THE FEDERALIST SOCIETY
21st ANNIVERSARY
NATIONAL LAWYERS CONVENTION

+ + + + +

CONSTITUTIONAL LIMITATIONS ON ENVIRONMENTAL PROTECTION

Friday, November 14, 2003

Panelists:

PROFESSOR JONATHAN ADLER, Assistant Professor of Law, Case Western University School of Law

PROFESSOR JOHN C. EASTMAN, Professor of Law at Chapman University School of Law

PROFESSOR ROBERT V. PERCIVAL, Professor of Law and Director of the Environmental Law Program, University of Maryland School of Law

JOHN D. ECHEVERRIA, Executive Director, Georgetown Environmental Law and Policy Institute

HONORABLE DAVID B. SENTELLE, Judge, United States Court of Appeals for the District of Columbia Circuit, moderator

MODERATOR: Our assigned topic this afternoon is "Constitutional Limits on Federal Environmental Protection." I'm aware, as you may be, that some people don't seem to think there are any constitutional limitations on federal environmental protection. We have the good fortune to have four panelists who have thought a lot about that subject and reached perhaps varying conclusions as to whether and what those limitations might be.

Beginning on my right, geographically at least, we start with Jonathan Adler who is an assistant professor of law at the Case Western University School of Law. Before that he had been a graduate of Yale, undergraduate, and George Mason University Law School. In between he clerked for somebody on the District of Columbia Circuit named Sentelle or something like that. Rather than reading his biography, I'm going from memory on him.

Seated next to Jonathan—we have a lot of Jon's around this afternoon—is John Eastman. John is a professor of law at the Chapman University School of Law. In his earlier history, he had a PhD in government from the Claremont Graduate School before he went to law school, and then a J.D. from the University of Chicago Law School, so we

may assume that he understands the economic implications of the question for the afternoon. In between, he clerked first for Michael Luttig on the Fourth Circuit and then for Justice Clarence Thomas on the Supreme Court.

To my left, again at least geographically, we have Robert V. Percival, who is a professor of law and the Director of the Environmental Law Program at the University of Maryland School of Law. A graduate of Macalester College and Stanford Law School, he has an M.A. in economics, so perhaps we'll have if not agreement at least some overlap of subject matter. In between he clerked for Shirley Hufstedler on the Ninth Circuit and for Justice Byron White on the Supreme Court.

Finally, we have John D. Echeverria who is the Executive Director of the Georgetown Environmental Law and Policy Institute which conducts research and education on legal and policy issues relating to the protection of the environment. He is the former general counsel of the Audubon Society, so we might say he's for the birds. He's a graduate of Yale Law School and the Yale School of Forestry and Environmental Space. He served as a law clerk to my old friend, the late Gary Gazelle on the U.S. District Court for the District of Columbia. He's written extensively on the aspects of environmental and natural resources law, including a much-used textbook on the subject.

Without taking up the time that should be given to the experts, I will turn the subject matter at hand over to Jonathan Adler first to give us his take on the constitutional limitations on the federal environmental protection laws. Jonathan?

PROFESSOR ADLER: Thank you, Judge. It's a pleasure to be here. Last time I gave a speech in Washington, D.C., it was at the first annual convention of the American Constitution Society. I don't think we have any less disagreement on the panel. I'm hoping that it's a more sympathetic crowd.

Judge Sentelle mentioned that those of us on the panel have thought a lot about the constitutional limitations on federal environmental protection. But one of the problems we see in environmental law is that the authors of the various federal environmental statutes didn't. Thirty-five years ago when the proliferation of federal environmental legislation truly began, there was general consensus that environmental problems were important, that they were severe. The nation was awakened to environmental concerns, certain events such as oil spills, rivers on fire—that's one we should talk about later, if people want to know the true story on that since I am now from Cleveland. Many statutes were enacted to protect the air, the water, to protect wildlife, control waste, and so on.

Environmental concerns were everywhere. Activities that caused environmental problems were seen to be everywhere. As we've all learned, everything is connected to everything else. So the assumption was ambitious, far reaching, in some cases comprehensive, and in some cases quite onerous, federal environmental legislation was adopted. The problem, and this is in honor of Roger, who I think is back there somewhere, is again, we forgot about this. We forgot about the Constitution.

In fact, with perhaps the slight exception of minimal consideration of the Fifth Amendment, there was no consideration of the fact that our federal government is one of limited and enumerated powers, that we have a constitution that carefully delineates and prescribes what the federal government can and cannot do, and that those powers that aren't delegated are reserved to the states on the people. It's often remarked that our

constitution does not enact Herbert Spencer social statics. Well, we forgot that it doesn't enact all the Leopold Sand County Almanac either.

Well, ten years ago, the Supreme Court began to remind many of us, or at least many of those who had forgotten about the Constitution, that in fact the Constitution does impose limits, that again we do have a government of limited and enumerated powers, and that the federal government, even when pursuing the most noble and desirable ends, still must act within the limits that are prescribed. I want to focus on those limits which we may characterize as federalism limits, the limits of the enumeration of powers.

If there is no environmental power, I admit there are some federal appellate decisions which may suggest otherwise that there is somehow this latent power to protect natural resources because they're really, really important. But you look in your little, whether it's your Cato Constitution or any other version, the words are the same. We don't see a federal environmental power. We don't see a federal natural resources power. We see strict enumerated powers, the most expansive certainly is a commerce power, but as I know at least one of my panelists will mention, commerce power is still a limited power. Even as interpreted by Lopez and Morrison to control those activities which substantially affect commerce, it is not a power to regulate everything everywhere. It is not a power to regulate something merely because we can envision or perhaps even detect some environmental effect somewhere. It is not a power that would reach to a homeowner's decision in San Bernardino County, California, to clear a firebreak on his land to protect against wildfires just because Stephen's kangaroo rat likes that firebreak as much as the fire might.

In addition to enumerated powers limits, there are also structural limitations which are no less important. They may not have the same bite in the environmental context, but limitations, such as state sovereign immunity against suits for money damages or limitation on commandeering the federal government's lack of ability to simply tell states to do things because the federal government thinks it's the right thing to do and thinks that if states only were so enlightened, they would do it themselves, are important limits as well.

Those structural protections are similarly often forgotten about, although in an often forgotten anecdote in the history of environmental law, in the mid-1970s the Environmental Protection Agency did think about trying to tell states what to do, not inducing them with money, but simply to commandeer state regulation agencies for Clean Air Act implementation. But once that case was accepted for cert, the Solicitor General's office disabused the EPA of the notion that it could tell states how to regulate and what to regulate merely because it was the EPA. The fact is that the federal government can't reach everything that it might want to reach. It can't compel states, either directly through commandeering or through abrogation of sovereign immunity, to do things merely because we may think they are environmentally important.

I would argue that although we haven't seen this addressed directly, there are even limits on the federal government's ability to induce, or some would say bribe, states to participate in environmental regulation. The spending power is certainly a broad power, or certainly has at least been interpreted to be a very broad power. But there certainly is a distinction between the federal government giving money to a state saying, "We think controlling non-point source pollution is a good idea; here's some money to help you do it if you do it the way we like." There's a difference between that and what

the federal government often does, or does under the Clean Air Act, which is to say, "If you don't regulate air pollution precisely the way that we think is necessary, you lose all of your highway funds, even to the extent of telling states they must alter their rules for standing to sue, to challenge stationary source air permits in state court." The relationship of that to highway funding I would say is quite tenuous.

As loathe as I am to offer predictions, I think it is reasonable to expect and certainly to hope that South Dakota v. Dole is to the spending power what Jones and Laughlin Steel was to the commerce power. That is a very expansive interpretation that nonetheless makes clear that the Supreme Court's failure thus far to enforce limits doesn't mean that the limits are absent. It just means that they have yet to be enforced.

Now I've said the federalism limits are real and they should be enforced. I think it's important to make two points. One is that this is not to suggest that environmental protection is not important. It's not to suggest that clean air, clean water, protecting wildlife, ecosystems, controlling the effects of economic activity are somehow not worthy of federal action. It's merely to reassert something that we take for granted in many other areas, whether it's fighting crime or the war on terror, which is that no matter how important the goal, we still must observe the Constitution. We still must respect the limits that it places on the federal government, as well, where relevant, the limits it places on state and local governments.

