paths to the establishment of an independent fundamental right not specifically tied to a particular constitutional guarantee. One must either establish that recognition of the value in question "is necessary in making the express guarantees [of other provisions] fully meaningful"\textsuperscript{383} and hence that the value falls within the "penumbra" of those guarantees; or, one must demonstrate that the value by itself is so fundamental and basic a part of our society as to accord it constitutional protection.\textsuperscript{384}

2. Applying the \textit{Griswold} formula

a. The "protected penumbra"

One difficulty in applying Justice Douglas' approach in \textit{Griswold} to environmental values lies in the very novelty of the approach. The "penumbra" theory, it must be conceded, has not secured widespread acceptance outside the confines of \textit{Griswold} itself.\textsuperscript{385} In part, this fact may be due to the difficulty in treating the theory as conceptually distinct from more direct inquiry posed by the substantive due process test. If specified values are admitted to be essential in making other specific constitutional guarantees meaningful, then it is difficult not to conclude that those values are themselves sufficiently fundamental to require substantive protection.\textsuperscript{386}

\textsuperscript{382} 381 U.S. at 511 (Black, J., dissenting) ("I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same.").

\textsuperscript{383} 381 U.S. at 483.


\textsuperscript{386} The development of constitutional status for the "right of privacy" provides an illustration. \textit{Griswold}'s ambivalence as to whether this concept deserved recognition as "fundamental" in its own right, or "only" because of its nexus to other guarantees has now apparently been resolved in favor of the former approach by the Supreme Court's recent "abortion" decision in \textit{Roe v. Wade}, 410 U.S. 113, 152 (1973).
But distinct test or not, it seems logical to conclude that if nonconstitutional values are sufficiently related to the preservation of recognized constitutional values, then the former should equally receive some measure of substantive constitutional protection.387

b. The right of privacy

Assuming then that it is relevant in some sense to look for "implicit rights in the nexus between nonconstitutional" values and other recognized rights, the remaining question is whether the right to some form of environmental protection can be said to be a "prerequisite to the meaningful exercise"388 of other established constitutional guarantees. One candidate nominated in recent literature for the latter role is the right of privacy itself, which led the Griswold majority to erect constitutional safeguards around the marriage relationship and which only recently received confirmation of full constitutional status in the Supreme Court's decision on abortion in Roe v. Wade.389

In the years between Griswold and Roe v. Wade, the right to privacy has been the subject of continual judicial development and expansion, primarily in decisions interpreting the Fourth Amendment. In Katz v. United States,390 for example, the Supreme Court found that the electronic surveillance of a telephone booth fell within the Fourth Amendment's ban on unreasonable searches and seizures. In so doing, the Court rejected previous theories that seemed to make the constitutional guarantee hinge on whether particular

387 Nor is the validity of this conclusion necessarily weakened by the recent Supreme Court decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). At first glance the disagreement between the majority and the dissenters in that case over whether education is sufficiently "fundamental" to justify strict judicial scrutiny under the Equal Protection Clause, appears to rest on a disagreement over just this issue. As framed by Justice Marshall in his dissenting opinion, the dispute apparently revolved around whether fundamental interests "encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself," 411 U.S. at 99, or whether such interests may also receive constitutional protection "because they are, to some extent, interrelated with constitutional guarantees." 411 U.S. at 103. Closer inspection of Justice Powell's majority opinion, however, suggests that this disagreement may be more verbal than conceptual. For the majority opinion does not hesitate to include as candidates for special judicial protection, rights "implicitly" guaranteed by the Constitution as well as those explicitly guaranteed. 411 U.S. at 33. And although no direct explanation is given of how one discovers "implicit" rights, the opinion proceeds to examine on the merits each of appellee's arguments purporting to establish a special nexus between education and other explicit rights, such as freedom of speech and the "right to vote." 41 U.S. at 35-37.

388 411 U.S. at 36. n.79.
“protected areas” had been invaded, and looked instead to the expectations of privacy of the individual.

In this focus on the right of an individual to rely on certain common human expectations with respect to one's ability to exclude governmental intrusions into a selected domain, some commentators have thought to find a basis for erecting minimum constitutional protections for environmental values. Thus, it has been suggested that the right to privacy becomes meaningless if the environment is so degraded that enjoyment of that value is impossible, and that the “right to be let alone” includes the right to governmental protection of the “the integrity of [one's] natural surroundings.” In each case, the attempt seems to be to draw an analogy of constitutional significance between the intrusion that occurs when the government pollutes and contaminates one's private domain and the similar intrusion when the government, without warrant, invades a private conversation, enters a home, or purports to direct the intimacies of a marriage relationship.

To state the attempted analogy, however, is at the same time to draw attention to its weakness. For however important the preservation of environmental values to the enjoyment of life, “privacy” seems ill-equipped to serve as a concept that adequately conveys the significance of such values while at the same time, preserving the sense of the concerns that underlie decisions such as Griswold, Katz, and Roe v. Wade. The point is not that one set of values is necessarily more important or more fundamental than the other — an inquiry more relevant to a Ninth Amendment substantive due process approach. Rather, the point is simply the linguistic one that the attempt to bring environmental concerns under the same rubric that yields constitutional protections for privacy interests seems to stretch the meaning of the term beyond the point where the judiciary is likely to respond to the analogy.

