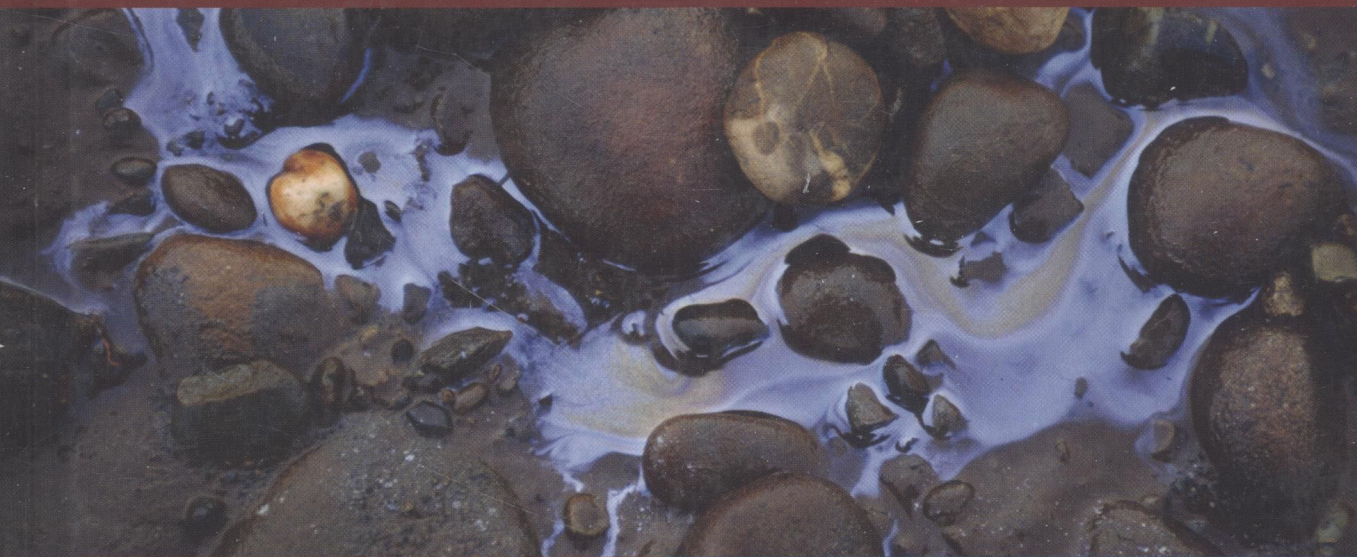
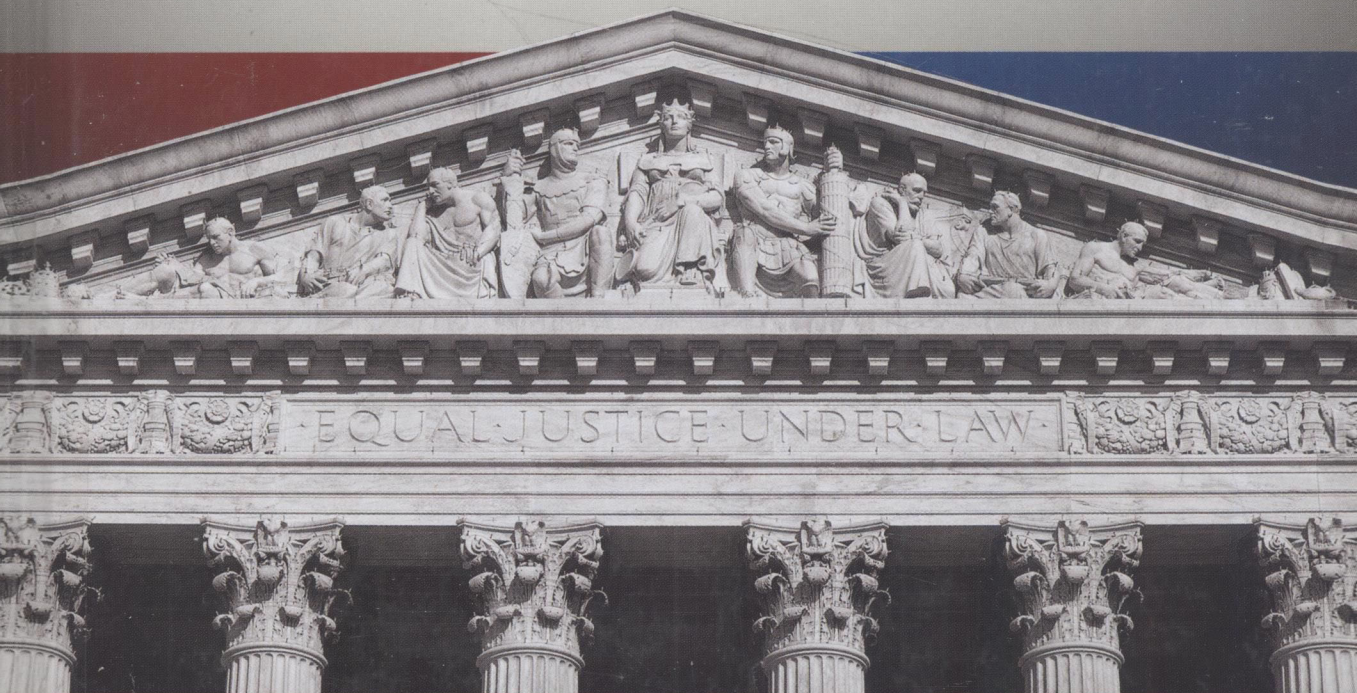