Finally, I think it's important also to recognize that constitutional limits on federal power aren't necessarily constitutional limits or obstacles on the ability to protect environmental values. This is something that I think is particularly important, because it's often assumed that to say that the federal government can't regulate something is to say that a problem can't be solved, or that it can't be addressed, or that we just must suffer with some environmental concern. I don't think that's true for three reasons, which I will give you very briefly before the Judge tells me that my time is up.

First is that federal power is not always benign. We often think about the fact that the federal government runs around doing many things to save the environment. We often forget that the federal government has spent much of its history creating many of the problems it is now regulating us to solve. The same federal government that regulates to protect and conserve wetlands spent decades upon decades not only destroying wetlands itself, but giving conditional grants of land on the condition that wetlands were drained, subsidizing the draining of wetlands and the like.

We also see a federal government which to this day continues to preempt state and local efforts which would often be more protective than the federal government's prescribed approach. A federal government that can infringe upon state autonomy to protect the environment can similarly infringe upon state autonomy to harm the environment. It's a two-edged sword, and that's important to remember.

Secondly, even a limited federal government still has substantial power. You may not always be able to regulate everything at once, but it can still spend in support. Limiting the federal government's ability to use the commerce power affects its choice of instruments in environmental policy. It doesn't affect or limit its choice of ends or goals. It just limits the way it goes about achieving those goals.

Finally, and perhaps most important, is that the federal government is not alone in protecting environmental values. There is substantial state ability to advance environmental concerns. Indeed, most of the environmental concerns we're concerned

about are local or regional in nature, and state and local governments tend to be in a better position to deal with those concerns because they are there. They have the local knowledge and expertise necessary to deal with the particulars of those problems. States, in fact, today are often in the lead of developing the most innovative and protective approaches to environmental protection.

We often hear about a race to the bottom, but as Professor Revesz at NYU has demonstrated, it is theoretically problematic—in his work by— (inaudible) — and myself and others—have pointed out empirically we don't see it. In fact, in some areas like wetlands, we see the exact opposite pattern of state regulation that we would expect if the race to the bottom were valid.

Finally, again this relates to the preemption point, there are many state and local efforts, and indeed also many private efforts, which are crowded out, preempted, or infringed upon when the federal government assumes that it and it alone knows how environmental protection should be dealt with.

Finally, I think it's important to remember that constitutional values serve us well. They serve us well when we are trying to protect our lives and our liberty, and they can serve us well when we seek to protect our environment as well. Thank you.

JUDGE SENTELLE: Jonathan, you mentioned that everyone would agree that the federal government is limited in such areas as crime. Within the last 24 hours I understand Senator Schumer has stated that only a radical would suggest that the federal government didn't have a role in the control of street crime. So I'm not sure that everyone would agree. I also think the radicals you were speaking of were the radicals of the 18th century and early 19th perhaps, rather than radicals of today.

Be that as it may, thank you for your presentation. We'll bring you back to answer questions in a few minutes, several minutes. Next we'll hear from John Eastman. Professor Eastman?

PROFESSOR EASTMAN: Thank you, Judge Sentelle. First, great kudos. I think one of the reasons, the ability to have this session and have it still not just be an academic discussion is in large part due to the great efforts you've performed from the D.C. Circuit, unfortunately, to this date only in dissent, but we aim to remedy that as soon as possible.

I want to talk about a couple of broad trends, because Jonathan gave us the 'is' what the Constitution set forth. He gave us the 'ought' that we ought to continue to follow the Constitution. But he didn't give you that in between, where we are today, which is far from either the 'is' or the 'ought' that he described.

He is right. We began a new revolution in this whole arena back in 1995 with *Lopez*, but there were hundreds of statutes challenged under the *Lopez* rationale following *Lopez*, none of which made it to the Supreme Court, none of which were overturned or ruled unconstitutional by the lower courts. So the academic view for many years in the immediate wake of *Lopez* was it was just an anomaly. Then the Supreme Court came forward with the Morrison case, the Violence Against Women Act case. I see Michael over here—kudos for that one. They told us resoundingly, "No *Lopez* is not an anomaly."

But then we got academic literature trying to narrow the impact of the reasoning in that case to say that it only applies to criminal law, Senator Schumer notwithstanding. So then we got, a couple of terms ago, Solid Waste Agency of Northern Cook County v.

U.S. Army Corps of Engineers, which answered yet again a resounding, "No that it isn't limited to criminal law. It actually does apply to environmental rules, as well."

So now we have open for us one trend: the ability in the environmental context to bring these Commerce Clause challenges in a way that 10 years ago was simply impossible to do. So that's one trend.

The second trend that's going on I call my ludicrous scale. I begin back with the SWANCC case itself. Here was an instance of a community in Northern Illinois trying to cite a garbage dump in their community. At the bottom of this old abandoned gravel pit were some puddles, because in Northern Illinois it occasionally rains. It even snows and sometimes it melts. At the bottom of this gravel pit there were some puddles. In these puddles birds that were traveling across state, either coming from Canada on their way south as winter approached or vice versa in the coming of spring, would sometimes stop off to bathe or drink. According to the U.S. Army Corps or Engineers, that gave them enough jurisdiction to regulate the deciding of this dump. Ludicrous scale level two or three.

The next case is last December, *Borden Ranch v. U.S. Army Corps of Engineers*. Angelo Tsakopoulos decided to buy a piece of land in a central valley of California, about as far away from any navigable waters as there is. He plowed his land, because he wanted to plant crops. He wanted to plow deep enough that the water would actually take hold in the soil and give his crops some sustenance: grape vines and fruit trees. You probably all will benefit from Mr. Tsakopoulos' fruit trees and grape vines I suspect perhaps later this afternoon at the reception.

Now, Mr. Tsakopoulos had the unfortunate difficulty that his land actually got wet when it rained occasionally in the central valley. There were puddles that formed on the flat portions of his land. We call them vernal pools. There were puddles that formed on slopes and then ran down the slopes. We call them swales. Some of those swales actually formed runoff in intermittent drainages.

As a result of these, the Army Corps of Engineers said that some of those intermittent drainages might become mittent drainages and become little streamlets, and then ultimately streams, and ultimately a river. If we let him plow, none of that will happen, and we won't have a navigable water connection.

So the Ninth Circuit Court of Appeals held that when he drove his plow across his field, it moved dirt, so that was a discharge. Dirt is a pollutant, so it's now a discharge of a pollutant. And but for the deep ripping, all of these pollutants might have ended up in a navigable water someplace. So this was the discharge of a pollutant into a navigable water, and that violated the Clean Air Act, even though specifically exempt from the Clean Air Act is normal farming actions, including plowing one's fields.

Now Mr. Tsakopoulos had the unfortunate circumstance of also having to run this plow several times across his field, back and forth on each row, surprisingly. The District Court found 358 separate violations, therefore, of the Clean Water Act, at 25,000 dollars each, for a total of 8,950,000 dollars in potential fines.

Now I think the District Court thought it was being compassionate when it reduced the fines to 1.2 million dollars, but I don't think Mr. Tsakopoulos thought so much. Now his petition for certiorari was granted, and he was excited until he realized that his friend, Justice Anthony Kennedy, needed to recuse himself, because he actually was unfortunate enough to know Justice Kennedy. So he ended up with a four-four split

affirming the Ninth Circuit's decision both to the penalties and the Clean Water Act violations.

The third on my scale of ludicrous is up this term, set for argument on January 14th: *Mikasuki Tribe of Indians v. South Florida Water Management District*. The South Florida Water Management District has the temerity, the audacity, to actually pump water from one part of the Everglades to another so as to try to control flooding, taking water out and putting it back in without adding anything to it at all. Yet that has nevertheless been held to be the discharge of pollutants into a navigable water for which the Florida Water Management Agency requires a National Pollution Discharge Elimination System permit under the Clean Water Act. The intrusion on the ability of the states to regulate their own power is phenomenal.

