Preserving the Priceless: A Constitutional Amendment to Empower Congress to Preserve, Protect, and Promote the Environment

Dan L. Gildor
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Every great movement must experience three stages: ridicule, discussion, adoption.

- John Stuart Mills

Today, federal environmental policy is experiencing two separate yet related crises. The first is a legal crisis wherein the constitutional foundation of such policy is being brought into question and challenged before an increasingly conservative bench sympathetic to such challenges. The second is an ethical crisis wherein present-day federal environmental policy, built upon the Commerce Clause, fails to properly express the environmental ethic that that policy seeks to embody. These two crises each independently commend a constitutional amendment to empower Congress to directly preserve, protect, and promote the environment. Taken together, they render undeniable the need for such an amendment, which, given its structure, content, and broad public acceptance, stands a good chance at ratification.
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INTRODUCTION

Since the 1780s, tens of thousands of amendments to the United
States Constitution have been proposed.1 Of those, more than 99 percent
have been rejected. This should not be surprising given that most of
the proposed amendments consist of nothing more than chaff.2 For instance,
an 1893 proposal sought to rename the United States, the United States
of Earth.3 A 1975 proposal submitted that “[n]o person shall be president
of the United States who shall not have enough sense to come in out of

1. By some estimates, more than 10,000 resolutions have been introduced in Congress to
amend the Constitution. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS,
PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995, at ix (1996); see also RICHARD
B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA — IF WE LOVE THE CONSTITUTION SO
MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? (1993).
2. See Daniel L. May, The Third Vice President of the United States of Earth, A.B.A. J.,
the rain of bullets."4 Such proposals are often ridiculed, and for good reason.

Proposed amendments to the Constitution that relate to the environment often get similar treatment. For instance, in 1979, David F. Favre wrote an article in which he proposed a constitutional amendment that provided that wildlife must not be deprived of life, liberty, or habitat without due process of law.5 Since its publication, however, the article has not been substantially cited anywhere. The same is true of other articles in which Environmental Quality Amendments (EQAs), as they are known, are proposed.6 These proposed amendments tend to declare the rights of an individual to a clean and healthful environment and to the protection of natural resources.7 In fact, EQAs that have been introduced in Congress have unceremoniously failed.8 This has lead some to argue that such amendments outright do not belong in the Constitution at all.9

Despite this, this Article proposes a constitutional amendment concerning the environment. The proposed amendment, however, differs from the amendments that others have proposed before. Rather than install a right in the Constitution to a clean and healthy environment, the proposed amendment simply empowers Congress to legislate regarding the environment. The constitutional language to be added can be stated in one simple sentence: Congress shall have the power to preserve, protect, and promote the environment.

This Article explores the viability of such an amendment. Part I of this Article explores the justification for federalizing environmental

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7. See Favre, supra note 5; Schlickeisen, supra note 6; see also Pamela B. Schmaltz, Is It Time for an Environmental Amendment?, 38 LOY. L. REV. 451, 461-62 (1992). For instance, Schmaltz proposes an amendment with the following language:

The right of citizens of the United States to the continuing integrity, diversity and viability of the environment and existing ecosystems shall not be abridged by the United States or any state through action or inaction. The Congress shall have power to enforce this article by appropriate legislation.

Schmaltz, supra, at 466-67.
8. E.g., H.R.J. Res. 1321, 90th Cong. (1968); H.R.J. Res. 1205, 91st Cong. (1970); S.J. Res. 169, 91st Cong. (1970) ("Every person has the inalienable right to a decent environment. The United States and every state shall guarantee this right.").
policy in the first place, a necessary predicate for considering whether the Constitution needs any amendment at all. Part II then explores the need for such a constitutional amendment in light of two crises in the legal system related to federal environmental regulation. Part III analyzes such an amendment's likelihood of adoption and Part IV explores its likely impacts. The Article concludes that adopting a constitutional amendment empowering Congress to preserve, protect, and promote the environment is a necessary and proper exercise of Article V's amendment process.

I. THE NECESSITY OF FEDERALIZING BASELINE ENVIRONMENTAL POLICY

Any argument in support of a federal constitutional amendment empowering Congress to preserve, protect, and promote the environment would be beside the point if it were inappropriate for the federal government to regulate the environment in the first place. After all, "[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." 10 Whether it is more appropriate for baseline environmental policy to be set at a federal level or the state level, therefore, is a relevant question.

Though much ink has been spilled on this question, 11 the answer is quite simple: there is a pressing need for federal regulation of the environment, not only to make up for the inability of states to regulate the environment themselves, but also to control for and prevent the "race-to-the-bottom" 12 and to prevent interstate spillover effects. 13


12. "Race-to-the-bottom" is a term coined to represent the classical prisoner's dilemma that states face as they compete for capital and industry that is mobile. See infra notes 24-25 and accompanying text.

13. In his seminal article regarding environmental federalism, Richard Stewart identified four theoretical rationales for centralized environmental law: (1) to address the tragedy of the commons and achieve national economies of scale; (2) to overcome disparities in effective political representation; (3) to correct market failures arising from pollution externalities.
These reasons, in fact, were the exact reasons Congress set out when it adopted the bulk of the federal environmental statutory regime. For instance, in considering "federalizing" air and water policy, it is clear from the legislative history that Congress was concerned with controlling interstate spillovers and preventing races to the bottom.\textsuperscript{14} It is also clear, however, that Congress was specifically motivated by the inability of the states to otherwise perform.\textsuperscript{15} For instance, the Senate Subcommittee on Air and Water Pollution heard testimony that "the states simply have not moved."\textsuperscript{16} Regarding air quality, Representative Vanik noted, "[t]o date,
the States have been left to establish their own air quality standards. In all too many areas, there has been delay and foot dragging—and ridiculously low standards set to accommodate local industries and interests.”

It was necessary, therefore, to federalize environmental policy.

Revisionist economic theorists led by Professor Richard Revesz, however, have challenged these rationales for federal environmental regulation and advocate, instead, that environmental regulation devolve back to the states. Importantly, though, the revisionists’ arguments fail to account for the general and continuing ineffectiveness of the states in regulating the environment. For instance, an analysis of state endangered species laws demonstrates that these acts “fall far short of what is needed to adequately protect a state’s imperiled species.” Likewise, an analysis of state efforts toward attaining the Clean Air Act’s goals found that only three states were “steadily making progress.” By contrast, federal environmental law is generally considered quite effective.

("[T]he incentive of matching grants has not succeeded in bringing about the results that it had been hoped would be achieved.").

18. See Revesz, supra note 11 (finding race-to-the-bottom argument unsupported and federal intervention inappropriate).
19. Arnold W. Reitze, Jr., Federalism and the Inspection and Maintenance Program Under the Clean Air Act, 27 PAC. L.J. 1461, 1520 (1996) (“It seems fair to say that federalism is faring much better than the effort to protect the environment.”); see also infra notes 32-36 and accompanying text.
Moreover, the revisionists’ assertion that the race-to-the-bottom does not justify federal environmental regulation because such races do not occur or because they are actually beneficial does not bear scrutiny.\textsuperscript{23}

According to the race-to-the-bottom theory, the states are caught in a classical prisoner’s dilemma. As they compete for capital and industry that is mobile, any individual state or community may rationally and unilaterally decline to adopt high environmental standards that entail substantial costs.\textsuperscript{24} The knowledge that other states may act in this manner induces a state to act preemptively or responsively to lower its own standards. This triggers a downward spiral that leads to inferior regulatory results at the level of the lowest common denominator.\textsuperscript{25}

The empirical proof demonstrates that this is exactly what happens. For instance, a 1991 survey of California businesses showed that “[e]xcessive environmental regulation is one of the top reasons one in three businesses in California will relocate or expand outside the state within the next two years.”\textsuperscript{26} Thus, the incentives behind the race-to-the-bottom and the predicted results appear to be specifically in play. Indeed, Kirsten Engel, in her Article \textit{State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?},\textsuperscript{27} specifically sought out empirical evidence of the “race-to-the-bottom” and found it.\textsuperscript{28} According to Engel, “data from statistical modeling studies on the actual importance of environmental stringency upon firm location decisions and survey data from state environmental regulators on the influence of concern over industry location upon environmental standard-setting seem to provide prima facie evidence that states are indeed engaged in a race-to-the-bottom.”\textsuperscript{29} Engel concludes that even though industry may not in fact respond much to differences in state environmental standards, a lowering of standards nonetheless occurs, resulting in lower social welfare that is unlikely to be offset by any compensating economic gain.\textsuperscript{30}

Indeed, contrary to revisionist assertions, many of the basic predictions of the race-to-the-bottom theory are borne out by the evidence. For instance, one prediction is that states will lag behind the federal government in developing programs to protect environmental

\begin{thebibliography}{10}
\bibitem{23} Revesz, \textit{supra} note 11, at 1253 (suggesting that “the forces of interstate competition, far from being conclusively undesirable, are at least presumptively beneficial”); Adler, \textit{supra} note 11, at 225.
\bibitem{24} Stewart, \textit{supra} note 11, at 1212.
\bibitem{25} \textit{Id.}; see also Daniel C. Esty, \textit{Revitalizing Environmental Federalism}, 95 \textit{Mich. L. Rev.} 570, 603-05 (1996).
\bibitem{27} \textit{Id.} at 271 (1997).
\bibitem{28} \textit{Id.} at 352.
\bibitem{29} \textit{Id.}
\bibitem{30} \textit{Id.}; see also Esty, \textit{supra} note 25, at 603-05.
\end{thebibliography}
resources. Such a lag is exactly what is observed. Professor Jerome Organ, for instance, has reported that between 1987 and 1995, "19 states enacted at least one statute constraining the authority of a state agency to promulgate rules more stringent than required by federal environmental law." These states have essentially tied their hands and guaranteed that at best they will only keep pace with federal regulation.

This lag is directly visible in the context of the Clean Water Act. Notably, only Ohio and Wisconsin have passed laws filling the gap created by the Supreme Court's narrowing of the Act's jurisdiction and the Bush administration's concomitant decision to leave the filling of seasonal wetlands unregulated. Efforts in California died in committee. All of this has led one expert to conclude that state and local wetland regulations in fourteen states will only partially fill the gap in federal wetland regulation for isolated wetlands, with little protection provided in the remaining thirty-six states for these wetlands. It is impossible, therefore, "to have any reasonable confidence that even the most aggressive and competent states are capable of supplanting the federal role of establishing a baseline for pollution control."

