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Justice Rehnquist and the Dismantling of Environmental Law

Robert L. Glicksman
George Washington University Law School, rglicksman@law.gwu.edu

James May

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by James R. May and Robert L. Glicksman

Editors' Summary: Chief Justice William H. Rehnquist was uniquely situated to have a profound impact on the development of federal environmental law—both because of the overlap of his tenure with the development of the field of environmental law and because of his four-decade tenure on the U.S. Supreme Court, more than one-half of which was as Chief Justice. Before his death on September 3, 2005, Rehnquist heard the vast majority of the Court's environmental cases during the modern environmental era, penning opinions in 25% of them, and affording him an opportunity to shape environmental law, especially during its formative years, that no Justice is likely to match. This Article discusses how Justice (and then Chief Justice) Rehnquist interpreted federal constitutional and public law in the opinions he wrote in environmental cases. It concludes that Rehnquist's environmental opinions reflect a three-tiered agenda. First, if a case involved a constitutional or statutory property rights question, Justice Rehnquist almost always chose to protect property rights over competing environmental concerns. Second, in the absence of a property rights issue, Rehnquist almost always decided cases so as to protect state sovereignty, sometimes but not invariably with pro-environmental results. Third, in cases lacking a property rights or state sovereignty component, he almost always decided them in a way that curtailed federal power, and with it, the effectiveness of environmental law. The Article, which is part of a larger ongoing study of Justice Rehnquist's environmental law jurisprudence, explores the extent to which Justice Rehnquist's three-tiered approach has already weakened environmental law and whether that approach is likely to contribute to further diminishment of effective environmental protection under the pollution control and natural resource management legislation in the future.

"[T]he requirements of the Clean Air Act Amendments virtually swim before one's eyes . . . ." *U.S. Steel Corp. v. EPA*, 444 U.S. 1035, 1038-39, 10 ELR 20081 (1980) (Rehnquist, J., dissenting).

"The Court errs in substantial measure because it refuses to acknowledge that a safe and attractive environment is the commodity really at issue. . . ." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 349, 22 ELR 20909 (1992) (Rehnquist, C.J., dissenting).

I. Introduction

William H. Rehnquist left an indelible imprint on the law in the four decades he served on the U.S. Supreme Court, first as an Associate Justice, and then as the nation's 16th Chief Justice. Nominated by President Richard M. Nixon on October 11, 1971,[1] he served as an Associate Justice from 1972 until President Ronald W. Reagan elevated him to Chief Justice in 1986. Rehnquist was uniquely situated to have a profound impact on the development of federal environmental law—both because of the overlap of his tenure with the development of the field of environmental law and because of his long tenure on the Court. His appointment corresponds almost exactly with the birth of modern federal environmental law, marked by the passage of formative environmental legislation such as the National Environmental Policy Act (NEPA)[2] in 1969 and the Clean Air Act

James R. May is a Professor of Law at the Widener University School of Law, and a Visiting Scholar at the Environmental Law Institute (ELI). He would like to thank Prof. Robert Percival for inviting him to present this paper as part of the faculty development series at the University of Maryland School of Law, Scott Schang and Leslie Carothers of ELI for inviting him to present the paper as part of the ELI's seminar series, and Jay Austin for comments on a draft version.

Robert L. Glicksman is the Robert W. Wagstaff Professor of Law at the University of Kansas. He would like to thank Prof. Richard Lazarus for inviting him to present this Article as part of his environmental law seminar series at Georgetown University Law Center and to all of those who provided feedback on the presentation.

1. For the story behind his nomination, see JOHN DEAN, THE REHNQUIST CHOICE (2001).

2. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209.

(CAA)[3] in 1970. During his tenure as Associate Justice, the U.S. Congress enacted or substantially amended nearly all of the nation's bedrock environmental bills, both in the pollution control and natural resource management fields.

Justice Rehnquist was something of a workhorse in the field. He participated in 90% of the nearly 280 environmental law cases the Court has decided since the dawn of the modern environmental era.[4] He sat on nearly all environmental cases decided after 1971, or roughly 250 of them, including 100 as Chief Justice. As the only Justice who was on the Court during its consideration of every modern environmental law case to come before it between 1971 and his death on September 3, 2005, Rehnquist wrote more opinions—84—in environmental cases than any other Justice.[5]

Justice Rehnquist considered himself a westerner who enjoyed the great outdoors. He and his family owned a summer cottage in Vermont's Green Mountains. He socialized, in majestic settings, with environmental stalwart Justice William O. Douglas.[6] He fished with Justice Robert H. Jackson, for whom he clerked. Yet Rehnquist seemed agnostic and, at times, even hostile toward modern federal environmental law. He regarded environmental law as at best "a specialty all its own."[7] At worst, it was a nuisance, resulting in "protracted litigation" that bespeaks unwarranted expansion of the federal judiciary,[8] and clogs federal courts, thereby distracting them from more important business.[9] He disdained what he called "harsh and draconian" environmental programs, such as the CAA, the requirements of which, he said, "virtually swim before one's eyes."[10] He seldom deferred to the U.S. Environmental Protection Agency's (EPA's) interpretation of federal environmental laws. He published four books and numerous articles, but managed to avoid the subject altogether. His popular account of the Supreme Court does not discuss the seven times he vigorously dissented from majority opinions that struck down "pro-environmental" state laws under the dormant Commerce Clause.[11]

Rehnquist's approach to environmental cases did not seem to soften through the years. As an Associate Justice, he aggressively used federalism as a justification for limiting the reach of federal environmental law.[12] After he became Chief Justice, Rehnquist spoke of environmental law with increasing skepticism. Deploring the "boring nature of work assigned to young associates in large firms," in remarks he made at a law school dedication, he said, "You don't become an environmental lawyer now, or a Clean Water Act [(CWA)][13] lawyer, but a Section 404 [CWA] Lawyer."[14] Predictably, then, more often than not Rehnquist voted against environmental protection interests. According to Prof. Richard Lazarus, Rehnquist's "Environmental Protection" score is about 36%, one of the three lowest in the modern federal environmental law era.[15]

Given Rehnquist's longevity and leadership on the Court, and the possibility that his views will continue to influence the Justices (particularly the more conservative ones) for decades to come, we believe it is worth exploring in some depth not only how Justice Rehnquist voted in environmental cases, but also the analysis reflected in the opinions he wrote. We conclude that Rehnquist's opinions demonstrate that he was highly invested in curtailing federal power, promoting state prerogatives, and protecting private property rights. Our analysis supports the conclusion that Rehnquist favored environmental protection legislation or regulation only to the extent that doing so was consistent with these values, which turned out to be seldom.

Part II of this Article analyzes Rehnquist's penchant for construing the constitutional and statutory aspects of environmental cases so as to curtail federal power. Here we explore how Rehnquist tried to reinvigorate the nondelegation doctrine, narrow the reach of federal regulatory power under the Commerce Clause, and apply tools of statutory construction to limit the scope of environmental legislation. Rehnquist seems to have been committed to the narrowing of federal authority in pollution control and natural resource management cases even in situations in which doing so did not result in an expansion of state power.

Part III discusses how Rehnquist sought to protect state sovereignty through constitutional interpretation and statutory construction in environmental cases. His opinions limited the constraints placed on state power by the dormant Commerce Clause and the Supremacy Clause and interpreted environmental statutes, particularly those pertaining to natural resource management, so as to promote state authority to control activities with potential adverse environ-

3. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

4. *See* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 708 (2000) [hereinafter Lazarus, *Restoring What's Environmental*]; Richard J. Lazarus, *Thirty Years of Environmental Law in the Supreme Court*, 19 PACE L. REV. 619 (2002); Richard J. Lazarus, *Environmental Law in the Supreme Court: Three Years Later*, 19 PACE L. REV. 653 (2002).

5. He wrote majority, concurring, dissenting, and per curiam opinions 40, 12, 30, and 2 times, respectively.

6. Rehnquist fondly recalled spending "several delightful days" with Justice Douglas and his wife at their summer retreat in Goose Prairie, Washington. WILLIAM H. REHNQUIST, THE SUPREME COURT 226 (2001). Rehnquist called Douglas "a conservationist long before it became fashionable to be one, and his efforts were instrumental in bringing the C&O Canal into the National Park System." *Id*. at 178.

7. William H. Rehnquist, *Remarks Made at Temple University School of Law Centennial and Convocation*, 69 TEMPLE L. REV. 645, 652 (1996).

8. William H. Rehnquist, *Soluble Problems for the Federal Judiciary: Curtailing the Expansion of Federal Jurisdiction and Other Matters*, 35 CT. REV. 4 (1998).

9. William H. Rehnquist, *Welcoming Remarks: National Mass Tort Conference*, 73 TEX. L. REV. 1523 (1995).

10. U.S. Steel Corp. v. U.S. EPA, 444 U.S. 1035, 1038-39, 10 ELR 20081 (1980) (Rehnquist, J., dissenting).

11. *See* REHNQUIST, *supra* note 6.

12. Prof. Robert V. Percival has asserted that "Rehnquist was intellectually consistent in his defense of federalism, voting in favor of states when their efforts to promote environmental protection were challenged as violative of the Commerce Clause or federal legislation promoting nuclear power." Robert V. Percival, *Environmental Law in the Supreme Court: Highlights From the Marshall Papers*, 23 ELR 10606, 10622 (Oct. 1993) [hereinafter Percival, *Marshall Papers*].

13. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

14. Carlos Santos, *Rehnquist Chides Legal Profession; Remarks Come at U. Va. Law School Dedication*, RICHMOND TIMES-DISPATCH, Nov. 9, 1997, at C3.

15. Prof. Richard J. Lazarus gives Justice Rehnquist an "Environmental Protection" or "EP" score of 36.5, that is, that he voted in favor of a pro-environmental outcome in 36.5% of what Lazarus identifies as the Court's most environmental cases up to 1998 (40 out of 114). Lazarus, *Restoring What's Environmental*, *supra* note 4, at 725, 729, 812. Controlling for the dormant Commerce Clause cases discussed *infra* at Section III.A.2. would take his EP to about 30 (33 out of 107).

mental effects. This aspect of Rehnquist's environmental jurisprudence did not always redound to the detriment of environmental protection. Rather, when environmental protection objectives aligned with his federalism agenda of protecting a state's authority to protect its own resources against external threats, Rehnquist favored the retention of state power, as he consistently did in his dissenting opinions in the dormant Commerce Clause cases.

Part IV explains Rehnquist's strong commitment to the protection of private property rights in environmental cases, both through his resolution of questions arising under the Takings Clause of the Fifth or Fourteenth Amendments of the U.S. Constitution and through his interpretation of federal statutes that had the potential to impinge on private property rights. It also explores how Rehnquist reacted when the state sovereignty and private property rights components of his agenda came into potential conflict. The cases demonstrate that Rehnquist tended to be willing to sacrifice state autonomy upon the altar of private property rights protection.

In each of the three main parts of this Article, the discussion follows the same structure: a section analyzing Rehnquist's use of constitutional law doctrines to limit federal power, protect state sovereignty, or protect private property rights; a section analyzing Rehnquist's resolution of statutory issues to accomplish the same goals; and a final section discussing the significance of the cases in each category. Our aim in this Article is by and large to be more descriptive than normative. While Rehnquist's specific influence on modern environmental law is impossible to predict with certitude, it seems clear that his efforts to curtail federal power, promote state prerogatives, and protect private property rights have in no small way helped to dismantle important aspects of modern environmental law. The implications are not particularly encouraging for those who find environmental protection to be a worthwhile endeavor. More extensive normative assessments of Rehnquist's jurisprudential templates, the correlation between what he wrote and how he voted, and the jurisprudential approaches that Rehnquist used in his constitutional and statutory interpretation in environmental cases are all subjects that warrant further study, which we are undertaking.

II. Curtailing Federal Power

Rehnquist construed the scope of federal regulatory authority under both the Constitution and federal environmental statutes narrowly, often at the expense of environmental protection objectives. His interpretations of both the nondelegation doctrine and the scope of congressional power under the Commerce Clause provide examples from the constitutional arena. Likewise, he tended to interpret federal statutes such as the CAA, the CWA, and NEPA narrowly, except when such interpretations worked against state interests.

A. Constitutional Interpretation

In certain contexts, Justice Rehnquist interpreted the Constitution as it might have been interpreted in 1935, usually in ways adverse to modern environmental law. He strenuously argued, for example, in favor of rescuing the nondelegation doctrine from obscurity to keep Congress from "delegating" too much responsibility to federal agencies such as EPA and the Occupational Safety and Health Administration (OSHA). He also aimed to curtail precipitously the extent to which Congress may regulate activities that affect interstate commerce.

1. The Nondelegation Doctrine

The nondelegation doctrine stems from Article I of the Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[16] Given the reference to "All legislative Powers," the nondelegation doctrine addresses the extent to which congressional grants of authority to executive agencies fall within the ambit of Article I.

The nondelegation doctrine did not arise until the dawn of the regulatory state. The Court determined in 1928 that a legislative grant of authority to third parties would pass constitutional muster provided Congress coupled it with an "intelligible principle" for effectuating legislative aims.[17] During the 1935 to 1936 term, the Court struck down, based on a violation of the nondelegation doctrine, three aspects of two signature New Deal laws. When coupled with the Court's limited reading of the Commerce Clause at the time, the constitutional basis for big government seemed tenuous. Within a few years, however, the Court experienced unprecedented turnover, affording President Franklin D. Roosevelt the opportunity to replace four of the Court's conservative stalwarts with Justices less interested in using the nondelegation doctrine to limit statutory delegations. Thereafter, the Court gave the doctrine little notice and it fell into desuetude for the next five decades.

This changed in 1980 and 1981, when Justice Rehnquist resurrected the doctrine to limit agency authority in two important environmental cases. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (the *Benzene* case),[18] the Court was confronted with determining whether to uphold OSHA's establishment of limits on occupational exposure to benzene pursuant to a provision authorizing regulation at a level that would "most adequately assure[ ], to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity," even during a lifetime of exposure.[19] A plurality of the Court avoided the constitutional question of whether the provision ran afoul of the nondelegation doctrine by narrowly interpreting the scope of authority that the statute delegated to OSHA. The Court held that the statute required OSHA, as a prerequisite to regulation, to make a finding that exposure to benzene in the workplace posed a significant risk. OSHA could promulgate a feasibility-based standard to protect employees against material impairment of health or functional capacity due to workplace exposure only if the answer was yes.[20] Justice John Paul Stevens, writing for the plurality, concluded that, in the absence of such a threshold finding requirement, the statute would vest in OSHA a "sweeping del-

16. U.S. Const. art. I, §1.

17. J.W. Hampton Jr. & Co. v. United States, 276 U.S. 397 (1928).

18. 448 U.S. 607, 10 ELR 20489 (1980).

19. 29 U.S.C. §655(b)(5).

20. The *Benzene* case, 448 U.S. at 642.

egation of legislative power" that might violate the nondelegation doctrine.[21]

Justice Rehnquist concurred, though he would have found that the Act ran afoul of the nondelegation doctrine. He concluded that Congress had skirted a hard social decision about acceptable exposure levels to hazardous chemicals in the workplace. Instead, "Congress, the governmental body best suited and most obligated to make the choice confronting us . . . has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court."[22] Instead of providing an "intelligible principle" to guide OSHA in promoting statutory purposes, Rehnquist found the statute to be "completely precatory."[23] He concluded that, "especially in light of the importance of the interests at stake, I have no doubt that the provisions at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power."[24]

Notably, other Justices tried to convince Rehnquist to abandon his concerns about nondelegation and instead strike down the statute on statutory grounds. Both Justices Thurgood Marshall (Justice Marshall) and Stevens drafted memoranda interpreting "feasible" in such a way that would allow the Court to invalidate OSHA's benzene regulation on statutory grounds.[25] Rehnquist replied that neither draft "breathes sufficient life into the word 'feasible' to avoid excessive delegation problems."[26] But Rehnquist's attempts to persuade his colleagues to adhere to his view of the nondelegation rationale did not bear fruit either.[27]

The following year, in *American Textile Manufacturing Institute v. Donovan* (the *Cotton Dust* case),[28] Justice William J. Brennan, writing for a 5 to 3 majority, upheld the application of OSHA's standard for occupational exposure to cotton dust, a health hazard formed by cotton yarn manufacturing and weaving. In adopting that standard, OSHA found that compliance was feasible, but did not engage in cost-benefit analysis to justify the level of controls it chose. The Court held the statute did not *require* a cost-benefit analysis, but instead directed OSHA to mandate that the industry conform to regulations reflecting what was "technologically and economically achievable."[29]

Rehnquist again concluded that the statute was unconstitutional: "Rather than make [a hard] choice and resolve the difficult policy issue, however, Congress passed. . . . The words 'to the extent feasible' were used to mask a fundamental policy disagreement in Congress. I have no doubt that if Congress had been required to choose . . . , there would have been no [legislation]."[30] Rehnquist protested the Court's willingness to approve congressional abdication of hard legislative choices to "nonelected officials of the Executive Branch."[31]

Rehnquist's view that Congress too readily abdicated tough social decisions so as to run afoul of the nondelegation doctrine seems paradoxical. Indeed, in the *Cotton Dust* case he urged his colleagues not to decide the case because the new Reagan Administration was assessing the feasibility of conducting a cost-benefit analysis, and a "decision by the Court at this time would be tantamount to an advisory opinion."[32] Yet, despite the change to an administration he perhaps found more favorable, Rehnquist still would have invalidated the statute because it gave the executive too much discretion.

The nondelegation doctrine bubbled up once again 20 years later in a CAA case, *Whitman v. American Trucking Ass'ns, Inc*.[33] At issue was Congress' instruction to EPA to establish ambient air quality standards that "are requisite to protect the public health."[34] Notwithstanding ample supposition that the case raised the prospect of a resurgence of the doctrine,[35] Justice Antonin Scalia, writing for a unanimous Court, found that the provision "falls comfortably within the scope of the discretion permitted by our precedent."[36] Justice Rehnquist did not write separately.

2. The Commerce Clause

Due in no small part to the continued vibrancy of the federalism debate, the shadow that Rehnquist's Commerce Clause jurisprudence casts on environmental and natural resources law is perhaps his longest. The Constitution permits Congress to "regulate Commerce . . . among the several states."[37] In *McCulloch v. Maryland*,[38] Chief Justice John Marshall (Justice John Marshall) famously held that Congress has the authority to enact the necessary and proper means to achieve the ends to the powers enumerated in the Commerce Clause. To hold otherwise, he reasoned, would essentially render much of the commerce power a dead letter: "Its nature, therefore, requires, that only its great outlines . . . be deduced from the nature of the objects themselves. . . . [W]e must never forget that it is *a constitution* we are expounding."[39] Justice John Marshall subsequently recognized Congress' broad authority to regulate interstate commerce notwithstanding countervailing state laws in *Gibbons v. Ogden*.[40]

The Court's appetite for questioning federal power under the Commerce Clause has ebbed and flowed in the nearly

21. *Id.* at 646.
22. *Id.* at 681-82 (Rehnquist, J., concurring in the judgment).
23. *Id.* at 675 (Rehnquist, J., concurring in the judgment).
24. *Id.* (Rehnquist, J., concurring in the judgment).
25. Percival*, Marshall Papers*, *supra* note 12, at 10616.
26. *Id.*
27. *Id*. at 10616 n.132 (quoting letter from Rehnquist to Justices Marshall and Stevens arguing that OSHA's "to extent feasible" directive was an unlawful delegation of congressional authority).
28. 452 U.S. 490, 11 ELR 20736 (1981).
29. *Id.* at 545-49.
30. *Id*. at 546 (Rehnquist, J., dissenting).
31. *Id.* at 547 (Rehnquist, J., dissenting).
32. Percival, *Marshall Papers*, *supra* note 12, at 10615.
33. 531 U.S. 457, 31 ELR 20512 (2001).
34. *Id.* at 472 (citing 42 U.S.C. §7409(b)(1)).
35. *See, e.g.*, Cass Sunstein, *Is the Clean Air Act Constitutional?*, 98 MICH. L. REV. 303 (1999); Jonathan Adler, American Trucking *and the Revival (?) of the Nondelegation Doctrine*, 30 ELR 10233 (Apr. 2000); Craig N. Oren, *Run Over by* American Trucking *Part I: Can EPA Revive Its Air Quality Standards?*, 29 ELR 10653 (Nov. 1999); and Craig N. Oren, *Run Over by* American Trucking *Part II: Can EPA Implement Revised Air Quality Standards?*, 30 ELR 10034 (Jan. 2000).
36. *American Trucking*, 531 U.S. at 476.
37. U.S. CONST. art. I, §8, cl. 3.
38. 17 U.S. (4 Wheat.) 316 (1819).
39. *Id.* at 407.
40. 22 U.S. (9 Wheat.) 1 (1824).

185 years since *Gibbons*.[41] Its tolerance of congressional authority under the Commerce Clause reached a nadir in the mid-1930s, when it favored a formalistic approach to the Commerce Clause in holding that Congress may not regulate in areas of traditional state concern, such as manufacturing, production, and other activities with only indirect effects on interstate commerce. It adopted a more practical approach in the late 1930s, culminating in a 1942 pronouncement that Congress may regulate intrastate activities that "substantially affect" interstate commerce, which may be demonstrated by "aggregating" the effects of those activities.[42]

No Justice saw fit to question congressional authority over commerce during the next four decades.[43] In the late 1960s and early 1970s the Warren E. Burger Court in particular seemed to embrace Justice John Marshall's expansive interpretation of broad congressional commerce authority, harnessed only by the political process. Indeed, the Court seemed *sub silentio* to have dropped the adjective "substantial" from its Commerce Clause calculus altogether.