The third trend I want to talk about very quickly is that the states are starting to realize how ludicrous this is, and they are beginning to object, as in Mikasuki Tribe, the case I just mentioned. In *Alaska Department of Environmental Conservation v. the U.S. EPA*, which was just argued last month, another Ninth Circuit case, the Alaska agency had granted a permit for a new generator for a north shore of Alaska mining outfit.

What this had to do with interstate commerce and whether any of this air was ever going to get to any other state in the country is beyond me. But in adding their new generator, they also said, "We will, in exchange for letting us not have to go to the most current technology, which is 10 times more expensive, upgrade all of our existing generators so that we'll actually have a lower pollution output after this than we do before." The Alaska agency signed off on it. The U.S. EPA said, "No way." Now the states are involved in litigation against the EPA on that.

In my own neck of the woods, in Southern California, we find that it's not always that the states are trying for less onerous regulations. In Southern California South Coast Air Quality District has the unique benefit of actually regulating a bit of air that doesn't go anywhere else. The problem we have in Los Angeles is that because of the mountains, the air sits in the Los Angeles basin and accumulates there. The reason it's some of the worst air pollution in the country is because it doesn't flow to any other state. Why it's therefore necessary for the federal government to regulate this is beyond me. But the South Coast Air Quality Management District has imposed some more stringent requirements on operators in its basin than are imposed by the federal rules. But those rules have been challenged because the federal law now is claimed to preempt any of the more onerous state regulations. The intrusions on the states are becoming more severe.

The same thing is happening in New Mexico where its difficulties with the silvery minnow have led to drought, which has led to bark beetle infestations, which has led to utter destruction on historic pinions—I have a personal interest in this—the pinions on my own property in Santa Fe have now been affected.

Most recently these last couple of months in Los Angeles, the Los Angeles fires suffered from a same problem. Ridiculous environmental policy preventing any proper forestry management techniques in the Southern California forests led to over growth, a lack of availability of water to support the over growth, therefore a drought, a bark beetle infestation, the killing of thousands of trees, creating tinderboxes on sides of mountains, massive fires, floods, mudslides. We had hail last week. I'm waiting for the locusts to come next. All of this—maybe Arnold Schwarzenegger can fix it, I don't know.

So, the next steps then, it seems to me, we have to have a return to local control, because the local control is going to make sure that the benefits and the costs of bad environmental policy are borne by those who are making the decisions. We've got some cases pending, and I hope soon to be before the Supreme Court, that will press this issue, press the significance of *Lopez* and its rationale in the environmental context.

My own case involves the Southwestern Arroyo Toad, which is a pleasant little critter. We call it the pocket toad; it's so easy to take from one development to another and snap pictures. Not that anybody on this panel would do that. But the problem with the Arroyo Toad is it's actually indigenous to northern Mexico. During some of the drought years in California it migrated a bit north. Now it's starting to migrate back a bit south. It's not endangered; there are millions of them.

It is, however, endangered in the California portion of its range, which under the statute is enough for the federal regulations to have listed it as endangered and to claim hundreds of thousands of acres of land off limits because it's potential Arroyo Toad habitat. Interestingly, though, they do this under the Commerce Clause. Yet in the regulation designating the Arroyo Toad habitat they specifically held that there was no significant effect on commerce, because that's how they avoided the impact of the Unfunded Mandates Act.

There's a parallel case down in Texas involving spiders in caves that don't actually have any connection with any other creature on the face of the earth, GDF Realty Incorporated v. Norton, raising the same Commerce Clause challenge.

Finally, we come full circle back to SWANCC where the local powers there actually gave all the environmental permits that should have been necessary in order to cite this dump. I think the states are starting to weigh in. I think the private sector is starting to appreciate that this no longer has anything to do with environmental policy. It has to do with stopping growth, stopping investment, stopping business any way we can. I'm reminded of the famous line of Chief Justice Marshall: When Congress sets out to use its enumerated powers to accomplish ends not given to it, it will be the solemn duty of this Court to say that's mere pretext and strike it down.

JUDGE SENTELLE: Well, we have nothing if not balance in the Federalist Society. I'm told that Professor Percival may not agree with everything that's been said so far. So we'll now hear from Professor Percival.

PROFESSOR PERCIVAL: I'll work from my computer.

JUDGE SENTELLE: Also from his computer.

PROFESSOR PERCIVAL: I have to start by saying off the cuff here that those last two presentations convinced me that Al Gore must have really won the election, because who are they railing against? It's the Bush Administration EPA and the federal environmental policies, one would think that if there's such a monster afoot that is interfering with federalism right and left --

JUDGE SENTELLE: Perhaps that's just because the Federalist Society is not the partisan place that people over in Capitol Hill think it is.

PROFESSOR PERCIVAL: Okay. And that's exactly why I have always thought that the Federalist Society should be my best ally, because I consider myself an even worse victim of federal oppression, solely because of the fact that I happen to be a resident of the District of Columbia. I don't have voting representation in Congress to deal with this. When our President is now saying that we fought a war to spread democracy to the Middle East, yet he's opposing the spread of democracy to the District of Columbia, despite the fact that his grandfather, Prescott Bush, the late senator, had been one of the champions as a matter of principle and fundamental fairness of voting rights. But enough said about that.

Let's talk about environmental regulation. I don't think Congress forgot about the Constitution when it enacted the environmental laws. The environmental laws that the two previous speakers railed against were in fact enacted by overwhelming bipartisan majorities in Congress. There was a continual dialogue about what the relationship between the federal government and the states would be.

In fact, they were quite sensitive to state and local concerns, because it was well understood that we couldn't be successful unless states and localities played a major role in environmental protection.

What I'd like to do first is just walk you through some of those cases that deal with the revival of the new constitutional limits on environmental protection. First, *National League of Cities v. Usury*. This was one of the first indications that the Commerce Clause doctrine that had previously let the federal government do just about anything it wanted constitutionally by citing the Commerce Clause was not necessarily going to be the case, because Justice Blackmun provided the fifth vote in a five to four decision saying that it was unconstitutional for Congress to apply the Fair Labor Standards Act to state and local employees.

At the time that decision came down, however, in 1976, in a concurring opinion, he cautioned that this does not outlaw federal power in areas such as environmental protection where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. Now, after trying for nine years to apply the new limits that had been articulated in *National League of Cities*, Justice Blackmun in *Garcia v. San Antonio Metropolitan Transportation Authority* ultimately threw up his hands and said the political process is the best way to protect state and local interests. At least if you're not a resident of the District of Columbia, you have voting representation in Congress.

As a result, he joined a five-four decision reversing National League of Cities v. Usury and argued that if the courts got involved in trying to draw fine constitutional lines that limited federal powers in these areas, it would "inevitably invite an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."

Now from the standpoint of environmental regulation, there actually have been very few, if any, decisions where constitutional limits have led to a federal regulation being struck down. *Pennsylvania v. Union Gas* was a very badly split four-one-four decision where the Supreme Court agreed that Congress had intended and did have the constitutional power to hold states liable under CERCLA for contribution actions by companies who believed that states had caused the environmental contamination. That

was subsequently reversed in *Seminole Tribe of Florida v. Florida* where the Court, as a result of the revival of Eleventh Amendment limits on Congress' power to waive state sovereign immunity, now essentially has made states exempt from liability under the Superfund legislation in cases where businesses believe they're the ones that really caused the problem. That's one instance where it's had an impact.

New York v. United States is another example. This was the case where the Court struck down the provision in the Low-level Radioactive Waste Policy Act that had tried to force states to take title to low-level radioactive waste if they hadn't entered into arrangements to site their own disposal facility. I think what's important about this case is that Justice O'Connor, in her majority opinion, said that the reason why this was unconstitutional was because it was a rare instance where the federal government was trying to commandeer and directly command the states what to do. The reason that has not had any real impact on environmental regulation is that that is incredibly rare in the environmental laws. Generally, the federal government is involved in cooperative federalism where it offers states a choice. If they don't want to regulate, the federal government can step in and preempt. But generally, Congress has been careful not to preempt state and local regulations and to allow states to go beyond the federal minimum.