Furthermore, aside from the academic debate regarding the race-to-the-bottom, it must be remembered that many environmental problems

31. See Adler, supra note 11, at 228.
34. Editorial, Saving Wetlands, S.F. CHRON., June 21, 2004, at B6. Based on the fact that two states have responded to SWANCC, Jeffrey Wood, a revisionist, argues that fears regarding a race-to-the-bottom are unfounded because "many states have responded to SWANCC by enacting or recommending the enactment of relatively aggressive regulatory programs to protect isolated wetlands now beyond the reach of the federal government." Jeffrey H. Wood, Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC, 19 J. LAND USE & ENVTL. L. 91, 115 (2003) (emphasis added). Likewise, Jonathan Adler also points to two states, New York and Maryland, that have buffers for wetlands more stringent than federal requirements in his attempt to refute the race-to-the-bottom's prediction that states will lag behind federal government regulation. Adler, supra note 11, at 229. For both authors, however, two states out of fifty is hardly equal to "many" and is hardly convincing proof that states are indeed willing to regulate more stringently than the federal government. See Adler, supra, at 229; Wood, supra, at 115.
strongly resist decentralized approaches because of their sweeping spatial and temporal scope. According to Professor Lazarus, such problems "defy localized jurisdictional boundaries and shorter-term time horizons, and their resolution may offer economies of scale that favor more centralized approaches." Indeed, centralizing environmental laws at the federal level "provides many benefits for the environment and the public that cannot be provided by a system of fifty separate state laws." One such benefit, which actually accrues to industry, is that, with environmental policy set at a federal level, industry only has to comply with a single national standard rather than fifty different state standards. Because "even small decision-making errors can pose threats of irreversible, catastrophic ecological harm occurring beyond the decision maker's own jurisdictional boundaries, the decentralization of certain kinds of environmental decision making can be especially problematic." It is in response to such concerns that many of the nation's federal environmental laws were passed.

Overall then, it is clear both from a theoretical as well as a practical perspective that federal regulation of the environment is necessary, both because states continue to be subject to a race-to-the-bottom and because states continue to be ineffective at protecting the environment. The

39. Id. at 761.
42. Lazarus, supra note 38, at 761

At the very least, the essential Brandeisian observation that "[i]t is one of the happy incidents of the federal system that a single courageous State may... try novel social and economic experiments" is deprived of some of its persuasive force when, as happens with environmental injuries, errors made in those laboratories can have major adverse consequences that are not confineable to the lab itself.
43. See, supra notes 14-17 and accompanying text.
44. It is interesting to note that many of the same arguments made in favor of federalizing environmental policy were also made during the Constitutional Convention in favor of federalizing the Commerce Power. UNITED STATES CONSTITUTIONAL CONVENTION, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed. 1911); see also Albert S. Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 MINN. L. REV. 432, 438 (1941) ("Thus the delegates had twice approved, once as a committee of the whole and once as a convention, schemes which spoke in terms of legislative incompetence of the states, of disturbances of harmony between the states, and—on final submission—of furtherance of the general interests of the union."); Alan R. Greenspan, The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism, 41 VAND. L. REV. 1019, 1024 (1988) (Commerce Clause adopted to prevent the "economic Balkanization of the states"); David A. Linehan, Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation, 2
question then turns to whether the existing constitutional structure supporting such regulation is so insufficiently robust as to warrant amendment.

II. THE NEED FOR A FEDERAL CONSTITUTIONAL AMENDMENT: THE CRIZES IN PRESENT-DAY ENVIRONMENTAL POLICY

It is axiomatic that the federal government is one of limited power. As such, Congress can only exercise those certain specific powers enumerated in the Constitution. Regulating the environment, however, is not one of these powers. Accordingly, federal environmental policy, consisting of the body of law contained in the Clean Water Act, the Clean Air Act, the Endangered Species Act, the Solid Waste Disposal Act, and the Comprehensive Environmental Response, Compensation, and Liability Act, among others, has all stemmed entirely from Congress's exercise of its Commerce Clause power.

 Tex. Rev. L. & Pol. 365, 367 (1998) ("It has been well-documented that the need to provide a more uniform and predictable system of commerce among the American states was the impetus for abandoning the Articles of Confederation in favor of a new Constitution.").

45. M'Culloch v. Maryland, 17 U.S. 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent ...."); Marbury v. Madison, 5 U.S. 137, 176 (1803) ("The powers of the legislature are defined, and limited ....").

46. VILE, supra note 1, at 119 ("the Constitution does not affirmatively protect the environment”).

52. Tarlock, supra note 9, at 223-24 ("Environmental protection has almost no constitutional foundation except as an exercise of the Commerce Power."); Jeanine A. Scalero, The Endangered Species Act’s Application to Isolated Species: A Substantial Effect on Interstate Commerce?, 3 CHAP. L. REV. 317, 318 (2000) ("The constitutional basis for many environmental statutes, including the ESA, is the Commerce Clause ... "); Steinzor, supra note 37, at 363 (noting that when Congress abandoned encouraging state efforts to regulate the environment through the traditional exercise of the police power, Congress turned to the Commerce Clause “to justify centralization of the regulatory system”); see also Hodel v. Virginia Surface Mining & Reclamation Ass’n., 452 U.S. 264, 277-83 (1981) (upholding validity of Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. §§ 1201-1328, under Commerce Power given congressional findings of the substantial impact on commerce arising from surface mining activities); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (noting that in enacting the Clean Water Act, Congress exercised its power under the Commerce Clause); Hodel v. Indiana, 452 U.S. 314, 324 (1981) (“Congress was entitled to find that the protection of prime farmland is a federal interest that may be addressed through Commerce Clause legislation”); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 281-82 (1977) (holding that Commerce Clause permits Congress to regulate the taking of wildlife where there is an effect on interstate commerce); United States v. Bramble, 103 F.3d 1475, 1482 (9th Cir. 1996) (upholding Eagle Protection Act under Commerce Clause); Palila v. Hawaii Dep’t of Land & Natural Res., 471 F. Supp. 985, 999 (D. Haw. 1979) (“The Endangered Species Act is a valid exercise of Congressional power pursuant to ... the Commerce Clause of the Constitution.”).
Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." 53

As developed below, however, this basis for federal environmental law is lacking in two respects. First, as recent Commerce Clause jurisprudence suggests, the extent and range of federal environmental law, which, as demonstrated above, is a necessity, is arbitrarily limited and constrained by requiring that the object of the regulation have a substantial effect on interstate commerce. Second, basing federal environmental law on the Commerce Clause and economic considerations distorts legislative expressions of an existing environmental ethic widely held in this nation.

A. The Legal Crisis in Present Federal Environmental Policy

As mentioned above, most of today's federal environmental policy is derived from Congress's ability to regulate interstate commerce through the Commerce Clause. Since its inception, courts have interpreted the Commerce Clause broadly to confer on Congress power to regulate activities that affect interstate commerce, even indirectly. 54 According to longstanding judicial interpretations, "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." 55 This expansive interpretation of Congress's power under the Commerce Clause reached its apex shortly after the Great Depression and remained a bedrock principle of Commerce Clause jurisprudence throughout the 1960s and 1970s when Congress enacted today's federal environmental laws. 56

Basing the nation's environmental policy on the Commerce Clause, however, is becoming increasingly suspect as courts, following the Supreme Court decision in 1995 in United States v. Lopez, 57 have begun to narrow and restrict Congress's ability to regulate local affairs

53. U.S. CONST. art. I, § 8, cl. 3.
54. See Gibbons v. Ogden, 22 U.S. 1, 196 (commerce power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution"); see also United States v. Darby, 312 U.S. 100, 121 (1941); Wickard v. Fillburn, 317 U.S. 111 (1942) (upholding regulation of intrastate farmer's personal consumption of homegrown wheat under the Agricultural Adjustment Act of 1938); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).
56. See Fry, 421 U.S. at 547; Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976); see also Philip Soper, The Constitutional Framework of Environmental Law, in FEDERAL ENVIRONMENTAL LAW 20, 27-28 (Erica L. Dolgin & Thomas G. P. Guilbert eds., 1974) ("In view of the broad reach of the commerce power, it is difficult to imagine examples of federal action that could be justified only on the basis of some other constitutional authority.").
nationally under the Clause.\textsuperscript{58} In \textit{Lopez}, as is now well known, the Court struck down the Gun-Free School Zones Act of 1990.\textsuperscript{59} That act made it a federal crime for any individual to knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.\textsuperscript{60} The Court struck the act down because, according to the Court, the act regulated an activity with too tenuous an effect on interstate commerce and thereby exceeded Congress's authority.\textsuperscript{61}

In reaching this holding, the Court set forth its jurisprudence on the Commerce Clause, finding three broad categories of activity that Congress can regulate under that power. First, according to the Court, Congress can regulate the use of the channels of interstate commerce.\textsuperscript{62} Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.\textsuperscript{63} Last, Congress can regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.\textsuperscript{64}

Focusing solely on this last regulatory category, having readily dismissed the other two given that the Gun-Free School Zones Act involved regulation of neither a channel of interstate commerce nor an instrumentality of interstate commerce,\textsuperscript{65} the \textit{Lopez} Court found that because the Gun-Free School Zones Act was a criminal statute, by its own terms, the Act had nothing to do with "commerce" or any sort of economic enterprise, however broadly those terms might be defined.\textsuperscript{66} Furthermore, the Court found that the Act did not contain any jurisdictional element that would ensure through case-by-case inquiry that the firearm possession in question substantially affects interstate commerce.\textsuperscript{67} That left the Court with only the invitation to "pile inference upon inference" to find the substantial effect that possessing a firearm within a school zone has on interstate commerce. According to the Court, accepting such an invitation "would bid fair to convert congressional

\textsuperscript{58} Though at first blush, the recent Supreme Court opinion in \textit{Gonzales v. Raich}, 125 S. Ct. 2195 (2005), appears to reverse this trend, \textit{Raich} is distinguishable from \textit{Lopez} and \textit{Morrison} as the majority pointedly noted: "Unlike those at issue in \textit{Lopez} and \textit{Morrison}, the activities regulated by the CSA are quintessentially economic.... Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in \textit{Morrison} casts no doubt on its constitutionality." \textit{Id.} at 2211.


\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Lopez}, 514 U.S. at 551.

\textsuperscript{62} \textit{Id.} at 558.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.} at 558-59.

\textsuperscript{65} \textit{Id.} at 559.

\textsuperscript{66} \textit{Id.} at 560.

\textsuperscript{67} \textit{Id.} at 561.
authority under the Commerce Clause to a general police power of the sort retained by the States." The Court declined this invitation, stating that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."69

With that statement, the Court marked a dramatic departure from over seventy years worth of jurisprudence that up until then had enabled Congress to regulate matters of national concern despite only particular "local" manifestations of that concern.70 Since then, the Court has led the charge to limit Congress's ability to regulate non-economic matters that may only incidentally affect interstate commerce.71 For instance, in *United States v. Morrison,*72 the Court ruled that the Violence Against Women Act of 199473 was unconstitutional given untenable connections between gender-based violence and interstate commerce.74 In *Morrison,* the Court tracked its decision in *Lopez,* finding that if it were to uphold federal regulation of gender-based violence based on congressional findings of a substantial impact of such violence on interstate commerce, the Court would be inviting Congress to "completely obliterate the Constitution's distinction between national and local authority."75 According to the Court, the concern with federal regulation of non-economic activity lies in preserving those areas traditionally reserved to local control.76

1. The Present Impact of *Lopez* and *Morrison* on Federal Environmental Jurisprudence

The jurisprudential shift marked by *Lopez* and *Morrison* becomes particularly relevant in the context of federal environmental regulation.
where the focus of the regulation is not economic activity but other
issues, such as the filling of isolated vernal pools and wetlands or the
preservation of a wholly intrastate species. Moreover, regulation of such
activities has also been traditionally reserved to local control. As such,
under Lopez and Morrison, federal environmental regulation becomes
constitutionally suspect when one has to pile "inference on top of
inference" in order to establish a substantial impact on interstate
commerce. Indeed, Justice Thomas has gone on record to suggest that
federal environmental legislation must fail where there is less than a
substantial effect on interstate commerce.