In 1980, Justice Rehnquist began his long quest to reimpose limits on federal power under the Commerce Clause. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[44] a group of companies engaged in strip mining in Virginia challenged Congress' authority under the Surface Mining Control and Reclamation Act (SMCRA)[45] to impose environmental quality, land reclamation, and restoration requirements on "the use of private lands within the borders of the States."[46] Writing for a unanimous Court upholding SMCRA, Justice Marshall found Congress' commerce power to be "broad enough to permit . . . regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."[47] Marshall's opinion also held that Congress' constitutional prerogatives under the Commerce Clause are entitled to deferential rational basis review.[48]

Rehnquist concurred in the judgment, troubled by Justice Marshall's omission of the adverb "substantially" before "affects." Rehnquist complained that "it would be a mistake to conclude that Congress' power [is] unlimited," and he cautioned that although "one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress . . . there *are* constitutional limits."[49] Rehnquist asserted that "Congress must show that the activity it seeks to regulate has a substantial effect on interstate commerce."[50] He ultimately concluded that precedent impelled him to support the result the majority reached, notwithstanding his view that SMCRA stretched congressional authority "to the 'nth degree.'"[51]

Fifteen years elapsed before Rehnquist discovered the "nth degree" plus one. In *United States v. Lopez*,[52] writing for a bare majority, the now Chief Justice Rehnquist invalidated the Gun-Free School Zones Act (GFSZA) of 1990,[53] in which Congress made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[54] The Court held that Congress had exceeded its commerce authority because the statute "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[55] In reaching that result, Rehnquist emphasized the need to respect traditional state powers under the Constitution and reestablished the adjective "substantial" as a necessary predicate to Congress' commerce authority.[56]

Of the three categories of activities covered by the commerce power, the one best suited to support congressional authority to enact the GFSZA was the third, activities that substantially affect interstate commerce.[57] Rehnquist identified three "reference points"[58] to consider in determining whether an activity qualifies under the "substantial effects" test. First, does Congress seek to regulate an economic activity?[59] Rehnquist reasoned that the GFSZA did not do so because it "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise."[60] Second, does the law contain a "jurisdictional element" whereby Congress explicitly limits the legislation to activities that affect interstate commerce?[61] Perhaps elevating form over substance,[62] he found the GFSZA lacking because it contained no specific language limiting its reach to activities affecting interstate commerce.[63] Last, what impact does the activity have on interstate commerce? Again, Rehnquist found the GFSZA deficient because none was "visible to the naked eye."[64] Especially telling to Rehnquist was the lack of congressional findings linking gun possession and education.[65] He found that "neither the statute nor its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone."[66] Rehnquist also declined to

41. *See generally* Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 123-79 (15th ed. 2005).
42. Wickard v. Filburn, 317 U.S. 111 (1942).
43. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 195 (1968).
44. 452 U.S. 264, 11 ELR 20569 (1981).
45. 30 U.S.C. §§1201-1328, ELR Stat. SMCRA §§101-908.
46. *Hodel*, 452 U.S. at 268.
47. *Id.*
48. *Id.* (stating that "when Congress has determined that an activity *affects* interstate commerce, the courts need inquire only whether the finding is rational") (emphasis added).
49. *Id.* at 272 (emphasis added) (Rehnquist, J., concurring in the judgment).
50. *Id.* at 307 (Rehnquist, J., concurring in the judgment).
51. *Id.* (Rehnquist, J., concurring in the judgment).
52. 514 U.S. 549 (1995).
53. 18 U.S.C. §§921-922.
54. *Lopez*, 514 U.S. at 549 (quoting 18 U.S.C. §922q(1)(A)).
55. *Id.* at 551.
56. *Id.* at 559.
57. The two categories that did not apply are the channels of interstate commerce and instrumentalities, persons, and things in interstate commerce.
58. This is how Rehnquist describes these factors in *United States v. Morrison*, 529 U.S. 598, 613 (2000).
59. *Lopez*, 514 U.S. at 559-61.
60. *Id.* at 551.
61. *Id.* at 561.
62. *See* Philip Bobbitt, Constitutional Fate: Theory of the Constitution 194 (1982) (discussing "cueing" function of having Congress specify a link between the activity and commerce).
63. *Lopez*, 514 U.S. at 561-62.
64. *Id.* at 563.
65. For an in-depth discussion of this component, see Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 Case W. Res. L. Rev. 695 (1996).
66. *Lopez*, 514 U.S. at 562.

accept that aggregating the impacts of gun possession in school zones saved the statute.[67]

Five years later, Rehnquist continued his effort to turn the Commerce Clause clock back to 1935. In *United States v. Morrison*,[68] Rehnquist, writing again for a bare majority, invalidated the Violence Against Women Act (VAWA) of 1994,[69] which made some gender-motivated violence an actionable federal offense. Following the path he paved in *Lopez*, Rehnquist found the VAWA to be unconstitutional because: (1) violence against women is "not, in any sense of the phrase, economic activity,"[70] and that regulating it has "always been the province of the States"[71]; (2) it lacked a jurisdictional element establishing that federal enforcement promoted Congress' interest in regulating interstate commerce; and (3) it had effects on interstate commerce that were too attenuated for Congress to regulate.[72]

Rehnquist put his post-modern Commerce Clause jurisprudence to work in an environmental case the year after *Morrison*, but failed to deliver a knockout punch.[73] In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*),[74] Rehnquist, writing for the Court, struck down aspects of the U.S. Army Corps of Engineers' "migratory bird rule." Rather than rule on the constitutionality of the rule, the Court found that it was an unlawful interpretation of the CWA's definition of "navigable water" insofar as the Corps required a permit to discharge dredge and fill material into intrastate seasonal ponds located on the site of an abandoned, isolated sand and gravel pit that provided habitat for migratory birds.[75]

While the Court did not reach the constitutional question, Rehnquist made clear that he would have struck down the rule as inconsistent with the Commerce Clause had it instead been an act of Congress. Uncertain as to "the precise object or activity that, in the aggregate, substantially affects interstate commerce," Rehnquist wrote:

> [There] are significant constitutional questions raised by [the Corps'] application of their regulations . . . . Permitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize" [it]. We thus read the statute as written to avoid the significant constitutional and federalism questions raised by [the Corps'] interpretation.[76]

67. *Id.* at 560-61.

68. 529 U.S. 598 (2000).

69. 18 U.S.C. §§2265-2266; 42 U.S.C. §13981.

70. *Morrison*, 529 U.S. at 600.

71. *Id.* at 602.

72. *Id.*

73. For an interesting discussion of the disharmonies between Commerce Clause jurisprudence and environmental law, see Robert V. Percival, *"Greening" the Constitution—Harmonizing Environmental and Constitutional Values*, 32 ENVTL. L. 809, 836-37, 842-44, 864-65 (2002); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name:* Lopez*,* Morrison*,* SWANCC*, and* Gibbs, 31 ELR 10413 (Apr. 2001).

74. 531 U.S. 159, 31 ELR 20382 (2001).

75. *Id.* at 162.

76. *Id.* at 174. In the aftermath of *SWANCC*, Congress considered amending the CWA to make it less vulnerable to constitutional attack, by excising the definition of "navigable waters" or adding a jurisdictional predicate that links water pollution to interstate commerce. These efforts eventually stalled. *See* Thomas W. Merrill, *The Story of* SWANCC*: Federalism and the Politics of Locally Unwanted Land Uses*, *in* ENVIRONMENTAL LAW STORIES 283, 307-09 (Richard J. Lazarus & Oliver A. Houck eds., 2004).

77. Others shared his sentiments. One of Justice Harry A. Blackmun's clerks wrote to Blackmun in 1991: "I don't know what to advise you about these petitions. The clerks all call them 'those horrible EPA cases.'" *Robert V. Percival, Environmental Law in the Supreme Court: Highlights From the Blackmun Papers*, 35 ELR 10637, 10645 (Oct. 2005) [hereinafter Percival, *Blackmun Papers*].

78. Percival, *Marshall Papers*, *supra* note 12, at 10617.

79. 451 U.S. 287, 11 ELR 20357 (1981).

80. 33 U.S.C. §§401-418.

81. California v. Sierra Club, 451 U.S. at 301-02 (Rehnquist, J., concurring). Rehnquist was initially charged with drafting the majority opinion. Because his opinion appeared to preclude implied causes of action in other contexts, Justices Blackmun, Brennan, and Marshall joined what was a much narrower concurring opinion by Justice Byron R. White, converting it into the Court's lead opinion. Percival, *Marshall Papers*, *supra* note 12, at 10618-19.

82. 463 U.S. 680 (1983).

83. 42 U.S.C. §7607(f).

B. Statutory Construction

William Rehnquist almost always interpreted federal environmental legislation so as to curtail its reach. He could be very prickly about complex federal environmental laws.[77] He labeled the CAA, for example, a "harsh and draconian statute."[78] He hindered private enforcement of environmental statutes by refusing to recognize implied private rights of action and limiting the recovery of attorneys fees. He rarely deferred to statutory interpretations by environmental agencies such as EPA, and he was remarkably consistent in adopting the narrowest possible interpretations of NEPA. In construing these statutes, Rehnquist often looked beyond the text of the statute to its structure, legislative history, and underlying purpose, particularly if the purpose included either placing limitations on congressional authority or promoting federalism.

1. Predisposition Against Implied Rights and Attorneys Fees

Justice Rehnquist seemed somewhat antagonistic to citizen participation in the enforcement of environmental legislation. This stance had the effect of hindering private efforts to promote legislative purposes and, ultimately, curtailing legislative initiatives to protect the environment. In *California v. Sierra Club*,[79] the Court held that the Rivers and Harbors Act[80] does not provide an implied private right-of-action for citizens to enforce the statute. Rehnquist concurred to emphasize the need for clear evidence of legislative intent to create an implied right-of-action in explicit statutory text or legislative history. He found no such evidence in that case.[81]

Rehnquist seemed hostile to environmental citizen suits. He apparently ignored the plain meaning of the CAA to limit the extent to which courts may award attorneys fees in *Ruckelshaus v. Sierra Club*.[82] The issue was whether the CAA allows fee awards to litigants who achieve some degree of success short of earning a judicial decree on the merits, such as by "catalyzing" compliance. Writing for a 5 to 4 majority, Rehnquist held that the provision allowing a court to make an award "whenever it determines that such award is appropriate"[83] requires that a fee claimant "attain some

success on the merits before it may receive an award of fees."[84] Rehnquist posited that the provision allowing a fee award whenever the court determines it to be appropriate lacks "meaningful guidance," despite noting that "appropriate" means "fit" or "proper."[85] Instead, he relied on a "point of reference" not referenced in the CAA: the "American Rule," under which each side bears its own costs, regardless of who prevails.[86] To reach this result, Rehnquist dismissed key passages in the legislative history, including House and Senate reports showing that Congress did not want to limit fee awards to "prevailing" parties.[87] Instead, and without precedent, he expressed concern about the propriety of Congress allowing fee awards to those who do not prevail on the merits: "[T]he defendant's reward [for prevailing] could be a second lawyer's bill—this one payable to those who wrongly accused it of violating the law. We simply do not believe Congress would have intended such a result without clearly saying so."[88]

2. Predisposition Against EPA Arguments

Rehnquist seemed to look askance at EPA's interpretations of pollution control legislation and was reluctant to defer to agency expertise, especially in cases under the CAA. In *United States Steel Corp. v. EPA*,[89] for example, the Court declined to grant the steel company's writ of certiorari to review its procedural challenges to EPA's approval of a state implementation plan (SIP) under the CAA. Rehnquist, writing for the dissent and in opposition to EPA's position in the case, would have granted the petition, observing: "The fact that the requirements of the Clean Air Act Amendments virtually swim before one's eyes is not a rational basis, under these circumstances, for refusing to exercise our discretionary jurisdiction."[90]

Rehnquist sometimes went to great lengths to reject EPA's arguments. In *Adamo Wrecking Co. v. United States*,[91] he resorted to legislative history and structure to reject EPA's pro-environmental construction of the CAA. The issue was whether "work practice" procedures constituted "emission standards" for hazardous air pollutants under §112 of the 1970 CAA. EPA argued that the company could not seek judicial review of an emission standard it had allegedly violated in a collateral criminal proceeding. It claimed that the company could challenge the standard, if at all, only in a separate civil proceeding under the Administrative Procedure Act (APA).[92] Rehnquist rejected EPA's claim on the basis of his "survey of the totality of the statutory scheme," concluding that Congress did not intend that EPA's view that the regulation was within its authority "should be conclusive in a criminal prosecution."[93] He observed that the Act's criminal provisions envisioned enforcement of particular limits instead of practices, and "did not empower [EPA], after the manner of Humpty Dumpty in 'Through the Looking-Glass,' to make a regulation an 'emission standard' by [ ] mere designation."[94] Rehnquist also based his disagreement with EPA on his concerns about the "draconian" effect it might have on small businesses.[95] Dissenting in *Harrison v. PPG Industries, Inc.*,[96] Rehnquist again rejected EPA's reading of the CAA, employing canons of statutory construction, legislative purposes, and legislative history to do so.[97]

3. Predisposition Against Requiring Agencies to Consider Adverse Environmental Consequences

Rehnquist's opinions in cases arising under NEPA[98] reflect the same inclination to interpret the scope of federal environmental legislation narrowly.[99] On the one hand, narrow constructions of NEPA's application enhance agency discretion to pursue projects that the agencies declare to be exempt from environmental evaluation obligations, allowing them to avoid NEPA compliance altogether. Alternatively, such constructions may allow agencies to pursue projects approved after the preparation of NEPA documents that appear to be less than comprehensive, thereby minimizing NEPA's procedural and analytical burdens. On the other hand, narrow constructions of NEPA reduce the power of the federal courts to halt individual projects allegedly undertaken in violation of NEPA procedures.

To be sure, Rehnquist couched his NEPA opinions as efforts to implement congressional intent.[100] The pattern of re-

84. *Ruckelshaus*, 463 U.S. at 693.

85. *Id.*

86. *Id.* at 683-84 (citing Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 5 ELR 20286 (1975)).

87. *Id.* at 687-90.

88. *Id*. at 692.

89. 444 U.S. 1035, 10 ELR 20081 (1980).

90. *Id.* at 1038-39 (Rehnquist, J. dissenting).

91. 434 U.S. 275, 8 ELR 20171 (1978).

92. *Id.* at 278-79. 5 U.S.C. §§500-596.

93. *Adamo Wrecking Co.*, 434 U.S. at 284.

94. *Id.*

95. *Id*. at 283 n.2. Rehnquist was more tolerant of government arguments in another case in which law and order was at stake. In *United States v. Ward*, 448 U.S. 242, 10 ELR 20477 (1980), writing for the majority, Rehnquist held that the imposition of civil penalties for violations of the CWA's oil spill provisions does not invoke the Fifth Amendment's guarantee against self-incrimination.

96. 446 U.S. 578, 10 ELR 20353 (1980).

97. Rehnquist seems to have lost patience with the Act's vagaries in *PPG*, remarking that "[t]he effort to determine congressional intent here might better be entrusted to a detective than to a judge." *Id.* at 596 (Rehnquist, J., dissenting). Rehnquist was reluctant to accept EPA's constructions of the pollution control statutes it administers even when doing so tended to limit local discretion. In *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 24 ELR 20810 (1994), for example, the Court refused to defer to an EPA policy directive declaring that the Resource Conservation and Recovery Act's definition of "hazardous waste" exempts ash from municipal incinerators. Rehnquist joined Justice Scalia's majority opinion.

98. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209.

99. Rehnquist minimized the scope of federal control over natural resource management in at least two other groups of cases. First, he interpreted the scope of federal common law narrowly in cases involving land title disputes, thereby leaving state law as the governing body of law. These cases are discussed in Section III.B.1. below, which deals with Rehnquist's use of statutory interpretation to promote federalism. Second, he construed statutes or deed provisions to narrow the scope of the property rights reserved by the federal government in conveyances with private parties. The effect of these cases was to protect the property rights of the grantees, at the expense of the federal government. *See infra* Section IV.B.

100. Prof. Michael Herz claims that the Rehnquist Court as a whole tended to be more deferential to the executive than the legislative branch throughout its administrative law jurisprudence. Michael Herz, *The Rehnquist Court and Administrative Law*, 99 Nw. U. L. REV. 297, 298 (2004). Herz adds that Rehnquist himself took the position that Congress, not the courts, was the proper locus of control over agencies. *Id.* at 304. *See also id.* at 363 (stating that "[t]he simplest and baldest conclusion is that the Rehnquist Court likes agencies more than it likes Congress"); *id.* (stating that the cases decided

sults reflected in Rehnquist's NEPA opinions, however, is suspicious—he adopted the narrower and less protective interpretation at every single opportunity.[101] Whether Rehnquist's NEPA jurisprudence represents a net decrease in federal power or merely a refusal to allow the courts to enhance their own authority at the expense of Congress by adopting unintended, broad interpretations of the statute's scope, one thing is clear. Rehnquist's NEPA opinions undoubtedly weakened NEPA as a mechanism for forcing development-oriented agencies or other agencies historically inclined to minimize environmental considerations to pay closer attention to those considerations. In contrast, as indicated below, his dissenting opinion in an important case decided under the Endangered Species Act (ESA)[102] reflects a very different view of the appropriate role of judicial discretion than the one that emerges from the NEPA cases.

Justice Rehnquist wrote opinions in five cases involving alleged noncompliance with NEPA. In every one, he refused to find a NEPA violation. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[103] Rehnquist's majority opinion barred the lower federal courts from imposing on agencies procedures more rigorous than those derived from the APA. In particular, the Court held that the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit had improperly required the Nuclear Regulatory Commission (NRC) to provide opportunities for public input concerning the potential adverse environmental effects of nuclear power plant licensing beyond those required by the APA. Concluding that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act,"[104] the majority found it "clear" that "NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA."[105] According to Rehnquist, judicial second-guessing of legislative and agency determinations on the appropriate level of procedure "fundamentally misconceives the nature of the standard for judicial review of an agency rule."[106] "[U]nwarranted judicial examination of perceived procedural shortcomings," therefore, is bound to "seriously interfere" with congressionally prescribed process.[107]

Rehnquist also inveighed against excessive judicial scrutiny of the underlying policy rationale for agency decisions with environmental implications. The D.C. Circuit had held that the NRC had afforded inadequate consideration to energy conservation alternatives to nuclear plant construction. The Court reversed on this point as well, emphasizing that the role of the courts in reviewing alleged noncompliance with NEPA is "limited both by the time at which the decision was made and by the statute mandating review."[108] It was up to Congress, not the courts, to resolve policy questions about the utility and safety of nuclear energy. Congress chose to experiment with nuclear power, and the "fundamental policy questions appropriately resolved in Congress" concerning that choice "are not subject to reexamination in the federal courts under the guise of judicial review of agency action" in a suit alleging NEPA noncompliance.[109]

Rehnquist's opinion in *Vermont Yankee* set the tone for his other NEPA opinions, all of which reject expansive interpretations of the obligations NEPA imposes on agencies to consider potential adverse consequences. In one case, Rehnquist urged the Court to make it more difficult for litigants to challenge alleged NEPA noncompliance in federal court by requiring exhaustion of administrative remedies.[110] Just as in *Vermont Yankee*, Rehnquist warned against the judicial disruption of legislative procedural choices that would likely occur in the absence of an exhaustion requirement.[111]

In the other cases, Rehnquist interpreted narrowly the range of circumstances in which NEPA applies. In a per curiam opinion for an 8 to 1 majority in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,[112] Rehnquist construed the term "human environment" so as to absolve a federal agency of the need to consider less environmentally damaging alternatives to a low-income housing project. The opinion makes it clear that NEPA imposes solely procedural, not substantive, requirements.

Similarly, Rehnquist's opinion for a unanimous Court in *Metropolitan Edison Co. v. People Against Nuclear Energy*[113] interpreted narrowly a key statutory trigger for the

by the Rehnquist Court "show a surface respect for Congress in theory and a more meaningful respect for agencies in practice"). Rehnquist's NEPA opinions may illustrate his tendency to reach decisions more favorable to agencies than to the legislative body that is the source of the agencies' delegated power in a way that hinders environmental protection.

101. Rehnquist's opinions are certainly not alone in producing this result. The Supreme Court has never adopted an expansive interpretation on any issue ever presented to it in a NEPA case. *See* Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 STAN. ENVTL. L.J. 3, 10 & n.43 (2006) (quoting David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 553 & n.6 (1990)).

102. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

103. 435 U.S. 519, 8 ELR 20288 (1978).

104. *Id.* at 548 (citing Kleppe v. Sierra Club, 427 U.S. 390, 405-06, 6 ELR 20532 (1976)). Although Rehnquist found it appropriate for agencies to subject themselves to procedures not required by the APA, he stated that "reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Id.* at 524. *See also id*. at 543 (stating that "[a]bsent constitutional constraints or extremely compelling circumstances 'the administrative agencies "should be free to fashion their own rules of procedure and to pursue method of inquiry capable of permitting them to discharge their multitudinous duties"'").