There has been one case where regulation was struck down. That was a fairly obscure provision in the Toxic Substances Control Act that required states to inspect water coolers for lead contamination. That was struck down on commandeering grounds. But the reason this has not had a larger impact is that the environmental laws do it right in keeping with what Justice O'Connor outlined by offering the states a choice of losing federal money if they don't regulate in accordance with federal standards or having the federal government come in and regulate for them.

Lopez, of course, is the major sort of constitutional revolution in indicating for the first time in nearly 60 years that Congress had exceeded its authority in trying to regulate something under the commerce power. As interpreted in *Morrison v. United States*, it now looks like there's this important distinction being made between whether or not the activity regulated is an economic or non-economic activity.

This actually has not had much impact, particularly in the environmental area. I want to quickly show you some data that a student of mine has recently compiled. She took a look at all the cases where *Lopez* challenges have been made. As you can see, there's been overall about a thousand cases since *Lopez* came down where convictions under the federal firearms statutes or other regulations have been challenged as a violation of *Lopez*. It doesn't seem to be diminishing. That last table is just as of 11/1. It may have diminished a little bit. Very few of them have been environmental. Only about five percent have involved environmental provisions. The lion's share has been the kind of federal firearms challenges like in the Stewart case where just yesterday the Ninth Circuit said that if you genuinely make a machine gun yourself and are doing it all with your own materials and not purchasing anything, then your conviction can be reversed under the federal statute that prescribes owning a machine gun, or possessing one. The result of *Lopez* challenges, though, is they almost invariably fail. In fact, there have been only 28 cases that she was able to find where a court reversed on *Lopez* grounds, and primarily these involved, again, the federal firearms convictions.

Now, why hasn't it had much of an impact? It's because, as Jon Adler said, everything is connected to everything else in the modern economy. So it's not that

difficult to be able to demonstrate, so long as the *Wickard v. Fillburn* cumulative impact analysis applies, that just about anything that's regulated by the federal government can have a substantial effect on interstate commerce. That's why those who cite *Wickard* got all excited about maybe they could grow marijuana in their backyard and avoid federal drug laws have been sorely disappointed. I wanted to make one final point, and that is that there's a tremendous amount of doctrinal confusion about how do you apply *Lopez*. What do you focus on? Do you focus on the activity being regulated? Do you focus on whether or not that's economic or non-economic? Do you focus on what the overall purpose of the statute was? Do you focus on the individual endangered species that's imperiled and what possible economic value that might have?

I wanted to share one anecdote, a little nugget that I found when I did research in the Marshall Papers. When the Marshall Papers were released, I read all the papers that were in Justice Marshall's files involving environmental cases which span just about the whole period of the environmental revolution from 1969 on to the early 1990s.

Hodell v. the Virginia Surface Mining Reclamation Association was one of the first major cases where the Supreme Court upheld the Surface Mining Reclamation Control Act against a Tenth Amendment challenge. What's interesting about it is the slip opinion came out on June 15, 1981 and the Court upheld it against the Tenth Amendment challenge. This is the concluding three sentences of Justice Rehnquist's opinion in the case. He says, "Congress must bear an additional burden." He wrote this separately because he thought the Court had not stressed significantly enough how substantial the affect on interstate commerce has to be. "Congress must bear an additional burden. If challenged as to its authority to act pursuant to the Commerce Clause, Congress must show that its regulatory activity has a substantial affect on interstate commerce."

Three months later Justice Rehnquist sent this memo to the Court. This is great for law professors because it shows sometimes even Supreme Court justices will listen to you. "At the suggestion of a law professor who shall remain unnamed, I would like to change the penultimate sentence in my opinion concurring in the Court's judgment last term to read Congress must show that the activity it seeks to regulate has a substantial affect on interstate commerce."

He chides Justice Marshall for the fact that he made a similar last minute change before something was going to go into the Federal Reports in one of his opinions in the Granny Goose case. But I think what this illustrates is this confusion is not new; it's been going on a long time.

An excellent illustration of it that Judge Sentelle is very familiar with involves the Delhi Sands flower-loving fly where all three judges on the panel had very different views about how you apply Commerce Clause analysis. The fly ended up winning two to one in the D.C. Circuit. In fact, the Fourth Circuit in the *Gibbs* case in a similar bitter two to one split upheld the application of the Endangered Species Act to protect an experimental population of red wolves.

To conclude, I think that what this illustrates overall is that Lopez has created an awful lot of litigation, nearly all of it unsuccessful. One would think that it's kind of conservative to be opposed to creating unnecessary litigation. But certainly you understand that the courts are struggling to try to articulate some lines that will be sensible and that would give litigants guidance so that we wouldn't have all these unsuccessful challenges being made all the time. But it seems to me that Justice

Blackmun's admonition in *Garcia* has as much force as ever. It's very difficult to draw such principled lines, and you run the danger that unelected judges are imposing their own preferences as to what statutes they like or don't like. Certainly there's a lot of activity in Congress today to adopt new federal laws that will do things like preempt state tort liability or regulate certain medical procedures that are instances where federal power is being used for what many people think are conservative ends.

To a certain extent, these debates over federalism often involve whose ox is gored as to where you stand on what the limits are. Thank you.

JUDGE SENTELLE: We've had discussion, I understand, having been to many of the panels, about international implications of lots of the subjects that we've taken up at this conference. I believe, Professor, you have an international view you'd offer us on the subject.

PROFESSOR ECHEVERRIA: This is my maiden voyage with Power Point and I thought I'd try it out on you guys. Bob, who's an expert, may have to help me. Sorry, what am I doing here?

JUDGE SENTELLE: We've now learned that if it's not plugged up, it won't work.

PROFESSOR ECHEVERRIA: If you had more financial resources, you wouldn't have this problem.

Well, thank you very much for the opportunity to speak at this convention again. I always enjoy being here. I don't agree with everything I hear, but I do agree with a great deal of it, and I always find it very stimulating and interesting.

Robert Percival alerted me to the fact that there really wasn't going to be much for me to say after he was finished, that this issue that the limitations of the Commerce Clause imposes on the federal government's environmental powers is really more smoke than fire. Given the fact that he was going to make an excellent presentation to that effect, I thought I'd just leave it to him to make the point.

What I wanted to do was take this panel in a somewhat different direction, but one that is actually more in keeping with the basic focus of this three-day conference, and that is international law and American sovereignty. Now my basic message to you is that if you are concerned about international law as an infringement on American sovereignty—and I think personally that there is a substantial basis for that concern—then you should be very concerned about Chapter 11 of the North American Free Trade Agreement and similar provisions in other international agreements involving Chile, Singapore, Australia, Morocco, that have either been negotiated or that are in the works. Also the Free Trade of the Americas Agreement that will be the subject of a debate or a riot, we don't know which, in Miami next week. More specifically, if your concern is that customary international law provides a font for unlimited judicial activists, and that was the very persuasive thesis of the opening panel of this conference yesterday morning, then you should be very concerned about Chapter 11 of the North American Free Trade Agreement, because it is an equally powerful font for judicial activism involving customary international law.

Now you might say that's very interesting, John, but how in the world did you think you could get away with injecting this topic into this program on the Constitution and the environment? Nothing you've said really indicates any connection whatsoever.

The argument is basically this, that NAFTA Chapter 11 and all of these other agreements are creating, in effect, a global constitution, a supra-national constitution that is equally enforceable against the United States, but that is separate and apart and in some sense above our own constitution. It is being used for a whole variety of purposes, but in particular to challenge the sovereign acts of the United States and of the states in enforcing environmental laws.

Let me give you just a quick thumbnail sketch of Chapter 11 of the North American Free Trade Agreement for those of you who are not familiar with it. It creates a direct right of action against the United States that can be invoked by foreign investors. This is not available to U.S. citizens living and working in the United States. Foreign investors can sue the United States under this provision. They sue based on "measures", a very broadly defined term, adopted either by the federal government or by state and local governments. The cases are heard by three member tribunals appointed for the occasion.

The tribunal awards are immediately convertible, at least this is the theory, via the so-called New York Convention, into monetary judgments against the United States. In terms of enforcement, the tribunal decisions are not subject to review in U.S. court either for errors of law or errors of fact. Like usual arbitration awards, they are subject to review for lack of jurisdiction or other sort of extraordinary circumstances. These judgments are about as immune from judicial review as any kind of judgments or ruling we're familiar with in the law.