In part, the problem may be one of society’s perception of the kind of harm that results from the intrusion. Polluted rivers, filthy air, vanishing wildlife, and deteriorating scenery are likely to be perceived first and foremost as offenses to man’s physical senses lessening his prospects for pleasure in his natural surroundings, and traditionally finding redress in the law, if at all, only on theories of nuisance — interference with the reasonable use and enjoyment of property. In contrast, intrusions into the marital bedroom, the home, the private conversation strike at values perceived as implicit in the concept of the individual qua human, not qua sentient. The fact that “[t]he poorest

391 See Roberts, The Right to a Decent Environment: Progress Along a Constitutional Avenue, supra note 369.
392 Note, supra note 384, at 466.
393 See W. PROSSER, TORTS 594 (3d ed. 1964); Note, supra note 385, at 458, n.3.
man may in his cottage bid defiance to all the force of the Crown”\(^{395}\) only serves to emphasize that the values embraced by the concept of privacy seem to stand, at least in the traditions of our society, on a qualitatively different level from the physical surroundings in which the right is enjoyed.

This is not to say that the attempt to establish a constitutionally significant nexus between environmental rights and the “right to be let alone” is forever doomed. The same considerations that make the attempted connection appear weak today also point toward the kind of development which, should it occur, could give added force to the constitutional argument. As the degradation of man’s surroundings comes to be viewed more and more as an affront not just to his senses, but, as it were, to his soul — diminishing each man’s worth, to paraphrase John Donne,\(^{396}\) just as surely as it diminishes the physical worth of his surroundings, then one may more easily expect the courts to follow suit and accord commensurate constitutional protection. For the present, however, this possibility still seems to lie largely in the realm of speculation.

3. The Ninth Amendment and substantive due process

a. The judicial temperament

It is to Justice Goldberg’s opinion in Griswold and the due process approach of Justice Harlan that most recent lawsuits have turned in the effort to secure judicial recognition of environmental rights. It has already been suggested that the basic inquiry under both the Ninth Amendment and substantive due process approach is essentially the same: the aim is to establish that the right to enjoy certain environmental values occupies such a basic, fundamental position in the American scheme of things as to require equal status with other protected liberties. Conceptually, the Ninth Amendment approach may seem to enjoy the theoretical advantage of avoiding any need to establish at the outset of the inquiry that “environmental rights” are encompassed by the concepts of “life, liberty, or property.” But this advantage is offset by the seeming lack of judicial support for Justice Goldberg’s Ninth Amendment theory. No Supreme Court case since Griswold has relied on the theory, although no case has repudiated the theory either. In the two cases most closely analogous to Griswold and hence most obvious potential candidates for Ninth Amendment analysis — Eisenstadt v. Baird\(^{397}\) (contraceptive devices) and Roe v. Wade\(^ {398}\) (abortion) — the majority chose to rely respectively on equal protection analysis and substantive due process, despite


\(^{397}\) 405 U.S. 438 (1972).

\(^{398}\) 410 U.S. 113 (1973).
the fact that in the latter case the lower federal court had explicitly invoked the Ninth Amendment theory of Griswold.399

Even under the relatively more acceptable substantive due process approach, care must be taken to distinguish the task of determining whether environmental rights are within the ambit of the Fifth Amendment’s prohibition on the deprivation of “life, liberty, and property” without due process of law, from the more difficult task of determining whether such “liberties” are so fundamental that substantive protection is required. Recent cases seeking constitutional protection for environmental interests tend to blur this distinction. Typical, for example, is the argument advanced in Environmental Defense Fund v. Hoerner Waldorf.400 Seeking an injunction against the operation of defendant’s pulp and paper mill, plaintiffs argued that since health is necessary to sustain life, polluting activities which endanger health constitute a deprivation of “life” within the meaning of the Fifth Amendment. The district court had no difficulty in accepting the basic claim that “each of us is constitutionally protected in a natural and personal state of life and health,” but denied relief because the requisite state action did not exist.

A similar connection between “life” and a healthy pollution-free environment was pressed on the court in Virginians for Dulles v. Volpe,401 a case challenging the levels of aircraft operation at Washington National Airport (WNA):

Plaintiffs would ideally define health in the euphoric terms of the World Health Organization — “A state of complete physical, mental, and social well being, and not merely the absence of disease or infirmity.”402

In this case, it was not the absence of state action that led the court to deny relief, but the fact that:

[plaintiffs presented no case of specific personal injury causally related to noise from WNA. Absent this and absent a finding of generalized injury to health or property from such noise, no fifth or ninth amendment claim is, in the opinion of the court, present.]403

Both of these cases are somewhat misleading in suggesting that the only barrier to constitutional protection in this area is one of establishing, e.g., that state action has led to a deterioration of health. But broadening the concepts of life and liberty to include environmental values is only half of the inquiry —

399 See id. at 153. For a brief review of the reception accorded the Ninth Amendment theory in scholarly commentary and in other judicial decisions see Note, supra note 384, at 461 n.15.
402 Id. at 578, 2 ELR at 20365.
403 Id.
and the easy half at that. "Deprivation of life" has never been limited solely to actual physical death.\textsuperscript{404} Similarly, as discussed at some length below,\textsuperscript{405} recent Supreme Court decisions can be read as affirming an expansive view of the concept of liberty, sufficiently broad to include environmental interests. In short, one may concede that state actions that adversely affect health or restrict the opportunities to enjoy an uncontaminated environment infringe to some degree on values within the concepts of life and liberty. So for that matter do government decisions to prosecute a war. But the crucial question in such cases is what boundaries due process places on such state actions. It is that question that focuses the analysis on the relevant issue of whether environmental rights are sufficiently fundamental to require elevation to independent substantive constitutional status.