THE SUPREME COURT'S POWER IN AMERICAN POLITICS



THE SUPREME COURT^{AND} THE ENVIRONMENT

THE RELUCTANT PROTECTOR



MICHAEL ALLAN WOLF

The Supreme Court and the Environment: The Reluctant Protector

Michael Allan Wolf



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To

*Harold Morganstern and Norma Schindler,
for providing constant love and support,
and to Wade Berryhill,
for teaching me environmental law.*

Summary Contents

| | |
|---|-----|
| Foreword | xv |
| INTRODUCTION | 1 |
| 1. SETTING THE STAGE: THE SUPREME COURT CONSIDERS FOUNDATIONAL SOURCES OF AMERICAN ENVIRONMENTAL LAW | 7 |
| 2. AN OPEN-MINDED ATTITUDE: THE COURT'S INITIAL RESPONSE TO THE NEW SET OF ENVIRONMENTAL STATUTES | 39 |
| 3. LOSING STEAM: THE COURT ACTS IN THE SHADOW OF THE ENERGY CRISIS | 105 |
| 4. THE REHNQUIST COURT: FROM INDIFFERENCE TO ANTAGONISM | 247 |
| 5. WILL THE CLIMATE CHANGE? A SHARPLY DIVIDED COURT CONSIDERS GREENHOUSE GASES, OIL SPILLS, AND RISING SEAS | 373 |
| Glossary of Acronyms | 467 |
| Text Credits | 471 |
| Selected Bibliography | 473 |
| Index | 477 |

Foreword

In studying the decisions handed down by the United States Supreme Court, we have to keep in mind that they are part of a dialogue with the other branches of government as well as with the states and, indeed, the American people. In some instances the Court is passing on the constitutionality of a law passed by Congress or a state legislature, or on the actions of an administrative agency or even of the president. In other instances the high court's rulings do not take on effective life until Congress, the president, or the states act. For example, when the justices ruled in *Gideon v. Wainwright* (1963) that states had to provide lawyers for indigent defendants, it did not really mean anything until the states actually implemented the ruling and passed legislation to fund this legal assistance.

Chief Justice Earl Warren majestically proclaimed in *Brown v. Board of Education* (1954) that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." But it took more than two decades of congressional and executive action before legalized segregation disappeared from the states.

Most studies of the Court are doctrinal: they view the decisions of the Court in a particular area to see how they have developed, what rules have been created, what arguments and precedents are now in place. This type of analysis is legitimate; in fact it is primarily what is done in law schools. Historians and political scientists tend to look also at the impact the Court's decisions have on different groups and agencies. We want to know how the Court's decisions affected the actions of the states, the president, Congress, and other parts of society—that is, how words convert into action.