The casual observer, however, will no doubt note that Lopez and
Morrison have so far not had much if any effect on federal environmental
regulation. After all, application of such bedrock environmental laws

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77. Approximately 521 of the 1082 species in the United States designated as threatened or
dangered are found in only one state. Nat'l Ass'n of Home Builders v. Babbitt (NAHB), 130
F.3d 1041, 1052 (D.C. Cir. 1997).

78. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs (SWANCC), 531 U.S. 159, 174 (2001) (recognizing states' traditional and primary power over
land and water use); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204
(1999) (noting that states have important interests in regulating wildlife and natural resources
within their borders that are only shared with the federal government when the federal
government exercises one of its enumerated constitutional powers).

79. It should be noted, however, that the applicability of Lopez and Morrison's holdings is
not strictly limited to federal environmental law. These holdings would seem to also preclude the
constitutionality of such congressional acts as the Defense of Marriage Act, Pub. L. No. 104-199,
HASTINGS CONST. L.Q. 1, 26 (2000); see also Jack M. Balkin & Sanford Levinson, Understanding
The Constitutional Revolution, 87 VA. L. REV. 1045, 1057 (2001) ("Thus, we do not yet know the
full contours of the present revolutionary situation. It could become much more radical and far
ranging. For example, the Court might hold that certain environmental regulations are beyond
the commerce power. It might prohibit suits against the states for violations of the Family and
Medical Leave Act. Finally, it might hold that older civil rights laws involving race and sex are
effectively inapplicable to states. Two examples would be application of disparate impact
liability under Title VII of the Civil Rights Act of 1964 and the prohibition of pregnancy
discrimination under the Pregnancy Discrimination Act, each of which offers protections well
beyond what the Constitution requires under the Court's existing equal protection jurisprudence.").

certiorari) ("This case raises serious and important constitutional questions about the limits of
federal land-use regulation in the name of the Clean Water Act that provide a compelling reason
to grant certiorari in this case.").

81. Indeed, under the Supreme Court's recent decision in Gonzales v. Raich, it is
conceivable that courts would find that particular intrastate applications of federal
environmental statutes such as the Clean Water Act and the Endangered Species Act are part of
a class of regulated activities that are within the reach of federal power such that "the courts
have no power 'to excise as trivial, individual instances' of the class." 125 S. Ct. 2195 (2005)
(quoting Perez v. United States, 402 U.S. 146, 154 (1971)). Given, however, that these statutes
regulate something other than economic activity, it is not clear that intrastate applications of
these statutes are "applications of a concededly valid statutory scheme." Id. at 2237.
Furthermore, it is not clear that specific intrastate applications are "essential part[s] of a larger
regulation ... in which the regulatory scheme could be undercut unless the intrastate activity
such as the Clean Air Act, the Clean Water Act, and the Endangered Species Act has continued to be upheld despite challenges to these statutes' constitutionality. For instance, in United States v. Buday82 and FD&P Enterprises, Inc. v. United States Army Corps of Engineers,83 federal district courts rejected Commerce Clause challenges to Clean Water Act jurisdiction.84 Courts have also rejected Commerce Clause challenges to the Clean Air Act85 and the Endangered Species Act.86 Indeed, in only one case so far has application of federal environmental law—in that case the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—been held to be unconstitutional, a holding that was reversed on appeal.87

An analysis of the cases, however, reveals Lopez and Morrison’s very visible constitutional shadow. Indeed, many if not all of these cases challenging federal environmental policy on Commerce Clause grounds would not have been brought absent the encouragement that Lopez and Morrison gave the various parties in those cases.88 Nor would straightforward application of the nation’s environmental law have been thrown into the disarray observed in such a case as National Association of Home Builders v. Babbitt ("NAHB").89

In NAHB, the holdings and rationales expressed in Lopez and Morrison threw the D.C. Circuit Court of Appeals into utter confusion. In that case, the court considered whether application of section 9 of the Endangered Species Act90 to the Delhi Sands Flower-Loving Fly (the "Fly") was constitutional. Section 9 makes it unlawful to “take” any

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85. See United States v. Ho, 311 F.3d 589, 603 (5th Cir. 2002) (rejecting Commerce Clause challenge to criminal application of the CAA for violating an asbestos work practice standard by finding substantial impact on interstate commerce).


88. Within the first three years after the Lopez decision was issued, over forty federal laws were challenged with Lopez as the basis for the challenge. William Funk, The Lopez Report, 23 ADMIN. & REG. L. NEWS 1, 14 (1998); Alistair E. Newbern, Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use after United States v. Lopez, 88 CAL. L. REV. 1575, 1607 (2000) (noting that within four years of Lopez, 566 cases arguing Commerce Clause violations were filed in federal courts, with over eighty filed in the first eight months). The challenged laws mark a diverse range of congressional enactments, from the Freedom of Access to Clinic Entrances Act, see United States v. Bird, 124 F.3d 667 (5th Cir. 1997), to the Child Support Recovery Act, see United States v. Bailey, 115 F.3d 1222 (5th Cir. 1997).

89. 130 F.3d 1041 (D.C. Cir. 1997).

endangered species. The Delhi Sands Flower-Loving Fly is such an endangered species. It is the only remaining subspecies of its species, has a population that numbers only in the few hundreds, and is found only in the "Delhi series" soils in southwestern San Bernardino County and northwestern Riverside County in California. San Bernardino County, however, wanted to build a "state of the art," $470 million earthquake-proof emergency medical, burn care, and teaching center right on that remaining habitat. Having been informed by the Fish and Wildlife Service that this construction would likely unlawfully take the Fly, the County, along with several other parties including the Building Industry Legal Defense Fund and the City of Colton, filed suit alleging that application of section 9 to the Fly was unconstitutional and in excess of Congress's commerce power in light of Lopez.

Absent Lopez and Morrison, the case would have been a run of the mill Commerce Clause case in the same vein as United States v. Darby, Wickard v. Fillburn, and Heart of Atlanta Motel v. United States. With Lopez and Morrison "on the books" however, to affirm, the court had to find some rationale consistent with those binding precedents. The result was that the three-justice panel split three different ways thereby failing to reach any majority opinion.

Justice Wald, writing for the court, noted that application of section 9 to the Fly was constitutional because (1) the takings prohibition was necessary to aid the Endangered Species Act's (ESA's) prohibitions on transporting and selling endangered species in interstate commerce; (2) the takings prohibition fell under Congress's authority to prevent the channels of interstate commerce from being used for immoral or injurious purposes; (3) the takings prohibition prevents the destruction of biodiversity, thereby protecting current and future interstate commerce that relies upon it; and (4) because the prohibition controls adverse effects of interstate competition.

Justice Henderson, in a separate concurring opinion, disagreed with Justice Wald's first two points because the Fly was purely an intrastate
species, but agreed that the loss of biodiversity has a substantial effect on commerce and added that protection of the Fly is proper because the regulation substantially affects plainly interstate commercial development activity. 101

Justice Sentelle, however, rejected all of these justifications outright and questioned in his dissent what business the federal government has in disrupting local government activities in favor of flies “that live as larvae for nearly two years under Dehli Sands... after which they emerge to feed and breed for two weeks before dying.” 102 The impact that Lopez and Morrison have is made clear when Justice Sentelle states that, “[w]hile I would have found the present application of the ESA to be outside the enumerated powers of Congress under the Commerce Clause even in the world before Lopez, after that controlling decision, I think there can be no doubt.” 103

It is clear, then, that Lopez and Morrison have had an impact on the judicial mindset when it comes to considering the constitutionality of federal environmental laws. For instance, in GDF Realty Investments, Ltd. v. Norton, 104 six circuit judges filed a blistering dissent to a denial of a petition for rehearing en banc in a case upholding application of the ESA to “cave bugs.” 105 In Gibbs v. Babbitt, Judge Luttig voiced a strong

101. Id. at 1058 (Henderson, J. concurring).
102. Id. at 1060 (Sentelle, J. dissenting).
103. Id. at 1061.
105. Id. at 293 (“To be faithful to the Supreme Court’s principles in Lopez and Morrison and this court’s Commerce Clause decisions, we should rehear this case en banc.”). The six dissenting judges were Edith H. Jones, J., E. Grady Jolly, J., Jerry E. Smith, J., DeMoss, J., Edith Brown Clement, J., and Pickering, J.

Though the Supreme Court denied certiorari in GDF Realty, it would be improper to infer that the Court somehow “approved” of the Court of Appeal opinion over that of the dissenters. Rather, “all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted.” State of Md. v. Baltimore Radio Show, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting the denial of certiorari). Indeed, the Supreme Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.... [The] denial of this petition carries no support whatever for concluding that either the majority or the dissent in the court below correctly interpreted the scope of our decisions .... It does not carry any implication that either, or neither, opinion below correctly applied those decisions to the facts in the case at bar.

Id.; see also Evans v. Stephens, 125 S. Ct. 2244 (2005) (Stevens, J., respecting the denial of certiorari); United States v. Carver, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”); 20 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 115 (2002); Robert L. Stern, Denial of Certiorari Despite A Conflict, 66 HARV. L. REV. 465, 472 (1953) (“Since there may also have been other reasons for denying certiorari in those cases, it is impossible for persons not having access to the Court’s conferences to do more than guess at why certiorari was denied.”). See generally Peter Linzer, The Meaning of Certiorari
statement based on Lopez and Morrison against finding authority in the Commerce Clause for application of the federal Endangered Species Act to the Red Fox; and, in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), the Supreme Court split 5-4 over the question of whether the filling of isolated, intrastate wetlands could be regulated under Clean Water Act. Though the Court avoided the constitutional question of whether such regulation was authorized under the Commerce Clause, the tensions brought out in NAHB, GDF Realty, and Gibbs were certainly evident throughout the decision.

Even where courts have rejected facial constitutional challenges to environmental statutes, the courts have ominously left open the question of whether “as applied” challenges would succeed as a result of Lopez and Morrison. For instance, in Nebraska v. EPA, though the court rejected a facial constitutional challenge based on the Commerce Clause to the Safe Water Drinking Act, the court left open the question of whether “the intrastate sale of drinking water has a sufficiently substantial impact on interstate commerce to justify federal regulation.” Likewise, in United States v. Wilson, Judge Niemeyer of the Fourth Circuit noted that a federal environmental statute requiring that the regulated activity have no substantial effect on interstate commerce would “present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause.” Indeed, in SWANCC, the Supreme Court noticeably narrowed the expansive reach of the Clean Water Act, all under the guise of simple statutory interpretation but clearly within Lopez and Morrison’s penumbra.