I've described this as a global constitution, but after all this is NAFTA. It was approved by Congress. How can one characterize the provisions of the North American Free Trade Agreement as constituting a constitution?

The way I want to illustrate that is by demonstrating to you the parallelism between provisions of Chapter 11 and provisions of our own Constitution. NAFTA articulates an equal protection principle. It says each party shall accord to investors of another party treatment no less favorable than that it accords in like circumstances to its own investors with respect to the establishment, blah, blah, blah, of investments, which in substance closely parallels our own Equal Protection Clause that says in the Fourteenth Amendment no state shall deny to any person within its jurisdiction the equal protection of the laws.

I could do the same thing with the due process principle, but I'll skip that in the interest of time—basically there are two provisions that are parallel—and go right to the takings principle. NAFTA says no party may directly or indirectly nationalize or expropriate an investment or investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except for a public purpose and on payment of compensation.

Then you refer to the takings clause, which is more succinct, but is essentially going after the same thing: nor shall private property be taken for public use without just compensation. So what we have is this really remarkable phenomenon of an international negotiation ratified by Congress creating a set of what are, in effect, statutory codifications of our own constitutional provisions.

Now I have to make some effort to link this to the environmental, because this panel is about environmental regulation. These provisions have been used in a variety of circumstances, and are being used to challenge environmental regulations. One of the most notable is the metal-clad case which actually does not involve a claim against the United States but rather a claim by a U.S. investor against Mexico arising from a local government's efforts to regulate the siting of a hazardous waste facility. The arbitration panel applied a takings test, which was whether there was a significant impact on the U.S. of or reasonably to be expected economic benefit of the property. I think most objective observers would acknowledge that that would be an extension of U.S. takings jurisprudence, a generous reading of U.S. Supreme Court precedent.

The British Columbia Supreme Court, which was being asked to review under the limited powers of a court reviewing an arbitration award the paneled award, opined that this standard was sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority. In other words, the arbitration panel had articulated taking standard that invalidated traditional zoning. But the court said, consistent with the structure of NAFTA, "It's not our business to review that. We have no jurisdiction to evaluate areas of law. Therefore, we let that portion of the award go forward."

Two other quick examples: the *Methanex* case, a claim by a Canadian company challenging a California regulation banning the use of MTBE as an additive in gasoline because of its effect on drinking water supplies. The Glamice Mine, another suit by a Canadian company involving, again, California as well as federal government restrictions on the siting of a proposed mine.

Now what are the key features of this emerging Chapter 11 legal regime? As I've explained, it's a shadow version of the U.S. Bill of Rights, but with some important twists. The actual text of our own constitution and the associated original understanding in which we put so much faith is completely irrelevant to these arbitrators. That's no longer a guiding principle in looking at NAFTA Chapter 11. U.S. Supreme Court precedent developed over the last 200 years interpreting our own Constitution is out of bounds for the purposes of interpreting NAFTA Chapter 11. What does one refer to for guidance beyond the bare words in Chapter 11 of NAFTA? One turns to that great font of judicial activism, customary international law.

If you were in the first panel yesterday, you would have heard that described. It involves law based on the usual practice of nations that they conduct in accordance with a sense of legal obligation. How does one derive that? One reads academic treatises. One looks at unratified treaties. One looks at the various U.N. Assembly resolutions that have been passed over time. In short, the decision maker defines it to mean whatever they want it to mean, because there are simply no boundaries on the scope of customary international law.

Now arbitration panels, which are appointed for the occasion—and I might just add at about two or three times the rate of Article III Court of Appeals judges—

JUDGE SENTELLE: They don't have to be confirmed by the Senate.

PROFESSOR ECHEVERRIA: They don't have to be confirmed by the Senate, but they get three or four times as much money. They do not have what we would call the usual

attributes of independence associated with the Article III judiciary. Nonetheless, to the surprise of many, interpreting the provisions of NAFTA, they have come to the conclusion that they have the power to review the judgments of U.S. courts. Two notable examples have been the so-called Mondit case involving the review of a decision by Charles Fried when he was sitting on the Massachusetts Supreme Court. Another case, Lowen, involving the review of a Mississippi jury award. None of the cases yet have actually involved review of an Article III judgment. But there's no question under the established law as its emerging that Article III court rulings are subject to challenge under NAFTA. So under this regime, non-Article III tribunals are empowered to review the judgments of Article III courts relying on their interpretation of customary international law.

Now there's a great deal of excitement at this convention, and I guess there will be a whole panel about it tomorrow, talking about the alien tort statute. That is patty cake compared to this, because that at least is being interpreted by Article III courts. One might have some confidence that the Article III courts acting as intermediaries would limit the scope of the alien tort statute.

On the other hand, ad hoc arbitration panel members, who are subject to no judicial review, are given the same expansive powers that are allegedly granted by the alien tort statute. There's essentially no judicial control over that.

Now what are the ultimate issues here? Is Chapter 11 a potential font of judicial activism? Yes, in spades. Can this be real? And many people who hear this say well this is just crazy; this can't possibly be what Congress intended and this cannot be the institutional arrangement in these United States. It's a possibility this isn't real. No judgment has yet been rendered against the United States. No foreign investor has gotten one of these awards from an arbitration panel, gone through the process, and gotten a check from the United States.

There is a significant argument that in negotiating this and in approving it, Congress did not in fact dot the i's and cross the t's and has not waived the immunity of the United States. In order to waive the immunity of the United States, Congress has to be quite specific about doing so. Perhaps we haven't done that. There is an argument.

If that is the case, then the question is, is the United States selling its trading partners, under the North American Free Trade Agreement and under the Chilean Agreement and the Singapore, a pig in a poke? The answer may be yes that we got you to waive your sovereign immunity, and our investors are going to be able to sue you. That's good for U.S. business, but thankfully we've preserved our own immunity and our own sovereignty, so it's not going to work against us.

I'm not sure that the leaders of our trade policy want to advertise that, but it's possible that that's the solution, that we can promote free trade on behalf of the United States and preserve our sovereignty. But if that's not so, and in fact these claims are enforceable against the United States, then it seems to me the ultimate question is, does this violate Article III of the Constitution? Is this an attempt by trade negotiators with the blind acquiescence, I would argue, of Congress, to confer the judicial power of the United States on non-Article III judges? My answer to that would be yes.

Now let me just close by saying that I had a long conversation about this issue with a very, very distinguished international law professor at NYU. We went on for about a half an hour. He turned to me at the end of the conversation and he said, you're a Jesse

Helms. I just want to say if I'm a Jesse Helms, at least some of you are with me on this issue. Thank you very much.

JUDGE SENTELLE: Well I hope you thanked him appropriately when he told you you were a Jesse Helms. The time has now come when we will permit you to come to the microphone and address questions to the panelists. While you're doing so, line up here at the mike.

I'll direct one myself almost irrelevant question at Professor Percival. You seem to be saying that the people who are bringing the *Lopez* challenges should quit because they're losing most of them. Am I misunderstanding you on that?

PROFESSOR PERCIVAL: I'm saying that's an indication of how unclear the standards are. As long as they remain unclear, you're likely to see a lot more unproductive litigation. If they start winning more, I think you'll see even more challenges, because it gives every defendant who's charged with a federal crime at least another argument for his public defender to raise.

JUDGE SENTELLE: I wonder if the same analysis would have applied to the equal protection litigation after *Plessey v. Ferguson* between then and *Brown* when Robinson and Greenberg and Abrett and Thurgood Marshall were brining the equal protection challenge, use them or lose them, time after time. Should they have backed off because it was unproductive litigation?

PROFESSOR PERCIVAL: That was pretty productive litigation actually.

JUDGE SENTELLE: Not for 50-some years or 60 years. You may have an analogy. You may have a comparison there, a good argument 60 years from now, Professor, but up 'til then I'm not sure how you could say it was very productive.

Roger?