The books in this series, *The Supreme Court's Power in American Politics*, do not ignore doctrinal issues, but focus more on how Court decisions are translated into practice. What does it mean, for example, in actual police work when a court says that officers must follow certain rules in gathering evidence or making arrests? What does it mean to a state legislature when the high court holds the legislature's current apportionment scheme unconstitutional? How does an administrative agency respond when the judiciary has ruled that the agency overstepped its authority?

In some areas the responses have been simple, if not always straightforward. For all of the furor raised by critics of the ruling in *Miranda v. Arizona* (1966), within a relatively short time police departments made the *Miranda* warning part of the routine for an arrest. On the other hand, decisions regarding school prayer and abortion have met with opposition, and the responses of state and local governments have been anything but simple or straightforward.

Judges, just as the president and members of Congress do, take an oath of office to preserve, protect, and defend the Constitution. While the document is quite explicit in some areas (such as terms of office), the Framers deliberately wrote other provisions in broad strokes so that the Constitution could grow and adapt to the needs of future ages. Determining what specific meanings should be attached to various constitutional clauses is a task that lies not only with the courts, but with the other branches of government as well, and they do not always agree.

In this volume, *The Supreme Court and the Environment*, by Michael Allan Wolf, we see how an issue that has become a major source of concern, and a source of conflict in public policy debates, has played in the debate between the Court and the other branches of government.

Environmental issues include matters such as clean water and air, so-called greenhouse gasses, global climate change, carbon footprints, and alternative forms of “clean” energy, to name only a few. In many instances, federal legislation on these issues dates back only to the 1970s. The environment, however, even if under different names, has been a matter for law for centuries. English property law dealt with matters such as spoliation of the land, while riparian law considered the results of polluting a water supply. In the United States we can, to some extent, date the beginnings of environmental consciousness to the drive to preserve great tracts of virgin lands in our National Parks system. In the progressive era reformers spoke about the “conservation” of national resources.

The emphasis, then, was on preserving forests and natural wonders such as the Grand Canyon from despoliation. Today our concern is with reversing the harmful effects that urbanization and industrialization have had on our air, water, and land. But the problem is complicated because there does not seem to be any one “right” answer to what should be done. As Professor Wolf shows, this lack of certainty on both process and goals is reflected in the Court’s decisions and in the give-and-take among the various branches of government debating the issue.

In *Miranda*, for example, the Court said that police had to give warnings regarding the rights of persons taken into custody in connection with crimes. In many ways this was an easy issue; the police had very little problem incorporating such a statement into their arrest procedures. The high court’s word on this subject was the last word, and while some groups have continued to complain about Warren Court decisions, the debate is pretty much over.

In the area of the environment, however, there is no simple decision tree. Sometimes even after the courts approve developments in some high-profile cases, other factors will then come into play that may derail the project—such as escalating costs, local opposition, and changing public attitudes.

Moreover, the Court has been far from consistent in its environmental decisions. In areas such as civil rights, apportionment, rights of the accused, and voting rights, while there have been debates both within the high court and in the other branches of government, the major decisions of the past fifty years are all relatively unswerving. Discrimination based on race is bad; while practical politics dictate certain variations, the basic rule in apportionment remains “one person, one vote”; people accused of crimes need to know the nature of their alleged wrongdoing, they need to have the assistance of counsel, and

they must be informed of their rights; voting remains a key element of a democratic society, and the integrity of the ballot process must be maintained.

The Court's decisions on the environment, as this volume shows, have been anything but consistent, and perhaps part of that inconstancy is due to the fact that no broad consensus exists over exactly what the nation's environmental policy ought to be. One result is that in many areas of the debate, even when an issue reaches the high court, the decisions of the justices are not the last word. The give-and-take between the courts and the other branches of government has, as a result, been ongoing and often surprising. This is the tale that Professor Wolf tells so well.

