

Closing Statement

Now On Endangered List: Environmental Law Itself



J. William Futrell
President

America's legacy of robust environmental law and policy is now in serious jeopardy. Anti-government ideologues of the bar and the bench are resurrecting the pre-modern dogmas of radical federalism and unfettered economic liberty to attack not just environmental laws themselves but the constitutional substructure on which those laws are erected. According to some advocates and judges, the Constitution demands massive deregulation, special rights for corporations and developers, and the curtailment of citizens' access to justice. If left unanswered, this reinterpretation of constitutional principles could lead to a judicial dismantling of environmental protection in the United States.

Two cases decided last year illustrate just how precarious the foundations of environmental law are becoming. In the first, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the bitterly divided Supreme Court's decision had the effect of invalidating significant portions of the federal wetlands program. Overturning long-settled application of the Commerce Clause to federal environ-

mental protection efforts, the majority sidestepped the constitutional issue and held that the Clean Water Act applies only to traditionally "navigable waters" and immediately adjacent wetlands — leaving unprotected perhaps as much as a third or more of the nation's wetlands. SWANCC has led to a stunning reversal of the nation's longstanding commitment to wetland protection and a virtual invitation to destroy many of our most ecologically critical areas.

In the second case, *Bragg v. Robertson*, the Fourth Circuit Court of Appeals struck down an order limiting mountaintop removal mining in West Virginia. With the blessing of state officials, mining companies are literally blowing off the tops of forested mountains to expose coal seams and dumping the resulting debris into surrounding valleys and streams. Even though this practice violates federal environmental and mining laws, the court ruled that the sovereign immunity principles of the Constitution's Eleventh Amendment barred judicial consideration of the case. The ruling ignored the court's own precedents and forged a greatly expanded doctrine of state rights. If it stands, the case could thwart citizen efforts to hold state officials accountable for even the most blatant violations of environmental law.

Sadly, these are just two examples of a much broader anti-environmental trend evident in dozens of cases decided by federal judges in recent years.

These developments in the courtroom are not accidental, but the result a well-financed effort to reshape the judiciary (as well as the political branches of government) along strict ideological lines. A quarter century ago, the conservative activist William E. Simon articulated a plan to "funnel desperately needed funds to scholars, social scientists, writers, and journalists" who could supply the intellectual underpinnings for a new deregulatory movement. Today, a handful of right-wing foundations provide generous funding for orga-

nizations like the Federalist Society, the Pacific Legal Foundation, and the Institute for Justice, all of which advocate a philosophy of American government hostile to environmental regulation. The Federalist Society has now replaced the American Bar Association as the primary evaluator of candidates for the federal bench.

Environmental groups and the foundations that support them are so busy pursuing worthy single-issue projects with the result that the national marketplace of ideas is dominated by a heavily subsidized class of reactionary thinkers, authors, and lawyers. The enemies of environmental law have been able to propagate urban legends about extortionate land regulators, lazy bureaucrats, and "junk" scientists without a comprehensive and organized response from the environmental community. By allowing their radical ideas to seep unopposed into the national consciousness and find expression in lawsuits and court rulings, the environmental community risks losing the war over fundamental principles even as it battles to improve the laws built on those principles.

ELI is responding to these disturbing trends by launching the Endangered Laws Program, a multi-year initiative designed to halt the erosion of environmental law in the nation's courtrooms and restore intellectual and constitutional legitimacy to environmental protection.

Over the coming months, the Institute will undertake a broad-based effort to reframe the debate over environmental law's critical role in a sustainable global economy. This effort will call on ELI's wide constituency in academia, private practice, public interest organizations, and government to monitor and respond to the flood of decisions in the hundreds of lower courts where the edifice of environmental law is reinspected each year. Without a reinforced commitment to protective environmental law, we are in danger of seeing one of America's proudest achievements collapse as its foundations are eroded.