Consequently, while Lopez and Morrison do not appear to have dramatically changed the landscape of federal environmental regulation,
they have caused fractures and faults in that landscape. Whereas before, the reach of federal environmental law appeared unbounded, now, after Lopez and Morrison, that reach appears to be limited, with the constitutional boundaries already drawn. Add to this balance the Supreme Court's holdings in Printz v. United States, United States v. New York, Seminole Tribe of Florida v. Florida, Idaho v. Coeur d'Alene Tribe of Idaho, and City of Boerne v. Flores, and you get an explosive mixture of doctrinal devolution to the states, all despite the clear need and sound reasons for maintaining a uniform national environmental policy. Today, Commerce Clause jurisprudence, and federalism jurisprudence overall, has evolved to a point where the universality and uniformity of federal environmental law cannot be assured, leading many commentators to conclude that critical aspects of federal environmental law are subject to limitation if not outright invalidation by the courts as being in excess of the power granted Congress by the Commerce Clause.

113. See, supra note 56 and accompanying text.
114. Rancho Viejo LLC v. Norton, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J. (concurring)) ("the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the [endangered species], does not affect interstate commerce"); see also SWANCC, 531 U.S. at 171-72 (excluding from CWA jurisdiction isolated, seasonal ponds).
120. Funk, supra note 88, at 15 ("the impact of Lopez, as opposed to its doctrinal effect, extends well beyond this limited field when it is combined with the Supreme Court's federalism decisions in recent years ... as a group they reflect an aura of heightened concern with expansive federal power, and this concern clearly has the potential for major effects on federal regulatory activity"); see also Elizabeth C. Price, Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman, 48 SYRACUSE L. REV. 139, 221 (1998) ("Although Lopez itself has had limited impact, when it is viewed in conjunction with Seminole Tribe, Coeur d'Alene and Printz, a potential new meaning emerges, suggesting that Lopez may be more than an isolated spasm of federalism."); Dr. Bill Swinford & Dr. Eric N. Waltenburg, The Supreme Court and the States: Do Lopez and Printz Represent a Broader Pro-State Movement?, 14 J.L. & POL. 319, 356-60 (1998) (noting consistent and conspicuous five-justice pro-state bloc on the Supreme Court).
121. See supra, Part I.
122. Adler, supra note 11, at 238 ("Perhaps the most likely area where the Court will be forced to confront the environmental challenge to federalism is the Endangered Species Act (ESA)."); Scalero, supra note 52, at 320 ("Section 9(a)(1)(B) of the Endangered Species Act...is thought to be the most susceptible to invalidation on Commerce Clause grounds"); Linehan, supra note 44, at 414 ("regulation of 'isolated wetlands' under the CWA and habitat modification provisions under the ESA are vulnerable to Lopez-style challenges ... because they are indefensible as proper regulations of 'commerce' under any untortured definition of the word"); Paul Boudreaux, Federalism and the Contrivances of Public Law, 77 ST. JOHN'S L. REV. 523, 524 (2003) ("the Rehnquist Court has positioned itself to take aim at a range of public welfare statutes, from environmental legislation to laws outlawing race and sex discrimination.").
2. The Future Impact of Lopez and Morrison on Federal Environmental Jurisprudence

Though it is impossible to predict the future with any certainty, if one were to predict the direction that Commerce Clause jurisprudence will take in the future with regard to federal environmental policy, it is more likely that the Lopez and Morrison holdings will be extended rather than be seen as aberrations. Indeed, the fact that a Republican President now has the opportunity to make substantial judicial appointments is sufficient to warrant concern given that the power of Lopez and Morrison to affect a judge’s attitude toward the constitutionality of a law is highly correlated with the political orientation of the judge and the president that appointed that judge. As William Funk has reported, of the twelve cases in which Lopez challenges have been rejected over a dissent between 1995 and 1998, the dissenting member of the panel had been appointed by a Republican in all but one case. By comparison, eighteen of the nineteen Democratically appointed judges in these twelve cases voted to uphold the statute.

Consequently, substantial appointments of conservative judges by a Republican president can, and most likely will, impact the judicial view regarding the constitutionality of federal environmental regulation—and President Bush has not shied away from nominating conservative jurists who have actively spoken against the constitutionality of the nation's environmental statutes. For instance, a recent nominee to the Ninth Circuit Court of Appeals—William G. Myers III—has intensely lobbied over the span of his career on behalf of mining, grazing, and cattle industries against the application of federal environmental laws such as the Clean Water Act and Endangered Species Act. In fact, Myers filed an amicus brief in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon arguing that regulations under the Endangered Species Act prohibiting significant habitat modifications on private but see Johnson, supra note 40, at 82 (“even under its broadest reading, Lopez will have little effect on federal environmental regulation”).

123. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 266-68 (2d ed. 2002) (noting that Lopez was not merely an aberration, but “the beginning of a major change” in Commerce Clause jurisprudence); see also Price, supra note 120, at 221 (“Lopez may be more than an isolated spasm of federalism.”).


125. Id.

126. See generally Benjamin Wittes, The Hapless Toad, ATL. MONTHLY, May 2005 (describing the threat associated with President Bush's judicial appointments); Jeffrey Rosen, The Unregulated Offensive, N.Y. TIMES MAGAZINE, Apr. 17, 2005, at 6-42 (quoting Michael Greve of the American Enterprise Institute that “the judicial appointments [of conservative judges] are what matters most of all” in drawing back the expansiveness of federal environmental regulation).
property that kill or injure endangered species are unconstitutional. He also filed an amicus brief in SWANCC advocating a very limited view of congressional power under the Commerce Clause in regard to environmental law.

Other conservative jurists with positions similar to Myers’ have already been confirmed and installed on the federal bench. For instance, Jeffrey Sutton was recently appointed to the Sixth Circuit Court of Appeals. Sutton, who filed an amicus brief in SWANCC arguing that application of the Clean Water Act in that case exceeded Congress’s Commerce Clause power, is a strong proponent of radically restricting Congress’s ability to protect the environment. Likewise, Victor Wolski—who filed an amicus brief in support of certiorari in Cargill, Inc. v. United States arguing “that it was ‘far beyond’ Congress’s power under the Commerce Clause to protect ponds that served as habitat for fifty-five different species of migratory birds”—was recently appointed to the Court of Federal Claims.

Indeed, President Bush has even at times worked around normal constitutional processes to install through recess appointments William Pryor and Charles Pickering—jurists who favor limiting Congress’s authority to regulate the environment. William Pryor, appointed to the Eleventh Circuit Court of Appeals, has taken consistent positions against the Endangered Species Act, wetland protection, and environmental justice. For instance, Pryor filed an amicus brief in SWANCC contending that Congress did not have the authority under the Commerce Clause to regulate the filling of isolated wetlands. Likewise, Charles Pickering, who has been appointed to the Fifth Circuit Court of Appeals, has been described as having a “bleak” environmental record.

128. Id. at 13.
130. Id. at 12.
135. GEORGE W. BUSH AND JUDICIAL NOMINATIONS, supra note 133.
Any sense that these recess appointments are inconsequential is belied by the fact that Judge Pickering has already been involved in at least one key decision where he joined a panel of Circuit Judges strongly dissenting from the denial of a hearing *en banc* in *GDF Realty Investments, Ltd. v. Norton*.136

This trend of appointing conservative jurists to critical positions, moreover, has culminated with Bush's appointments to the Supreme Court. Facing a largely unprecedented opportunity to fill multiple openings on that Court over his second term,137 President Bush has already appointed John G. Roberts, Jr. to fill the vacancy created by Chief Justice Rehnquist's passing.138 Judge Roberts, while sitting on the D.C. Court of Appeals, wrote a dissent questioning the constitutional validity of the Endangered Species Act.139

More recently, President Bush nominated Judge Samuel Alito of the Third Circuit to fill Justice Sandra Day O'Connor's seat.140 Described as "the most conservative judicial...candidate since Robert Bork in 1987,"141 Judge Alito, dissenting in *United States v. Rybar*,142 expressed concern over "converting Congress's authority to regulate interstate commerce into 'a plenary police power,'"143 and stressed that "if *Lopez* means anything, it is that Congress's power under the Commerce Clause must have some limits."144 Given that Judge Alito has already once refused to even recognize an environmental group's standing to sue under the Clean Water Act,145 it is likely that Judge Alito will side with Justices Scalia and Thomas should the constitutionality of environmental statutes be presented before the Court in the near future.146

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137. *See* Stephen Dinan, *A Rare Chance to Reshape Top Court Three Retirements Likely by 2009*, WASH. TIMES, Oct. 10, 2004, at A1 (reporting that up to three Supreme Court retirements are expected in the next four years).


142. 103 F.3d 273 (3d Cir. 1996).

143. *Id.* at 291 (Alito, J., dissenting).

144. *Id.*


146. *See* Epstein, *supra* note 140, at A1. Alito has been nicknamed "Scalito" or "Scalia-Lite" because his judicial philosophy resembles that of Justice Scalia.
Moreover, Michael W. McConnell and J. Michael Luttig are perennially on President Bush's shortlist should a third opportunity to appoint a Supreme Court justice arise. McConnell, a federal appellate judge in Denver and a former University of Chicago law professor not only has "impeccable social conservative credentials" but also holds "a vision of federalism that looks like the Constitution we once had [under Lochner]." Luttig, a federal appellate judge in Virginia, dissented in Gibbs v. Babbitt on the basis that protecting the Red Fox from extinction was unconstitutional and has vigorously advocated for the view that some federal environmental laws exceed Congress's powers to regulate interstate commerce.

With all of these nominations and appointments of conservative jurists, it would appear as though the commentators' predictions regarding the likely demise of federal environmental law will come true.

3. Other Constitutional Provisions Cannot Fill the Gap in Federal Environmental Jurisprudence Left by Lopez and Morrison

None of this concern would amount to much, however, if the Constitution were able to support federal environmental policy through provisions other than the Commerce Clause. For instance, under the Property Clause, Congress has the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Thus, from the vast Bureau of Land Management holdings to every single military base and even the District of Columbia, Congress has absolute power to dictate the environmental policy in those areas. Additionally, the Treaty power gives Congress the power to legislate to implement treaties entered into by the United States. Accordingly, where such a treaty exists, Congress would have the power to set national environmental policy in accordance with that treaty.