AUDIENCE MEMBER: Yes, thank you, Judge Sentelle. I want to follow up on your question, because it struck me in listening to you, Professor Percival, that your argument in essence was that *Lopez* hasn't produced much in the way of change in the direction that its proponents would like because it's quite unclear how to apply it and, therefore, probably shouldn't be applied, which of course is a counsel of despair with respect to the deeper issue of reviving the doctrine of enumerated powers. The implication of your argument is that Jonathan and John were tying their argument to a losing horse. Well, it strikes me that they were really subscribing to the point that Rehnquist was reviving the doctrine of enumerated powers for the first time in 60 years, and the holding was absolutely right, although the opinion I think they would both agree, was less than stellar with respect to what the Commerce Clause is about. In fact, when we turn to Justice Thomas in his concurrence, we see that very clearly. He says to his brethren in the majority, that you've moved the ball a little bit, but if the framers had wanted the Commerce Clause to be read as enabling Congress to regulate anything that substantially affects interstate commerce, they could have said that. They didn't say that.

So it remains for the Court to develop a principled theory of the Commerce Clause which will take it back to its original purpose, which was to ensure the free flow of goods and services among the states. In fact what has come to be called the dormant commerce clause; there is no such thing—is pretty much what the framers had in mind when they wrote the Commerce Clause. It was meant to ensure free flow of goods and services and, of course, this is not what came out of *Lopez*.

JUDGE SENTELLE: We'll ask you first, then I'm going to let the others comment, particularly since they were named. Thank you, Roger.

PROFESSOR PERCIVAL: I'm not sure if that was a question.

JUDGE SENTELLE: I'm fairly certain it was not, but he's going to sit down and the next person can ask a question after you get through commenting on this.

PROFESSOR PERCIVAL: I certainly think that the courts have an important role to play in adjudicating disputes between states under the dormant commerce clause to ensure that the states aren't ganging up on each other and discriminating. I don't think, unless you go back to the pre-New Deal days when Congress can't regulate manufacturing, that it's going to be possible to come up with a principled way to draw the line that will avoid allowing judicial preferences to basically dictate what statutes are good and what statutes are bad.

In a sense what I think *Lopez* has done, and it probably has been useful, is to make Congress pay more attention to what is the federal jurisdictional hook. Certainly after the *Morrison* decision they amended that statute to require with that with violence against women there had to be some interstate travel involved. But Congress is smart enough that it's going to be able to get around those decisions unless you really substantially cut back on federal power in a way that would be pretty policy at a time when we're having a globalized economy and much more economic integration. I think Justice Breyer actually captured this in his dissent in *Lopez*.

JUDGE SENTELLE: I think your comment has now gotten longer than Roger's non-question. So if you'll wrap it up.

PROFESSOR PERCIVAL: Okay, well I save the quotation for --

AUDIENCE MEMBER: Is there something wrong with going back to pre-New Deal?

JUDGE SENTELLE: Roger, you've had your turn. Let somebody else get a chance.

PROFESSOR PERCIVAL: Yes, I think it would be a disaster economically for the U.S.

JUDGE SENTELLE: Jonathan and John get a crack at that since their names came up in the discussion.

PROFESSOR EASTMAN: Let me take that up. Professor Percival's whole statement was about the Constitution. It never once mentioned this notion of enumerated powers, the notion that there are limits on commerce, that Commerce Clause meant commerce among the states. There had to be both commerce, and there had to be some connection between different states.

The Arroyo Toad, as I put it in the brief, "Look this thing is not Mark Twain celebrated jumping frogs of Calavares (sp) County. There's not any commerce in this thing. There never has been."

The notion that because somebody puts up a private fence on their private property that might somehow interfere with the movement of this toad, when some parts of that fence might have been purchased from somebody who has some connection with some other state, or that they hope one day maybe to build a home and some of the materials in their home might have been wood that came from Portland, or it might have been electrical cooper wire that came from someplace east, to think that that's somehow commerce among the states that lets us regulate whether I walk across my property and disturb this arroyo toad habitat is ludicrous.

So newsflash, yes, I think we do know. If we're going to need to get any coherence in this body of law, we do need to revisit the New Deal's expansion, or not expansion of the Constitution's powers, complete abrogation of the limits of the Constitution's powers. If we're going to live in a constitutional system at all, we have to take seriously the limits of that constitution.

The *Lopez* challenges are serious and aren't going away, because they are so right and grounded in constitutional text. For a court that has finally taken that text seriously again, I think we're going to continue this fight until we get our Brown v. Board of Education in the subject area.

JUDGE SENTELLE: I would say also that the Delhi Sands flower-loving fly is an inveterate stay at home that has never been found anywhere outside of a few acres of Southern California.

Jonathan?

PROFESSOR ADLER: I think where Bob did make an important point that thus far, not just in the environmental area, federal courts have been, I would say, fairly deficient in their application of *Lopez* and *Morrison* let alone the actual Constitution. But that doesn't mean that they're incapable of doing so. We've seen other periods in U.S. history where Supreme Court precedents have been ignored for a long period of time. During the New Deal when the Court obliterated constitutional limits, it took a long time for lower federal courts to actually start listening. There are all kinds of reasons why we could expect that kind of inertia in a federal system.

But the fact that lower courts aren't applying the tests of *Lopez* and *Morrison* doesn't mean the tests aren't there. And I think more importantly, that doesn't mean the tests can't be applied in a systematic way that doesn't simply lead to the validation of one's preferences.

It's just that very few judges, and our moderator is an exception, have actually spent the time to wrestle with those opinions and to actually apply them to the facts at hand.

The last point I would make is Congress' response is, yes, Congress has responded by adding jurisdictional hooks to lots of statutes. Two things to keep in mind. One, many of our environmental statutes still lack such hooks. So under the Endangered Species Act there is no requirement that the taking of the species that violates Section 9 occurs in or affecting commerce. Some courts have invented that jurisdictional hook to try and save the ESA in various challenges, but it's not there in the statute.

I think at the very least it's reasonable to expect Congress to not only identify the source of an exercise of its authority, but actually make some effort to tie what it's doing to that authority. In statutes like the Endangered Species Act, that remains totally absent despite eight years since Lopez.

JUDGE SENTELLE: I would say, with reference to the jurisdictional hooks, that this is not a novel development. Until the last very few decades it was the norm that Congress carefully inserted some constitutional jurisdictional hook.

Many of us in my generation went to college on the National Defense Education Act. Now whether it was good reasoning or not, the reasoning for making that statute constitutional was that developing the minds that would provide for the national defense. Congress at least was looking for, with Sam Irvine and Richard Russell and senators before there, a way to tie the law to the Constitution. Congress got out of that habit. At least it's getting back in that habit.

Professor Echeverria, I don't mean to skip you. You hadn't been mentioned in that exchange. Do you want to comment?

PROFESSOR ECHEVERRIA: I just take silence as acquiescence in my point of view. I welcome your support for American sovereignty.

JUDGE SENTELLE: I think you raised legitimate questions. Again, I hope you thank the fellow who called you Jesse Helms, who raised those points before you did, some of them.

But I'll hear the next speaker.

MR. CHIPCHASE: Thank you. Cal Chipchase, Honolulu, Hawaii. My question is whether the treaty power, perhaps in like a *Missouri v. Holland* line, can be seen as extending what Congress can do in the environmental area. Thank you.

JUDGE SENTELLE: Is that directed to anyone in particular, or to everyone?

MR. CHIPCHASE: Anyone who wishes to address it.

JUDGE SENTELLE: Okay.

PROFESSOR EASTMAN: Let me take that.

JUDGE SENTELLE: John Eastman this time then.

PROFESSOR EASTMAN: Let me look, *Missouri v. Holland* or holds that, a case 30 years later, *Reed v. Covert* says just the opposite, that you can't use the treaty power to violate provisions of the Constitution. *Reed v. Covert* involved a prohibition in the Constitution. But post-*Lopez* we've realized that the limits on the enumerated powers are themselves prohibitions in the Constitution.

So I don't think you can use the treaty power as the basis for environmental law if it doesn't otherwise fit within the Commerce Clause. But a straight application of *Missouri v. Holland* would say you can.

Now, the government in my toads case raised the Treaty Clause argument until thye found out that the Treaty Clause and the treaty in question didn't apply, and they backed off of it.

JUDGE SENTELLE: That was a good reason.