105. *Id.* at 548.

106. *Id*. at 547. According to Professor Herz, however, "[t]he Rehnquist Court is dubious about judicial power generally; it is less dubious about its own power." Herz, *supra* note 100, at 364. Rehnquist also asserted that case-by-case judicial determinations as to the appropriate degree of procedure would disrupt the statutory scheme adopted by Congress, after balancing the interests of the relevant "opposing social and political forces." *Id.*

107. *Vermont Yankee*, 435 U.S. at 547-48.

108. *Id.* at 555.

109. *Id.* at 557. *See also* Herz, *supra* note 100, at 304 (arguing that Rehnquist's opinions, including *Vermont Yankee*, look "to electorally accountable officials to resolve questions of value"). Herz posits that the Rehnquist Court's jurisprudence supports the conclusion that "[w]hat makes a governmental decision 'right' is not its technical correctness or consistency with some external standard, but rather the fact that it was the preference of duly elected and at least somewhat accountable public officials." *Id.* at 366.

110. General Pub. Util. Corp. v. Susquehanna Valley Alliance, 449 U.S. 1096 (1981).

111. *Id.* at 1100-01 (Rehnquist, J., dissenting from denial of certiorari) (asserting that allowing the plaintiff to sue despite failure to exhaust would allow "circumvention of agency review and pursuit of NEPA claims directly in the district courts").

112. 444 U.S. 223, 10 ELR 20079 (1980). According to Professor Percival, Rehnquist was the author of the opinion. *See* Percival, *Marshall Papers*, *supra* note 12, at 10611.

113. 460 U.S. 766, 13 ELR 20515 (1983).

responsibility to prepare environmental impact statements (EIS). The issue was whether the NRC improperly failed to prepare an EIS before approving resumption of operations at the undamaged reactor at the Three Mile Island nuclear power plant. The NRC had shut down the entire complex after a 1979 accident at another reactor at the same facility.[114] Nearby residents argued that the NRC should have considered the potential damage to their psychological health and the disruption of the stability and well-being of the community caused by restarting the undamaged reactor. In rejecting the challenge, Rehnquist held that the NRC need not prepare an EIS because the residents failed to allege harm to the "environment." He asserted that NEPA only requires agencies to consider the effects of their actions on the physical environment.[115] The residents' fears about the risk of environmental damage if the undamaged reactor were restarted were not the proximate cause of any change in the physical environment that directly resulted from the NRC's decision to allow operations to resume.[116] Rehnquist found that the political process, not NEPA, provided "the appropriate forum in which to air policy disagreements."[117]

Rehnquist also allowed an agency to escape NEPA procedures in *Weinberger v. Catholic Action of Hawaii*.[118] The U.S. Navy prepared an environmental assessment (EA) finding that the transfer of nuclear weapons stored on Oahu would have no significant environmental impact. The Navy's regulations prohibited it from admitting or denying that it had actually stored any weapons on Oahu because the information was classified for national security reasons. The environmental plaintiffs alleged that the Navy should have prepared an EIS, rather than the more perfunctory EA it did prepare. They claimed that the Navy had ignored the enhanced risk of a nuclear accident resulting from the proximity of the weapons storage site to three air facilities, the effects of such an accident on the population and environment, and the effects of radiation from the storage of nuclear weapons in a populated area.[119]

Writing for the majority, Rehnquist concluded that the plaintiffs did not show that the Navy had failed to comply, or even needed to comply, with NEPA. He found that NEPA's twin goals of forcing agencies to consider the environmental impacts of their actions and to disclose to the public the results of those deliberations are not necessarily coextensive.[120] There might be situations, for example, in which NEPA would require a federal agency to consider the environmental consequences of its actions but not require it to disclose any resulting NEPA documents. In seeking to balance NEPA's disclosure goals with national security considerations, the appellate court had required the Navy to prepare a "hypothetical" EIS assessing the impact of nuclear weapons storage at the facility without revealing specific information about the number and type of nuclear weapons that might be stored there. According to Rehnquist, however, Congress had already struck the balance between environmental and national security concerns by exempting from disclosure under the Freedom of Information Act (FOIA) matters relating to national defense or foreign policy, including information relating to nuclear weapons.[121] Thus, it was "clear" that Congress intended that the public interest in NEPA compliance "give way to the Government's need to preserve military secrets."[122] The Navy therefore did not have to disclose an EIS on a proposal to store nuclear weapons.[123]

C. Discussion

Rehnquist's analysis of constitutional and statutory issues in environmental cases evinces an interest in curtailing federal authority in the field. In cases presenting constitutional questions, he sought to limit federal authority through an expansive interpretation of the constraints placed on congressional power by the nondelegation doctrine and a narrow interpretation of the degree of regulatory authority delegated by the Constitution to Congress under the Commerce Clause. In the statutory arena, Rehnquist seemed relentlessly determined to confine the degree to which NEPA imposes obligations on federal agencies with non-environmental missions to consider and publicly disclose the potential adverse environmental impacts of their proposed actions. He also interpreted other environmental legislation, such as the CAA, narrowly, often rejecting EPA's interpretations of the statute in the process.

Rehnquist regarded the principle that Congress lacks the authority to delegate legislative power to the president as "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the

114. *Id.* at 768.

115. *Id.* at 772. According to Rehnquist, the legislative history showed that "although NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment." *Id.* at 773.

116. According to Rehnquist, the direct effects of restarting Three Mile Island included the release of fog caused by operation of the plant's cooling towers, the release of warm water into the river, and the risk of a nuclear accident, all of which the NRC had considered. *Id.* at 775.

117. *Id.* The opinion emphasized that policy disagreements about the advisability of using potentially dangerous technologies (such as nuclear power) should be settled in the political process, not through litigation in which litigants disguise their disagreements with agency policy choices in the garb of alleged noncompliance with statutory procedures. *Id*. *Cf.* Herz, *supra* note 100, at 325 (stating that "when other actors seek to legitimize their decisions on the basis of a supposed policy expertise rather than electoral or political accountability, the [Rehnquist] Court is often suspicious and less likely to defer"). Rehnquist also argued that a broader reading of NEPA would be unworkable, given the limited time and resources available to agencies subject to NEPA requirements, and would divert agencies' attention from the core risks to the physical environment that NEPA was designed to alleviate. *Metropolitan Edison*, 460 U.S. at 776. In addition, Rehnquist feared that it would be difficult for agencies to distinguish legitimate claims of psychological harm from spurious claims based on policy disagreements. *Id*. at 777.

118. 454 U.S. 139, 12 ELR 20098 (1981).

119. *Id.* at 141-42.

120. Rehnquist stated that §102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), the provision at issue in the vast majority of NEPA cases:

> serves twin aims. The first is to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS. The second aim is to inform the public that the agency has considered environmental concerns in its decisionmaking process. Through the disclosure of an EIS, the public is made aware that the agency has taken environmental considerations into account.

Weinberger, 454 U.S. at 143.

121. *Weinberger*, 454 U.S. at 144-45 (citing 5 U.S.C. §552(b)(1)).

122. *Id.* at 145-46.

123. Indeed, the Navy did not even have to prepare an EIS solely for internal purposes because the Navy's contemplation of storing nuclear weapons at the Oahu facility did not qualify as a proposal. *Id.* at 146.

Constitution."[124] He perceived the doctrine as a means of promoting three important functions, each one a reflection of the first three articles of the Constitution. First, and "most abstractly," he characterized judicial adherence to the nondelegation doctrine as a tool for ensuring that hard social choices are made neither by the executive nor the judicial branches, but by elected lawmakers: the doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."[125] To the extent that Congress has difficulty reaching agreement on the details that agencies normally provide in the exercise of delegated power, it also may have the practical effect of reducing the amount of environmental legislation that Congress is able to enact. Second, Rehnquist asserted, the doctrine helps the president perform his constitutional functions by providing guidance on how to achieve congressional aims by requiring an "intelligible principle" to guide the exercise of delegated discretion.[126] Third, the doctrine provides the courts with ascertainable standards with which to measure compliance with legislative dictates. As Rehnquist explained, "the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."[127]

Justice Rehnquist obviously did not succeed in his quest to reinvigorate the nondelegation doctrine. Indeed, when the Court in a 2001 decision overturned a D.C. Circuit decision declaring EPA's interpretation of a key provision of the CAA to be a violation of the doctrine, Chief Justice Rehnquist joined Justice Scalia's majority opinion.[128] While possible, it seems unlikely that the nondelegation doctrine will see much action in the near future from the Court. Thus far, Chief Justice John G. Roberts Jr. has exhibited little appetite for it. It remains to be seen how much play it might receive from Justice Sandra Day O'Connor's successor, Justice Samuel A. Alito Jr., although he is an avowed proponent of the "unitary executive" theory. That doctrine embraces the notion that the executive is answerable to Congress only to the extent that the legislature makes its intentions clear. The rejection of the doctrine by Justices Scalia, Clarence Thomas, and Anthony M. Kennedy is based primarily on *stare decisis* and not constitutional interpretation, and thus is on shaky ground.

Rehnquist's efforts to restrict the scope of federal regulatory authority through narrow interpretations of the scope of the commerce power are likely to bear more immediate fruit. Rehnquist wrote the majority opinions in both *Lopez* and *Morrison*. Given the Supreme Court's subsequent limitation of those precedents to cases involving regulation of non-economic activities,[129] it is not clear whether the Court is ready to embark upon the kind of retrenchment of federal authority that Rehnquist seemed to support. The impact of the appointment of two new Justices since Rehnquist's death, for example, remains to be seen. Even if the Court does not follow Rehnquist's impetus to narrow the scope of Congress' power to regulate interstate commerce, it is likely that some Justices will interpret narrowly the scope of authority delegated by Congress to administrative agencies under the environmental statutes. Rehnquist also wrote the majority opinion in *SWANCC*, in which the Court relied on doubts concerning the constitutionality of an expansive interpretation of the CWA's dredge and fill permit program to invalidate the Corps' migratory bird rule.

Despite its potential lasting import, Rehnquist's Commerce Clause jurisprudence has some irreconcilable attributes. As a threshold matter, and despite citing *Gibbons* with approval in both *Lopez* and *Morrison*,[130] Rehnquist could never quite square his philosophies with Justice John Marshall's view that Congress may regulate intrastate activities except for those "completely" within a state, "which do not affect other states."[131] Moreover, Rehnquist declined to confront Marshall's sentiment that the ultimate check on congressional overreaching under the Commerce Clause in our representational democracy is the political process because federal representatives are elected by *the People*: "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are . . . the restraints on which the people must rely solely, in all representative governments."[132] Rehnquist's unwillingness to trust the political process to provide adequate constraints on Congress' exercise of its power under the Commerce Clause contrasts with his approach toward statutory construction, in which he often advocated for representational—and not judicial—responses to perceived legislative shortfalls.

Rehnquist's opinion in *SWANCC* appears to demonstrate that he was above all troubled by congressional efforts to regulate in areas traditionally left to the states. As discussed below, his aversion to federal regulation in such situations is consistent with his repeated dissents in the dormant Commerce Clause cases involving scarce resources traditionally controlled by the states, including landfill space, wild minnows, and groundwater.[133] Rehnquist felt strongly that states should be able to make rational choices about how to use their own natural resources without fear of constitutional infirmity.[134]

In contrast, Rehnquist did not seem as skeptical of the exercise of Congress' authority under the Property Clause to regulate or otherwise take actions to protect federally managed natural resources. For more than one and one-half centuries, the Supreme Court has interpreted the scope of Congress' authority under the Property Clause to be extremely broad, indeed to be essentially without limitation.[135] In one

124. Field v. Clark, 143 U.S. 649, 692 (1892).

125. Industrial Union Dep't AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685, 10 ELR 20489 (1980).

126. *Id*. at 685-86.

127. *Id*.

128. Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 31 ELR 20512 (2001).

129. Gonzales v. Raich, 125 S. Ct. 2195, 2210-11 (2005).

130. United States v. Lopez, 514 U.S. 549, 553-54 (1995); United States v. Morrison, 529 U.S. 598, 617 n.7 (2000).

131. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 74 (1824).

132. *Id*. at 75.

133. *See infra* Section III.A.2.

134. For a thoughtful rendering of this view, see Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 557 (1995) ("we should ask ourselves the question, 'Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?'").

135. *See, e.g.*, Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1871); United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840). Relatively early in Rehnquist's tenure on the Court, the Court stated that it had

late 19th century case, it asserted that Congress' power under the Property Clause is "analogous to the police power of the several States" and declared that "[a] different rule would place the public domain of the United States completely at the mercy of state legislation."[136] Rehnquist apparently was not inclined to question such precedents.

Rehnquist's proclivity for interpreting environmental legislation narrowly is most starkly evident in the opinions he wrote in cases arising under NEPA. In this respect, he was squarely within the Court's mainstream, as the Court has repeatedly endorsed constricted readings of NEPA's scope. Rehnquist's NEPA opinions established or confirmed the following propositions: (1) that the Act has little or no substantive component; (2) that its procedural obligations do not repeal by implication statutes such as the APA that impose different procedures on federal agencies; (3) that other statutes, such as FOIA, may relieve agencies of NEPA responsibilities that otherwise would have applied if they endorse the pursuit of policies inconsistent with NEPA's consideration and disclosure policies; (4) that the "proposals" for major federal action that trigger the EIS preparation requirement are often narrowly construed; (5) that the effects that an agency must consider in deciding whether one of its proposed actions requires the preparation of an EIS are confined to effects on the physical environment; (6) that litigants may not pursue NEPA claims in federal court without first exhausting administrative remedies; and (7) that the role of the courts in reviewing alleged noncompliance with NEPA is a limited one and, in particular, that the courts are not free to engraft onto the statute procedures that do not clearly appear on its face. Cumulatively, those propositions significantly restrict the scope of NEPA's applicability.

Curiously, while Rehnquist repeatedly rebuked the lower courts for their improper expansions of the CAA and NEPA when those expansions yielded more environmental protection, in at least one case he endorsed the exercise of broad judicial discretion in a manner that detracted from rather than amplified the force of environmental legislation. In *Tennessee Valley Authority (TVA) v. Hill*,[137] the majority held that the TVA's construction of the Tellico Dam violated the ESA's prohibition on agency actions that jeopardize the continued existence of listed species.[138] It also held that the district court had no choice but to enjoin the project pending compliance with the ESA because Congress had afforded the courts no discretion to balance the advantages and disadvantages of injunctive relief. Rehnquist dissented, concluding that the ESA did not prohibit the district court from exercising its equitable discretion by refusing to enjoin completion of the dam.[139] Further, Rehnquist concluded that the district court did not abuse its discretion by refusing an injunction, in light of the TVA's good faith and the significant public and social harm that would otherwise result.[140] Rehnquist was not convinced that Congress meant to divest the lower courts of their discretion to deny injunctive relief despite finding a violation of the ESA if an injunction would prejudice the public interest.[141] The contrast between Rehnquist's approval of wide judicial discretion to refuse to enjoin ESA violations and his repeated warnings in cases such as *Vermont Yankee* and *Metropolitan Edison* about the dire consequences of the exercise of judicial discretion in addressing alleged noncompliance with NEPA raises the possibility that an anti-environment animus lurks behind Rehnquist's resolution of these cases.

III. Promoting Federalism

The federal-state dynamic turns on two axes—the degree to which the Constitution constrains the exercise of both federal and state power. This part maintains that Rehnquist not only used the federalism-related provisions of the Constitution to impose restraints on federal authority, as indicated in the discussion in Part II above, regardless of whether the result was the protection or expansion of state power. He also typically interpreted the federalism provisions to avoid the imposition of restrictions on the exercise of state authority. Together, these two approaches were designed to protect the integrity of state sovereignty from encroachment by federal legislation.

A. Constitutional Interpretation

Rehnquist's commitment to the promotion of federalism in the establishment and implementation of environmental policy is revealed in his application of the Supremacy Clause and the dormant Commerce Clause to environmental law disputes. With one exception, he interpreted the Supremacy Clause narrowly to limit the extent to which federal environmental laws explicitly or impliedly preempt state law. He also consistently argued that the dormant Commerce Clause should not be read to limit state responses to national environmental challenges.

1. The Supremacy Clause

Not all environmental laws originate in the halls of Congress. State law fills in both the wide and the interstitial fissures left by federal law. Most states have myriad statutory and common laws that apply to activities that adversely affect ecosystems, serve as a nuisance, inflict personal injury, or diminish property value. Most states have comprehensive statutory programs that regulate activities that pollute the air, water, and soil or regulate the use of state natural resources, such as wildlife, minerals, and forests. These common or codified laws often provide remedies for those harmed by pollution or imprudent land use. Local laws, such as zoning ordinances, may impose additional restrictions on land uses that threaten to cause adverse environmental impacts. The question is how much of this law remains in the aftermath of federal environmental law.

The Supremacy Clause provides that federal law is the "Supreme" law of the land.[142] When Congress specifically expresses its intent to override state law, little doubt remains that state law is preempted. Problems arise, however, when

"repeatedly observed that the power over the public lands thus entrusted to Congress is 'without limitations.'" Kleppe v. New Mexico, 426 U.S. 529, 539, 6 ELR 20545 (1976) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)). Rehnquist joined Justice Marshall's unanimous opinion for the Court.

136. Camfield v. United States, 167 U.S. 518, 526 (1897).

137. 437 U.S. 153, 8 ELR 20513 (1978).

138. 16 U.S.C. §1536(a)(2).

139. TVA v. Hill, 437 U.S. at 211.

140. *Id.* at 212-13.

141. *Id.* at 213.

142. U.S. Const. art. VI.

Congress does not clearly state whether and the extent to which it intends to preempt state law. Absent explicit evidence of intent to preempt, the Court has held that Congress may preempt state law implicitly, either because federal legislation has occupied a field of interest so pervasively that preemption is assumed or because state law conflicts with federal law.[143]

Rehnquist was reluctant to find that federal environmental laws implicitly preempt state laws, especially if preemption would displace state power over matters traditionally regulated by the states. He consistently refused to find preemption in cases arising under pollution control legislation. In *City of Burbank v. Lockheed Air Terminal*,[144] for example, Rehnquist dissented from the majority's holding that the federal Noise Control Act (NCA)[145] preempted a local ordinance restricting noise pollution from aircraft "overflights." The majority concluded the NCA so "pervades" the field of aircraft noise that Congress has impliedly preempted local measures even absent any express language demonstrating an intention to do so. Rehnquist asserted that the Court should have presumed a lack of intent to preempt matters traditionally regulated at the local or state level, like noise abatement, absent a "clear and manifest purpose of Congress."[146] Noting the lack of express language or legislative history demonstrating such a purpose, Rehnquist would have deferred to the local response to noisy aircraft.[147]

Similarly, in *Pacific Gas & Electric Co. v. States Energy Resources Conservation & Development Commission*,[148] Rehnquist voted with a unanimous Court to uphold California's decision to impose a moratorium on siting new nuclear power plants due to the state's concerns about the unknown costs of providing for the disposal of high-level radioactive wastes. Rehnquist did not write an opinion in the case. But Justice Harry A. Blackmun's papers reveal that, even though Rehnquist described himself as "not fully at rest," he agreed that federal law does not preempt state laws that control nuclear power development based on economic rather than safety concerns, and he found broad federal intrusion in the field inappropriate.[149]

Rehnquist also demonstrated an aversion to federal preemption of state legislation designed to control natural resources found within the state. *Douglas v. Seacoast Products, Inc.*[150] involved the validity of two Virginia statutes barring nonresidents from catching fish in the state's territorial waters. After a business incorporated in another state was denied a state license despite having the right to fish in Virginia waters under a federal vessel licensing statute, it sought a declaration that the federal laws preempted the Virginia statutes. Virginia argued that the federal Submerged Lands Act (SLA)[151] recognized a state ownership interest in the fish swimming in their territorial waters. Because Virginia "owned" the fish, it could exclude federal licensees. The majority held that the federal licensing statutes preempted the Virginia statutes, even though the case involved a field traditionally occupied by the state.[152] It insisted that its decision was consistent with sound federalism policy considerations because "[t]he business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines."[153] Upholding Virginia's laws would invite protective and retaliatory measures by other states.[154]

Rehnquist concurred in part and dissented in part, taking issue with the majority's treatment of the states' interests in their coastal fisheries. Although the states do not own fish "in any conventional sense of that term, . . . it is also clear that the States have a substantial proprietary interest sometimes described as 'common ownership' in the fish and game within their boundaries."[155] Rehnquist read Supreme Court precedents as recognizing that state interests in common resources such as fish and game "are of substantial legal moment, whether or not they rise to the level of a traditional property right."[156] As a result, only a "direct conflict" with federal law invalidates state regulatory measures relating to fish and game, "no matter how 'peripatetic' the objects of regulation or however 'Balkanized' the resulting pattern of commercial activity."[157] Rehnquist ultimately agreed that the Virginia statutes were preempted, but only because there was a direct conflict between those statutes and the federal licensing statutes, which the SLA had not implicitly repealed.[158] He wrote separately to stress that the majority afforded inadequate weight to the states' interests in controlling their own natural resources.