Having isolated the key task, it is at once obvious that the great obstacle confronting its successful accomplishment lies in finding the formula for determining what shall count as constitutionally fundamental. According to Justice Harlan one must look to "the teachings of history, ... the basic values that underlie our society, and ... the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedom ..."\textsuperscript{406} One may wonder whether this formulation really advances the inquiry, or whether like other judicial attempts to describe the key to the discovery of such basic values,\textsuperscript{407} one remains with little more than is conveyed by the concept of fundamentality itself.\textsuperscript{408} In light of the vagueness of the judicial standard, it is perhaps small wonder that cases attempting to establish recognition of environmental rights leave the impression that this half of the task is not one amenable to argument, but only to assertion, with the hope that lightning in the form of judicial agreement will eventually strike. Typical is the language from the complaint filed in \textit{Environmental Defense Fund v. Corps of Engineers} (the Gillham Dam case):

\begin{quote}
The right to enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of life, is part of the liberty protected by the Fifth and Fourteenth Amendments to the Constitution from deprivation without due process of law, and is also one of those unenumerated rights retained by the people, free from abridgement by any government, as provided in the Ninth Amendment to the Constitution of the
\end{quote}

\textsuperscript{404} See note 449, infra.
\textsuperscript{405} See text accompanying notes 441-445 infra and see note 444 infra.
\textsuperscript{407} See Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("traditional motions of individual liberty"); United States v. Guest, 383 U.S. 745, 758 (1966) (rights "so elementary" as to be "conceived from the beginning to be a necessary concomitant of the . . . Union the Constitution created").
\textsuperscript{408} See Note, supra note 384, at 463, n. 29.
United States.  

Small wonder too, that the court in this case, while expressing sympathy with plaintiff's position, reluctantly refused to release the requested bolt in the absence of explicit instructions from Thor himself:

Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition. But, as stated by Judge Learned Hand in Spector Motor Service Inc. v. Walsh, 139 F. 2d 809 (2d Cir 1944); "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."  

While at least one district court has not been quite so reluctant to agree that the Fifth and Ninth Amendments extend to the protection of environmental values (denying relief only because the requisite state action had not been established) other courts have uniformly rejected the proposition.  

Undoubtedly, the lack of judicial receptiveness to the argument reflects in part the continuing impact of the New Deal constitutional crisis which led to the Supreme Court's dramatic reversal in approach to claimed invasions of "fundamental economic rights." That story is a familiar one, and need not be recounted in any detail here. The upshot of the development is the familiar dichotomy between "economic rights" and "individual," "personal," or "civil" rights. Whereas the latter still remain potential candidates for constitutional protection under the Due Process Clause—requiring a compelling state interest to justify legislative intrusion—the invasion of economic interests only requires at best some conceivably rational justification, thus in practice insulating such claimed intrusions from constitutional review. Griswold itself reiterates this dichotomy in the following passage from Justice Douglas's opinion:

410 Id.
[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; ... We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife ..414

In light of this historical development, the task in attempting to persuade courts to respond to the call for recognition of constitutional environmental rights becomes to some degree a matter of measuring environmental rights against economic rights on the one hand, and individual or personal liberties on the other in order to determine by comparison with these two poles of current judicial activism, where on the scale of “fundamental values” environmental rights are to be located.

b. Economic rights, personal freedoms, and environmental values

The most direct explanation for the difference in judicial treatment of economic and civil rights rests on a basic judgment about the relative importance of the interests at stake. Curtailing an individual’s freedom to contract, it is argued, does not have the same impact on his worth as an individual as does, say, curtailing his freedom of expression or his freedom to marry.415

Implicit in the argument are two assumptions: first that there are some aspects of human life with respect to which an individual’s ability to enjoy exclusive control is an integral function of what it means simply to be a human being; and second that preservation of the individual’s control over these areas of his life is more important in the scale of human values than preservation of his control over other, more contingent aspects of human existence. Assuming for the moment that the assumptions are valid, application of the rationale to the case of environmental values seems to support the conclusion that these correspond more closely to the latter, contingent aspects of human life and hence are more closely analogous to economic rights in terms of the need for special judicial protection. For the same considerations discussed above in pointing out an apparent qualitative distinction between environmental and privacy interests (the former concerned with physical senses, the latter with the human personality), would lead under this analysis to recognition of a quantitative distinction as well, with environmental values assuming less weight in terms of their basic importance.

414 301 U.S. at 481.
415 See McCloskey, supra note 413, at 45-46.
In an attempt to avoid this conclusion, one may object to the basic assumptions on which the "relative importance" argument is based. It is not at all clear, for example, that the notion of human values which belong to man qua man is a meaningful one or, even if it is, that such values must necessarily be assigned greater importance in the scale of human concerns. As one commentator notes, for large segments of society, if not in fact for a majority of men, economic rights such as freedom of occupation may be at least as valuable as the more lofty values of free speech or protected privacy. 416 Undoubtedly, there are also those who view the freedom to enjoy an unspoiled habitat as no less important than other personal rights. Probably the most that one can conclude from such arguments is that the attempt to establish a hierarchy of interests in terms simply of their relative importance must inevitably leave an impression of subjectivity, opening a court to the charge that it is usurping a legislative function and thwarting a proper majoritarian choice of values. Thus, unless some better rationale is forthcoming for treating environmental rights differently from economic interests, it is not likely that a court will be eager to open yet another field to the uncertainties of active judicial review.