147. Rosen, supra note 126; see also Lochner v. New York, 198 U.S. 45 (1905) (holding unconstitutional congressional act regulating the hours that bakers can work).
149. Rosen, supra note 126.
150. See supra note 122.
151. U.S. CONST., art. IV, § 3, cl. 2.
152. Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) ("we have repeatedly observed that 'the power over the public land thus entrusted to Congress is without limitations'"); see also Sophie Akins, Congress' Property Clause Power to Prohibit Taking Endangered Species, 28 HASTINGS CONST. L.Q. 167, 185-86 (2000) (arguing that Property Clause is a logical source of congressional power to regulate endangered species).
154. For instance, in Missouri v. Holland, the Supreme Court upheld the Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755, reasoning that if the Migratory Bird Treaty were valid,
Another potential source of congressional power is Congress's Spending Power, which is often touted as a parallel source of authority to the Commerce Clause for federal environmental policy. That power can even be used to implement a federal environmental policy beyond the Commerce Clause's limited reach or indeed any of Congress's enumerated legislative fields. As the Supreme Court held in *South Dakota v. Dole*, under the Spending Power, Congress can "authorize expenditure of public moneys for public purposes [un]limited by the direct grants of legislative power found in the Constitution." Indeed, this power is limited only in that the conditions imposed on expenditures (1) promote the general welfare, (2) be unambiguous, and (3) relate to a legitimate federal interest. Accordingly, one of the most successful federal environmental programs is the Swampbuster Program, which withholds all federal agricultural payments to farmers who drain and convert wetlands. That Program, enacted under the Spending Power, is wholly constitutional irrespective of any impacts on interstate commerce. Thus, under the Spending Power, Congress can indirectly regulate things that it cannot directly regulate under the Commerce Clause.
These powers, however, cannot substitute for the Commerce Clause (or, for that matter, the proposed amendment) because these powers are either limited in their nature or require necessary predicates that inherently limit their reach. For instance, to exercise the Treaty Power, there must be a suitable and adequate treaty, while the exercise of the Property Power requires that there be federal property involved. Meanwhile, exercises of the Spending Power can only result in indirect regulation, whereby incentives are manipulated through taxation or subsidization, that can never be as effective at achieving environmental goals as traditional Commerce Clause style of regulation.165 Indeed, even as an aspect of market-based regulation, which is generally touted as being effective, taxes and subsidies are generally thought to be the least effective mode of market-based regulation.166 As such, these alternatives to the Commerce Clause as authority for Congress to regulate the environment are simply insufficient bases of authority needed to establish a uniform, national environmental policy. Given the concomitant shortcomings now associated with the Commerce Clause after Lopez and Morrison, some other constitutional power must fill the gap.

4. A Constitutional Amendment Must Be Adopted to Bridge the Gap Between Existing Policy and Constitutional Authority

We return here, then, where we started, with the acknowledgment that there is no specific and direct constitutional authority for Congress to legislate in the environmental arena.167 Yet it cannot be disputed that an

165. See Latin, supra note 41, at 1270-71 (arguing the advocates for market incentives have "an excessive preoccupation with theoretical efficiency, while...plac[i]ng] inadequate emphasis on actual decisionmaking costs and implementation constraints" and identifying some advantages of traditional command-and-control regulation over market incentives); see also Denee A. Diluigi, Kyoto's So-Called "Fatal Flaws": A Potential Springboard for Domestic Greenhouse Gas Regulation, 32 GOLDEN GATE U. L. REV. 693, 733 (2002) ("While market-based incentives may be an effective alternative to the traditional command and control approach to environmental regulation, if improperly implemented and maintained, they will fail to reduce pollution.").

166. See Sandra B. Zellmer, The Virtues of "Command and Control" Regulation: Barring Exotic Species from Aquatic Ecosystems, 2000 U. ILL. L. REV. 1233, 1256–57 (2000) (cataloging ways in which regulation through economic incentives such as subsidies "do not necessarily stimulate environmental improvement"); Theodore C. Regnante & Paul J. Haverty, Compelling Reasons Why the Legislature Should Resist the Call to Repeal Chapter 40b, 88 MASS. L. REV. 77, 84 (2003) (finding regulatory program to encourage development of affordable housing "troubling" given that it "will lead to a return of the command and control system of subsidies, which has proved to be a less effective method of stimulating creation of affordable housing than market-driven methods").

167. See supra note 46 and accompanying text.
extensive and pervasive legislative agenda regarding the environment has been on the books for quite some time now. The lack of a solid constitutional foundation for that agenda leaves that agenda vulnerable to long run erosion through “ossification, marginalization, and assimilation,” making it difficult to buffer the original public policy objectives that were expressed in the nation’s environmental statutes against hostile executive and judiciary branches. As for the judiciary, the Supreme Court has historically and perennially been hostile to Congress’s environmental agenda; and as for the executive, one need go no further than the current administration to see that agenda’s deterioration. With judges currently straining themselves to fit federal environmental regulation into Commerce Clause jurisprudence, it is clear that to the extent that the nation’s environmental laws are imperiled, they stand particularly precariously because of a weakness in the Constitution itself, which does not directly enable such laws. If Congress had been able to invoke some principle other than the Commerce Clause in legislating its agenda, the resulting legislation would have developed on a more stable, less confusing foundation.

Absent an affirmative power that enables Congress to directly regulate environmental conduct, the present coherent and cohesive

168. Tarlock, supra note 9, at 226.
169. Id.
170. See Lazarus, supra note 38, at 706 (“the [Supreme Court] Justices have never fully appreciated environmental law as a distinct area of law,” leaving their attitudes toward environmental law to “become increasingly skeptical over time... notwithstanding the tenacity with which the public, in general, and the legislative and executive branches, in particular, have during this same time period maintained and expanded the nation’s commitment to environmental protection through an increasingly comprehensive and demanding set of legal rules”).
171. See, e.g., Editorial, Surrender in the Forests, N.Y. TIMES MAGAZINE, July 18, 2004, at 4-12. (“The Bush administration has taken apart so many environmental regulations that one more rollback should not surprise us.”).
172. Absent any direct interstate connections, judges often must force the categorization of non-economic activities such as a take of an intrastate species into an economic activity. See Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs (SWANCC), 531 U.S. 159, 193 (2001) (Stevens, J., dissenting) (“the discharge of fill material into the Nation’s waters is almost always undertaken for economic reasons”); Rancho Viejo LLC v. Norton, 323 F.3d 1062, 1072 (D.C. Cir. 2003) (upholding application of the ESA because “both the ‘actor,’ a real estate company, and its ‘conduct,’ the construction of a housing development, have a plainly commercial character”). But see GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 634 (5th Cir. 2003) (finding error in expanding inquiry to activity’s commercial motivations); United States v. Ho, 311 F.3d 589, 602 (5th Cir. 2002) (recognizing that the regulated activity at issue was asbestos removal, not the plaintiff’s commercial enterprise). See also Wood, supra note 34, at 113 (“These cases, like their progenitors, reflect the lengths courts must travel to fit federal regulation of intrastate species into the Commerce Clause box.”); Tarlock, supra note 9, at 223-24.
173. See Steinzor, supra note 37, at 364 (noting that if Congress had invoked some other principle other than the Commerce Clause, “[e]nvironmental federalism might well have developed on a more stable, less confusing foundation”).
federal environmental policy is put in jeopardy. Given that such policy is needed,\textsuperscript{174} and given that no constitutional power can support all applications of such policy either alone or in concert with other powers, a new congressional power must be added. Such a power could take the form of the amendment proposed herein.

B. The Ethical Crisis in Present Federal Environmental Policy

Even if the full breadth and application of federal environmental laws were not constrained by the Commerce Clause such that there would be no legal reason for adopting a constitutional amendment empowering Congress to preserve, protect, and promote the environment, there is a wholly separate ethical reason for adopting a constitutional amendment: to provide a means for clearly expressing the nation's environmental ethic free from the distorting effects created by expressing that ethic through the Commerce Power.

1. The Evolution of the Nation's Environmental Ethic

An "ethic," quite simply, is a principle of right or good conduct.\textsuperscript{175} Aldo Leopold, one of the fathers of environmental ethics,\textsuperscript{176} stated "[a]n ethic, philosophically is a differentiation of social from anti-social conduct."\textsuperscript{177} In the evolution and development of ethics,\textsuperscript{178} the bulk of evolutionary development has been in the ethics that manage human interrelationships. Indeed, the concept of inalienable rights embodied in the Constitution that governs man's relationship towards other men only had its start recently, with the Magna Carta. As Victor Hugo stated, "no doubt it was [first] necessary to civilize man in relation to man."\textsuperscript{179}

Hugo continued, however, to note that while "[t]hat work is already advanced and is making progress every day... man must be civilized also in relation to nature."\textsuperscript{180} Writing in the mid-nineteenth century, Hugo noted that "[i]n the relations of man with the animals, with the flowers, with all the objects of creation, there is a whole great ethic, scarcely

\begin{itemize}
\item \textsuperscript{174} See supra Part 1.
\item \textsuperscript{175} AMERICAN HERITAGE DICTIONARY 467 (2d ed. 1985).
\item \textsuperscript{176} RODERICK F. NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 63 (1989) ("Few today would challenge Aldo Leopold's reputation as one of the seminal thinkers in the modern American development of environmental ethics."); J. Baird Callicot, Animal Liberation: A Triangular Affair, 2 ENVTL. ETHICS 311 (1980) (describing Leopold as "the father or founding genius of recent environmental ethics").
\item \textsuperscript{177} ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 202 (1964).
\item \textsuperscript{178} Ethics, like man, evolve. HOLMES ROLSTON III, ENVIRONMENTAL ETHICS: DUTIES TO AND VALUES IN THE NATURAL WORLD 342 (1988); see generally CHARLES DARWIN, DESCENT OF MAN 137-41 (1988).
\item \textsuperscript{179} VICTOR HUGO, THE ALPS AND PYRENNES 279 (John Manson trans., 1898).
\item \textsuperscript{180} Id.
\end{itemize}
perceived as yet, which will at length break through into the light and which will be the corollary and the complement to human ethics."181

Since then, philosophers and ethicists have stated, "the moral life is not complete without a sensitive approach to one’s place—to the fauna, the flora, the landscapes surrounding one’s life."182 Indeed, Holmes Rolston III pointed out in his book *Environmental Ethics* that the "aggressive attempt" at which the anthropocentric ethics that have developed so far “make humans the sole loci of value, transcending the otherwise valueless world... stunts humanity, because it does not know genuine human transcendence—an overarching care for the others."183 According to Rolston and others,184 “[i]nterhuman ethics is not mandatory and environmental ethics optional. Nor does justice require interhuman ethics and charity permit an environmental ethic. Duty demands both. *All ethical agents who seek mature character are required to develop an environmental ethic as well as a cultural ethic.*”185

In whatever particular expression this ethic takes form,186 man must maintain a high regard for the land’s value in a philosophical sense that extends far more broadly than consideration of the land’s sole economic value. As Leopold observed, “It is inconceivable to me that an ethical relation to land can exist without love, respect, and admiration for land, and a high regard for its value. By value, I of course mean something far broader than mere economic value.”187 Indeed, when Rolston looked at nature, he catalogued fourteen values, only one of which was economic

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181. *Id.* at 278.

182. *Rolston, supra* note 178, at 341; *Id.* at 192 (“no ethics is complete until one has an appropriate respect for fauna, flora, landscapes, and ecosystems”).

183. *Id.* at 337.

184. For example, Albert Schweitzer wrote that “[a] man is ethical only when life, as such, is sacred to him, that of plants and animals as that of his fellowmen, and when he devotes himself helpfully to all life that is in need of help.” *Albert Schweitzer, Out of My Life and Thought: An Autobiography* 158-59 (C.T. Campion trans., 1949).