PROFESSOR EASTMAN: Yes, that's a good reason. But they are clearly laying the ground work for that in international treaties and with the things John Echeverria talked about. You don't even need a treaty so much any more if international law is going to apply, because there's this kind of nebulous evolving customary international law. But a bunch of third world countries have agreed on some principle: "We'll all apply it against the United States."

So far the federal courts have been very circumspect about not applying that, but there's a constant barrage of efforts to get them to do just that and apply customary international law. Even on treaties that the U.S. specifically refused to ratify there's an attempt to try and claim that those are binding on us. So I think it's a real danger.

JUDGE SENTELLE: Professor Echeverria, that did run across your trail. Do you want to comment on this one?

PROFESSOR ECHEVERRIA: Well, I think the related point is that whatever power the government has under treaties and to what extent it can do things under the treaty power that it can't do under other enumerated powers, a great many of the international agreements the United States is entering into circumvent the Treaty Clause. North American Free Trade Agreement is not, in fact, a treaty but — (inaudible) — of two-thirds of the Senate. That's true of most of the international agreements.

My distinguished former law professor, Bruce Ackerman, has a theory, which is that effectively there was a constitutional moment, which is his term, 20 or 30 years ago when we effectively abrogated the Treaty Clause provision and we don't need to recognize it anymore. Lawrence Tribe has done a very effective job of debunking that view of constitutional amendments, and I don't follow it. But I just thought that would be a relevant comment.

JUDGE SENTELLE: John?

PROFESSOR EASTMAN: I might take a slightly, although I would stress slightly, more expansive view of the treaty power than John. Two things I would say about *Missouri v. Holland*: one, if you actually go back and read the case very closely, it's very vague and

very ambiguous. I don't think a fair reading of it actually supports the idea that anything that's in a treaty grants Congress the ability to adopt in momenting legislation to achieve that goal. The treaty in question involved a simple deal between the United States and then England that when birds flew up to their territory in Canada, they wouldn't kill them all so they could come back down to the United States and vice versa. There is clearly something involving reciprocity and interaction between nations, clearly something international, about that treaty that makes it appropriate for an exercise of the treaty power.

What we're seeing in the environmental context, and we saw this in several of the briefs in the SWANCC case, is the argument that treaties that have no reciprocity, treaties that have no exchange or interaction, could be a font of federal power. So if the United States said to Bangladesh, "We'll protect our vernal pools if you protect yours," then Congress seized upon that to regulate vernal pools or whatever else that are otherwise beyond its jurisdiction. That's fundamentally different than the sort of thing that was upheld in *Missouri v. Holland*.

So even if you accept *Missouri v. Holland* and accept a limited ability of Congress to implement what are truly international agreements with reciprocity with other nations, that is not carte blanche to address any environmental concern that the United States could get another country to go along with.

JUDGE SENTELLE: Professor Percival?

PROFESSOR PERCIVAL: Certainly in the context of migratory birds, the federal government has always had a long tradition of being able to protect resources that travel trans-boundary. It doesn't really raise the same questions of the fly being totally intrastate. So under the Commerce Clause they probably would have very little problem.

But if you greatly restrict the Commerce Clause authority and the implication of that is that there's an important resource that travels trans-boundary that's not going to be able to be protected, I think you'll see efforts by litigants on the other sides to try to develop new theories about other ways of protecting them.

JUDGE SENTELLE: Next question.

AUDIENCE MEMBER: I'm curious what the panelists' views of the public trust doctrine are and what role we can expect that doctrine to play in future property rights and environmental litigation.

JUDGE SENTELLE: We'll go with Jonathan Adler first on this one.

PROFESSOR ADLER: I try and look at the public trust doctrine as little as possible, which will let you know what I think of it. I think it's used and relied upon. There's a case that a Supreme Court justice denied cert on, I believe, from North or South Carolina where the public trust doctrine was essentially used to impose a restriction tantamount to the restriction that was found to be a taking in the *Lucas* case. So it's certainly something that we see folks using.

I think we see a trend in environmental law to use any legal doctrine that can protect environmental measures or measures that are adopted in the name of the environment at least from constitutional limitations or other legal limitations. I think, unfortunately, what we do in the process is we undermine, in the case of the public trust doctrine, traditional notions of property rights and the Fifth Amendment.

But as we've been talking about today, we see the same thing in a constitutional realm of federalism where we seize on a doctrine because we think we can use it to get around what might otherwise be an inconvenient way of adopting a politically preferred regulatory regime.

PROFESSOR EASTMAN: Can I comment on that?

JUDGE SENTELLE: Go ahead.

PROFESSOR PERCIVAL: Just very briefly. I had the privilege of representing the State of South Carolina in the recent McQueen case that was referred to in which the South Carolina Supreme Court said the denial of permits to fill area below the mean high water mark did not constitute a taking because the area was subject to the traditional public trust doctrine. There are a number of other decisions in the same line. I think it's fair to say that the traditional old fashioned public trust in Thailand serves as a very powerful defense against takings claims.

At the risk of contradicting my efforts to ingratiate myself with you to this point, let me mention one other application of the public trust doctrine which I think is interesting and well founded and is related to the conversation we're having about various species. That is the public trust in wild animals. Going back to ancient Roman law, English law, and the Colonial law from the founding of each of the individual colonies and then states, it has been established that the states, as representatives of the people, hold a property ownership interest in the wild animals that exist within the jurisdiction of the state. Therefore, when looking at conceptualizing the landscape, there are private real property interests. There is also a public ownership interest in the wildlife. This is the traditional basis for hunting regulations, all kind of game regulations, which are quite strict. There's never been any question about the power of the government to restrict the hunting or shooting of deer on private real property.

I think there's a substantial basis for arguing that federal and state regulations protecting wildlife, regardless of whether or not the other tests for a taking might be met, and they're hard to meet, should not result in findings of a taking, because the regulations can be justified under the doctrine of the public trust in wild animals.

JUDGE SENTELLE: I have to wonder what that has to do with federal regulations. As you said, there was a development of such law with reference to the colonies and then the states. But I'm not sure it has anything to do with constitutional powers.

I've looked throughout the Constitution, and don't recall the wild animal power being anywhere in Article I.

PROFESSOR PERCIVAL: Because in applying the federal Constitution to a federal regulation under the takings doctrine, the first question you ask is, is there a property

interest? Regardless of whether regulations, federal or state in nature, you generally resolve the threshold property issue by looking to state law.

JUDGE SENTELLE: If you're looking at the legislature's power, the first question Justice O'Connor asked Mr. Day at the *Lopez* argument was if we accept your view, what's left of the limitation of powers doctrine? And if we extend the public trust in wild animals to the federal government, I'd have the same question. So Mr. Day, what's left of that power?

John, do you wish to comment on that one?

PROFESSOR EASTMAN: One of the trends that I was talking about earlier is we have shifted in our environmental law from a nuisance model, the old smoke stack spewing forth of particles and air pollution onto a neighbor and causing externalities problems, to a statist model. You look at the new environmental things. It's, "Am I going to be allowed to develop my own property in a way that takes away a wetland? Am I going to be able to develop my property that causes additional runoff, no different than anybody else is already causing in the Lake Tahoe basin or down off the coast of South Carolina in Lucas?"

Those are fundamentally different models of how to think about environmental law. One is a nuisance model, trying to protect against externalities. The other is a statist model where the state will take ownership if everything. In fact what we find in the Lake Tahoe case, for example, is that the statist model actually, in the end, ends up being less protective of the environment in the way that the old free flowing, build first you get more of the gas and oil in the old oil and gas cases was less protective. People will then rush to over develop because their property rights at the end of the day are not protected if they don't.

What you've got to do is shift back from that and realize that the only way that you're causing a nuisance is when you're doing something different in kind than everybody else already has permission to do. The court simply got it wrong in Lake Tahoe. They got it right in Lucas but on the wrong reasoning, so they were never going to be able to sustain that.

It's this shift from nuisance model to statist model that the courts, by and large, have not been understanding that's gotten them into a lot of mess in environmental policy right now. The public trust doctrine is just going to take that 10 degrees further away from where it needs to be.