Melvin I. Urofsky
November 2011

Contents

| | |
|--|----|
| Foreword | xv |
| INTRODUCTION | 1 |
| | |
| 1. SETTING THE STAGE: THE SUPREME COURT CONSIDERS FOUNDATIONAL SOURCES OF AMERICAN ENVIRONMENTAL LAW | 7 |
| Public and Private Nuisance | 8 |
| Statutes and Ordinances from the Colonial and Early National Periods | 9 |
| The Justices Wrestle with Public Nuisance Law | 10 |
| Expanding the Reach of the Police Power | 12 |
| Establishing the Legitimacy of Early Federal Regulatory Power | 14 |
| Before the Flood: Judicial Support for Incremental Environmental Regulation | 15 |
| | |
| <i>Documents</i> | |
| 1.1 An 18th Century English Court Upholds a Public Nuisance Prosecution Brought Against an Early Industrial Polluter, May 20, 1757 | 17 |
| 1.2 A 19th Century Wisconsin Private Nuisance Case Pitting a Homeowner Against a Polluting Neighbor, May 1, 1894 | 19 |
| 1.3 A Colonial-Era Ordinance Banning the Operation of Slaughterhouses from Certain Parts of New York City, November 18, 1731 | 20 |
| 1.4 A 1765 Fire Prevention Ordinance from Wilmington, North Carolina, January 14, 1765 | 21 |
| 1.5 Attempting to Resolve a Water Pollution Dispute Between Two Midwestern States, February 19, 1906 | 21 |
| 1.6 An Interstate Air Pollution Source That Was the Subject of U.S. Supreme Court Scrutiny: Tennessee Copper Company's Copper Smelter and Acid Plant in Copperhill, 1912 | 25 |
| 1.7 The Village of Euclid, Ohio, Adopts Its Original Zoning Ordinance, November 13, 1922 | 26 |
| 1.8 The U.S. Supreme Court Gives Its Blessing to Zoning, November 22, 1926 | 27 |
| 1.9 Congress Sets Aside Land for Yellowstone National Park, March 1, 1872 | 29 |
| 1.10 Empowering the Department of Agriculture to Protect Wild and Game Birds, May 25, 1900 | 30 |
| 1.11 Authorizing the Department of the Interior to Create Effective Rules for Protecting Forest Reserves, June 4, 1897 | 31 |
| 1.12 Cancelling the Fraudulent Teapot Dome Lease, October 10, 1927 | 32 |
| 1.13 Supporting State and Local Efforts Against Air Pollution, July 14, 1955 | 34 |
| 1.14 Redeploying a Federal Navigational Statute to Combat Industrial Water Polluters, November 1, 1954 | 35 |

| | |
|--|-----------|
| 2. AN OPEN-MINDED ATTITUDE: THE COURT'S INITIAL RESPONSE TO THE NEW SET OF ENVIRONMENTAL STATUTES | 39 |
| "Hearing" the Silence: Carson, Douglas, Kennedy, and Strategic Litigators | 41 |
| Ratcheting Up Judicial Review of Federal Agency Decision Making | 43 |
| Standing in the Way of Achieving Environmental Protection Through Litigation | 49 |
| Between a (Legislative) Rock and a (Presidential) Hard Place | 52 |
| Through the Courthouse Door: Early NEPA Cases in the High Court | 57 |