185. *Rolston, supra* note 178, at 333-34 (emphasis added); see also *id.* at 340-41 (“Humans can achieve genuine altruism; it begins when they recognize the claims of other humans—whether or not such claims are compatible with their own self-interest—but is not complete until humans can recognize the claims of nonhumans: fauna, flora, species, ecosystems, landscapes. In that sense environmental ethics is the most altruistic form of ethics.”); *Aldo Leopold, Some Fundamentals of Conservation in the Southwest, 1 Envtl. Ethics* 131, 140 (1979) (“A moral being respects a living thing”); *Albert Schweitzer, Indian Thought and Its Development* 261-62 (C.E.B. Russel trans., 1936) (“By reason of the quite universal idea ... of participation in a common nature, [one] is compelled to declare the unity of mankind with all created beings.”).

186. For instance, Albert Schweitzer once said that under an environmental ethic, one “shatters no ice crystal that sparkles in the sun, tears no leaf from its tree, breaks off no flower, and is careful not to crush any insect as he walks.” *Albert Schweitzer, Philosophy of Civilization: Civilization and Ethics* 254 (John Naish trans., 1923). This is but one expression of the ethic and by no means the only expression.

value. These non-economic values point out powerful additional contributions, beyond all the standard and familiar ways in which nature contributes to human welfare, that are easily overlooked and impossible to quantify.

Today, societies throughout the world evince and express such an environmental ethic. For instance, at least forty-two jurisdictions in the United States presently recognize some form of the public trust doctrine. That doctrine posits an absolute duty and obligation on the part of the state to manage and maintain certain lands solely for those lands' intrinsic value. Accordingly, states have imposed on themselves limits and restrictions on the proper disposition of these lands to the exclusion of economic considerations. In other words, these jurisdictions have adopted an environmental ethic as put forth by Hugo, Leopold, Ralston, and others.

Such a significant environmental ethic, in fact, pervades society. Governments throughout the world are not only legislating regarding the environment, but they are also elevating environmental protection to constitutional status in the form of statements regarding rights, duties, and obligations. Over half of the states in the United States have such constitutional provisions regarding the environment, while at least fifty nations do as well. Indeed, with passage of the major federal

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188. ROLSTON, supra note 178, at 3-27.
190. John C. Tucker, Constitutional Codification of an Environmental Ethic, 52 FLA. L. REV. 299, 300 (2000) ("Society has developed an environmental ethic during the course of the past several centuries.").
192. See, e.g., Nat'l Audubon Soc'y v. Sup. Ct., 658 P.2d 709, 724 (Cal. 1983) (stating that the public trust doctrine "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands"); In re Water Use Permit Applications, 9 P.3d 409, 450 (Haw. 2000) ("if the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time").
193. Tucker, supra note 190, at 306 (there is "powerful evidence of a societal environmental ethic"); Craig A. Arnold, Working out an Environmental Ethic: Anniversary Lessons from Mono Lake, 4 WYO. L. REV. 1, 5 (2004) ("The concept of an environmental ethic is now significant in American culture and environmental policy and activism.").
194. Tucker, supra note 190, at 307 n.44. At least thirty states of the United States have constitutional provisions regarding the environment.
195. Id. at 307, 312 n.73. E.g., ARG. CONST. § 41(1) ("All inhabitants are entitled to the right to a healthy and balanced environment fit for human development"); PORT. CONST. §III, ch. II, art. 66(1) ("Everyone has the right to a healthy and ecologically balanced human environment and the duty to defend it."); BRAZ. CONST. art. 225 ("All persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to healthy life, it being the duty of the Government and of the community to defend and preserve it for present and future generations."). In even more countries, the state is specifically empowered to protect the environment. E.g., INDIA CONST. art. 48A ("The State shall endeavor to protect and
environmental laws in the 1970s, Congress adopted and expressed a pervasive environmental ethic, which was nearly unanimous.

2. Present-Day Expressions of the Nation's Environmental Ethic Are Distorted by the Commerce Clause

Presently at the federal level, expressions of this pervasive ethic are distorted by the limitations imposed on those expressions by the Commerce Clause. For instance, when one looks at the federal policy regarding the environment, one is struck by the focus on instrumental and economic value to the exclusion of any other values including intrinsic value. For instance, back in 1920, the Supreme Court in *Missouri v. Holland* noted that protecting migratory birds was important not for the sake of the birds themselves, but because such birds are "protectors of our forests and our crops" as well as "a food supply."

Such contorted articulations of the nation’s environmental ethic continue to this day. For instance, in *NAHB*, the court upheld land use restrictions based on the presence of the endangered Delhi Sands Flower-Loving Fly, not based upon the Fly’s own intrinsic value but instead on...

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196. See *NASH*, supra note 176, at 8 ("An ethical rather than an economic approach to environmental protection lay behind ideas like [the Endangered Species Act and Marine Mammal Protection Act]."); see also Presidential Statement on Signing S.1983 into Law, reprinted in LIBRARY OF CONG., ENVT. POL’Y DIV., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 487 (1982) [hereinafter LEGISLATIVE HISTORY] ("Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed ... [that] forms a vital part of the heritage we all share as Americans.").

197. For instance, the ESA passed by vote of 345 to 4 in House, with 73 not voting, 119 Cong. Rec. 42,915-16 (1973), reprinted in LEGISLATIVE HISTORY, supra note 196, at 483-85, and unanimously in the Senate, 119 Cong. Rec. 42,535 (1973), reprinted in LEGISLATIVE HISTORY, supra note 196, at 474. Interestingly, the Commerce Clause was similarly considered nearly unanimously. Abel, supra note 44, at 444 ("in the convention itself ... [the Commerce Clause] was agreed to without dissent.... In the ratifying conventions, the same lack of opposition is disclosed."); id. at 444-45 ("[Commerce power] seems rather to have been acquiesced in semper omnibus et ubique as an appropriate matter for federal control.").

198. The "intrinsic value" of an object is "that value it has which is not dependent on its contribution to the value of another object." *NORTON*, supra note 189, at 151-52.


200. 130 F.3d 1041 (D.C. Cir. 1997).
the economic value of biodiversity and the prevention of destructive interstate competition. Likewise in *Palila v. Hawaii Dept. of Land and Natural Resources*, the court upheld a challenge to the listing of the Palila as an endangered species because the ESA established "a national program to protect and improve the natural habitats of endangered species [to] preserve[] the possibilities of interstate commerce in these species and of interstate movement of persons... who come to a state to observe and study these species." Indeed, in *GDF Realty Investments, Ltd. v. Norton*, the court upheld land use restrictions based on the presence of endangered subterranean invertebrate species not because the ESA sets forth the goal of protecting the "esthetic, ecological, educational, historical, recreational, and scientific value" of these species, but because the "ESA is an economic regulatory scheme."

Such distortions of the environmental ethic expressed in federal environmental law are the result of the Constitution's failure to support federal environmental policy such as species preservation through anything other than the Commerce Clause and its concomitant consideration of economic impacts.

Ethicists such as Leopold lament such discounting of natural value in favor of economic value and disclaim the "subterfuges" that need to be invented in order to give non-economic things such as endangered species or isolated wetlands "economic importance." These "subterfuges" have the perverse effect of tending to protect a ubiquitous yet threatened species in favor of the last sole few survivors, or a lightly but not entirely destroyed wetland in favor of the nearly destroyed wetland, given that the "subterfuges" cannot properly account for these resources' actual value. Leopold, accordingly, concluded that such a system of conservation and preservation, based solely on economic self-interest,
was "hopelessly lopsided... tend[ing] to ignore, and thus eventually to eliminate, many elements in the land community that lack commercial value, but that are (as far as we know) essential to its healthy functioning." According to Leopold, this could not be right. He warned of "the dangers that lurk in the semi-honest doctrine that conservation is only good economics," noting the false assumption that "the economic parts of the biotic clock will function without the uneconomic parts."

Leopold and Rolston both conclude that such behavior is morally immature. According to Leopold, "[a] thing is right only when it tends to preserve the integrity, stability, and beauty of the community, and the community includes the soil, waters, fauna, and flora, as well as people." Under an ecological conscience, "economic provocation is no longer a satisfactory excuse for unsocial land-use, (or, to use somewhat stronger words, for ecological atrocities)." Rolston, likewise, questioned the fundamental logic of a philosophy that championed economic value over all else:

Can humans genuinely gain by exploiting the fractional wilds that remain? What does it profit to gain the world, only to lose it? To gain it economically, to fence it in, pave it over, harvest it, only to lose it scientifically, aesthetically, recreationally, religiously, as a wonderland of natural history, as a realm of integral wildness that transcends and supports us—and perhaps even to lose some of our soul in the tradeoff?

11. LEOPOLD, supra note 177, at 214.
12. Ecological Conscience, supra note 210, at 52 ("It cannot be right, in the ecological sense, for a farmer to drain the last marsh, graze the last woods, or slash the last grove in his community, because in doing so he evicts a fauna, a flora, and a landscape whose membership in the community is older than his own, and is equally entitled to respect.").
13. Id. at 51.
14. LEOPOLD, supra note 177, at 214.
15. Ecological Conscience, supra note 210, at 52 ("The practice of conservation must spring from a conviction of what is ethically and esthetically right, as well as what is economically expedient."); ROLSTON, supra note 178, at 289 ("There is something morally immature in a land dedicated to liberty for its citizens and to the total conquest of nature, maximizing fauna and flora as nothing [but] (economic) resources."). Not only is basing environmental policy on economic value morally wrong, it is analytically flawed given that "one of the central assumptions of the Benefit Analysis approach, that meaningful and nonarbitrary dollar values can be assigned individual species, is false." NORTON, supra note 189, at 120; see also id. at 43 ("intrinsic value of species cannot be reduced to demand value by hypothetically inferring felt preferences"); id. at 50 ("dollar figures assigned to the value of species' contributions to ecosystem services...[are] essentially arbitrary. Such figures would depend on so many unjustified assumptions about ecosystem functioning that no credence could be given them.").
17. Id.
18. ROLSTON, supra note 178, at 289.
Given that all federal environmental policy is based on the Commerce Clause and therefore is based on "economic provocation," the federal environmental policy that has been developing over the past thirty-five years amounts to a stunted and incomplete expression of the nation's environmental ethics. Moreover, absent some other constitutional power that enables federal regulation that is not based on "economic provocation," federal environmental policy will continue to fail to properly and fully express and parallel the evolution of this nation's ethics.

The solution to this situation, then, is to reconcile congressional authority under the Constitution with the environmental ethic that pervades society, and "a constitutional amendment remains the most forthright means of transforming a strong nationwide desire for fundamental change into law, particularly in the realm of such inherently constitutional matters as the relations between national and state governments." What is needed is an amendment to allow Congress to "quit thinking about decent land use as solely an economic problem." An amendment, such as the one proposed in this Article, to empower Congress to preserve, protect, and promote the environment independent of any relation to commerce, satisfies this requirement and will free Congress's expression of the nation's environmental ethic from the distortions attendant to such expression under the Commerce Clause.