The following year, Justice Rehnquist wrote the majority opinion in a second natural resources law preemption case, *California v. United States*.[159] The issue was whether the adoption of the federal Reclamation Act of 1902[160] prohibited a state agency from imposing conditions on the federal government's allocation of water impounded behind a federally constructed dam to promote aesthetic, environmental, recreational, fish and wildlife protection, and stockwatering uses of the water. The United States argued that it could impound whatever unappropriated water was necessary for its reclamation project without complying with state law.[161]

143. Pacific Gas & Elec. Co. v. State Energy Resource Conservation & Dev. Comm'n, 461 U.S. 190, 13 ELR 20519 (1983).

144. 411 U.S. 624, 3 ELR 20393 (1973).

145. 42 U.S.C. §§4901-4918.

146. *City of Burbank*, 411 U.S. at 643 (citing Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230 (1947)).

147. *Id.* at 651.

148. 461 U.S. 190, 13 ELR 20519 (1983).

149. Rehnquist supposedly stated that the Atomic Energy Commission read the Atomic Energy Act "to say 'love me, love my dog.'" Percival, *Blackmun Papers*, *supra* note 77, at 10648. Rehnquist was also loath to interpret federal environmental laws as impliedly displacing "substantial," though not "traditional," state interests, particularly in cases ostensibly involving commercial speech. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 570, 11 ELR 20600 (1981) (Rehnquist, J., dissenting) (prohibition on billboards); Central Hudson Gas & Elec. v. Public Comm'n of New York, 447 U.S. 557, 584-88 (1980) (Rehnquist, J., dissenting) (restrictions on promotional advertising of electricity deemed inconsistent with energy conservation goals).

150. 431 U.S. 265, 7 ELR 20442 (1977).

151. 43 U.S.C. §§1301-1315.

152. *Douglas*, 431 U.S. at 286.

153. *Id.* at 285.

154. *Id.* at 285-86.

155. *Id.* at 287-88.

156. *Id.* at 288.

157. *Id.*

158. *Id.* at 289.

159. 438 U.S. 645, 8 ELR 20593 (1978).

160. 43 U.S.C. §§371 et seq.

161. *California*, 438 U.S. at 647, 652.

The savings clause[162] whose interpretation controlled the issue appeared in §8 of the Act. It provided:

> Nothing in [specified sections of the Reclamation Act] shall be construed as affecting or intended to affect or to in any way interfere with [state laws] relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing [in those sections] shall in any way affect any right of any State . . . or user of water in, to, or from any interstate stream or the waters thereof.[163]

Rehnquist held that the Act did not displace the application of state water law to the distribution of federally impounded water. In doing so, he relied on the historical relationship between the federal and state governments in the reclamation of arid lands in the West, which reflected a "consistent thread of purposeful and continued deference to state water law by Congress."[164] In particular, Congress decided to require the Secretary of the U.S. Department of the Interior to appropriate necessary water rights in "strict conformity with state law" and to distribute water at federal reclamation projects to landowners in accordance with that law.[165] Moreover, accommodating state water law seemed to make sense to Rehnquist as a matter of policy. The "very vastness" of the United States, the different times at which federal lands were "acquired and settled, and the varying physiographic and climatic regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences."[166] Rehnquist thus endorsed a reading of the Reclamation Act, and in particular of its savings clause, that served to minimize federal control over resources subject to competing federal and state claims.

In one case, Rehnquist deviated from his disinclination to interpret federal environmental and natural resources legislation to have preemptive effects. Significantly, the result of finding preemption was to weaken the capacity of state law to provide levels of environmental protection beyond those provided by federal law. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[167] the majority held that Congress did not intend the "abandonment" provisions of the federal Bankruptcy Code to preempt state measures, such as requiring site cleanup prior to abandonment, designed to protect the public health or safety from identified hazards. Rehnquist dissented, arguing that Congress impliedly preempted the states from regulating abandonment. He seemed convinced the state acted to protect the "public fisc," rather than to carry out its traditional role of protecting public health and safety.[168] Perhaps that belief explains his willingness to preempt state power despite his other opinions protesting federal intrusions on state authority to regulate in areas of traditional state concern. Whatever the reason for his stance, Rehnquist was unable to hold onto the majority of the Justices who initially supported his approach. Justice Lewis F. Powell switched his vote due to concerns that Rehnquist's position reflected the anti-federalist proposition that the authority of a trustee in bankruptcy to abandon property "is not subject to any general requirement of compliance with state regulatory laws."[169]

2. The Dormant Commerce Clause

The one area in which Rehnquist's opinions demonstrate an undeniable environmental sensibility is at the confluence of states rights and environmental law under the dormant Commerce Clause. The "dormant Commerce Clause" limits a state's ability to regulate interstate commerce even in the absence of congressional preemption. It finds its origin in the Commerce Clause, which provides "Congress shall have Power [to] regulate Commerce [among] the several states."[170] During Rehnquist's tenure, the Court invalidated every attempt by states to conserve natural resources and protect health and safety by enacting restrictions on the transport, management, or disposal of waste. Rehnquist dissented each and every time, arguing passionately that states should be free to enact such laws even if incidental effects on interstate commerce ensue.

Rehnquist's inaugural departure from most of the others on the Court in this vein came in *City of Philadelphia v. New Jersey*.[171] New Jersey enacted a law that, with a few exceptions, prohibited the importation of all waste that originated outside the state until it determined it could manage the waste without endangering public health, safety, and welfare. Writing for the majority, Justice Potter Stewart held that the law was unconstitutional, falling "squarely within the area that the commerce clause puts off limits to state regulation."[172] Even though states have some latitude to slow

162. In the environmental and natural resources law context, a "savings clause" typically preserves the applicability of some body of law outside the statute that contains the clause. *See, e.g.*, Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. Pa. L. Rev. 125, 148, 161-63 (1985).

163. 43 U.S.C. §383.

164. *California*, 438 U.S. at 653. In another case decided the same year, Rehnquist also relied on the need for federal deference to state water law. The issue in *United States v. New Mexico*, 438 U.S. 696, 8 ELR 20564 (1978), was whether the United States had implicitly reserved water rights to promote aesthetic values, recreation, and fish and wildlife protection when it created the Gila National Forest. Rehnquist's opinion for the majority concluded that it had not. *See infra* Section III.B.1.

165. *California*, 438 U.S. at 665, 667.

166. *Id.* at 648.

167. 474 U.S. 494, 16 ELR 20278 (1986).

168. *Id.* at 516 (Rehnquist, J. dissenting).

169. Percival, *Marshall Papers*, *supra* note 12, at 10620. In *City of Milwaukee v. Illinois*, 451 U.S. 304, 11 ELR 20406 (1981), Rehnquist's majority opinion held the CWA's comprehensive regulatory scheme preempts federal common-law remedies for interstate water pollution. That decision is not particularly relevant to Rehnquist's treatment of federalism issues, however, because the case involves preemption of one body of federal law by another body of federal law, rather than preemption of state law by federal statute. Rehnquist did later join an opinion, however, concluding that the CWA preempted the common law of the state adversely affected by pollution in an interstate water pollution dispute, even though the CWA includes a savings clause that clearly disclaims any such preemptive intent. International Paper Co. v. Ouellette, 479 U.S. 481, 17 ELR 20327 (1987). The case revolved around an interpretation of 33 U.S.C. §1365(e), which provides that "[n]othing in [the citizen suit provision of that Act] shall restrict any right which any person (or class of persons) may have under statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ." *See also id*. §1370. For analysis of a series of Supreme Court decisions eviscerating the CWA's citizen suit savings clause, including *City of Milwaukee*, see Glicksman, *supra* note 162.

170. U.S. Const. art. I, §8.

171. 437 U.S. 617, 8 ELR 20540 (1978).

172. *Id.* at 628.

the flow of waste into state landfills in ways incidentally affecting interstate commerce, they cannot do so by discriminating against out-of-state wastes "unless there is some reason, apart from their origin, to treat them differently."[173] Because there was no evidence that out-of-state waste was any more dangerous than New Jersey's waste, the Court found the law to be protectionist in nature, subject to "a virtually per se rule of invalidity."[174]

Rehnquist (joined by Chief Justice Warren E. Burger) dissented. He disagreed that the statute was protectionist, was troubled by the detraction of sovereignty and lack of deference resulting from the majority opinion, and believed the law fell within the Court's quarantine cases. First, he characterized New Jersey's ban as a legitimate effort to conserve its natural resources and prevent serious health and safety problems that had only incidental effects on interstate commerce.[175] Acknowledging that solid waste proliferation is a national problem, Rehnquist believed it has both local causes and solutions and that crafting these solutions traditionally had been left to the states.[176] Second, Rehnquist regarded the majority's decision as an undue infringement on New Jersey's sovereignty. It was unfair to force New Jersey to accept out-of-state waste against its will in light of the inexorable increase in health problems that would result. He found no constitutional basis to foist upon the state the "Hobson's Choice" of either banning all solid waste disposal in the state or accepting waste no matter its point of origin.[177] Instead, a state should be free to choose to dispose of its own waste within while banning waste from without.[178] Thus, Rehnquist maintained that states should be free to enact legislation that discriminates—even facially—against out-of-state articles of commerce if the legislature's aim is to protect its citizens' health and safety.[179] Third, Rehnquist was troubled by the Court's dismissive attitude toward the state's legislative determinations as well as to the findings of the state's highest court upholding the legislature's justification for the ban.[180] Finally, Rehnquist likened New Jersey's ban on out-of-state waste to state quarantine laws that the Court had upheld since the dawn of the industrial revolution,[181] and he challenged the notion that the Court's quarantine cases turned on the hazard associated with the article's transport rather than its destination.[182]

The next year in *Hughes v. Oklahoma*[183] the majority invalidated an Oklahoma statute that prohibited the transport of minnows caught in the state for sale outside the state because it was improperly discriminatory and therefore violated the dormant Commerce Clause.[184] Rehnquist would have upheld the state law as a permissible, evenhanded effort to effectuate a legitimate state interest (the preservation of indigenous fish populations) with only incidental effects on interstate commerce.[185] In his view, the Court had previously upheld many regulations designed to conserve and maintain the natural resources of a state, and he would have continued to accord to the states wide latitude to fashion regulations appropriate for the protection of wildlife, absent a direct conflict with federal law.[186] Further, Rehnquist concluded that Oklahoma's chosen method for achieving its legitimate interest in conserving wild minnows at worst burdened interstate commerce only minimally.[187]

Three years later, Rehnquist dissented again in *Sporhase v. Nebraska*.[188] The majority held that a Nebraska statute that restricted the withdrawal of groundwater from any well in the state for use in an adjoining state violated the dormant Commerce Clause. Rehnquist argued that Nebraska had the constitutional prerogative to preserve dwindling groundwater supplies by requiring those who wished to transport it out of state to obtain a permit.[189] He would have upheld Nebraska's law for two reasons. First, "[a]s with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in groundwater, [but] only a right to *use* [it] on the land from which it has been extracted."[190] Therefore, he reasoned, the groundwater was not an "article of commerce" for purposes of the dormant Commerce Clause. Second, he believed the dormant Commerce Clause does not upset a state's legitimate, traditional efforts to devise rational means to regulate "essential" resources like water use, particularly in the West.[191]

173. *Id.* at 627.

174. *Id.* at 624.

175. *Id*. at 630 (Rehnquist, J., dissenting).

176. Justice Rehnquist remarked: "Congress specifically recognized the substantial dangers to the environment and public health that are posed by current methods of disposing of solid waste in the Resource Conservation and Recovery Act of 1976." *Id.* at 631 n.2 (Rehnquist, J., dissenting).

177. *Id.* (Rehnquist, J., dissenting).

178. *Id.* at 632 (Rehnquist, J., dissenting) (arguing that "New Jersey should be free . . . to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens," and that the state's continuing need to dispose of its own waste "does not mean that New Jersey may not prohibit the importation of even more solid waste into the State").

179. *Id*. (Rehnquist, J., dissenting).

180. *Id.* at 633 (Rehnquist, J., dissenting).

181. Rehnquist found no basis to distinguish solid waste from "germ-infected rags, diseased meat, and other noxious items" that the Court had previously allowed the states to block at their borders. *Id.* at 631-32. In particular, he observed that leachate, methane gas, and vectors from landfills present hazards not unlike those the Court had traditionally allowed states to prohibit under the quarantine exception to the dormant Commerce Clause. *Id.* at 630 (Rehnquist, J., dissenting).

182. According to Rehnquist, solid waste that presents a health hazard when it reaches its destination may also present hazards in transit. He failed to see "why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety." *Id.* at 632-33 (Rehnquist, J., dissenting).

183. 441 U.S. 322, 9 ELR 20360 (1979).

184. *Id.* at 335. In doing so, the Court overruled *Geer v. Connecticut*, 161 U.S. 519 (1896). The statute invalidated by the Court effectively allowed commerce involving only minnows raised in fish hatcheries but prohibited the seining of wild ones from state rivers and streams.

185. *Id.* at 343 n.7 (Rehnquist, J., dissenting) (applying the balancing approach from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

186. *Id.* at 342-43 (Rehnquist, J., dissenting).

187. *Id.* at 343-44 (Rehnquist, J., dissenting). According to Rehnquist, the Oklahoma statute served "the special interest of the State . . . in preserving and regulating exploitation of free-swimming minnows found within its waters. . . . [T]he range of regulations that a State may adopt under these circumstances is extremely broad. . . ." *Id*. at 335.

188. 458 U.S. 941, 12 ELR 20749 (1982).

189. *Id.* at 961 (Rehnquist, J., dissenting).

190. *Id.* at 964 (Rehnquist, J., dissenting).

191. *Id*. One other natural resources case bears mentioning. Largely due to the wide latitude states have over the use of their natural resources, Rehnquist, joined by O'Connor, rejected as "artificial and unconvincing" the "market participant" exception to the dormant Commerce Clause that a plurality of the Court found availing in 1984 in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 14 ELR 20548 (1984).

Rehnquist returned to these themes in two more dissents written a decade later. In *Chemical Waste Management, Inc. v. Hunt*,[192] the Court struck down on dormant Commerce Clause grounds a surcharge imposed by Alabama on out-of-state waste haulers. The Court rejected the state's contention that the fee was valid because it served legitimate purposes, including protection of health and safety and conservation of natural resources.[193] It found that the state did not choose the least burdensome means of achieving these legitimate ends. In his lone dissent, Rehnquist chided his brethren for failing to "acknowledge that a safe and attractive environment is the commodity really at issue in cases such as this."[194] According to him, the "[s]tates may take actions legitimately directed at the preservation of the State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators."[195] In addition, he argued that the Court's ruling would have a "perverse regulatory incentive" for states to ban in-state hazardous waste disposal categorically.[196]

In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*,[197] the Court overturned a Michigan law that prohibited disposal of in-state or out-of-state waste in county landfills unless the landfill operator complied with a state-approved disposal plan. Rehnquist would have upheld the statute as one aimed to protect legitimate environmental and health interests. He regarded the majority's opinion as an unfair attack on state sovereignty, arguing that the Commerce Clause does not require "cheap-land States to become the waste repositories for their brethren, thereby suffering the many risks that such sites present."[198] The majority's decision had the paradoxical consequence of punishing common sense state solutions to important national problems and would likely encourage states to take a "wait and see approach" by sending their wastes to disposal sites located in other states.[199] Rehnquist doubted that Michigan's "comprehensive approach to regulating in this difficult field, is the stuff of which economic protectionism is made."[200]

Finally, in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,[201] the Court rejected a law that imposed a higher fee for out-of-state than in-state waste disposal. Again in dissent, Rehnquist would have upheld the law as a rational state response to a national environmental problem.[202] Expressing his frustration, he bemoaned the Court's "stubborn" refusal "to acknowledge that a clean and healthy environment, unthreatened by the improper disposal of solid waste, is the commodity really at issue in cases such as these."[203]

B. Statutory Construction

Justice Rehnquist sought to protect state prerogatives through statutory interpretation as well as constitutional adjudication. Sometimes he overrode agency interpretations of the environmental statutes that, in his view, threatened to encroach upon state interests. In other cases, he deferred to agency interpretations that protected state prerogatives. In particular, Rehnquist wrote a series of opinions in which he endorsed statutory interpretations that enhanced state natural resource management capabilities. He generally supported the allocation of primary decisionmaking authority over the management and use of natural resources such as water and land to the states. In particular, he consistently interpreted federal natural resource management legislation and the federal implied reserved water rights doctrine narrowly to protect state primacy in the management of water resources, and he applied the equal footing and related doctrines to enhance either state ownership or control over land and other natural resources.

1. Protection of State Prerogatives Through Statutory Interpretation

Perhaps the best example in an environmental case of Rehnquist's willingness to take issue with agency statutory interpretations that posed threats to federalism was his majority opinion in *SWANCC*.[204] *SWANCC* involved a challenge to the Corps' application of its migratory bird rule under the CWA's dredge and fill permit program. Relying on the rule, the Corps required a consortium of local governments to apply for a permit before building a landfill on an abandoned sand and gravel mining site containing isolated, intrastate, and seasonal ponds that provided habitat for migratory birds.[205] The consortium challenged the Corps' assertion of jurisdiction as exceeding the bounds of both the CWA and the Commerce Clause.[206]

The case turned on the meaning of the term "navigable waters" under the CWA. The Act defines that term for purposes of both the dredge and fill and national pollutant discharge elimination system permit programs to "mean the waters of the United States."[207] Although the Act does not define the latter term, the Conference Report on the 1972 version of the statute indicated that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation."[208] In *United States v. Riverside Bayview Homes, Inc.*,[209] the Court, in an opinion joined by Justice Rehnquist, had previously upheld the Corps' interpretation of the term "navigable waters" to include non-navigable wetlands that are adjacent to otherwise navigable waters. The next year, the Corps clarified its posi-

192. 504 U.S. 334, 22 ELR 20909 (1992).

193. *Id.* at 343.

194. *Id.* at 350 (Rehnquist, C.J., dissenting).

195. *Id.* at 349 (Rehnquist, C.J., dissenting).

196. *Id.*

197. 504 U.S. 353, 22 ELR 20904 (1992).

198. *Id*. at 373 (Rehnquist, C.J., dissenting).

199. *Id*. at 369 (Rehnquist, C.J., dissenting). *See also id*. at 368 (charging that "the substantial risks attendant to waste sites make them extraordinarily unattractive neighbors," that few states are willing to help dispose of waste, and that "[t]hose locales that do provide disposal capacity to serve foreign waste effectively are affording reduced environmental and safety risks to the States that will not take charge of their own waste").

200. *Id.* at 369-70 (Rehnquist, C.J., dissenting).

201. 511 U.S. 93, 24 ELR 20674 (1994).

202. *Id.* at 109-10 (Rehnquist, C.J., dissenting).

203. *Id*. at 110 (Rehnquist, C.J., dissenting).

204. 531 U.S. 159, 31 ELR 20382 (2001).

205. *Id.* at 162.

206. For a discussion of the constitutional dimensions of this case, see *supra* Section II.A.2.

207. 33 U.S.C. §1362(7).

208. S. Rep. No. 92-1236, at 144 (1972).

209. 474 U.S. 121, 16 ELR 20086 (1985).

tion on the scope of the permit program by issuing the migratory bird rule. It asserted that navigable waters include "isolated intrastate waters" that are or could be used as habitat by migratory birds that cross state lines.[210]

Chief Justice Rehnquist, writing for the majority in *SWANCC*, found that the Corps' interpretation of "navigable waters" in the migratory bird rule exceeded the bounds of the CWA.[211] He concluded that the Corps' application of the dredge and fill permit program to the proposed landfill site raised "significant constitutional questions," particularly because allowing the Corps to regulate the consortium's property under the rule "would result in a significant impingement of the States' traditional and primary power over land and water use."[212] Finding "nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit such as we have here," Rehnquist interpreted the term "navigable waters" to exclude the intrastate waters involved as a means of avoiding "the significant constitutional and federalism questions" that a contrary conclusion would have presented.[213]

On the other hand, Rehnquist was willing to defer to EPA interpretations of environmental statutes when they reduced regulatory burdens on the states and promoted federalism. In *Train v. Natural Resources Defense Council*,[214] for example, Rehnquist, writing for the majority, held that the 1970 version of the CAA required EPA to approve the authority of the states to issue variances from emission limitations under the CAA as permissible "revisions" to SIPs. Accepting EPA's reading of the statute, Rehnquist relied on the legislative history, including "legislative documents" and statements made (or not made) during floor debates.[215] *Train* illustrates Rehnquist's willingness to rely on multi-faceted techniques for statutory interpretation if the result of doing was to protect or enhance state authority. In *Environmental Protection Agency v. Brown*,[216] EPA convinced Rehnquist, writing per curiam for the Court, that the Court need not reach the merits of a pending challenge to a James (Jimmy) E. Carter Administration EPA rule that required state regulation of mobile source air pollution under the CAA when the Reagan Administration subsequently withdrew the rule.[217]

Rehnquist employed a variety of interpretive techniques to support subordination of federal to state decisionmaking authority over water allocation and use. One of them was to interpret narrowly the scope of the federal implied reserved water rights doctrine. The issue in *United States v. New Mexico*[218] was how much river water the United States reserved when it created the Gila National Forest in 1899. Rehnquist concluded that, in enacting the Forest Service Organic Act of 1897,[219] Congress meant to reserve national forests for only two purposes—to conserve water flows and to furnish a continuous supply of timber.[220] Writing for a 5 to 4 majority, he rejected the government's contention that Congress intended to set aside sufficient water to serve aesthetic, environmental, recreational, or wildlife preservation purposes.[221] He noted that "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."[222] The United States invoked the federal reserved water rights doctrine to support its claim for water rights, but Rehnquist characterized it as "a doctrine built on implication" that represents "an exception to Congress' explicit deference to state laws in other areas."[223] Interpreting the exception narrowly, Rehnquist concluded that Congress intended to subordinate the Forest Service's attempts to use water for the purposes in question to state water law and policy.