A second explanation for according certain personal liberties more protection than economic rights can be found in the argument that the former are particularly vital to the proper operation of the American political system, or for the protection of identifiable minorities against an overzealous majority. Examples are provided by the Supreme Court’s voting and reapportionment decisions, aimed at ensuring continual access to the political processes. 417 Other illustrations of this rationale at work—of special importance to unpopular or politically ineffective minorities—are evident in the Supreme Court’s approach to cases involving freedom of expression and the rights of racial minorities. 418

Again, one may question whether this explanation actually justifies a lesser degree of judicial concern for economic rights; 419 but in any event, application of the rationale to environmental values does not seem to yield a case for any greater judicial concern in that area. A worsening environment does not seem to single out a readily identifiable existing class to bear the resulting hardship; 420 nor is there any reason to think that those for whom environmental concerns are especially important will find themselves unnaturally blocked from making their views known through the political

416 See id.
419 See McCloskey, supra note 413, at 48.
420 But cf., text accompanying note 428, infra.
A third explanation often given for judicial deference to the legislature in cases of economic regulation relies on assumptions about the competence of the judiciary as an institution to deal with complex economic decisions, as opposed to decisions about more personal interests such as those involving the rights of the criminally accused. The themes which underlie this argument are reminiscent of those involved in questions concerning the "justiciability" of an issue. Economic decisions, it is argued, involve the balancing of a variety of complex factors—a task that is peculiarly within the expertise of the legislature both because the latter is closer to and hence better informed about the conditions that give rise to the immediate problem and because the legislature has procedures for fact gathering not generally available to the courts.\footnote{See Howard, supra note 417, at 195-96.}

Under this argument, too, environmental decisions would generally appear matters more appropriately left to the judgment of the legislature. Questions concerning the acceptable level of environmental degradation require a careful weighing of the complex costs and benefits involved in attempting to prevent such degradation while still maintaining acceptable levels of production of the goods that society seems to want. In light of the inevitable differences in individual opinion concerning the proper tradeoffs to use in making these calculations, the final balance seems peculiarly suited to majoritarian determination.\footnote{See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1158 (1969).}

None of the above explanations thus seems to offer a persuasive case for placing environmental rights in the same category as personal or individual rights with respect to the appropriateness of resurrecting the due process approach abandoned in the case of economic rights. There is one respect, however, in which intrusion on environmental interests appears to stand in a better position than the regulation of economic interests as a possible candidate for active judicial review. That respect derives from the unique-\footnote{This consideration has led commentators who have otherwise advocated a strong judicial role in dealing with environmental issues to express skepticism about the value of affirming that role through constitutional amendment rather than through legislation. See J. Sax, Defending the Environment 234-39 (1971); comment, The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality, 17 U.C.L.A. L. Rev. 1070, 1077 (1970) ("simply stated, a constitutional right requires the court to shoulder responsibility for decision making which is more properly assumed by representative bodies"). For the suggestion that these objections would not, however, apply to claims for procedural due process with respect to environmental decision making see C. Meyers and A. D. Tarlock, Selected Legal and Economic Aspects of Environmental Protection 291 (1971).}
ness—in a quite literal sense—of the interests that are often at stake. An unwise legislative choice of a particular economic or social theory can, in principle, often be revised as subsequent events yield hindsight.424 In contrast, decisions concerning the environment can easily assume an aura of irreversibility. The blunt fact that man lives on a finite planet with finite resources has already led to concern in some circles that we may soon pass the point of no return in the increasing depletion of crucial supplies of valuable minerals, clean air and water, and available sources of energy.425 The increasing danger of extinction faced by a variety of wildlife species furnishes its own good example of the kind of finality that may attend decisions about the use of the environment.426 In short, at some point the extent of environmental damage from governmental decisions may well become relevant to the question of the availability of constitutional protection, in a way that consideration of the kind of damage does not. And where environmental decisions can be challenged on a theory that unique values are being irretrievably lost, countervailing arguments for active judicial supervision can be made under each of the three theories just discussed. Thus, the fact that an irreplaceable asset faces potential destruction cannot but add to the perceived relative importance of the asserted right to continued enjoyment of the asset.427 And where the actions of one generation threaten final consumption or destruction of recognized national treasures, the fact that future generations are forever denied any say in the matter may justify active judicial supervision on a theory of protecting the rights of a significant unrepresented group.428 Finally, however complex the normal process of weighing adverse environmental costs against alleged benefits, that balancing decision arguably becomes less complicated and less a matter peculiarly within the expertise of the legislature when one side of the scales—the environmental loss—adds up to total destruction of the resource involved.

Whether or not these arguments prove ultimately convincing, they at least indicate a potential constitutional base on which a set of minimum substantive controls over environmental intrusions might be built. Even so, the base

424 The desirability of preserving this possibility of experimentation probably helped provoke Justice Holmes' vigorous protest during the height of "economic due process" that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner v. New York, 198 U.S. 45, 75 (1905) (dissenting opinion).


427 See id. ("Extinct animals, like lost time, can never be brought back. They are gone forever").

428 See Note, supra note 384, at 483.
remains a narrow one. Assuming as it does an extreme set of facts, the
"uniqueness" theory seems limited in its usefulness to what is probably at
present the rare case.

4. Interlude: a brief digression and a modest proposal

In one respect, it may be unfortunate that so much of the emphasis in
recent litigation has been aimed at establishing a vaguely defined "right" to
environmental protection on theories such as those discussed above. For the
implication of such arguments is that the question of constitutional protection
is an all-or-nothing thing; courts must either agree to embrace such rights
within an expanded Ninth Amendment or a theory of substantive due process;
or, by refusing to do so, they must abdicate the field entirely at least as far as
constitutional protection is concerned.