Documents

| | | |
|------|---|----|
| 2.1 | The Portent: Rachel Carson Submits a Letter to the <i>Washington Post</i> , April 10, 1959 | 59 |
| 2.2 | A Strong, Dissenting Voice Calling for Judicial Involvement, March 28, 1960 | 60 |
| 2.3 | Justice Douglas Offers High Praise for an Instant Classic, September 1962 | 63 |
| 2.4 | Getting President Kennedy's Attention, August 29, 1962 | 64 |
| 2.5 | The Kennedy Administration's Initial Response, May 15, 1963 | 65 |
| 2.6 | Congressional Interest in Carson's Findings, October 3, 1962 | 66 |
| 2.7 | EDF's Strategic Litigation Meets with Success, May 28, 1970 | 67 |
| 2.8 | A Sign of Success: The FDA Publishes EDF's Zero Tolerance Notice for DDT, July 1, 1970 | 71 |
| 2.9 | Ten Years Later: The EPA Cancels DDT, June 2, 1972 | 72 |
| 2.10 | The U.S. Supreme Court Opens the Door to Judicial Review of an Agency's Decision-Making Process, March 2, 1971 | 73 |
| 2.11 | U.S. Transportation Secretary Volpe Complies with the Supreme Court's Procedural Blueprint and Shifts Positions, January 18, 1973 | 77 |
| 2.12 | A Senate Subcommittee Reviews the Overton Park Highway Controversy, April 19, 1978 | 78 |
| 2.13 | President Harrison Carves Out the Sierra Forest Reserve, February 14, 1893 | 80 |
| 2.14 | The Sierra Club Sues to Protect Its Namesake, June 5, 1969 | 82 |
| 2.15 | Justice Douglas Presents an Alternative Vision of Standing to Protect the Environment, April 19, 1972 | 83 |
| 2.16 | Congress Stands Up for Mineral King Valley, November 10, 1978 | 85 |
| 2.17 | The Dawn of a New Year, Decade, and Era in Federal Environmental Law, January 1, 1970 | 87 |
| 2.18 | Election Eve Defiance: President Nixon Vetoes Clean Water Legislation, October 17, 1972 | 88 |
| 2.19 | President Nixon Follows Through on His Threat to Impound Clean Water Funding, November 22, 1972 | 90 |
| 2.20 | The President Takes His Case to the Press (and the American People), January 31, 1973 | 91 |
| 2.21 | Changing the Rules in the Middle of the Game: The Impoundment Control Act of 1974, July 12, 1974 | 92 |
| 2.22 | Tying Up Loose Ends: The Supreme Court Frees Impounded Water Pollution Funding, February 18, 1975 | 93 |
| 2.23 | Pushing the NEPA Envelope: Attempting to Force Federal Officials to Consider Environmental Effects of Their Actions, April 11, 1973 | 96 |
| 2.24 | A Generous View of Compliance with NEPA, June 24, 1975 | 98 |

| | |
|---|------------|
| 3. LOSING STEAM: THE COURT ACTS IN THE SHADOW OF THE ENERGY CRISIS | 105 |
| Congress Corrects the Court (I): Close Statutory Readings Opposed by Environmentalists | 107 |
| Congress Corrects the Court (II): Close Statutory Readings Favored by Environmentalists | 113 |
| Narrowing NEPA: The High Court Curbs an Effective Strategy for Restricting Federal Agency Activities | 122 |
| Constitutional (Over)Reaching: Judicial Rejection of Rights- and Preemption-Based Challenges to Regulation | 131 |
| The New Default: Deference to Agency Expertise | 138 |
| <i>Documents</i> | |
| 3.1 President Nixon Calls for Energy Independence, November 7, 1973 | 143 |
| 3.2 Congress Comes to the Rescue (I) of the Trans-Alaska Pipeline, November 16, 1973 | 148 |
| 3.3 Congress Comes to the Rescue (II) of Environmental, Civil Rights, and Other Public Interest Attorneys, September 15, 1976 | 149 |
| 3.4 Congress Incentivizes Public Interest Litigation, October 19, 1976 | 150 |
| 3.5 Clarifying Congress's Original Intent, Part One, May 12, 1977 | 151 |
| 3.6 Enacting a Legislative Fix for <i>Hancock v. Train</i> , August 7, 1977 | 152 |
| 3.7 Clarifying Congress's Original Intent, Part Two, July 28, 1977 | 153 |
| 3.8 Enacting a Legislative Fix for <i>EPA v. California ex rel State Water Res. Control Bd.</i> , December 27, 1977 | 153 |
| 3.9 Reining in State Regulation of Activities Affecting the Coastal Zone in <i>Secretary of the Interior v. California</i> , January 11, 1984 | 154 |
| 3.10 Closing the Coastal Zone Management Act Loophole, June 11, 1990 | 157 |
| 3.11 The Utilities Industry Pleads for Economic Considerations in <i>Union Electric Co. v. EPA</i> , August 29, 1975 | 158 |
| 3.12 The Court in <i>Union Electric Co. v. EPA</i> Expresses Impatience with Industry Delays in Complying with the CAA, June 25, 1976 | 159 |
| 3.13 Congress Ensures that Federal Agency Activities Do Not Imperil Protected Species, December 28, 1973 | 162 |
| 3.14 Seeking Federal Protection for a Small Fish, March 7, 1975 | 163 |
| 3.15 Making It Official: The Snail Darter Is Listed, October 9, 1975 | 164 |
| 3.16 The Department of Interior Beggars to Differ with the Government's Position in <i>TVA v. Hill</i> , January 26, 1978 | 165 |
| 3.17 While <i>TVA v. Hill</i> Moves Toward the Justices, Congress Proposes an Exemption Mechanism, April 12, 1978 | 166 |
| 3.18 Taking Legislative Notice of a Pending <i>TVA v. Hill</i> , April 13, 1978 | 168 |
| 3.19 Dam, No: The Majority Reads the ESA Carefully in <i>TVA v. Hill</i> , June 15, 1978 | 169 |
| 3.20 President Carter Reluctantly Affixes His Signature to Changes in the ESA, November 10, 1978 | 175 |
| 3.21 The "God Squad" Rules Against the TVA, February 7, 1979 | 176 |
| 3.22 The Fury of Senator Baker Scorned, January 29, 1979 | 178 |
| 3.23 Not-So-Easy Rider: Another Attempt to Hijack the ESA Process, June 18, 1979 | 179 |
| 3.24 President Carter Again Succumbs to Compromise, September 25, 1979 | 180 |
| 3.25 Look at the Big Picture: The President Justifies His Position on the Tellico Dam, October 20, 1979 | 181 |