The question of whether federal or state law controls natural resource ownership, use, or management arose in another group of cases. One recurring issue was whether federal common law governed particular natural resource management issues and, if so, whether it displaced state law. In each case, Rehnquist's opinions took a relatively narrow view of the circumstances in which the application of federal common law is appropriate, reflecting his marked preference for resorting to state law to govern resource management questions. Some of these cases involved, either in conjunction with federal common-law issues or separately, the application of the equal footing doctrine. That doctrine governs, among other things, the scope of the title to lands underlying navigable waters that the states acquired upon their admission to the Union. Rehnquist typically favored applications of the doctrine that maximized the states' proprietary or regulatory control over the lands, water, or other natural resources involved.

The first case in which Rehnquist addressed the propriety of applying federal common law was *United States v. Little Lake Misere Co.*[224] The United States brought an action to quiet title to land in Louisiana which it had acquired under the Migratory Bird Conservation Act (MBCA)[225] as part of a wildlife refuge. The documents transferring title to the United States reserved to Little Lake Misere (LLM) various minerals for 10 years and for as long thereafter as LLM's drilling operations continued. After that, the mineral rights were to vest in the federal government. After the initial 10-year period expired without any drilling activity, the United States issued oil and gas leases on the parcels. LLM claimed the mineral rights, relying on a Louisiana statute that purported to make it impossible for the United States to acquire by prescription any mineral rights reserved to previous own-

210. 51 Fed. Reg. 41217 (Nov. 13, 1986).

211. *SWANCC*, 531 U.S. 159, 162, 31 ELR 20382 (2001).

212. *Id*. at 174.

213. *Id*.

214. 421 U.S. 60, 5 ELR 20264 (1975).

215. *Id.* at 84. Rehnquist rejected the Natural Resources Defense Council's interpretation of the Conference Committee's work as having "no specific support in legislative documents or debates." *Id*. at 96.

216. 431 U.S. 99, 7 ELR 20375 (1977).

217. *See* Percival, *Marshall Papers*, *supra* note 12, at 10614.

218. 438 U.S. 696, 8 ELR 20564 (1978).

219. 16 U.S.C. §476 (repealed 1976).

220. *New Mexico*, 438 U.S. at 707-08.

221. He supported his conclusion that Congress intended to establish the national forests in general, and this one in particular, for the two "narrow purposes" he identified by noting that Congress had used "broader language" in authorizing the establishment of the national parks. In addition, he argued that when Congress intended to maintain minimum instream flows for particular national forests, it had done so in the legislation establishing those forests. That kind of provision was missing from the statute creating the Gila National Forest. *Id.* at 709-10.

222. *Id*. at 701.

223. *Id*. at 715.

224. 412 U.S. 580 (1973).

225. 16 U.S.C. §§715 et seq.

ers. According to LLM, the state statute rendered inoperative the conditions for extinguishment of the reservations.[226]

The majority held that the Louisiana statute did not preclude termination of the reservations, emphasizing that the land acquisitions arose from and bore heavily upon a federal regulatory program. It concluded that federal, not state law, applies to transactions undertaken by the federal government, even if the federal statute authorizing the transactions (here, the MBCA) does not explicitly so provide. Under choice of law principles adopted by the federal courts, the Louisiana statutes did not apply to the mineral reservations so that LLM's interests expired in accordance with the terms of the reservations.[227] Justice Rehnquist concurred in the judgment, minimizing the importance of the federal interest in controlling the fate of the minerals in question. He regarded "the central question" as whether Louisiana had the constitutional authority to apply its anti-prescription statute to the relevant transactions, "and not whether a judicially created rule of decision, labeled federal common law, should displace state law. The [MBCA] does not establish a federal rule controlling the rights of the United States under the reservation."[228] Rehnquist found the federal government's interest in applying a uniform federal rule to govern real property transactions to which it is a party to be "too tenuous" to justify the invocation of federal common law, particularly given the Court's past insistence that state law governs real property transactions.[229]

Another case involving the potential application of federal common law was *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*[230] Oregon sued a sand and gravel company in ejectment to settle ownership of lands underlying the Willamette River, a navigable river that is not an interstate boundary. The state argued that, because of its sovereignty, it owned in fee simple the disputed portions of the riverbed.[231] Four years previously, the Court had held in *Bonelli Cattle Co. v. Arizona*[232] that federal common law determines whether a state retains title to lands that reemerge from the bed of a navigable stream because that land is subject to the equal footing doctrine. That doctrine, which dates back to the Supreme Court's decision in *Pollard's Lessee v. Hagan*,[233] provides that when states are admitted to the Union, they acquire the same jurisdiction over lands within their borders as the original 13 states. *Pollard's Lessee* established that, pursuant to this doctrine, new states acquire title to the lands underlying navigable waters within their boundaries.[234]

In his opinion for the majority in *Corvallis*, Justice Rehnquist declared that the decision in *Bonelli* to apply federal common law had been incorrect. The Court had erred by failing to recognize that, while the determination of the initial boundary between a riverbed acquired by a state under the equal footing doctrine and riparian fast lands is governed by federal law, once that determination has been made, "the role of the equal footing doctrine is ended" and the land becomes subject exclusively to state law.[235] The Court had consistently held that, unless some other principle of federal law requires a different result, state law governs issues relating to the ownership of riparian lands. Rehnquist added, "under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States."[236] Accordingly, the states are free to formulate and modify rules of riparian ownership as they see fit.[237] Because *Bonelli* had wrongly treated the equal footing doctrine as a source of federal common law in inappropriate circumstances, and there was no other basis for allowing federal common law to override state real property law, the ownership of the disputed riverbed lands in *Corvallis* was governed by state law, not federal common law.[238]

Rehnquist also addressed the relationship between the equal footing doctrine and the role of federal common law in his 1982 opinion in *California v. United States*.[239] The United States and California both claimed ownership of oceanfront land on the coast of California created through accretion. The result in the case depended on whether federal or state law applied. Under California law, the state would own the land, but under federal law, title to the deposited land vested in the United States as the accretions formed. The majority held that federal law governs disputes over accretions to oceanfront land where title rests with or was derived from the federal government and that, under federal law, the United States owned the land in dispute.[240] Rehnquist concurred in the judgment. He interpreted the SLA as withholding from grants to the states all accretions to coastal lands acquired or reserved by the United States. But he objected to the majority's reliance on a previous case that had endorsed the application of federal common law to a dispute over title to oceanfront property between a state and a federal patent holder. Although he suggested that the Court did not need to address the continuing vitality of that precedent,[241] he seemed prepared to reverse the ruling that federal law governs ownership disputes like the one involved there in the absence of a governing federal statute.

In yet another case involving the equal footing doctrine, Chief Justice Rehnquist dissented from the Court's ruling in favor of the United States in a quiet title action pitting the federal government against the state of Idaho.[242] The dis-

226. *Little Lake Misere Co.*, 412 U.S. at 583-84.

227. *Id.* at 592-94, 604.

228. *Id.* at 606-07 (Rehnquist, J., concurring in the judgment).

229. *Id.* at 607. Rehnquist nevertheless concurred in the judgment because the doctrine of intergovernmental immunities prohibits a state from discriminating against the United States in a manner that interferes with the execution of federal laws. The Louisiana statute discriminated by precluding the acquisition of title to minerals by prescription by the United States, but not by nongovernmental grantees. *Id*. at 608.

230. 429 U.S. 363, 7 ELR 20137 (1977).

231. *Id.* at 365.

232. 414 U.S. 313, 4 ELR 20094 (1973).

233. 3 How. 212 (1845). For further discussion of the equal footing doctrine, see 1 George Cameron Coggins & Robert L. Glicksman, Public Natural Resources Law §3:11 (1991).

234. *Corvallis Sand & Gravel*, 429 U.S. at 369-70.

235. *Id.* at 376-77.

236. *Id.*

237. *Id.* at 379.

238. *Id.* at 381.

239. 457 U.S. 273 (1982). This is a different case from the case of the same name, discussed above, that involved an interpretation of the extent to which the Reclamation Act of 1902 displaced state law in the allocation and use of water impounded behind a federally constructed dam. For discussion of that case, see *supra* notes 159-66 and accompanying text.

240. *California*, 457 U.S. at 278.

241. *Id.* at 290 (Rehnquist, J., concurring in the judgment).

242. Idaho v. United States, 533 U.S. 262, 31 ELR 20725 (2001).

pute involved conflicting claims to submerged lands underlying two rivers. The majority held that the United States owned those lands in trust for the Coeur d'Alene tribe, finding that Congress intended to bar passage of title to those lands to the state upon its admission to the Union.[243] Rehnquist, joined by three other Justices, argued that, even if the federal government intended at the time of Idaho's admission to retain title in trust to the disputed submerged lands, that intent was insufficient to defeat Idaho's title to submerged lands within its borders. According to Rehnquist, ownership of lands under navigable waters is an incident of sovereignty, such that there is a presumption against defeat of a state's title to those lands.[244] The majority mistakenly applied the equal footing doctrine to overcome that presumption. Among other things, it made the unwarranted assumption that any use granted by the United States with respect to navigable waters must necessarily include a reservation of title to the submerged lands below them.[245] Rehnquist concluded that the evidence of congressional intent to retain title to the submerged lands was not even close to being sufficient to rule in favor of the state; "Congress's desire to divest an entering State of its sovereign interest in submerged lands must be 'definitely declared or otherwise made very plain.'"[246]

In a final case involving the application of the equal footing doctrine, Rehnquist again dissented from a decision he perceived to be insufficiently protective of state interests. The majority in *Minnesota v. Mille Lac Band of Chippewa Indians*[247] held that tribal usufructuary rights to hunt and fish survived Minnesota's admission to the Union. Rehnquist contested the majority's premise that the tribal rights recognized by the majority are not inconsistent with state sovereignty. He characterized treaty rights like those allowing the Chippewas to hunt and fish as "temporary and precarious" and concluded that, under the equal footing doctrine, they did not survive the state's admission to the Union.[248]

C. Discussion

Justice Rehnquist's constitutional analysis in environmental cases promoted states rights. He tended in cases involving the Supremacy Clause to rule that federal environmental and natural resource management statutes did not preempt state law. In every one of the cases in which the Court held that state environmental legislation violated the dormant Commerce Clause, Rehnquist dissented, protesting that the states had the right to protect their own natural resources.

Just what was it about state laws governing use of a state's natural resources and management of its environment that captured Rehnquist's attention in cases attacking those laws based on alleged violations of the Supremacy and dormant Commerce Clauses? Rehnquist's opinions in these cases largely promote a singular ideal: the need to protect a state's authority, in an area that has traditionally been regarded a matter of local concern, to control the fate of its own natural resources. In the preemption cases, Rehnquist repeatedly stressed the strength of the states' interests in natural resource management and the tradition of federal deference to those interests. He characterized "the crucial inquiry" in dormant Commerce Clause cases as "determining whether [the challenged state or local law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[249] In his view, natural resources are a commodity traditionally subject to state control, and federal courts should presume that state conservation laws are rational means to achieve legitimate state ends that have but incidental effects upon interstate commerce. Moreover, Rehnquist took the position that the federal courts should defer to both state legislative and judicial findings supportive of a non-protectionist impetus behind state waste control laws.[250]

Although Rehnquist wrote the majority opinion in one important preemption case (the 1978 *California* case), the pursuit of his agenda in the dormant Commerce Clause cases was for the most part a Quixotic endeavor. While he had occasional allies, including Chief Justice Burger, and Justices Blackmun, O'Connor, and David H. Souter, Rehnquist was often a lone dissenter in these cases. He never enticed more than a single Justice at a time to accept his reading of the dormant Commerce Clause. Curiously, while Rehnquist joined Justices Scalia and Thomas, and sometimes Kennedy and O'Connor, in restricting federal power and expanding state sovereignty under the 10th and 11th Amendments, none of these four other than O'Connor saw fit to join Rehnquist in his advocacy of state efforts to protect natural resources from being damaged by undue or unwanted out-of-state waste.[251] Rehnquist's inability to overcome the isolation in which he found himself in the dormant Commerce Clause cases undoubtedly frustrated him. He vented this frustration in a slightly different, but related context:

> The wisdom of a messianic insistence on a grim sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind. It is the Court which has imposed the policy under the dormant Commerce Clause, a policy which bodes ill for the values of federalism which have long animated our constitutional jurisprudence.[252]

Rehnquist thus most likely would have agreed with Prof. Robert Percival's observations about the tensions between the various strands of the Court's disposition of federalism issues in environmental cases decided during Rehnquist's tenure as Chief Justice:

> [T]he Court's current dormant commerce clause jurisprudence is undeniably in tension with the Court's efforts to vindicate the dignity and sovereignty of states. A Court that once extolled the importance of upholding states' sovereign interests in protecting their citizens against unwanted exposure to risks originating in other

243. *Id.* at 280-81.

244. *Id.* at 281-82 (Rehnquist, C.J., dissenting).

245. *Id.* at 282-87 (Rehnquist, C.J., dissenting).

246. *Id.* at 288 (Rehnquist, C.J., dissenting).

247. 526 U.S. 172, 29 ELR 20557 (1999).

248. *Id.* at 219-20 (Rehnquist, C.J., dissenting).

249. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 368, 22 ELR 20904 (1992).

250. Rehnquist's takings jurisprudence was not similarly deferential to state legislative and judicial determinations. *See infra* Part IV.

251. *See generally* Percival, *supra* note 73, at 846-47.

252. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting).

> states now routinely invalidates their regulatory initiatives that seek to do so.[253]

Thus far Rehnquist's approach to the dormant Commerce Clause has managed to attract more support from academics than others on the Court.[254] That may yet change. Justices Scalia and Thomas have denied there is any basis to the dormant Commerce Clause as an original matter, and have agreed to invalidate state laws under this doctrine as a matter of *stare decisis*, and even then only with respect to discriminatory state action not needed to achieve a legitimate state purpose.[255] With the appointment of Rehnquist's successor, Chief Justice Roberts, in 2005 and Justice Alito in 2006, there may be new opportunities for the Court to apply the dormant Commerce Clause in a manner more consistent with Rehnquist's vision of federalism.

Rehnquist's commitment to the protection of state sovereignty over matters of traditional state and local concern also provided the underpinning for much of his analysis in statutory interpretation cases arising under the federal environmental laws. This commitment appears to have induced him to downplay if not ignore evidence of congressional intent to vest in federal agencies a degree of environmental regulatory authority with which Rehnquist seemed uncomfortable. In *SWANCC*, for example, he gave short shrift to a canon of statutory interpretation[256] that provides that if Congress has amended a statute in a manner that does not upset an extant agency construction, acquiescence is assumed. Even though Congress amended the CWA after the issuance of the Corps' 1977 rule defining "navigable waters" to include more than traditionally navigable waters, and again in 1987 after issuance of the migratory bird rule, Rehnquist declined to find congressional acquiescence in either definition.[257] In the same case, he also downplayed the significance of relevant (and arguably determinative) legislative history, rejecting all aspects of the CWA's legislative history that support a broad construction of the term "navigable water" to include isolated waters visited by migratory birds.[258]

Finally, Rehnquist rejected what even he agreed was a "plausible" construction of the statute advanced by the Corps. While the terms "navigable waters" and "waters of the United States" leave room for interpretation, *SWANCC* departs from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*'s[259] instruction that courts defer to reasonable interpretations of ambiguous statutory terms proffered by expert agencies charged with administering the statute containing the ambiguous provision. Instead of deferring to the Corps' (and EPA's) most recent definition of the term "navigable waters," Rehnquist relied on the Corps' "initial" 1974 definition—which was probably vestigial to the Corps' historical mission of safeguarding navigational and recreational uses of interstate waters and which the Corps had abandoned nearly 25 years earlier.

The obvious explanation for Justice Rehnquist's interpretive awkwardness in *SWANCC* is his desire to promote federalism. He relied prominently on the CWA's policy of preserving and protecting "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources . . . ."[260] According to Rehnquist, allowing the Corps to exercise jurisdiction over the abandoned sand and gravel pit in *SWANCC* based merely on the presence of migratory birds "would result in a significant impingement of the States' traditional and primary power over land and water use."[261] The desire to avoid addressing the "significant" federalism questions that the Corps' interpretation presented provided Rehnquist with a justification for refusing to apply *Chevron* deference.[262]

Rehnquist's commitment to the protection of state sovereignty in areas of traditional state regulation is also reflected in every single implied reserved water rights, federal common law, and equal footing doctrine case that arose under the federal natural resource management laws. In *New Mexico*, Rehnquist's narrow interpretation of the implied reserved water rights doctrine left the federal government's ability to devote water in the national forests to environmental protection purposes more or less at the mercy of state water law. In *Little Lake Misere*, Rehnquist disagreed with the majority's endorsement of federal common law as a means of displacing the application of state law to real property transactions. In *Corvallis*, he objected to the use of federal common law to determine conflicting state and private claims of title to riparian lands. According to Rehnquist, state law governs the effect on title to riparian lands of

253. Percival, *supra* note 73, at 865.

254. *See, e.g.*, Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217 (arguing that dormant Commerce Clause cases allow states to discriminate in favor of insiders, mishandle economic analysis, and unnecessarily protect outsiders who can avail themselves of the in-state political process).

255. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring) (arguing that the only time dormant Commerce Clause issues should arise is when a state law accords "discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose").

256. In some cases, judges conclude that neither the plain meaning of the statutory text nor the statute's legislative history is capable of furnishing a sufficient guide to the intended meaning of a statute. In such cases, judges may invoke "canons of construction" as supplemental aids in discerning the legislature's intent. *See* WILLIAM N. ESKRIDGE JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 330 (2000) (stating that substantive canons of construction "significantly affect statutory interpretation in federal and state courts"). The role of these canons in statutory interpretation is controversial, particularly when the canons "are rooted in broader policy or value judgments." *Id*.

257. *SWANCC*, 531 U.S. 159, 169, 31 ELR 20382 (2001).

258. Rehnquist discounted a Conference Report statement indicating that Congress intended that "'navigable waters' be given the broadest possible constitutional interpretation," arguing that it did not "signif[y] that Congress intended to exert anything more than its commerce power over navigation." *Id.* at 168 n.3.

259. 467 U.S. 837, 14 ELR 20507 (1984).

260. *SWANCC*, 531 U.S. at 167 (quoting 33 U.S.C. §1251(b)). Rehnquist's expansive reading of §1251(b) to reduce the scope of federal regulation provides a curious contrast to his treatment of the CWA's savings clauses in cases concerning the effect of the CWA's enactment on supplemental federal and state common-law remedies. Rehnquist wrote the majority opinion in *City of Milwaukee v. Illinois*, 451 U.S. 304, 11 ELR 20406 (1981), holding that the savings clause of the CWA's citizen suit provision (33 U.S.C. §1365(e)) did not preserve federal common-law nuisance remedies for interstate water pollution. *See supra* note 169. He joined the majority opinions in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 ELR 20684 (1981), in which the Court reached the same result as in *City of Milwaukee* with respect to ocean pollution, and in *International Paper Co. v. Ouellette*, 479 U.S. 481, 17 ELR 20327 (1987), in which the Court held that §1365(e) did not preserve state common-law remedies available under the law of the downstream state.

261. *SWANCC*, 531 U.S. at 174 (quoting Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) (stating that "regulation of land use [is] a function traditionally performed by local governments")).

262. *Id*. at 172-73.

events that occur after a state's admission to the Union, given the long-standing recognition that property ownership generally is governed by state law rather than by a general federal law. In the 1982 *California* case, Rehnquist disavowed the majority's apparent willingness to apply federal common law in a broader range of cases than he deemed appropriate. In the *Idaho v. United States*[263] case, Rehnquist again protested the majority's inappropriately expansive application of the equal footing doctrine in a dispute over title to inland submerged lands. Rehnquist charged that the majority improperly divested the state's interest in submerged lands, despite the absence of clear evidence that Congress intended that result. In *Mille Lac*, on the other hand, Rehnquist protested the majority's conclusion that Indian treaty and fishing rights survived Minnesota's admission to the Union. Favoring the application of the equal footing doctrine this time, Rehnquist argued that the doctrine had the effect of abolishing the tribe's usufructuary rights when the state was admitted to the Union.

Rehnquist sometimes supported the application of federal law and sometimes supported the application of state law in these cases. He sometimes objected to, but sometimes concurred in, the application of the equal footing doctrine. But he always either favored application of the body of law that was more protective of state interests, or objected to the application of federal law in a particular case in a manner that he regarded as insufficiently protective of state sovereignty or state proprietary interests.