The emphasis on "rights" also has the drawback of leaving a great deal of
unanswered questions to be filled in by the judiciary without the benefit of a
prior precedential framework. Consider, for example, the problems involved in
formulating a reasonably precise definition of the "right" that is involved.
Proferred formulations include the right to protection "from unreasonable
environmental degradation,"429 the "right to a decent environment,"430 the
"right to an environment fit for human habitation,"431 or "fit to sustain
healthy human life,"432 and the "right to enjoy the beauty of God's creation
and to live in an environment that preserves the unquantified amenities of life
..."433 Giving content to these formulations in a way that will yield specific
rules to govern particular cases of water or air pollution is a difficult task for a
court. And although the task is not necessarily beyond the competence of the
judiciary, as evidenced by a variety of legislative enactments or proposals,434
the invitation to give content to such vaguely defined rights solely by reference
to the Constitution, without specific legislative direction, is one that courts, as
we have seen, find easy to decline.435

429 Note, supra note 384, at 473.
430 Roberts, supra note 391, at 160.
431 Roberts, The Right to a Decent Environment: E = MC², supra note 369 at 691.
432 Id. at 686.
433 See Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, 739, 1
ELR 20130, 20133 (E.D. Ark. 1971) (quoting from plaintiffs complaint in the
Gillham Dam case).
434 See the lists of states with legislation patterned on the Michigan "Sax Act" at 2
ELR 10117 (1972) and 3 ELR 10126 (1973). The Hart-McGovern Bill, S. 1104, 93
Cong., 1st Sess. (1973), proposes similar federal legislation.
435 For an explanation of this difference between constitutional and legislative
creation of environmental "rights" see the discussion and sources cited in note 423
supra.
What is unfortunate about this approach, is the inevitable impression that these various formulations of environmental “rights” can have no status at all in constitutional jurisprudence until specifically adopted by a court as the basis for granting relief in a particular case of environmental degradation. In light of the understandable judicial reluctance to make the leap from the present apparent lack of constitutional protection for such values to full-scale protection, there may be something to be said for focusing instead on the other end of the spectrum—on the fact that intrusion on environmental interests at the very least requires equal constitutional treatment as intrusion on economic interests. For, although the demise of economic due process has left some question whether any substantive constitutional protection for such interests remains,436 a review of the rhetoric of the cases suggests that there must still in theory be some rational justification for the state's economic regulation.437 That is to say, rather than flatly declare “that economic legislation was no longer subject to judicial review on the question whether it had a 'rational basis,'” the court chose instead “to retain the rhetoric of the rational basis standard, but to apply it so tolerantly that no law was ever likely to violate it.”438 In either case, of course, the end result is the same: claims that substantive economic rights have been violated do not command much judicial sympathy. But the rhetoric is important, if for no other reason than that it preserves the potential theoretical basis for judicial supervision.

Applied to the case of environmental rights, there is probably little reason to expect drastically different results in the immediate future in terms of judicial willingness to examine the rational basis for environmentally degrading governmental actions. But by posing the issue in these terms, the groundwork is at least laid for gradually increasing judicial control over such action in proportion to the increasing importance of environmental concerns. One possible result, for example, might be the elevation to constitutional status of what at present appears a minimum requirement of a variety of federal statutes: significant government decisions which do not take into account the impact on the environment are “arbitrary” and “capricious” and cannot be sustained.439 Even if a court in most cases will presume as a constitutional

436 See Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (“We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”) (Black, J.); Roe v. Wade, 410 U.S. 113, 167 (1973) (Stewart, J., concurring).

437 See Roe v. Wade, 410 U.S. 113, 173 (1973) (“The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective.”) (Rehnquist, J., dissenting). McCloskey, supra note 413, at 36-40.

438 McCloskey supra note 413, at 39.

439 That this is the effect of combining Administrative Procedure Act standards for
matter that the requisite environmental factors have been taken into account, to secure recognition of some such proposition as a statement of the minimum constitutional requirements of "rationality" in this area offers a better basis for subsequent judicial development than a series of cases uniformly refusing to apply a full-blown theory of substantive protection for environmental rights.

B. Indirect Constitutional Safeguards

In view of the theoretical and practical obstacles that confront attempts to establish judicial recognition of an independent environmental right it is worth considering whether environmental values might not find at least modest protection through the application of other, more specific guarantees. The most likely candidates for such a role are provisions of the Fifth and Fourteenth Amendments that erect procedural safeguards for "life, liberty, and property," prevent the taking of property without just compensation, and prohibit state actions which deny "the equal protection of the laws."

1. The Fifth Amendment

a. "Life, liberty, and property": procedural due process

It has previously been suggested that the task of bringing the concept of "environmental rights" within the concepts of "life, liberty, or property" is considerably less difficult than the task of establishing substantive protection for such rights.\(^{440}\) The preceding discussion further suggests that to establish that the Due Process Clause encompasses environmental rights is strategically important, even if for the present one must "settle" for procedural rather than substantive protection.

The Supreme Court has recently reaffirmed an expansive view of the concept of liberty that seems easily broad enough to include the "right to enjoy the amenities of life":\(^{441}\)

While this court has not attempted to define with exactness the liberty ... guaranteed [ by the Fourteenth Amendment] the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up
children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by freeman. *Meyer v. Nebraska*, 262 U.S. 390, 399. In a constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Stanley v. Illinois*, __ U.S. ___.

If the key to including an item in this list of "liberties" is to demonstrate that the item is a "privilege long recognized ... as essential to the orderly pursuit of happiness by free men," then it is difficult to see how the pursuit of values encompassed by the term "environment" can persuasively be excluded. Indeed, "liberty" here appears sufficiently broad to suggest that the concept ultimately builds on the Millsean notion that individuals should enjoy the maximum possible "freedom" consistent with a like freedom for all. Thus any state action infringing on an individual's chosen pattern for the enjoyment of life should potentially require the minimum justification reflected in the Due Process Clause for deprivation of "liberty," — a theory that finds support in language from a Supreme Court case of a previous era:

> The liberty mentioned in [the Fifth and Fourteenth amendments] means, not only the right of the citizen to be free from the mere physical restraints of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways ... 

Even more persuasive, perhaps, is an approach that attempts to secure minimum procedural safeguards for the environment under the theory that property interests are being invaded. The traditional route to judicial relief for pollution has after all been through theories of nuisance law and claimed invasions of legitimate interests in the use and enjoyment of property.