III. ANALYSIS OF PROBABLE ADOPTION

In evaluating the likelihood of the adoption of any constitutional amendment, one is best guided by looking at previous constitutional amendments that have both succeeded and failed. Looking into this nation's history, one rather quickly discovers that the amendments that have been adopted generally fit particular patterns. For instance, most successful amendments have tended to "limit government infringement of existing rights rather than defining new rights." Other successful amendments have "describe[d] election procedures and define[d] governmental structure." Indeed, the patterns into which successful amendments fall are so readily discernable that Professor J.B. Ruhl has

219. See Boudreaux, supra note 122, at 597-98.
220. LEOPOLD, supra note 177, at 224; see also Ecological Conscience, supra note 210, at 53 ("Cease being intimidated by the argument that a right action is impossible because it does not yield maximum profits, or that a wrong action is to be condoned because it pays."); ROLSTON, supra note 178, at 260 ("The hierarchical ordering here advocated prevents further reduction of environmental goods to economic or market values. From here on, such values—through present and considerable—come last in an ethic of the commons.").
221. "I have but one lamp by which my feet are guided, and that is the lamp of experience. I know no way of judging of the future but by the past." Edward Gibbon.
222. Schmaltz, supra note 7, at 472.
223. Id. at 457.
set up a framework through which constitutional amendments can be analyzed to determine their likelihood for success.\textsuperscript{224}

A. A Framework for Analysis

In Professor Ruhl's framework, there are four analytical dimensions at play: (1) the function that a proposed amendment serves,\textsuperscript{225} (2) the proposed amendment's target,\textsuperscript{226} (3) whether the amendment is "socially acceptable and institutionally necessary given conditions in the social and political realms,"\textsuperscript{227} and (4) whether the amendment espouses policies that are reducible to legal principles that are binding in effect, sufficiently clear to minimize unanticipated interpretations, and sufficiently stable and flexible to provide an enduring statement of social policy even in the face of shifting political climates.\textsuperscript{228}

The combination of where a proposed amendment falls along these independent dimensions determines the likelihood of adoption. For instance, an amendment that is operational in that it deals with the federal government's "operating system text"\textsuperscript{229} ranks highly on the functional dimension while amendments that explicitly create new rights do not.\textsuperscript{230} Likewise, an amendment whose target is intra- or

\textsuperscript{224} See generally Metrics, supra note 9; Good Message, Bad Idea, supra note 9.
\textsuperscript{225} Metrics, supra note 9, at 256.
\textsuperscript{226} Id. at 259-60.
\textsuperscript{227} Metrics, supra note 9, at 254. Article V so much as demands this of any proposed amendment.
\textsuperscript{228} Good Message, Bad Idea, supra note 9, at 48; Thomas E. Baker, Towards a "More Perfect Union": Some Thoughts on Amending the Constitution, 10 WIDENER J. PUB. L. 1, 17 (2000) ("only matters of lasting national consensus fully deserve our constitutional allegiance").
\textsuperscript{229} Metrics, supra note 9, at 256.
\textsuperscript{230} Id. at 257-58. Ruhl, and others, so much as dismiss such "aspirational" amendments out of hand, using the Eighteenth Amendment (Prohibition) as their posterchild. Id. at 260 (amendments "purporting to express aspirational values or regulate civil relations, or do both, should set off bells and whistles in the political evaluation process."); id. (calling Prohibition an "unmitigated disaster."); see also Tarlock, supra note 9, at 223-24.

These commentators, however, largely ignore the Thirteenth Amendment, which prohibited slavery and effectively announced a new ethic regarding man's relations to man, making it perhaps the most aspirational amendment ever adopted. That amendment declared a very ethical and aspirational principle—that slavery is immoral and could not be condoned, a notion that up until then had been considered radical. NASH, supra note 176, at 200 ("A century and a half ago a group of American reformers proposed a change in thought and action that, for its time, was no less radical than that mandated by biocentric ethics."); see also DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823, at 11 (1975) (noting that a "profound transformation of moral perception" in the late eighteenth century exposed slavery as an ethical wrong). See generally Edmund S. Morgan, Slavery and Freedom: The American Paradox, 59 J. AM. HIST. 5 (1972). The commentators also ignore the Nineteenth Amendment, which in granting women the right to vote is equally aspirational and equally an extrapolation of the nation's liberal traditions and not just a tweaking of the operating rules of government. Given that the Constitution is, after all, intended to be the nation's ethical repository, see Ronald Dworkin, Is There Really No Right Answer in Hard Cases?, 53 N.Y.U. L. REV. 1 (1978) (envisioning the Constitution "as a system of abstract moral principles that contemporary judges
intergovernmental relations ranks high on the “target” dimension while amendments that regulate government-citizen or citizen-citizen relations do not. According to Ruhl, amendments that focus on intra- or intergovernmental relations represent the common core of amendments that are adopted, which also tend to be fairly operational and functional amendments. Those proposed amendments that rank highly on the other two dimensions also have a higher likelihood of adoption.

On all of these grounds, a proposed amendment to empower Congress to “preserve, protect, and promote the environment” fits the bill. First, such a proposed amendment forgoes declaring any right to a clean environment and instead only grants Congress the power to regulate the environment in whatever manner it sees fit. As such, the proposed amendment meets the criteria that amendments be “closely associated with the operating system function of the Constitution.”

Second, the amendment is based on broad social approval. When asked which level of government should have more responsibility for achieving the goal of protecting the environment, respondents to a Wall Street Journal/NBC News Poll selected the federal government by a margin of 50 percent to 38 percent. Another poll revealed that 62 percent of the voting public thinks that the federal government should be doing more to protect the environment. These numbers comport with the polling numbers of other successful amendments. For instance, 60...

must interpret according to their own lights”); see also Tucker, supra note 190, at 303 (“Constitutions reflect basic principles and values that are important to society.”), there is no better place for such aspirational ideals than in the Constitution. See Laurence H. Tribe, A Constitution We Are Amending: In Defense of a Restrainted Judicial Role, 97 HARV. L. REV. 433, 441 (1983) (the Constitution is “a record of the nation's deepest ideological battles”). As Professor Tribe has stated, “[t]he Constitution serves both as a blueprint for government operations and as an authoritative statement of the nation's most important and enduring values.” Id. Therefore, that an amendment is aspirational should not preclude its inclusion in the Constitution.

231. Metrics, supra note 9, at 259-60.
232. Id. Outliers—such as more aspirational amendments and those that regulate citizen-citizen relationships—do not belong and are largely doomed to failure. Id. at 261.
233. See id. at 254; Good Message, Bad Idea, supra note 9, at 48; see also Baker, supra note 228, at 17 (“only matters of lasting national consensus fully deserve our constitutional allegiance”).
234. By contrast, an environmental quality amendment, which tends to be more aspirational than functional and whose target is more the citizen-citizen relationship than intra- or intergovernmental relations, will have little chance of success. Metrics, supra note 9, at 250 (stating that such an amendment “does not belong in the Constitution”).
235. Id.
237. Steve Neal, Bush Ripe for Green Revolt, CHI. SUN, Nov. 21, 2003, at 49.
238. It could be argued that the polling numbers regarding which level of government is best suited to regulate the environment have no bearing on public support for an amendment empowering one particular level of government to regulate the environment. However, if one believed that the federal government should do more to protect the environment, then, a priori,
percent of those polled in 1971 were in favor of lowering the voting age from 21 to 18 (what would become the Twenty-Sixth Amendment);239 64 percent of those polled in 1957 were in favor of a constitutional amendment similar to the Twenty-Fifth Amendment specifying presidential succession;240 and 59 percent of the public favored what would become the Twenty-Second Amendment limiting presidents to two terms in office just before the House of Representatives adopted such an amendment.241 None of these polling numbers reflect supermajorities, yet they demonstrate sufficiently broad and pervasive public support to rank highly on this dimension.242 This has led commentators to conclude “there is a pervasive belief that the federal government has a substantial role to play in addressing environmental concerns.”243

Third, the proposed amendment addresses policy goals that are not capable of being fully implemented through other political or legal institutions. As discussed supra, though constitutional powers exist that allow Congress to regulate the environment, those powers require necessary predicates that are not always present or result in indirect and ineffective regulation at best.244 Moreover, the present political and legal institutions are too morally immature to properly express environmental policy goals. As such, it is clear that if left to their own existing constitutional authorities, the present institutions of government will fail to bring about the socially desired policy.

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239. George Gallup, 60% in Poll Favor Local Voting at 18, N.Y. TIMES, Apr. 25, 1971, at 49.
241. George Gallup, Public Upholds 2-Term Limit for Presidents, L.A. TIMES, Dec. 16, 1956, at A5; see also Two-Term Limit in Presidency Favored, L.A. TIMES, Feb. 25, 1947, at A4. In fact, public opinion was consistently against such an amendment up until December 1943, when the number of those in favor of such an amendment broke 50 percent. That number remained above 50 percent, reaching 57 percent at the time that Congress proposed the amendment on March 21, 1947. The amendment was later ratified in 1951.
242. By contrast, when a majority disagrees with a proposed amendment, it is doomed to failure. For instance, 76 percent of Americans polled back in 1939 disagreed with a proposed amendment to increase the presidential term from four to six years with no reelection. 6-Year Presidency Opposed by Voters, N.Y. TIMES, Jan. 25, 1939, at 10. Nothing ever became of the proposal.
243. Adler, supra note 11, at 238; see also Steinzor, supra note 37, at 364 (“As the dramatic expansion of health and safety regulation over the past half century indicates, there is an enduring national consensus that one of the roles of democratic government is to moderate purely economic forces, increasing every citizen’s opportunity to enjoy decent health and the maximum possible life span.”).
244. See supra notes 165-166 and surrounding text.
Lastly, the proposed amendment also passes the test that it be stable, flexible, and reducible to legal principles that are binding in effect as well as sufficiently clear. First, the amendment is eminently flexible, leaving it to the current politics of the day to determine the expression of the nation’s environmental policy rather than setting it in stone at the time of adoption. Nothing in the proposed amendment in fact requires Congress to do anything regarding the environment. The proposed amendment merely enables Congress to do something should it choose to do anything at all. Second, the amendment is perfectly reducible to legally binding principles given that it deals only with altering the operating rules of the system. Last, the proposed amendment is sufficiently clear to minimize unanticipated interpretations: the proposed language is not any more susceptible to unanticipated interpretation than the language of previously adopted amendments. Indeed, to the extent that the proposed amendment could be used to expand congressional power into other areas reserved to the states, it is more likely than not that Congress already has the power to regulate that area directly under existing constitutional authorities such as the Commerce Clause.

B. An Historical Analog—the Sixteenth Amendment

Overall, the proposed amendment fits the framework for adoption derived from generalizing the success of previous amendments to the Constitution. In fact, there is one readily apparent analog to the present proposed amendment: the Sixteenth Amendment. That amendment granted Congress the power to “lay and collect taxes on

245. Some might complain that the amendment is too flexible such as to form no guarantee of any right at all, rendering it worthless. Those who so complain should note that without the amendment and the small likelihood of the adoption of a fuller Environmental Quality Act (EQA), the proposed amendment is still a tremendous leap in the evolution of this nation’s ethical and legal approach to the environment.

246. One possible interpretation is that, like the Commerce Clause, the proposed amendment could, through the equivalent of the dormant commerce clause, preclude states from regulating the environment. To the extent that the dormant commerce clause was created solely by implication, see, e.g., Oklahoma Tax Comm’n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995), this “unanticipated” interpretation could be avoided by appropriate language in the proposed amendment that nothing therein precludes the states from regulating the environment.