IV. Protecting Private Property

One of the hallmarks of the Rehnquist Court has been its commitment to the protection of private property rights.[264] Chief Justice Rehnquist himself is typically regarded as having been a strong advocate of enhanced protection of those rights.[265] In cases presenting constitutional law questions as well as in statutory interpretation cases, Rehnquist's opinions indeed reflect a strong inclination to protect private property rights from intrusion by all levels of government. In the regulatory takings cases in which he wrote opinions addressing the merits, for example, Rehnquist sided with the property owner and against the government every time. Indeed, when protection of private property rights came into conflict with Rehnquist's commitment to restricting federal power (especially federal judicial power) or protecting state power, he tended to sacrifice those federalism interests to the protection of property.

263. 533 U.S. 262, 31 ELR 20725 (2001).

264. *See, e.g.*, Stewart E. Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys*, 99 Nw. U. L. Rev. 231, 232, 247 (2004) (stating that "judicial scrutiny of state and local land use practices is significantly less deferential than it was at the inception of the Rehnquist court" and that the Rehnquist Court "has afforded landowners significant protections that they did not enjoy before 1986"); Percival, *supra* note 12, at 10650-51 (stating that "a major part of the Rehnquist Court's jurisprudence has been to strengthen the constitutional protection of property rights").

265. *See, e.g.*, Douglas P. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and an Assessment of the Progress So Far*, 25 B.C. Envtl. Aff. L. Rev. 509, 538 n.127 (1998) (stating that "Justices Rehnquist and Scalia, generally regarded as among the Court's most conservative members, have emerged as strong advocates for greater private property protection").

A. Constitutional Interpretation

Justice Rehnquist's Takings Clause opinions arose in a variety of contexts. In some of the cases, the issue was whether the government had provided just compensation after formally invoking the power of eminent domain. In others, the Court had to address whether the government had engaged in a physical appropriation of property without compensating the affected property owners. In a third category of cases, Rehnquist wrote opinions in cases in which property owners alleged compensable regulatory takings, and the Court disposed of those claims either on procedural grounds or on the merits.

Rehnquist did not invariably write opinions that favored property owners dissatisfied with their treatment at the hands of government in the Takings Clause cases. In the two cases involving the government's use of the power of eminent domain, Rehnquist's opinions favored the government.[266] In each case, the issue turned on the appropriate degree of compensation to which the condemnee was entitled. In inverse condemnation cases[267] resulting from alleged physical takings, Rehnquist sided with the government twice and the property owner allegedly subject to a taking once.[268]

Rehnquist's regulatory Takings Clause opinions most strongly reflect his commitment to the protection of private property, even at the expense of his commitment to promoting federalism. In the cases resolved on procedural grounds such as finality, ripeness, or the application of the Full Faith and Credit Clause rather than on the merits of the takings question, Rehnquist sometimes ruled for the government and sometimes for the property owner.[269] He wrote opinions in five cases, however, in which the Court addressed either the merits question of whether a compensable taking had occurred or, assuming that it had, the issue of what the appropriate remedy is. In all five, his opinion favored the takings claimant. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[270] Rehnquist ruled that a regulated landowner is entitled to pursue an inverse condemnation remedy for a temporary taking. In *Dolan v. City of Tigard*,[271] a regulatory exactions case, he found a taking based on the lack of rough proportionality between the regu-

266. United States v. Fuller, 409 U.S. 488 (1973); Almota Farmers Elevator and Warehouse Co. v. United States, 409 U.S. 470 (1973).

267. In an inverse condemnation action, a property owner brings suit against the government seeking the payment of just compensation for an alleged taking, even though the government never initiated formal condemnation proceedings. "Such a suit is 'inverse' because it is brought by the affected owner, not by the condemnor. . . . The owner's right to bring such a suit derives from 'the self-executing character of the constitutional provision with respect to condemnation. . . .'" Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 5 n.6 (1984) (quoting 6 Philip Nichols, Eminent Domain §25.41 (3d rev. ed. 1972)).

268. United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) (siding with the government); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (same); Kaiser Aetna v. United States, 444 U.S. 164, 10 ELR 20042 (1979) (siding with the property owner).

269. *See infra* Section IV.A.2. In two cases, Rehnquist either sided with both the government and the regulated property owner on different issues or sided with the government while also raising doubts about the continuing validity of precedents that favored the government. San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491 (2005); Pennell v. City of San Jose, 485 U.S. 1 (1986).

270. 482 U.S. 304, 17 ELR 20787 (1987).

271. 512 U.S. 374, 24 ELR 21083 (1994).

latory burden imposed on the property owner and the degree of harm anticipated to result from her land use. In three different cases involving alleged takings based on the economic impact of regulation on affected owners, Rehnquist wrote opinions dissenting from the majority's conclusion that a taking had not occurred.[272]

The remainder of this section explores whether there is any doctrinal coherence to Justice Rehnquist's Takings Clause opinions. It analyzes his opinions in regulatory takings, eminent domain, and physical takings cases and assesses the manner in which his Takings Clause jurisprudence bears on his commitment to restricting federal authority to protect the environment and protecting state sovereignty over environmental and natural resource management.

1. Justice Rehnquist's Takings Clause Opinions

Justice Rehnquist's regulatory takings opinions consistently favored property owners alleging a constitutional violation. The discussion below focuses on the aspects of Rehnquist's regulatory takings jurisprudence that help to explain why he was more willing than some of his fellow Justices to find that a regulatory taking had occurred. This subsection then briefly describes Rehnquist's eminent domain and physical taking opinions, which reflect more evenhanded treatment of property owners and the governments whose activities allegedly gave rise to violations of the Takings Clause. In these two categories of cases, Rehnquist's opinions emphasize the need to preclude the government from interfering unreasonably with the legitimate expectations of takings claimants because such uncompensated interference represents the kind of unfair treatment that the Takings Clause was designed to forestall.

(a) Regulatory Takings Cases

Rehnquist's regulatory takings opinions turn largely on his resolution of the following questions: (1) how should courts define the nature of the property interest allegedly taken for purposes of determining the extent of the adverse impact imposed on the regulated property?; (2) assuming that a regulation has completely destroyed the property, so defined, how should the court determine whether the government is absolved of the duty to compensate due to the nature of the regulated activity?; and (3) did the regulation attacked as a taking resemble traditional forms of land use regulation? This subsection describes Rehnquist's general approach to two types of regulatory takings claims—those that did not involve exactions and those that did. How his treatment of important conceptual questions inclined him to rule in favor of regulatory takings claimants is discussed later in Section C.

(1) Non-Exactions Cases

Justice Rehnquist's regulatory takings opinions often turn on how closely the impact of the regulation attacked as a taking resembles a physical occupation of the regulated property; the closer the resemblance, the more likely Rehnquist was to conclude that the government had to compensate the regulated landowner. He first invoked this analogy as a crucial determinant in his dissent from a denial of certiorari in a case alleging that a local rent control ordinance constituted a taking. Rehnquist reasoned that the ordinance's restriction on the landlord's ability to remove rentals from the market "deprives [the owner] of the use of its property in a manner closely analogous to a permanent physical occupation."[273] The ordinance resulted in a physical occupation because it barred the landlord from evicting its tenants, with limited exceptions not available in that case. The deprivation of the owner's ability to possess its property, coupled with the evisceration of its power to exclude, rendered the application of the ordinance a taking.

Chief Justice Rehnquist returned to this mode of analysis in two opinions he wrote in 1987.[274] In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[275] Rehnquist dissented from the majority's holding that a statute restricting coal mining was not a taking. He asserted that the Court's precedents established that regulatory action may constitute a taking if it results in "as complete a loss as if the [government] had entered the surface and taken exclusive possession of it."[276] In *First English*, where Rehnquist wrote the majority opinion holding that a landowner whose property is temporarily taken by regulation is entitled to a damages remedy, he again resorted to the physical takings analogy. Rehnquist asserted that the Court had previously required compensation for temporary physical takings because those takings involve the same kind of denial of all use that results from permanent takings for which the Constitution clearly requires compensation.[277]

Finally, Rehnquist invoked the physical taking analogy in his dissent in the 2002 case *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[278] where he protested the majority's conclusion that a temporary moratorium on development pending enactment of a comprehensive land use plan was not a taking. Rehnquist disputed the significance of the distinction between temporary and permanent deprivations. He argued that differential treatment for the two types of deprivation is inconsistent with the justification for the rule, enunciated in the Court's 1992 decision in *Lucas v. South Carolina Coastal Coun-*

272. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 302, 32 ELR 20627 (2002); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 17 ELR 20440 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 8 ELR 20528 (1978).

273. Fresh Pond Shopping Ctr., Inc. v. Callahan, 464 U.S. 875, 876-77 (1983) (Rehnquist, J., dissenting from denial of certiorari). Rehnquist compared the impact on the landlord to the one that the Court had previously declared to be a permanent physical occupation in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Fresh Pond Shopping Ctr.*, 464 U.S. at 876-77.

274. The two were *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 17 ELR 20440 (1987), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 17 ELR 20787 (1987). Rehnquist did not write an opinion in a third case decided that year, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 17 ELR 20918 (1987), but he joined Justice Scalia's majority opinion declaring an exactions scheme to be a taking. Rehnquist endorsed *Nollan* and built upon its holding in finding a taking in a later exactions case, *Dolan v. City of Tigard*, 512 U.S. 374, 24 ELR 21083 (1994). *Dolan* is discussed *infra* at Section IV.A.1.(a)(2).

275. 480 U.S. 470, 17 ELR 20440 (1987).

276. *Id.* at 516 (Rehnquist, C.J., dissenting) (quoting United States v. Causby, 328 U.S. 256, 261 (1946)).

277. *First English*, 482 U.S. at 318.

278. 535 U.S. 302, 32 ELR 20627 (2002).

cil,[279] that a regulation resulting in the denial of all economically beneficial use of property is a per se taking. The reason, according to Rehnquist, that the state must compensate in *Lucas*-like situations is the "practical equivalence" of the regulation with a long-term physical appropriation. In *Tahoe-Sierra*, the practical effect of the moratorium was the same as if the government had taken a lease of the landowners' property, a situation that surely would have required compensation.[280]

(2) Exactions Cases

Chief Justice Rehnquist wrote the majority opinion in one of the two cases in the 1990s in which the Court held that exactions extracted from landowners seeking permits to develop amounted to takings.[281] He held in *Dolan* that the requirement that a store owner dedicate strips of land for a greenway and a pedestrian/bicycle path in return for approval of her business expansion plans worked a taking of property.[282] Although an "essential nexus" existed between the city's alleged goals and the conditions imposed on the landowner, as required by *Nollan v. California Coastal Commission*,[283] Rehnquist held that the city failed to demonstrate the requisite "rough proportionality" between the harms alleged to result from the owner's land use and the burdens the exactions imposed on her.[284]

An important aspect of Rehnquist's analysis was his characterization of the conditions imposed on the landowner. They were "not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."[285] The nature of the condition invoked the doctrine of unconstitutional conditions, which bars the government from requiring someone to give up a constitutional right (such as the right to receive just compensation) in exchange for a discretionary benefit.[286] The dedication requirements in *Dolan* required the regulated property owner to engage in affirmative conduct, a factor likely to tip Rehnquist toward the conclusion that a taking has occurred.[287] Moreover, the particular conduct required—conveyance of public access easements to the city—essentially amounted to a forced, or at least coerced, transfer of title, which can easily be regarded as the equivalent of a physical expropriation in that it "eviscerates" the landowner's right to exclude.[288]

Although it is not clear from the face of the opinion, Justice Blackmun's papers reveal that *Dolan* raised federalism-related qualms for Rehnquist. He assigned the opinion to himself in part as a means of establishing deferential rational basis-type review in cases alleging that exactions amount to regulatory takings. In a draft of the opinion, the test for assessing the legality of exactions was "whether the extent of the exactions are reasonably related to the projected impact of the proposed development."[289] Justices Scalia and Kennedy urged the adoption of a less deferential test, one that required proof of a "rough proportionality" between the project's impacts and the burdens imposed on the landowner by the exaction. Rehnquist ultimately relented, causing Justice Souter to dissent.[290] Rehnquist's initial support for rational basis review suggests that his commitment to the protection of private property rights was tempered, at least in this context, by his federalism-based commitment to the protection of state sovereignty. In the end, however, when he could not convince his fellow Justices that rational basis review struck the appropriate accommodation, he agreed to the substitution of the more intrusive rough proportionality test, thereby subordinating federalism concerns to the desire to protect private property.

(b) Eminent Domain Cases

Justice Rehnquist wrote only two opinions in cases in which the government had affirmatively exercised the power of eminent domain. In both cases, he ruled in favor of the government on questions pertaining to the amount of just compensation to which the affected landowner was entitled. In one case, the issue was whether, when the government condemned property in which the claimant held a lease, with no right of renewal, the lessee was "entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed."[291] The majority concluded that the answer was yes.[292] Rehnquist dissented, arguing that the majority failed to recognize the limited nature of the lessee's interest in the condemned land.[293] Although the government's decision to condemn the fee had turned the preexisting risk of nonrenewal into a certainty, the government should not have to compensate for the removal of an expectancy that was not part of the property taken in the first place.[294]

In the other case, Rehnquist wrote the majority opinion, again siding with the United States on a valuation question.[295] The federal government condemned a cattle rancher's land. The rancher leased adjacent lands from the federal government under a revocable permit issued under the Taylor Grazing Act, a statute that clearly stated that permittees acquired no rights in or title to federal land.[296]

279. 505 U.S. 1003, 22 ELR 21104 (1992).

280. *Tahoe-Sierra*, 535 U.S. at 349 (Rehnquist, C.J., dissenting).

281. Exactions are "local government measures that require developers to provide goods or services or pay fees as a condition to getting project approval." JESSE DUKEMINIER ET AL., PROPERTY 1042 (6th ed. 2006). These exactions may take the form of requirements that developers dedicate land to the local government for use as parks or for utilities or infrastructure. *See* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 656 (2d ed. 2005) (stating that exactions are requirements by local governments that developers of subdivisions "provide these public improvements at their own expense as a condition for granting subdivision approval").

282. Dolan v. City of Tigard, 512 U.S. 374, 24 ELR 21083 (1994).

283. 483 U.S. 825, 17 ELR 20918 (1987).

284. *Dolan*, 512 U.S. at 394-95.

285. *Id.*

286. *Id.*

287. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 140, 146, 8 ELR 20528 (1978) (Rehnquist, J., dissenting).

288. *Dolan*, 512 U.S. at 394.

289. Percival, *Blackmun Papers*, *supra* note 77, at 10656.

290. *Id.*

291. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473 (1973).

292. *Id.*

293. *Id.* at 482-83 (Rehnquist, J., dissenting).

294. *Id.* at 486-87 (Rehnquist, J., dissenting).

295. United States v. Fuller, 409 U.S. 488 (1973).

296. 43 U.S.C. §315b. For discussion of the legal impact of the issuance of a Taylor Grazing Act permit on the permittee's property rights, see generally 3 COGGINS & GLICKSMAN, *supra* note 233, §19:5.

The rancher argued that he was entitled to the enhancement in the value of his fee lands due to their potential use in conjunction with the federal lands covered by the permit.[297] Rehnquist held, however, that the government need not compensate for that enhanced value. Such a ruling would be inconsistent with the principle that the government need not compensate for elements of value it has created or that it might have destroyed under the exercise of authority other than the power of eminent domain.[298]

Rehnquist's opinions in both cases rejected the claims for enhanced compensation for essentially the same reason: the condemnee had no legitimate expectation that its package of property rights included the enhanced value so that it was not unfair to withhold that value upon condemnation. In the first case, the lessee consciously ran the risk when it made improvements that its lease would not be renewed and that it would have to forfeit the remaining value of the improvements upon nonrenewal. In the second, the Taylor Grazing Act put the rancher on notice that a federal grazing permit creates no property interests in the permit holder. Compensating the lessee for the value of the improvements without regard to the remaining term of the lease would therefore have provided it with an undeserved windfall. Compensating the rancher for the enhanced value of the fee resulting from its proximity to land in which the rancher held a revocable federal grazing permit would have accomplished the same result. In Rehnquist's view, the Takings Clause requires the government to treat property owners fairly and protect their legitimate expectations, but no more.

(c) Physical Taking Cases

Justice Rehnquist wrote opinions in three cases involving alleged physical takings. Only one of the three opinions sided with the takings claimant.[299] In the first case, *Kaiser Aetna v. United States*,[300] Rehnquist's majority opinion held that an attempt by the Corps to prohibit a subdivision developer from barring public access to a pond it had dredged and improved amounted to a taking. The United States argued that public access was protected under the navigable servitude, but Rehnquist responded that the Court had never declared the navigational servitude to be a blanket exception to the Takings Clause.[301] He objected to forced public access to the pond for several reasons. The developer's dredging activities had linked a previously inaccessible private pond to navigable waters. The developer had cleared all its activities with the Corps, and Corps officials had assured it that federal permits were unnecessary. The deprivation of the developer's right to exclude the public from the pond therefore amounted to improper interference with its expectations. If the government wanted to authorize a physical invasion of the pond in the form of a public access easement, it had to compensate the developer for transforming a private pond into a public aquatic park.[302]

Rehnquist also wrote the majority opinion in *PruneYard Shopping Center v. Robins*.[303] The issue was whether the owner of a private shopping center was entitled to compensation because it was required to afford access to political protestors exercising their free speech rights. Rehnquist acknowledged that the forced access amounted to a literal taking of a portion of the right to exclude. Not every such injury, however, rises to the level of a compensable taking. Rather, the question was whether the shopping center's owner was forced to bear an excessive share of burdens that should have been borne by the public as a whole.[304] Rehnquist found it "clear" that no taking had occurred because affording the access required by state law would not unreasonably impair the use of the property as a shopping center, the shopping center was already open to the public (so that, presumably, the forced access requirement did not unreasonably interfere with the owner's legitimate expectations), and state law preserved to the owner the right to impose reasonable time, place, and manner restrictions on the protesters. This particular owner's right to exclude was not sufficiently essential to the use or economic value of the shopping center to justify labeling the state's restriction of it a taking.[305]

The final physical taking case in which Rehnquist wrote an opinion involved, like *Kaiser Aetna*, an attempt by the federal government to assert the navigational servitude. The issue was whether the Fifth Amendment required the United States to pay the Cherokee Nation compensation for damage to sand and gravel deposits caused by navigational improvements it made on the Arkansas River.[306] The Court held that it did not because the interference with the tribe's in-stream interests resulted from the government's effort to regulate uses of navigable streams. Any damages that the tribe sustained resulted not from a taking of its property, but instead from "the lawful exercise of a power to which the interests of riparian owners have always been subject."[307]

All three cases appear to turn on the degree to which the challenged physical taking impermissibly interfered with the property owner's legitimate expectations. In *Kaiser Aetna*, the government gave the developer reason to believe that it could make improvements to the pond without triggering an obligation to afford access to the public. When the government tried to mandate access, Rehnquist ruled that it had to pay to acquire that right. In *PruneYard Shopping Center*, the fact that the center was already open to the public reduced the owner's expectations that it could fully control the right to exclude, and the relatively minimal nature of the intrusion represented by the presence of political protesters made it fair to force the landowner to accommodate the interference without compensation. In *United States v. Cherokee Nation of Oklahoma*,[308] the tribe's legiti-

297. *Fuller*, 409 U.S. at 489.

298. *Id.* at 492-93.

299. Rehnquist also wrote an opinion favoring property owners in a case involving the scope of the federal government's statutory authority to condemn lands allotted to Indians. United States v. Clarke, 445 U.S. 253 (1980) (construing 25 U.S.C. §357).

300. 444 U.S. 164, 10 ELR 20042 (1979).

301. *Id.* at 173.

302. *Id.* at 179-80.

303. 447 U.S. 74 (1980).

304. *Id*. at 82-83.

305. *Id.* at 83-84.

306. United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987).

307. *Id.* at 704. The Court also rejected the argument that the fiduciary obligations of the United States elevated the government's action into a taking. "[T]he tribal interests at issue here simply do not include the right to be free from the navigational servitude, for exercise of the servitude is 'not an invasion of any private property rights in the stream or the lands underlying it. . . .'" *Id.* at 707-08.

308. 480 U.S. 700 (1987).

mate expectations were not upset because its rights in the streambed had always been circumscribed by the navigational servitude, and therefore it never had the right to exclude the government.

2. Justice Rehnquist's Takings Clause Opinions and Federalism

The Supreme Court's takings jurisprudence implicates federal-state relationships because whenever property owners level a takings claim against the activities of state or local government, they ask the court to use federal law to constrain state or local legislative or regulatory authority. Any time Justice Rehnquist concluded that a state or local regulation of property amounted to a taking, as he often did, he allowed the federal constitutional provisions protecting private property rights to trump his normal inclination to promote federalism by protecting state power against federal intrusion.[309] Rehnquist's Takings Clause opinions, therefore, provide insights not only into how he viewed the appropriate interplay between federal and state power under the Constitution, but also into how he reconciled potential conflicts between two of his favorite agendas—the protection of private property rights and the promotion of federalism.