Thus where a legitimate claim of entitlement to protection of the surrounding air, water, land, or other resources can be made under state or

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442 *Id.* at 576. Despite this broad compass of the concept of "liberty," the *Roth* court concluded that it did not embrace a state's refusal to rehire a non-tenured teacher. It is not my purpose here to examine the adequacy of Justice Stewart's analysis in these non-tenured teacher cases, compare *Roth* with *Perry v. Sinderman*, 408 U.S. 593 (1972). However, it must be admitted that the conclusion in the text would be on firmer ground had Justice Marshall's opinion, dissenting on this aspect of the case, prevailed. See 408 U.S. at 588.


444 Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). While this case belongs to that class of subsequently repudiated decisions striking down state economic regulation on substantive grounds, that fact does not detract from the validity of the Court's definition of "liberty" for purposes of determining what, if any, procedural protections "due process" requires.

445 *See Note, supra* note 384, at 458 n.3.
federal environmental statutes or common law doctrines of nuisance, or public
trust theories, a constitutional basis may be laid for imposing minimum
procedural requirements on governmental actions with a potential for
affecting such interests before such actions are taken. Nor does this
conclusion mean that nuisance law is suddenly to be elevated to constitutional
status. Conceptualizing the resulting relationship between the constitutional
requirement and the underlying source of the claimed property right is
difficult, but no more so than in other Supreme Court "procedural due
process" cases. In the latter cases, one need not demonstrate that existing legal
arrangements in fact prevent deprivation of the previously enjoyed benefit.
Indeed, a subsequent judicial test may establish that one does not have the
claimed right to welfare, or to continued employment. But presumably,
as long as a colorable claim of entitlement to continued enjoyment of certain
benefits can be made, some hearing and statement of reasons must be
provided before depriving one of those benefits, pending an ultimate test of
the merits of the claim. Analogously, one would not actually have to
de demonstrate that environmentally degrading activities infringed interests
protected by statutory or common law. As long as a colorable claim of
infringement could be made, procedural safeguards would have to precede
governmental action leading to actual judicial testing of the claim. Further,
since actions significantly degrading the environment easily lead to questions
of possible "interference with the reasonable use and enjoyment of
property"—the typical basis for a private or public nuisance complaint—and
since such actions, at least on the federal level by virtue of the National
Environmental Policy Act (NEPA), raise questions of possible inconsistency
with applicable federal law, all such actions are theoretically open to the
charge that either private or public property interests are being jeopardized.

Even assuming, however, that environmental interests can be encom­
passed within "life," "liberty," and/or "property," the question of the kind
of procedural protection required remains to be considered. And at this point,

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Sinderman, 408 U.S. 593 (1972).
449 While few cases have had occasion to discuss the concept of "life" as used in the
Due Process Clause, that concept seems broad enough to justify including
pollution activities that jeopardize health within the class of state activities subject
to the minimum procedural requirements of the clause. See Munn v. Illinois, 94
U.S. 113, 142 (1877) (Field, J., dissenting) ("By the term life, as here used,
something more is meant than mere animal existence. The inhibition against its
deprivation extends to all those limbs and faculties by which life is enjoyed . . .
The deprivation not only of life, but of whatever God has given to everyone with
“a weighing process has long been considered a part of any determination of the form of hearing required in particular situations by procedural due process.” Without recounting the problems in weighing environmental values against other societal concerns, one significant difference between such values and those at issue in cases of teacher employment or welfare benefits deserves mention. In the latter cases, government action clearly singles out particular individuals for attention, resulting in a context more traditionally suited to the requirements for a hearing. In the typical case of government actions affecting the environment, the question is not one of justifying the treatment accorded a particular individual, but rather one of the justification for a policy decision affecting a large segment of the public—the building of a dam, the construction of a highway, the discharge of industrial wastes. The question of prior hearings, so crucial in the context of a welfare recipient or a tenured employee, is less an obvious requirement of due process in the case of these kinds of actions.

What is relevant is the requirement that such decisions not be made arbitrarily—that due consideration be given to environmental concerns by relevant officials prior to taking action. To paraphrase Justice Marshall, dissenting in Board of Regents v. Roth, “federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to [environmental decisions] that they ... control.” Thus what can probably be expected of arguments seeking the protection of procedural due process in the environmental context is a minimum requirement that government action give adequate consideration to environmental values.

This result accords with the suggestion discussed in the preceding section. The result is also probably not significantly different from the requirements already imposed by federal statutes such as NEPA and cases interpreting the “arbitrary and capricious” standard of judicial review in the context of particular agency enabling acts. Thus, the constitutional argument may well never need to be reached at least where federal action is concerned, with the result that theories of procedural due process, even at best, would erect new safeguards only in cases of state actions (where there is no comparable “state NEPA”) that significantly and adversely affect the environment without first considering the resulting impact on “life, liberty, and property.”

450 Board of Regents v. Roth, 408 U.S. 564, 570 (1972).
451 Id. at 588.
452 See text accompanying note 439.
453 See note 439 supra.
454 While this chapter will not discuss the “state action” problem, it should be kept in
b. Taking and just compensation

In addition to the Due Process Clause, the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." While the question of what constitutes a "taking" is a complex one, discussed in more detail elsewhere,\(^455\) it is worth noting the potential protection afforded by the taking clause for certain environmental intrusions. The most active example is provided by the case of aircraft operation that significantly interferes with the value of property adjoining an airport. The leading Supreme Court case is *United States v. Causby*,\(^456\) which held that low flights by government military planes over a chicken farm had made the property unusable for that purpose and therefore constituted a taking of an air easement for which compensation must be made. The principle was applied again in *Griggs v. Allegheny County*,\(^457\) although the divisive issue in that case was who was responsible for the taking—the Federal Government or the local county airport owner—with the majority of the Court deciding on the latter.