JUDGE SENTELLE: Robert, do you have anything to add or subtract?

PROFESSOR PERCIVAL: I'll just simply say the reason we shifted away from the public nuisance model and adopted the federal environmental laws with overwhelming bipartisan majorities in Congress is because we realized that that couldn't adequately deal with all the problems, particularly now that we realize that a lot of things that we previously thought were not harmful at all or even great services to society, like draining wetlands, caused really serious environmental damage.

JUDGE SENTELLE: Next questioner.

AUDIENCE MEMBER: Happening to be a friend of a crotchety 85-year-old man by the name of Palizzola, without whose case John wouldn't have had to take the trouble to take up McQueen's case in South Carolina again, I would point out that barristers on the environmental side in these public trust cases have a, let's say, loose habit of conflating the terms tide land and land below the mean high water mark, which is a great exception I take to the decision in South Carolina. I hope that the Rhode Island will not take that as an out.

But I have a challenge, and you've been so fair I'm sure it will go around the robin to the right side of the table as well, but I have a challenge for each of you gentlemen. I was at the panel yesterday on customary international law—I think the point that even those who raised the specter of --

JUDGE SENTELLE: Let's get to a question.

AUDIENCE MEMBER: -- customary international law suggested that if we entered into a treaty or we passed a statute that imported customary international law, then that was not an extra constitutional move. The only extra constitutional problem I see that you presented --

JUDGE SENTELLE: Let's do try to get to something --

AUDIENCE MEMBER: Well the extra constitutional problem is that the President through a treaty is evading the commerce power. You have to join us on commerce in order to win that argument, because NAFTA is a valid treaty, and we passed it.

To Robert I would say that you knocked on wood when you said this all holds federal environmental regulation as long as *Wickard* holds --

JUDGE SENTELLE: I think you've given them plenty to comment on. We've not been holding anyone else to just questions, but I think that's enough to comment on.

PROFESSOR ECHEVERRIA: I think the fundamental constitutional objection to the NAFTA scheme, if it works as the proponents intend it to work, is not rooted in the Commerce Clause but rather in the Article III problem that it assigns judicial power.

Your second point was whether Congress have the power to grant jurisdiction to a federal court or to some set of arbitrators to apply international customary law. It seems to me that the big objection to the alien torts statute is partly that it's being misinterpreted. But the other argument is, if it's being correctly interpreted, it's an abomination and it ought to be repealed. It seems to me that if that is the position, then the same position ought to apply to NAFTA.

JUDGE SENTELLE: Robert?

PROFESSOR ECHEVERRIA: If you appeal *Wickard*, then in every case you have to show that that individual case by itself has a substantial impact on interstate commerce, and that's just a counsel of endless litigation and the inability of the federal government

to do much of anything, including things like promote causes that this group would agree with.

JUDGE SENTELLE: Next question. I'm sorry, Jonathan had a comment.

PROFESSOR ADLER: Two quick points: I don't think commerce is the doctrine that you have to accept to get the Article III argument in NAFTA; I think it's non-delegation. That hasn't fared too well, although I'd be thrilled if John would join up with those of us that would like to see the non-delegation doctrine return.

JUDGE SENTELLE: The last time my court tried that, it didn't fare very well either.

PROFESSOR PERCIVAL: Well you can't defer it back to the agency to write the new rules.

PROFESSOR ADLER: On *Wickard* I would just say, whatever we think of *Wickard*, as it was handed down originally, I think fairly clearly defined in *Lopez*, *Wickard* aggregation only works in one of two cases. One, if the activity is itself economic activity as such. I think the Supreme Court has done more than drop hints that that doesn't mean that the poor sap that gets regulated is making money. It means what did Congress say it was regulating?

The alternative, and this is clearly why it would apply to the case of corn growing but not, say, home grown marijuana, is it was an economic regulatory scheme. It was a price control scheme that only works if you can regulate all instances of growing. Other types of federal regulatory statutes, environmental or otherwise, that seek to aggregate for some other reason fail that test. Conservatives may like that in the environmental context. They may not like that when it comes to medical marijuana or assisted suicide and the like, but so be it. Fair weather federalism is not what's in the Constitution.

JUDGE SENTELLE: We'll try to get these two questions in. I hope they're short.

AUDIENCE MEMBER: Yes, I wanted to quickly follow up on the fair statute issue. This question assumes that the ESA is unconstitutional under the commerce clause. But nonetheless there Could be a federal interest, that is the federal government can regulate obviously on its own federal lands.

Now the problem for fair statute, as Judge Sentelle suggested, is the states are the successor sovereigns, so they are the ones that hold the property interest in all of the species. So my question then is, could it be correct under the Spending Clause for the federal government to bribe or to pay the states for the property right in, first, question one, a particular species the federal government had interest in to the states where it's located, and question two, for a complete hand over of sovereignty in all wild animals within the state?

JUDGE SENTELLE: Does anybody want a bite?

PROFESSOR ADLER: Two things. One, I think *Cues v. Oklahoma* makes the successor sovereign part a little bit difficult. That's a case where the Supreme Court basically said states don't really own the wildlife. The federal government itself has disavowed ownership. I would actually prefer the federal government to assume ownership to the status quo, because in the federal government, yes, it would have an interest in the wildlife directly, but it also, at least in some cases, would be liable for the cost that wildlife can impose.

But I think more significantly, yes, there are all kinds of ways which the federal government can use the property clause, can use the spending power to advance values that it can't advance through regulation. That's why I mentioned in many cases it's a question of instrument choice. The Constitution limits the ability of the federal government to use certain instruments, like regulation, in certain contexts. But the federal government still can pay farmers to create habitat, pay to create national parks or wildlife preserves, and so on.

JUDGE SENTELLE: In the case of the states, you may get the *South Dakota v. Dole* problem that somebody raised during the earlier part.

Does anybody else want to comment on that before we get the last question.

PROFESSOR EASTMAN: I'll just say real quickly that I think there are some limits on the Spending Clause that parallel the limits on the Commerce Clause. It's got to be spending in the general welfare. It's got to be spending for the common defense. Spending that would address the L.A. basin problem is not for the general welfare, it's for the particular welfare of Los Angeles. I think those same kind of limits exist in the Spending Clause. So it's not the panacea to overcome all environmental problems after *Lopez*. I think the same kind of issues need to be raised and addressed there.

PROFESSOR ECHEVERRIA: I just want to highlight the irony of invoking Hughes and the notion that the federal Commerce Clause power can be used to wipe out the established state ownership of its wildlife. That is not my understanding of Hughes and it seems to be an overly expansive federalist interpretation of the Commerce Clause.

What the Court said in Hughes is when Congress is validly acting pursuant to the Commerce Clause, it can preempt state action. The fact that state action is justified as a matter of state law based on public ownership is not by itself a defense to the state's ability to act. But it seems to me in the absence of a conflict with superior federal law, the state ownership doctrine is alive and well.

JUDGE SENTELLE: Last question.

AUDIENCE MEMBER: I was wondering if the panel could address the pre-Seventeenth Amendment rule and choosing of senators in dealing with treaties' long reach into the environmental sector.

PROFESSOR ADLER: I don't know if Todd Zwyicki is here, but I think he's actually written several articles on how the Seventeenth Amendment changes federalism dramatically. But it certainly does, and certainly if we look at states as having residual

sovereignty, the reason why the Senate's involved in ratification of treaties and the House isn't can be understandable because treaties can impact states' sovereign interests.

When you go to direct election of senators, it changes that framework dramatically. In the environmental context, that will have consequences like in any other context.

JUDGE SENTELLE: Anybody else?

PROFESSOR EASTMAN: It certainly undermines the process federalism defense of let's let Congress do whatever it wants. The states can protect it.

But there's something else here, and I think it's important to put on the table. That is, one of the reasons you don't want the states exempt through whatever sovereign immunity defense you have and leaving Congress free to then regulate the private sector is you need the states helping serve as a counter balance against federal power. They do that better when they're subject to the same regulations as the rest of us.

If the regulations are onerous and exceed the constitutional authority, the fact that you've got private sector and state sector together fighting against that unlawful exercise of power, I think is a good thing.

We want to thank our panel, and thanks to a good audience.