In some of the cases in which Rehnquist expressed an opinion on the merits of a regulatory taking claim, he analyzed the roles of federal and state law in the disposition of such claims. Rehnquist took the position in his dissenting opinion in *Penn Central Transportation Co. v. City of New York*,[310] for example, that there are two exceptions to the general principle that government activity that results in destruction of private property amounts to a compensable taking. The government "need not compensate if it imposes prohibitions on noxious uses of property that would otherwise inflict injurious use on the community."[311] It also need not compensate if it "prohibits a noninjurious use, but the prohibition applies over a large cross section of land and thereby secures an 'average reciprocity of advantage.'"[312] When he addressed the first exception in *Penn Central*, Justice Rehnquist appeared to engage in his own, independent analysis of whether the use of the regulated property as a railroad terminal qualified as a noxious use, although he did refer to the fact that the terminal was in full compliance with applicable zoning laws and health and safety requirements, which were all presumably local in origin.[313] Nine years later, in his dissenting opinion in *Keystone*, Chief Justice Rehnquist stated explicitly that, in applying the "nuisance exception," the legitimacy of the regulatory authority's purpose "is a question of federal, rather than state, law, subject to independent scrutiny by this Court."[314] As Prof. Stewart Sterk has pointed out, this position creates some tension with the inclination among the Rehnquist Court's conservative Justices to defer to the democratic branches of the government in some areas of constitutional law.[315] This position also has the potential to "effectively federalize much of property law," a result one would have thought was abhorrent to these same Justices.[316]

On the other hand, Rehnquist resorted to state law to determine whether a regulation resulted in destruction of the regulated property, such that the regulation was subject to the general principle that a regulation that results in the deprivation of all economically viable use is a per se taking. In *Penn Central*, Rehnquist acknowledged the "difficult conceptual and legal problems" posed by the rule that such a regulation is a taking.[317] He noted that "the Court must define the particular property unit that should be examined" to determine the extent of the regulation's impact on the regulated property.[318] It is possible to interpret this statement as requiring the federal courts in which takings claims are litigated to make the determination involved in resolving this "conceptual severance" question.[319] In *Keystone*, however, Rehnquist took the majority to task for failing to evaluate the coal companies' takings claim "by reference to the units of property defined by state law."[320] Rehnquist asserted that state law governs the definition of the unit of property subject to regulation because property interests are created not by the federal Constitution, but by "independent sources such as state law."[321] Because the subsidence act completely extinguished the value of the coal companies' support estate, and Pennsylvania law recognized that estate as a separate property interest, a taking had occurred.[322] The dissenting opinions in *Penn Central* and *Keystone* indicate, then, that Rehnquist conceived of the Fourteenth Amendment's Takings Clause as the source of the rule that a complete destruction in economic value represents a compensable taking, that state law definitions of property are crucial to determining whether a regulation has resulted in such complete destruction, and that federal law, independently fashioned by the courts, governs the applicability of the nuisance exception to the complete destruction rule.

Rehnquist's treatment of threshold procedural issues in Takings Clause cases also bears on his conceptions of federalism. Most of the procedural issues raised in the regulatory takings cases in which Rehnquist wrote an opinion related to the finality, exhaustion, or ripeness doctrines. In *San Diego Gas & Electric Co. v. City of San Diego*,[323] Rehnquist con-

309. *Cf.* Percival, *supra* note 73, at 861 (arguing that "[o]ne of the most striking inconsistencies in the Court's recent jurisprudence is the contrast between its expansion of state sovereign immunity and its revival of regulatory takings doctrine").

310. 438 U.S. 104, 8 ELR 20528 (1978).

311. *Id*. at 144-45 (Rehnquist, J., dissenting) (citing Mugler v. Kansas, 123 U.S. 623, 669 (1887)).

312. *Id.* at 147 (Rehnquist, J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

313. *Id.* at 146 (stating that "the city was not prohibiting a nuisance" and that it did not "merely prohibit Penn Central from using its property in a narrow set of noxious ways").

314. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 512, 17 ELR 20440 (1987) (Rehnquist, C.J., dissenting).

315. *See* Sterk, *supra* note 264, at 235.

316. *Id.*

317. *Penn Central*, 438 U.S. at 149 n.13 (Rehnquist, J., dissenting).

318. *Id.*

319. Rehnquist's opinion in *Penn Central* is ambiguous on this point in part because he used the passive voice. He stated that if the New York City officials "are viewed as having restricted Penn Central's use of its 'air rights,' all return has been denied." *Id.* Viewed by whom, the Court or those who fashion New York property law? For further discussion of the conceptual severance question, see *infra* notes 362-74 and accompanying text.

320. *Keystone*, 480 U.S. at 518-19 (Rehnquist, C.J., dissenting).

321. *Id.* at 519 (Rehnquist, C.J., dissenting).

322. *Id.* at 519-20.

323. 450 U.S. 621, 11 ELR 20345 (1981).

curred in the majority's dismissal of an inverse condemnation action because of the absence of a final judgment on the question of whether a taking had occurred.[324] Rehnquist could not formulate federal constitutional principles of damages for land use regulation that amounts to a taking without knowing what disposition the state courts had made of the case.[325] Similarly, in *MacDonald, Sommer & Frates v. Yolo County*,[326] the majority refused to reach the merits when a property owner alleged that a local government's rejection of its subdivision proposal required compensation. The Court held that because the state courts had left open the possibility that the owner could pursue some development despite rejection of a particular plan, the local government had not yet stated its final position on the application of the subdivision regulations to the developer's property.[327] Justice Rehnquist, in dissent, distinguished *San Diego Gas & Electric Co.* on the ground that the developer sufficiently alleged a final decision denying it all beneficial use of its property. He nevertheless refused to take a position on whether a state may limit the remedies for a regulatory taking to declaratory and injunctive relief, preferring a remand to allow the state courts to address the substantive question of what remedies are available for an interim taking.[328] Rehnquist later answered that remedies question in *First English*, holding that the Takings Clause requires payment for the lost use value of the land during the period that the unconstitutional regulation was in effect.[329]

Like *Dolan*,[330] *First English* illustrates the tension Rehnquist sometimes perceived when forced to choose between promoting federalism or protecting private property rights. Rehnquist's opinion initially provided that "on the record in this case the [Takings Clause] would require compensation" for the temporary taking resulting from application of a flood control ordinance.[331] He later changed the opinion to clarify that the Court was not holding that a compensable temporary taking had occurred, but only that if it did (a matter to be resolved in the state courts on remand), compensation was due.[332] Rehnquist's hesitation about whether a taking had occurred may have resulted from his desire to minimize federal intrusion on local exercises of the police power.

The final "procedural" setting addressed in a Rehnquist Takings Clause opinion arose in a case decided during Chief Justice Rehnquist's last term on the Court. The issue in *San Remo Hotel, L.P. v. City & County of San Francisco*[333] was whether claims brought under the Takings Clause are exempt from the full faith and credit statute.[334] The majority refused to allow the San Francisco landowners to relitigate in federal court under the civil rights statute the merits of a regulatory taking claim that had already been resolved adversely to them in state court.[335] Rehnquist concurred. He agreed that the full faith and credit statute barred the plaintiffs from relitigating in their federal action the issues that had been adjudicated by the state courts. But he urged the Court to revisit an issue it had addressed in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*.[336] In that case, the Court, in an opinion joined by Justice Rehnquist, held that even after a local government applies a regulatory program to real property, the landowner must seek compensation in state court before bringing a federal constitutional taking claim in federal court. In *San Remo Hotel*, Rehnquist asserted that it was no longer obvious to him "that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim."[337] He denied that "the affirmative case for the state-litigation requirement" had yet been made, and he could not understand why the Court should "hand over authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings."[338]

Rehnquist's opinions indicate that he believed that both state and federal law have a role to play in the resolution of regulatory takings claims. Over time, he appeared to become more comfortable with affording federal law a dominant role. For one thing, he clarified in *Keystone* (and perhaps even reversed his position, since his *Penn Central* dissent was ambiguous on the issue) that federal, not state law governs the question of whether the nuisance exception to the compensation requirement for complete deprivations applies. For another, he answered the question in *First English* that he had agreed should be deferred in *Yolo County*—the question of what remedies the Constitution requires for temporary takings, even though the state courts had left unresolved questions in both cases.[339] Finally, Rehnquist's opinion in *San Remo Hotel* indicates that he was prepared to reverse himself on the position to which he

324. A final judgment is a prerequisite to Supreme Court review of the decisions of state supreme courts involving federal constitutional questions. 28 U.S.C. §1257(a).

325. *San Diego Gas & Elec. Co.*, 450 U.S. at 636 (Rehnquist, J., concurring). Similarly, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), Rehnquist found that a taking claim based on the application of a rent control statute was premature because the statute had not yet been applied to the landowners, so that a "sufficiently concrete factual setting for the adjudication of the taking claim" was lacking. *Id.* at 10.

326. 477 U.S. 340, 16 ELR 20807 (1986).

327. *Id.* at 352-53.

328. *Id.* at 364 (Rehnquist, J., dissenting).

329. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 17 ELR 20787 (1987). Before doing so, he rejected the local government's contention that the Court must evaluate independently the adequacy of the complaint and resolve the taking claim on the merits before reaching the remedies question. Instead, Rehnquist assumed for purposes of his analysis of that question that the flood protection ordinance, by depriving the landowner of all beneficial use, amounted to a temporary taking. *Id.* at 313.

330. *See supra* notes 281-90 and accompanying text.

331. Percival, *Marshall Papers*, *supra* note 12, at 10619.

332. *Id.*

333. 125 S. Ct. 2491 (2005).

334. *Id.* at 2495, 2501 (citing 28 U.S.C. §1738).

335. *Id.* at 2501-02.

336. 473 U.S. 172 (1985).

337. *San Remo Hotel*, 125 S. Ct. at 2508 (Rehnquist, C.J., concurring in the judgment).

338. *Id.* at 2509.

339. The unresolved questions, however, were different. In *Yolo County*, the question was what compensation, if any, is due for a temporary taking. In *First English*, the California Supreme Court had made its position clear that an inverse condemnation remedy is not available for a temporary taking. The state courts had not ruled, however, that the church's property had been taken by the application of the flood control ordinance. Justice Stevens dissented, charging that the Court had "unnecessarily and imprudently assume[d] that appellant's complaint alleges an unconstitutional taking" of the church's campground. *First English*, 482 U.S. 304, 322, 17 ELR 20787 (1987) (Stevens, J., dissenting).

had adhered in *Williamson County* and to rule that a property owner need not exhaust state compensation procedures as a prerequisite to filing a takings claim in federal court.

B. Statutory Construction

Justice Rehnquist's commitment to the protection of private property is revealed by his statutory interpretation analysis in environmental cases, as well as by his Takings Clause opinions. Several cases discussed above reflect Rehnquist's conviction that state, not federal, law should be the default law to govern land transactions and natural resource management, in the absence of a clear congressional intent to displace state with federal law.[340] Two of those cases—*Little Lake Misere* and *Corvallis*—also involved title disputes between either the federal government and one of its grantees or a state and a private claimant. In both cases, Rehnquist's position favored protection of private property rights. This section discusses additional cases in which Rehnquist interpreted federal natural resources legislation in a manner that benefited private property rights.

One such case was *Leo Sheep Co. v. United States*.[341] The issue was whether the federal government had retained an implied easement to build a road across land that Congress had granted to a railroad under an 1862 statute as part of a program to subsidize construction of the transcontinental railroad.[342] Writing for the majority, Rehnquist held that the federal government had not reserved such an easement by necessity. Among other things, he pointed out that the 1862 Act specifically listed reservations to the grant, but omitted any reference to a right-of-way of the sort claimed by the United States in the litigation. Rehnquist concluded that, "as a matter of construing congressional intent," the Court should not imply a right-of-way that Congress could have reserved explicitly if it had intended to do so.[343] He emphasized "the special need for certainty and predictability where land titles are concerned," and the need to avoid upsetting "settled expectations" on the basis of an implicit, "ill-defined power" to force public access over property granted to private parties.[344] Rehnquist thus resolved competing claims to natural resources between the federal government and a private landowner in favor of the latter by resorting to statutory interpretation by negative implication.

Rehnquist had an opportunity to protect private property rights in another context in *Summa Corp. v. California ex rel. State Lands Commission*.[345] Los Angeles brought suit against the owner of a lagoon that was connected to a man-made harbor, claiming that it held an easement in the lagoon for commerce, navigation, fishing, and recreation. The city sought to dredge and improve the lagoon without first condemning the lagoon owner's property.[346] The state supported the city's claim, alleging that it had acquired a similar easement before conveying it to the city. The lagoon owner argued that any servitude over the lagoon created under Mexican law before the land was conveyed by treaty to the United States had been forfeited by California's failure to assert that property interest in the federal patent proceedings by which the federal government divested itself of title.[347] Rehnquist, writing for the majority, agreed that the state's claim to a servitude must have been presented in the federal patent proceeding to survive issuance of the fee patent because the property interest claimed by the city was "so substantially in derogation of the fee interest" patented to the lagoon owner's predecessors.[348] The state claimed that its failure to reserve an interest in the lagoon in the federal patent proceeding was not determinative because its alleged public trust servitude was a sovereign right. Rehnquist responded that "California cannot at this late date assert its public trust easement over [the lagoon owner's] property, when [the owner's] predecessors-in-interest had their interest confirmed without any mention of such an easement taken pursuant to the Act of 1851."[349] *Summa Corp.* did not involve interpretation of a federal statute. It did, however, involve interpretation of the effect of the issuance of a land patent by the United States pursuant to statute. It also represents a decision in which Rehnquist was unwilling to allow a state's alleged public trust rights to trump private property rights, absent an explicit exercise of the state's rights in the patent documents so as to put the patentee on notice of the state's claim.

A final case in which Rehnquist used the tools of statutory construction to enhance private property rights was *Bedroc Ltd. v. United States*.[350] The issue was whether sand and gravel qualify as "valuable minerals" reserved to the United States in land grants issued under the Pittman Underground Water Act of 1919.[351] Rehnquist concluded that Congress' use of the term "valuable" made it clear that sand and gravel were not included in the statutory mineral reservation.[352] "Common sense" indicated that Congress did not regard sand and gravel found in Nevada at the time of the Act's adoption as "valuable minerals," given that these substances were abundant, had no intrinsic value, and were commercially worthless because of the state's sparse population and

340. *See supra* notes 218-48 and accompanying text.

341. 440 U.S. 668 (1979).

342. *Id.* at 669.

343. *Id.* at 681-82. The Court also refused to interpret the Unlawful Inclosures Act, 43 U.S.C. §1061, which prohibits inclosures of public lands, to apply to the landowner's refusal to acquiesce in a public road over its property. *Leo Sheep*, 440 U.S. at 684-87.

344. *Id*. at 687-88.

345. 466 U.S. 198, 14 ELR 20464 (1984).

346. *Id.* at 199-200.

347. The lagoon owner's title dated back to an 1839 grant by the Mexican Governor of California to the owner's predecessors, before California became part of the United States.

348. *Summa Corp.*, 466 U.S. at 200-01, 205.

349. *Id.* at 209. The 1851 statute referred to by the Court was the source of the federal government's authority to issue the patent that covered the lagoon. *Id.* at 205.

350. 541 U.S. 176 (2004).

351. 41 Stat. 293. Each patent issued under the Act was required to contain "a reservation to the United States of all the coal and other valuable minerals in the lands . . . , together with the right to prospect for, mine, and remove the same." §8, 41 Stat. at 295. Congress reserved the rights of existing patentees when it repealed the Pittman Underground Water Act. When a successor to the original patentee began extracting sand and gravel, the federal government concluded that he had engaged in a trespass against the reserved interest of the United States in the "valuable minerals" on the property. The successors filed suit against the United States, seeking to quiet title in the sand and gravel. *Bedroc*, 541 U.S. at 180-81.

352. *Bedroc*, 541 U.S. at 183-84. Rehnquist also relied on the Court's precedents establishing that, in interpreting statutory mineral reservations, Congress intended the terms of a reservation to be understood in their "ordinary and popular" sense. The "proper inquiry focuses on the ordinary meaning of the reservation at the time Congress enacted it." *Id.* at 184.

development.[353] Thus, even if sand and gravel qualified as minerals, they did not qualify as "valuable minerals" reserved to the United States.[354] Rehnquist distinguished a previous decision holding that sand and gravel found on lands patented under the Stock-Raising Homestead Act of 1916[355] were "minerals" reserved to the United States.[356] He concluded in *Bedroc* that the Court could not interpret the Pittman Act's reservation as expansively as the one in the 1916 Act because Congress "textually narrowed the scope of the term [minerals] by using the modifier 'valuable'" in the Pittman Act.[357]

C. Discussion

That Justice Rehnquist was disposed to protect private property rights is not fairly subject to dispute. His opinions in the eminent domain cases are not terribly revealing, indicating only that he interpreted the Takings Clause to require fair treatment and to preclude unreasonable governmental interference with legitimate expectations, but not to facilitate windfall recoveries by the owners of condemned land. Likewise, Rehnquist's opinions in cases involving alleged physical takings turned on his perception of whether the government's activities interfered with the affected property owners' legitimate expectations. Rehnquist's inclination to rule in favor of property owners and against governmental entities asserting conflicting title claims is more clearly apparent in the statutory interpretation cases discussed in the previous section. In every one of those, he construed the relevant natural resource management statutes in ways that maximized the rights of the private property claimants.

The regulatory takings cases also reflect Rehnquist's commitment to the protection of private property in the face of governmental activity alleged to adversely affect that property. Analysis of those cases indicates that Rehnquist's consistently pro-property stances resulted from his resolution of several key questions: whether a regulation resulted in a complete deprivation of all economically viable use, whether a regulation with such an effect nevertheless did not require compensation because of the nature of the regulated activity, and whether the nature of the regulation itself helped answer the question of whether a taking did or did not occur.

One of the key questions Justice Rehnquist tackled in his takings opinions is how to determine whether the impact of regulation is sufficiently tantamount to a physical taking so as to require the payment of just compensation. Rehnquist's inclination to decide whether a regulation amounts to a taking by assessing how closely it resembles a physical appropriation is now well entrenched in the Court's regulatory takings jurisprudence. In the Supreme Court's latest regulatory takings case, *Lingle v. Chevron USA, Inc.*,[358] Justice O'Connor stated that "the paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property," but that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable" under the Fifth and Fourteenth Amendments.[359] She added that although the Court's regulatory takings jurisprudence is anything but "unified," the principles reflected in several of the Court's landmark cases[360]

> share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. . . . A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.[361]

Rehnquist was unable to convince a majority of the Court, however, that his approach to determining whether a regulatory taking is tantamount to a physical appropriation is the proper one. Rehnquist's approach garnered the support of a majority of the Justices in the exactions context. Drawing an analogy between a physical expropriation and a regulatory requirement that a property owner dedicate its land to public use, such as in the exactions cases, does not require much of a stretch. The analogy between a physical taking and a regulation that adversely affects the economic value of the regulated property is perhaps less obvious. The analogy is strongest if the regulation deprives the regulated parcel of all economic value. Often, however, how to define "the regulated parcel" is anything but obvious. Rehnquist's approach to this definitional question led him to conclude that a taking had occurred in three regulatory takings cases, but in all three, Rehnquist found himself in dissent.

Assume that a regulation prevents all economically valuable use of 10 acres of wetlands, but does not affect at all the use of 40 other adjacent non-wetlands acres owned by the same person. Assume also that the owner purchased both the wetlands and non-wetlands acreage at the same time as part of a transaction in which the entire 50 acres was conveyed to the owner as a single parcel. Should the regulation be treated as one that deprives the owner of 100% of the value of the 10 wetlands acres, or as one that diminishes the value of the consolidated 50-acre tract by 20%? This question involves what is sometimes referred to as the concept of "conceptual severance."[362] If the regulation is conceived of

353. Thus, the search for statutory plain meaning entailed ascertaining the probable common meaning of the relevant term 85 years before the Court's decision, at the time the Pittman Underground Water Act was adopted.

354. *Bedroc*, 541 U.S. at 184.

355. 43 U.S.C. §§291-302 (repealed 1976).

356. Watt v. Western Nuclear, Inc., 462 U.S. 36, 13 ELR 20849 (1983).

357. *Bedroc*, 541 U.S. at 183.

358. 125 S. Ct. 2074, 35 ELR 20106 (2005).

359. *Id.* at 2081.

360. The cases she cited were *Loretto* (establishing that a regulation that results in a permanent physical occupation is a per se taking), *Lucas* (establishing that a regulation that deprives the owner of the regulated property of all economically viable use also is a per se taking), and *Penn Central* (establishing a three-factor balancing test to assess whether regulations that do not fit within either of the per se rules has worked a taking).

361. *Lingle*, 125 S. Ct. at 2082.

362. Prof. Margaret Radin, who originated the term, defines conceptual severance as:

> [D]elineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually

as completely eliminating the value of the 10-acre parcel, it is more likely that a court will reach the conclusion that the regulation is analogous, from the perspective of the property owner, to a physical expropriation of the 10-acre parcel, than if the court finds that a 20% diminution in value of the 50-acre parcel has occurred. As a result, Rehnquist's approach to conceptual severance goes a long way toward explaining his unwavering position that the impact-based regulatory programs at issue in cases in which he wrote opinions amounted to compensable takings.