The development of the taking doctrine with respect to aircrafts and airport operation since *Causby* and *Griggs* has not been a particularly happy one. In the first place, the facts in *Causby* presented a particularly egregious case of impairment of the complainant's property. Heavy bombers and fighter planes flew frequently and in considerable numbers over complainant's land "at times so close to the tops of the trees as to blow the old leaves off."\(^458\) Chickens were killed, flying into the wall from fright, and production fell off to the point that use of the property as a commercial chicken farm became impossible. Thus, even though the Court enunciated a general standard—a taking occurs when flights "are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land"—*Causby* itself did not offer much guidance concerning the minimum amount of interference that could constitute a taking.

\(^{455}\) See text accompanying notes 151-228, *supra*.

\(^{456}\) 328 U.S. 256 (1946).

\(^{457}\) 369 U.S. 84 (1962).

\(^{458}\) 328 U.S. at 259.
A second difficulty with the \textit{Causby} doctrine grew out of the Court's emphasis—repeated in Griggs—on the fact that the line of flight in question was \textit{over} the complainant's land. As a result, most of the cases since \textit{Causby} and \textit{Griggs} have assumed that a taking cannot occur unless there is an actual invasion by planes of the airspace over the plaintiff's property.\footnote{For further discussion of this development see the chapter on noise pollution.} Reviewing this development, a lower federal court in a recent decision questioned the logic of the "fly-by/fly-over" distinction, but refused nonetheless to depart from the majority of cases:

Although as an abstract proposition it is plausible to say that fumes, soot and vibration which strike a plaintiff's house horizontally, carried by the wind from an airfield across the road, are just as annoying to him as fumes, soot and vibrations which descend upon him vertically from an airplane passing overhead, still the fact remains that not only did the actual holdings in \textit{Causby} and \textit{Griggs}, on the facts of those cases, pertain only to the latter situation, but the language used by the court pertained to it as well.\footnote{\textit{Town of East Haven v. Eastern Airlines, Inc.}, 331 F. Supp. 16, 32, 1 ELR 20470, 20477 (D. Conn. 1971).}

In addition to these limitations, the usefulness of the taking theory as a vehicle for protecting the environment is further limited by the fact that the clause only requires compensation, not abatement of the polluting activity. Thus, in the case from which the above passage is quoted, the court responded to plaintiff's request for injunctive relief with the observation that even assuming the court had such power:

\begin{quote}
\textit{it would be manifestly inequitable to exercise it. The right of the public to travel by air by means of modern airplanes far outweighs the disadvantage to the relatively few persons, such as these plaintiffs, who are adversely affected to some extent.}\footnote{\textit{Id.} at 30, 1 ELR at 20475.}
\end{quote}

The protections provided by the taking clause need not, of course, be limited to the aircraft situation. Presumably, any kind of pollution sufficiently severe to cause a "direct and immediate interference with the enjoyment and use of the land" can constitute a taking. Thus the airport cases themselves, as one of the preceding quotations illustrates, refer not simply to the resulting noise pollution, but also to the air pollution caused by soot and fumes. Other cases have applied the theory to the pollution of a stream by a municipality in carrying out its sewage disposal functions,\footnote{\textit{See City of Walla Walla v. Conkey}, 6 Wash. App.6, 492 P.2d 589, 2 ELR 20172 (1971); Snavely v. City of Goldendale, 10 Wash. 2d 453, 117 P.2d 221 (1941). \textit{See generally} 2 J. Sackman, \textit{Nichols on Eminent Domain} §5.795(2) (3d ed. 1970).} and even, in calculating the amount of compensation required, to the aesthetic harm caused by the
erection of transmission lines across from a plaintiff's property. The limitations on the usefulness of the theory, however, seem equally applicable in these contexts as in the case of aircraft operation.

2. Equal protection

Judicial interpretation of the Equal Protection Clause in many respects parallels the development of concepts of substantive due process. Historically, questions of constitutionally unequal treatment arise where legislation distinguishes between two or more classes of people in terms of the burdens and benefits distributed. In such cases, the validity of the classification traditionally requires only that there be some reasonable relation "to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." As in the case of interpretations of "due process," the critical part of this formula is to be found in the standard of review which a court decides to employ in determining that the classification is neither "over" nor "under" inclusive, and is reasonably related to a legitimate goal.

Accompanying the demise of economic due process has been a similar increasing judicial deference to the legislative judgment in equal protection cases where the challenged classification involves economic regulation. In such cases, the presumption that the difference in treatment has some rational basis has resulted in virtual abandonment of judicial control through the Equal Protection Clause of business regulatory matters. In contrast, where certain "suspect classifications" or "fundamental interests" are involved, the Supreme Court's review of the justification for the difference in treatment has been much more stringent, with the result that in certain areas—race, voting, criminal procedure—classifications are almost presumptively invalid.