Furthermore, to the extent that “unanticipated interpretations” are raised in an argument against adoption of the proposed amendment, one should be mindful of the Fourteenth Amendment. Serious debate can be raised regarding that Amendment’s espousal of apparently clearly reducible legal principles given the complex and complicated judicial interpretation of that amendment. E.g., George Anastaplo, Amendments to the Constitution of the United States: A Commentary, 23 Loy. U. Chi. L.J. 631, 794 (1992) (“Whereas the Thirteenth Amendment is fairly simple and straightforward, the Fourteenth Amendment is much more complicated. Even more complicated is what has been done with the Fourteenth Amendment by courts and scholars, so much so that nothing I could say here is apt to provide more than the barest guidance to anyone familiar with the Amendment, its interpretation, and its implementation.”).
incomes...without apportionment.\textsuperscript{247} a power that had previously been declared by the Supreme Court to be external to Article I's grant of power. \textsuperscript{248} The Court reached this outcome in what are known as the Income Tax Cases in two badly divided 5-4 votes despite popular support for an income tax. Thereafter, the Court appeared to retreat.\textsuperscript{249} Furthermore, its composition changed. This created tremendous legal uncertainty regarding the constitutionality of an income tax,\textsuperscript{250} with many believing that the Court had been wrong.\textsuperscript{251}

A similar situation exists regarding contemporary federal environmental policy. Though there has not yet been a definitive Supreme Court case regarding the constitutionality of federal environmental policy, the \textit{SWANCC} decision plays an analogous role with regard to that policy as the Income Tax Cases played in federal income tax policy. Whereas the Income Tax Cases declared that a federal income tax was unconstitutional, the \textit{SWANCC} decision, an equally divided 5-4 decision, effectively removed application of the Clean Water Act to isolated wetlands from the reach of the federal government as though such an application were unconstitutional.\textsuperscript{252} Furthermore, by not addressing the constitutional question directly, the Court left tremendous legal uncertainty regarding the constitutionality of several aspects of federal environmental policy,\textsuperscript{253} the same type of uncertainty that was left by the Income Tax Cases. Lastly, as with the Income Tax Cases, many believe that the Court got \textit{SWANCC} wrong.\textsuperscript{254}

In the case of the federal income tax, it was decided, given the popularity of an income tax, that a constitutional amendment should be adopted as it would have been "indelicate, at least, for the Congress of the United States to pass another measure and ask the Supreme Court to

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  \item \textsuperscript{247} U.S. CONST. amend. XVI.
  \item \textsuperscript{248} See Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Pollack v. Farmers Loan & Trust Co., 158 U.S. 601, 637 (1895) (finding unapportioned income tax unconstitutional); see also Brushaber v. Union Pac. R. Co., 240 U.S. 1, 11 (1916) ("the 16th Amendment provides for a hitherto unknown power of taxation").
  \item \textsuperscript{249} E.g., Knowlton v. Moore, 178 U.S. 41 (1900).
  \item \textsuperscript{250} Erik M. Jensen, \textit{The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"} 33 ARIZ. ST. L.J. 1057, 1110 (2001).
  \item \textsuperscript{251} See 44 Cong. Rec. 1351 (1909) (statement of Sen. Bailey) ("I feel confident that an overwhelming majority of the best legal opinion in this Republic believes that it [the Income Tax Cases] was erroneous.").
  \item \textsuperscript{252} See Christopher H. Schroeder, \textit{Environmental Law, Congress, and the Court's New Federalism Doctrine}, 78 IND. L.J. 413, 457 (2003) ("\textit{SWANCC} removes the federal government from this area as surely as a holding of unconstitutionality would, but without touching the constitutional issue itself.").
  \item \textsuperscript{254} E.g., id. at 889 ("The \textit{SWANCC} decision wrongly limited the FWPCA to only navigable waters and non-navigable waters closely related to navigable waters.").
\end{itemize}
pass upon it, when they had already passed upon the proposition."255 As such, the Sixteenth Amendment was drawn up "evidently in recognition of the limitation upon the taxing power of Congress thus determined,"256 to represent a narrow change to the operating rules of the federal government.257 According to Senator Carter of Montana, "in the midst of that bewildering condition, it is infinitely better for us to refer the constitutional amendment to the several states, so that the question involving the power of Congress to levy an income tax may be forever and effectually put at rest."258

In the present situation, a similar course of action is indicated. Just as the Sixteenth Amendment was narrowly drawn, so too does the present proposed amendment only narrowly change the operating rules of government, making explicit a grant of power that, like the unapportioned income tax, is not explicitly granted in Article I.259 Furthermore, as with the Sixteenth Amendment, the present proposed amendment enables Congress to ratify policy choices that have substantial public support. Overall then, if the Sixteenth Amendment is to be any guide, the proposed amendment should likely be adopted.

IV. PROBABLE IMPACT OF THE PROPOSED CONSTITUTIONAL AMENDMENT

So what will adoption of the proposed constitutional amendment accomplish? At first blush, it would appear as though not much will change. After all, Congress has already legislated on many if not all relevant areas of the environment. Moreover, the amendment does not grant any right to a clean environment, so there would be no flood of litigation, no expansion of standing, and no alteration of the extent to which courts defer to administrative agencies—all the usual concerns regarding environmental law. Indeed, the amendment will only protect those exercises of congressional power at the very margins of the Commerce Clause given that most applications of the federal environmental law are already valid under that clause.260

257. Id. at 206 ("A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction ... "); also Brushaber v. Union Pac. R. Co., 240 U.S. 1, 18 (1916); see also Bruce Ackerman, Taxation and the Constitution, 99 COLUM. L. REV. 1, 41-42 (1999); Jensen, supra note 250, at 1116-18.
258. 44 Cong. Rec. 3995 (1909).
259. Indeed, many of the amendments since 1787 similarly grant Congress additional power over and above the initial grant in Article I. See U.S. CONST. amend. XIII, § 2; amend XIV, § 5; amend XV, § 2; amend. XIX; amend. XXIII, § 2; amend. XXIV, § 2; amend. XXVI, § 2. These clauses all grant Congress the power to enforce the amendment's provisions by appropriate legislation.
260. Daniel A. Farber, Environmental Federalism in a Global Economy, 83 VA. L. REV. 1283, 1311 (1997) ("For the present, at least, the massive body of federal environmental statutes resting on the commerce power seems safe from constitutional attack.").
The proposed amendment, though, would legitimize existing federal environmental laws. This will stop the marginalization and ossification that those laws are currently experiencing. The amendment could accomplish this, moreover, without requiring that those laws be re-passed under the new power.\(^{261}\) To avoid the potential political gridlock (let alone scuttling) that could ensue were such legislative acts as the Endangered Species Act reopened for consideration, the amendment itself must expressly make its application retroactive.\(^{262}\) With such retroactivity,\(^{263}\) laws such as the Endangered Species Act and the Clean Water Act would be placed beyond the reach of the constitutional challenges to which these laws are so readily subject today, resulting in a conservation of judicial resources and greater certainty in the law.

Moreover, adoption of the proposed amendment will free environmental regulation from the shackles of economic considerations. The amendment will reconcile the Constitution with the nation’s ethics and bridge the gap that has been growing in the nation’s legal and political institutions. With a single stroke of a pen, an ethical balance can be restored in the nation. Where that will take the country is unclear. It is clear, however, that species and habitat will be able to be championed over economic gain. Free from economic considerations, decisions will be able to be made based on a fuller and more ethically proper conception of what is “right.”\(^{264}\) On the eve of the federal government de-designating

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\(^{261}\) See William M. Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of “Unconstitutional” Statutes*, 93 COLUM. L. REV. 1902, 1934, n.122 (“when a constitutional amendment is passed that permits the legislature to adopt a statute that it could not previously adopt, the case law has consistently indicated that—unless the amendment is intended to be retroactive—a statute that was unconstitutional prior to the amendment will be enforceable only if it is repassed after the amendment is ratified”); see also Newberry v. United States, 256 U.S. 232, 254 (1921) (“An after-acquired power can not *ex proprio vigore* validate a statute void when enacted.”).

\(^{262}\) State v. Yothers, 659 A.2d 514, 520 (N.J. Super. App. Div. 1995) (“Constitutional amendments can validate previously unconstitutional statutes if there is a clear intent to do so.”); Bonds v. State Dep’t of Revenue, 49 So.2d 280, 282 (Ala. 1950) (“It remains now only to observe, as the trial judge did, that there is no reason why a constitutional amendment cannot by the use of express and clear terms validate and confirm an act of the legislature previously enacted but invalid on account of a failure to observe provisions of the State Constitution.”); Comstock Mill & Mining Co. v. Allen, 31 P. 434, 435 (Nev. 1892) (“If the statute was in conflict with the constitution as it stood at the time of the passage of the law, the subsequent change in the constitution, authorizing such legislation, would not validate it.”).

\(^{263}\) For instance, the proposed amendment could include the following language: “All congressional enactments regarding the environment prior to final ratification of this amendment shall be deemed to have been enacted under the authority of the grant of power in this amendment.”

\(^{264}\) In fact, it is possible that the debate over the proposed amendment will energize those long dormant liberal ideals upon which this country was founded and return the current political debate, characterized by such congressional meddling with these ideals as the Marriage Protection Amendment, S.J. Res. 1, 109th Cong. (2005), from out of the conservative wilds.
millions of acres of critical habitat under the ESA due to "cost" considerations, that alone would be a significant impact of adoption.

CONCLUSION

As Aldo Leopold once noted, "It has required 19 centuries to define man-to-man conduct and the process is only half done; it may take as long to evolve a code of decency for man-to-land conduct." Yet the nation and the world have advanced far in excess of the schedule predicted by Leopold, compressing the development of an environmental ethic to a span of less than a century. The Constitution, however, has not kept pace, leaving national environmental law and policy to be developed in an ethical and constitutional vacuum. Not only is the constitutionality of the nation's landmark environmental laws now being brought into question, the laws also clearly are ethically immature, relying on economics and commerce alone as the sole factor of their applicability.

A necessary precondition for the existence of democratic forms of government is agreement on ethical fundamentals. A moral revolution has taken place within this country regarding the environment all while the form of the national government has remained static. The result is that "[i]t seems clear that neither 'politics as usual' nor our judicial system can any longer be counted on to continue the impressive environmental progress achieved by the nation over the last 30 years." In light of the particular precariousness of the nation's environmental laws before the judiciary and in light of the divergence between the nation's ethics and the Constitution's ethical forms, "[t]he only way to address the mounting threat to sound, foresighted environmental policy-making appears to be to amend the Constitution itself." It is imperative that the Constitution be updated to enable Congress to act directly to preserve, protect, and promote the environment. It is the right thing to do.

266. Ecological Conscience, supra note 210, at 53.
267. See NASH, supra note 176, at 210 (citing GEORGE SANTAYANA, CHARACTER AND OPINION IN THE UNITED STATES 205-06 (1920)); see generally LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955).
269. Id.