Rehnquist acknowledged the thorniness posed by the conceptual severance issue in his dissent in *Penn Central*, stating that "[d]ifficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property."[363] To resolve those problems, Rehnquist recognized the need to "define the particular property unit that should be examined," and he criticized Justice Brennan's majority opinion for "do[ing] little to resolve these questions."[364] Rehnquist himself apparently regarded the "air rights" above Penn Central's railroad terminal as a segregable unit of property with an apparent value in the absence of regulation of millions of dollars.[365] Whereas neighboring property owners were free to use their air rights subject only to applicable zoning laws, the terminal owner could not make any use of its air rights without the approval of the agency that administered the historic preservation program, and it had already turned down two of Penn Central's proposed development plans.[366] Rehnquist did not, however, enunciate any general rule for resolving conceptual severance questions.

As Chief Justice, Rehnquist returned to the conceptual severance issue in his dissent in *Keystone*. Once again, he noted how nettlesome the task was, stating that "[t]he need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel."[367] Rehnquist disagreed with the majority's "broad definition of the 'relevant mass of property.'"[368] In particular, he took issue with the majority's conclusion that the appropriate "segment" of property for purposes of takings analysis was the entire interest of the regulated coal companies. He concluded instead that the focus of the impact-based inquiry should have been on the particular 27 million tons of coal that, because of the subsidence restrictions, could not be removed.[369] Rehnquist concluded that there was "no question that this coal is an identifiable and separable property interest," and that the regulatory scheme completely destroyed it. From the perspective of the coal companies, the effect of the regulation was "indistinguishable from the effect of a physical taking."[370] Rehnquist also found it important that the support estate was recognized as a separate property interest under Pennsylvania law. That characterization should have been determinative in defining the denominator of the regulatory takings equation. The majority, however, ignored the support estate as the relevant segment of property and focused instead on "some broader, yet undefined, segment of property presumably recognized by state law."[371]

Rehnquist was willing to engage in conceptual severance on a temporal as well as a geographical basis. His characterization of the economic impact of the development moratorium in *Tahoe-Sierra* as "a ban on all economic development"[372] resulted from his willingness to regard the time during which the moratorium was in effect as a separate "slice" of the owner's fee simple absolute and to analyze the impact of the moratorium only on that temporal slice. Viewed in this manner, it was but a short step to the conclusion that the moratorium was the "practical equivalent" of a physical appropriation and therefore violated the Takings Clause.[373] Thus, conceptual severance, either geographical or temporal, was a key component of Rehnquist's conclusion that the regulatory programs attacked as takings, based on their economic impact, required the payment of just compensation in *Penn Central*, *Keystone*, and *Tahoe-Sierra*.[374]

> "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.

Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988). Others have framed the issue raised by assessments of the scope of a regulation's economic impact in terms of a "denominator" problem:

> The key issue in making the takings determination in [hypotheticals like the one posed in the text] is defining the appropriate unit of property against which to conduct the . . . takings inquiry. In determining whether a regulation "denies all economically beneficial or productive use of land," one must do a fractional comparison between the value of the property after the regulatory imposition (the numerator) and the value of the property before the regulatory imposition (the denominator). And while the fractional analysis is easy to understand, it provides no assistance in making the often crucial determination of what unit of property will furnish the denominator value in the deprivation fraction.

Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 666-67 (1996). *See also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967) ("if, as seems clear, a comparison of magnitudes is intended—a comparison in which, were it fractionally expressed, the loss in value of the affected property would compose the numerator—what value supplies the denominator? Is it the preexisting value of the affected property, or is it the whole preexisting wealth or income of the complainant?"). In the wetlands regulation hypothetical set forth in the text, the issue is whether the denominator should be expressed in terms of the value of the 10 acres (which has been completely destroyed by the regulation) or the value of the 50 acres (which has been diminished only by 20%).

363. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 149 n.13, 8 ELR 20528 (1978) (Rehnquist, J., dissenting).

364. *Id.*

365. *Id.* at 140 (Rehnquist, J., dissenting).

366. *Id.* at 143 (Rehnquist, J., dissenting).

367. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 515, 17 ELR 20440 (1987) (Rehnquist, C.J., dissenting).

368. *Id.* at 514-15 (Rehnquist, C.J., dissenting).

369. In particular, Rehnquist thought the majority gave short shrift to the *stare decisis* implications of *Pennsylvania Coal*, stating at conference that "Pennsylvania Coal is close and was correct," although he conceded that the issue "depends on the point of view—9% v. 27 million tons." Percival, *Blackman Papers*, *supra* note 77, at 10652.

370. *Keystone*, 480 U.S. at 517-18 (Rehnquist, C.J., dissenting). *See also id.* at 514 (stating that "petitioners' interests in particular coal deposits have been completely destroyed").

371. *Id.* at 519 (Rehnquist, C.J, dissenting).

372. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 346, 352, 32 ELR 20627 (2002) (Rehnquist, C.J., dissenting).

373. *Id.* at 349-50 (Rehnquist, C.J., dissenting).

374. Rehnquist's majority opinion in *First English* also can be interpreted as an endorsement of temporal conceptual severance. *See, e.g.*, Eric

Rehnquist also recognized that the mere fact that a regulation constitutes a complete deprivation of the economic value of the regulated segment of property, however that is to be defined, does not necessarily dictate the conclusion that an impact-based taking has occurred. In *First English*, for example, Rehnquist assumed for purposes of analyzing the remedies question that the floodplain ordinance amounted to a taking on the merits, but he noted that two issues remained open for resolution by the state courts on remand. The first was whether the application of the ordinance to the church's property actually did result in a complete denial of use. Even if it did, however, the state courts might still conclude that the ordinance did not constitute a taking because the regulation was "insulated" from a takings attack "as a part of the State's authority to enact safety regulations."[375]

As early as his dissent in *Penn Central*, Rehnquist recognized the potential for the government's regulatory justification to shield it from the charge that the regulation's economic impact required it to compensate. He acknowledged that the Court's taking precedents recognized two exceptions to the general rule that destruction of private property through regulation amounts to a taking. One of them comes into play when the government adopts "a prohibition on use of property for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community; states need not compensate for prohibitions on noxious uses of property that would otherwise inflict injurious use on the community."[376] In that situation, the government may "single out" the regulated entity because the nature of the regulated use justifies onerous treatment.[377] Essentially, the target of a regulation directed at a nuisance-like use has no cause to complain, even if the economic value of its land is destroyed, because it never had the right to use its property in a nuisance-like manner to begin with.

How a judge defines the scope of the nuisance-like use exception is obviously important in determining how often he or she finds that a regulation is a taking based on its economic impact. Rehnquist defined the nuisance-like use exception narrowly. He stated in *Penn Central* that "[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others."[378] That formulation is not particularly useful, however, because it says little about what constitutes such a "danger," particularly in the context of regulatory attempts to protect the amorphous concept of the public "welfare." Rehnquist concluded that the application of New York's historic preservation law to the railroad terminal, and in particular its refusal to allow the terminal owner to proceed with either of its development plans, did not qualify as nuisance prevention. Those proposals would have complied with all applicable zoning laws and health and safety requirements. According to Rehnquist, instead of prohibiting a noxious use, the city forced Penn Central to preserve "an outstanding example of beaux-arts architecture" for the benefit of sightseers and tourists.[379]

Even if Rehnquist was unwilling to characterize a historic landmark preservation program as a nuisance prevention measure, he might have been expected to consider more seriously the applicability of the nuisance-like use exception to the regulatory program in *Keystone*. The state statute that restricted mining that resulted in subsidence explicitly billed itself as an attempt to protect the public health and safety (as well as the environment).[380] Yet, Rehnquist again concluded that the subsidence act was not the kind of regulation that triggers the nuisance exception. He characterized the nuisance exception as a "narrow" one that allows the government to prevent "a misuse or illegal use."[381] Indeed, Rehnquist asserted, the Takings Clause *compels* a narrow reading of the exception because a broad reading would enable the government to enact "multifaceted health, welfare, and safety regulations" that impose societal burdens on individual landowners as a means of securing health, safety, and welfare benefits for the public.[382] But these are the very kinds of regulations that Rehnquist himself in *Penn Central* declared to be within the scope of the nuisance exception.

Rehnquist identified "two narrowing principles" for the nuisance exception based on previous takings cases. First, nuisance regulations that are exempt from the obligation to compensate must have "discrete and narrow purposes."[383] This principle disqualified the Pennsylvania statute, which was "much more than a nuisance statute because it reflected in part, a concern for preservation of buildings, economic development, and maintenance of property values to sustain the state's tax base."[384] Rehnquist urged caution in allowing a regulation based on "essentially economic concerns" to be insulated from takings challenges.[385] Even under his narrow reading of the nuisance exception, however, shouldn't Rehnquist have at least exempted the statute to the extent that it was based on "non-economic" concerns grounded in the legislature's desire to protect the public health and safety from the adverse effects of surface coal mining?

Second, and in Rehnquist's own words, "more significantly," the Court had never interpreted the nuisance exception "to allow complete extinction of the value of a parcel of

R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 Nw. U. L. Rev. 187, 204 (2004) (stating that "*First English* called *Penn Central*'s 'parcel as a whole' logic into question").

375. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 313, 17 ELR 20787 (1987). In fact, on remand, the state court found that no taking had occurred for both reasons. First English Evangelical Lutheran Church v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893, 19 ELR 21329 (1989).

376. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 144-45, 8 ELR 20528 (1978) (Rehnquist, J., dissenting). The other exception applies "when the government prohibits a noninjurious use," but the prohibition affords the regulated property owner an "average reciprocity of advantage." *Id.* at 147.

377. *Id.* at 145 (Rehnquist, J., dissenting).

378. *Id.*

379. *Id.* at 146 (Rehnquist, J., dissenting).

380. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 476 n.6, 17 ELR 20440 (1987).

381. *Id.* at 512 (Rehnquist, C.J., dissenting) (quoting Curtin v. Benson, 222 U.S. 78, 86 (1911)).

382. *Id*. at 513 (Rehnquist, C.J., dissenting).

383. *Id.*

384. *Id*. Justice Blackmun's notes on the conference for the *Lucas* case indicate that Rehnquist also said of the critical areas protection legislation at issue in that case that "this type of regulation is not enough to bring the case under the nuisance line of cases." Percival, *Blackmun Papers*, *supra* note 77, at 10654. Rehnquist successfully counseled Justice Scalia to modify his majority opinion to reject more emphatically the South Carolina Supreme Court's use of the nuisance exception. *Id*. at 10655.

385. *Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

property."[386] The Court may have applied the nuisance exception to regulations that caused a substantial reduction in value, but it had never allowed the state to completely extinguish a property interest or prohibit all use without compensating. In *Keystone*, according to Rehnquist, the subsidence act completely destroyed the coal companies' interests (defined as the particular coal deposits that had to be left in the ground). To endorse such a regulation under the rubric of the nuisance exception would allow the state "not merely to forbid one 'particular use' of property with many uses but to extinguish all beneficial use of petitioners' property."[387]

Rehnquist's analysis of the nuisance-like use exception in *Keystone* is troublesome for many reasons. First, it seems to mischaracterize some of the Court's previous cases involving the exception, where the Court does appear to have endorsed regulations that resulted in total deprivations.[388] Second, Rehnquist himself described the nuisance exception in *Penn Central* as one that allows the destruction of private property without triggering an obligation to compensate.[389] Third, even assuming that the statute barred all other uses of the coal companies' property, it was directed at eliminating risks to health and safety resulting from mining that caused subsidence. It is not clear why the state should be precluded from prohibiting without compensation uses that generate adverse health and environmental effects, just because those are the only uses to which the land may profitably be put. At any rate, Rehnquist's increasingly narrow conception of the nuisance-like use exception[390] is a second key determinant of his willingness to endorse takings challenges based on the adverse economic impact of regulation.[391]

A third important component of Rehnquist's takings analysis in non-exactions cases was his focus on whether a regulation challenged as a taking took the form of familiar or traditional land use regulation.[392] In *First English*, Rehnquist held that the government must compensate for the lost use value of a regulation declared to be a taking while the regulation (in that case, a moratorium on development within a floodplain) was in effect. He distinguished the adverse impact resulting from "*normal* delays" in obtaining building permits, zoning changes, or variances, which typically do not require compensation.[393] Similarly, Rehnquist contended in *Tahoe-Sierra* that compensation was owed because a moratorium on development pending enactment of a comprehensive land use plan "does not resemble any traditional land-use planning device."[394]

This device for sorting out regulations that require compensation from those that do not helps explain why Rehnquist uniformly sided with property owners in the regulatory takings cases in which he wrote an opinion. The three non-exactions cases in which Rehnquist filed a dissent—*Penn Central*, *Keystone*, and *Tahoe-Sierra*—all involved environmental or similar regulatory schemes that probably did not conform to Rehnquist's conception of what "normal" or "traditional" land use regulation ought to look like. *Penn Central* involved historic preservation legislation,[395] *Keystone* involved a program restricting coal mining to minimize environmental damage, and the regulatory scheme at issue in *Tahoe-Sierra* sought to protect environmentally "sensitive lands" and to halt the environmental degradation that development near Lake Tahoe had caused to the lake's "unsurpassed beauty."[396] Rehnquist, therefore, was likely to be sympathetic to regulatory takings attacks that were leveled against modern environmental regulatory regimes, which he apparently regarded as somehow representing a departure from more "acceptable," or at least more traditional, forms of land use regulation such as Euclidean zoning. The government may well have the authority to adopt such newfangled regulatory programs, but if they do so in a way that results in significant economic harm to those regulated, they must be prepared to compensate adversely affected entities. Perhaps Rehnquist's distaste for nontraditional regulation that adversely affects economic value stemmed from his focus on the degree to which regulation impermissibly interferes with reasonable investment-backed expectations: landowners are more likely to anticipate "normal" or "traditional" land use regulation than the kinds of environmental regulations at issue in *Penn Central*, *Keystone*, and *Tahoe-Sierra*.[397]

Similarly, Rehnquist's opinion in *Dolan* is reminiscent of his invocation of the distinction between "normal" or "tradi-

386. *Id.*

387. *Id.* at 514 (Rehnquist, C.J., dissenting).

388. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

389. *Penn Central*, 438 U.S. 104, 144-45 (Rehnquist, J., dissenting).

390. According to at least one observer, Rehnquist's position essentially boiled down to the view that nuisance control (as he narrowly defined it) was "the only permissible basis for land use regulation." Sterk, *supra* note 264, at 233.

391. Although Rehnquist did not explicitly analyze the moratorium in *Tahoe-Sierra* to determine whether it might trigger the nuisance-like use exception, he probably would have concluded that it did not, based on both of the "narrowing principles" enunciated in *Keystone*. First, it is unlikely that he would have regarded the regulation as based on the kind of "discrete and narrow" purposes to which he referred in *Keystone*. Rehnquist characterized the lake in *Tahoe-Sierra* as "a national treasure," and did not question that the government's efforts at preventing its further degradation "were made in good faith in furtherance of the public interest. But, as is the case with most governmental action that furthers the public interest, the Constitution requires that the costs and burdens be borne by the public at large, not by a few targeted citizens." Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 354, 32 ELR 20627 (2002) (Rehnquist, C.J., dissenting). Second, once Rehnquist engaged in temporal conceptual severance—by treating the time during which the development moratorium was in effect as a separate and identifiable slice of property for takings analysis purposes—it was foreordained that he would conclude that the regulation completely destroyed the regulated property's value.

392. *Cf.* David A. Myers, *Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court*, 23 Val. U. L. Rev. 527, 551 (1989) (arguing that, for Rehnquist, "conventional perceptions of property rights are a primary focus" and that "[c]ommon law distributions of rights in land are accepted as natural and legislative decisions to alter these rights are viewed with suspicion").

393. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321, 17 ELR 20787 (1987) (emphasis added).

394. *Tahoe-Sierra*, 535 U.S. at 343 (Rehnquist, C.J., dissenting).

395. Justice Blackmun's Supreme Court papers indicate that, at the conference on *Penn Central*, Rehnquist distinguished zoning from New York City's historic landmark program on the ground that "[i]n zoning, there is a benefit that accompanies the burden," whereas the terminal owner in *Penn Central* received no such benefit. Percival, *Blackmun Papers*, *supra* note 77, at 10651.

396. *Tahoe-Sierra*, 535 U.S. at 307, 312.

397. Rehnquist, however, joined Justice Kennedy's majority opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 32 ELR 20516 (2001), in which the Court held that the fact that a property owner purchased the property after the enactment of the regulatory program being attacked does not necessarily bar the owner from asserting a taking claim.

tional" and novel land use restrictions in the cases alleging impact-based takings. He again differentiated the land use controls upheld in the face of previous constitutional attacks from the exaction requirements at issue in *Dolan*. In past cases, the Court had addressed "essentially legislative determinations classifying entire areas of the city," while in *Dolan*, "the city has made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."[398] Rehnquist appears to have been more concerned about that kind of adjudicative decision, perhaps because it enhances the risk that the affected property owner has been "singled out" to bear burdens that should have been borne by the public as a whole.

The most striking aspect of Justice Rehnquist's Takings Clause jurisprudence is his consistent willingness to find takings based on regulation, whether he regarded the fatal aspect of the regulation to be its endorsement of a government-sponsored physical invasion (in the nature of an easement) or the excessive economic impact of the regulation. Rehnquist's opinions repeatedly echo themes that he regarded as fundamental to the purposes of requiring just compensation for government takings of private property for a public use. These include the importance of fair treatment of property owners so that they are not inappropriately singled out to bear burdens that should have been imposed on society at large, protecting the right to exclude because it is one of the most fundamental sticks in the property owner's bundle of rights, avoiding the imposition of affirmative obligations in the absence of compensation, and protecting the legitimate investment-backed expectations of property owners.

Rehnquist's invocation of these themes may not be enough to explain his failure to ever write an opinion siding against a regulatory takings claimant on the merits. The same themes apply in the context of eminent domain and physical taking cases, and yet Rehnquist's treatment of governmental and landowner litigants seems to have been fairly even-handed. It is only in the regulatory takings arena that Rehnquist's opinions are so lopsidedly pro-property owner. Two of the most important determinants in regulatory takings cases are the definitions he adopted of the relevant property interest affected by regulation (the conceptual severance question) and of the category of activities that may be regulated without triggering liability under the Takings Clause (the nuisance-like use exception). Rehnquist's positions on both issues were heavily weighted in favor of regulated landowners, so much so that he ruled for them at every opportunity.

V. Conclusion

Rehnquist's resolution of constitutional and statutory issues in environmental law cases reflects his dedication to the imposition of limitations on congressional power, the protection of state sovereignty, and the protection of private property rights. He almost single-handedly reinvigorated the Commerce Clause as a tool for restricting federal power to a greater degree than the Supreme Court had endorsed for many decades. He consistently rejected preemption attacks that had the potential to narrow the scope of traditional state regulatory authority over natural resource management. Rehnquist advocated expansion of the Takings Clause under the Fifth and Fourteenth Amendments, with mixed results, and interpreted natural resource management legislation to protect private property rights at the expense of both federal and state governments.

Some portions of Rehnquist's agenda seem inherently anti-environmental, even if hostility to environmental regulation was not the motivating factor behind Rehnquist's jurisprudence. Expansive interpretations of the obligation to compensate landowners adversely affected by regulation inevitably will limit the government's ability to impose environmental restrictions. Similarly, a commitment to the imposition of limitations on federal power, either through narrow interpretation of the Commerce Clause or of the scope of regulatory authority delegated to agencies by federal environmental statutes, is likely to manifest itself in a series of decisions that impair the federal government's ability to protect the environment. Rehnquist's Commerce Clause jurisprudence may yet result in significant restrictions on Congress' authority to enact laws that protect resources such as wetlands and endangered species or in judicial adoption of narrow constructions of such laws to avoid perceived constitutional federalism questions.

Other portions of Rehnquist's agenda are not necessarily anti-environmental in orientation. The protection of state sovereignty has the potential to enhance state regulatory authority in environmental matters. If, however, Rehnquist's commitment to the protection of state sovereignty were selective, it would be fair to impart an anti-environmental animus to his jurisprudence. To the extent that some of his opinions find preemption of state efforts to adopt more stringent environmental regulation than the federal government has enacted, he is susceptible to this charge. Moreover, even if Rehnquist consistently pursued both his federalism and property rights agendas, the two agendas on occasion come into conflict. Rehnquist's opinions appear to reconcile that conflict more often than not by favoring the protection of property rights. That method of accommodating the need to protect both state sovereignty and property rights is prone to yield anti-environmental results, given that environmental regulation often restricts the use of property. Rehnquist's opinions sided with the regulatory takings claimant and against the governmental entity that adopted environmental regulatory measures in each case in which a clash between these two interests arose. His opinions often took the form of dissents, however. He was unable to convince a majority of the Justices to conform to his approach to issues such as conceptual severance.

In one area, Justice Rehnquist's commitment to the protection of state sovereignty induced him to take a firmly pro-environmental stance. Rehnquist repeatedly invoked the rights of the states to protect their own natural resources from external threats to conclude that state and local measures designed to avoid environmental harm through restrictions on the flow of or disposal of waste did not violate the dormant Commerce Clause. This commitment to the preservation of state power to protect threatened resources from out-of-state threats had no discernible impact, however. Rehnquist always found himself in dissent on dormant Commerce Clause issues, and often exclusively so. The strongest pro-environmental component of Rehnquist's jurisprudence thus has had far less impact than the components that have had the effect of dismantling important aspects of modern environmental law, either by design or effect.

398. Dolan v. City of Tigard, 512 U.S. 374, 385, 24 ELR 21083 (1994).