Paralleling this development has been the development of a new substantive approach to problems of equal protection. A good illustration is provided by Griffin v. Illinois. In that case, Illinois law required any person who wished to appeal his conviction to purchase a transcript for a stated fee. Under traditional theories, this statute would not have raised an equal protection problem since on its face the statute did not seem to involve any classification. In practice, however, indigent persons were unable to purchase transcripts and hence unable to avail themselves of the appeal afforded

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463 See Kamo Electric Cooperative, Inc. v. Cushard, ___ Mo. ___, 455 S.W.2d 513, (Mo. 1970).
466 See id. at 1087-31.
wealthier defendants. The Supreme Court held that the Illinois procedures violated the Equal Protection Clause by making access to review dependent solely on a person's ability to pay. In effect, the decision required the State of Illinois to take into account private inequalities existing among individuals in making decisions about the distribution of certain basic needs.\textsuperscript{468} Similar theories appear to underlie cases involving voting rights.\textsuperscript{469}

The relevance of these developments to environmental concerns lies in the potential extension of equal protection theory to require states to provide state services affecting environmental quality in a way that assures equal distribution among its citizens of certain basic environmental amenities. State supported services for which there is a uniform charge, such as sewage treatment and refuse collection, fall with greater impact on the poor than the affluent just as did charges for transcripts in \textit{Griffin}. Similarly, whether one is able to enjoy the pleasanter surroundings of a neighboring more wealthy county or municipality, may realistically depend on one's ability to pay—\textit{i.e.}, to exchange a low-cost but highly polluted environment for more amenable but more expensive surroundings. Thus, it may be thought that where the state is involved in providing protection for environmental values, the Equal Protection Clause should provide a similar basis for challenging disparities in such protection, even though such disparities result from inequalities in wealth or status for which the state is not directly responsible.\textsuperscript{470}


\textsuperscript{469} See \textit{Developments in the Law—Equal Protection}, \textit{supra} note 465, at 1180-83.

\textsuperscript{470} Some commentators have thought to find support for this theory in the decision of the Court of Appeals for the Fifth Circuit in \textit{Hawkins v. Town of Shaw}, 437 F.2d 1286 (5th Cir. 1971), \textit{aff'd on rehearing}, 461 F.2d 1171 (5th Cir. 1972) (en banc). See Note, \textit{Equal Protection Across the Tracks—Hawkins v. Town of Shaw}, 32 \textit{U. PITT L. REV.} 555, 578, (1971); Note, \textit{Equal Protection: The Right to Equal Municipal Services}, 37 \textit{BROOKLYN L. REV.} 560, 574 (1971). In that case, plaintiffs alleged that black citizens had received inferior municipal services, including inferior sewers, water mains, and surface drainage, in violation of the equal protection clause. The lower court, applying traditional standards of review, denied relief, but the court of appeals reversed, relying on historical and statistical evidence to find a prima facie case of racial discrimination, requiring justification under a strict standard. Since the court of appeals' theory is simply the traditional one of providing strict review for racial classifications, with the novelty of the case—if any—lying in the court's acceptance of statistical evidence to establish the classification, \textit{Hawkins} is not yet the case to establish a general right to equal treatment with respect to the provision of basic "environmental services." See \textit{Hawkins v. Town of Shaw—Equal Protection and Municipal Services: A Small Leap for Minorities but a Giant Leap for the Commentators}, 1971 \textit{UTAH L. REV.} 397.
In order for this argument to succeed, however, one would presumably have to convince the judiciary that the provision of environmental services is indistinguishable in terms of its "fundamental" importance from the provision of, say, voting facilities or criminal appeals. This task is, perhaps, not quite identical to the task analyzed above in connection with the substantive due process approach. There, the conclusion of fundamentality would presumably lead directly to incorporation of the interest within the Constitution as a protected, if unenumerated, right. Under the equal protection theory outlined above, something less than constitutional fundamentality can presumably still lead to strict judicial scrutiny of unequal distributions of the interest at stake. 471 Thus, the Supreme Court has yet to declare that an appeal in a criminal case is a constitutional requirement; yet that did not prevent the Court in *Griffin* from concluding that where a state does choose to provide appellate procedures, access to those procedures cannot be allowed to depend on ability to pay. Similarly, though failing in the attempt to establish environmental rights within the concept of substantive due process, one can presumably still argue that such rights are nevertheless sufficiently fundamental to require that where a state does undertake to provide protection for such values, it must do so under strict judicial supervision guaranteeing that all citizens, regardless of circumstance, participate equally in the benefits.

Even if not precisely identical, however, the considerations involved in choosing between an active and a permissive standard of review under the Equal Protection Clause will be similar to those already discussed in connection with the Due Process Clause. 472 In this connection, three recent Supreme Court decisions rejecting similar arguments in the areas of welfare, low-income housing and, most recently, education appear to establish that such arguments must also inevitably fail in the environmental context. In *Dandridge v. Williams* 473 the Court applied the rational basis test of the economic regulatory cases in upholding state minimum welfare grants. In *James v. Valtierra* 474 the Court upheld a provision of the California constitution requiring special referenda for proposals to construct low-income housing. Finally, in *San Antonio Independent School District v. Rodriguez*, 475 the Court upheld a state school financing system despite wide disparities in per-pupil revenues among the various districts.

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471 Given the subsequent equal protection decisions of the Supreme Court, discussed in the text, hopes that such a case could yet develop now appear unwarranted.

472 See Developments in the Law—Equal Protection, supra note 465, at 1130.


The implication of these decisions is that a state will be given the same broad latitude in responding to the housing, welfare, and educational needs of its citizens as it now enjoys in responding to the problems of economic regulation. That being the case, it is difficult to understand why less latitude should be accorded states attempting to respond to new and complex problems of pollution or environmental quality. While it may be true that a habitable environment is an underlying condition-precedent to the solution of all of society's other ills, it is unclear why that truism alone should persuade a court to view the Constitution as providing greater protection for environmental values than for basic human requirements for shelter, sustenance, and education.476 Perhaps if a case of impending disaster could be demonstrated, a court would be more likely to respond, although even then one may well wonder why the legislature, whose action is under attack, could not equally be persuaded of the awful error of its ways.

In short, the disinclination of the Court to extend active constitutional control over legislative responses to problems of housing and welfare suggests that the primary responsibility for environmental solutions will also remain with the legislatures.

476 But see Roberts, supra note 431, at 160-65.