| | | |
|-----------|---|------------|
| 3.26 | Reclassifying the Snail Darter, July 5, 1984 | 182 |
| 3.27 | The Plaintiffs in <i>Kleppe v. Sierra Club</i> Make Their Case for a Regional EIS, July 13, 1973 | 184 |
| 3.28 | The Court Limits Agency Duties Under NEPA in <i>Kleppe v. Sierra Club</i> , June 28, 1976 | 186 |
| 3.29 | The Energy Conservation Alternative Under NEPA, August 1, 1973 | 189 |
| 3.30 | 24 States Urge the High Court to Apply NEPA to the Nuclear Power Plant Approval Process, September 8, 1977 | 190 |
| 3.31 | The NEPA Rules Change that the Court Would Discuss in <i>Andrus v. Sierra Club</i> , November 29, 1978 | 192 |
| 3.32 | A Federal District Court Explains How “Tipping” Occurs, November 15, 1974 | 193 |
| 3.33 | The Three Mile Island Nuclear Accident Hits the Front Page, March 29–31, 1979 | 196 |
| 3.34 | Establishing the Ground Rules for Public Hearings on Restarting TMI-1, August 9, 1979 | 197 |
| 3.35 | The Supreme Court Allows the NRC to Decline to Consider Psychological Distress in <i>Metro. Edison Co. v. PANE</i> , April 19, 1983 | 198 |
| 3.36 | Miles Apart on the Risks of Nuclear Power: Oral Argument in <i>Baltimore Gas & Electric Co. v. NRDC</i> , April 19, 1983 | 201 |
| 3.37 | What Was at Stake in <i>Penn Central Transportation Co. v. New York City</i> , March 2, 1978 | 204 |
| 3.38 | <i>Penn Central</i> Introduces a Balancing Test for Regulatory Takings, June 26, 1978 | 205 |
| 3.39 | Designating the San Diego Gas Property as “Open Space,” April 1973 | 211 |
| 3.40 | Justice Brennan’s Influential Dissent in <i>San Diego Gas & Electric Co. v. City of San Diego</i> , March 24, 1981 | 213 |
| 3.41 | Making a Difference in the Fight Against Strip Mining: Honoring the “Heroic Efforts” of Louise Dunlap, August 3, 1977 | 216 |
| 3.42 | Recognizing Congress’s Ample Commerce Clause Power in <i>Hodel I</i> , June 15, 1981 | 219 |
| 3.43 | California’s Moratorium on New Nuclear Power Plants, June 3, 1976 | 224 |
| 3.44 | Upholding California’s Moratorium in <i>Pacific Gas</i> , April 20, 1983 | 225 |
| 3.45 | The Court Allows State Punitive Damages to Survive a Federal Preemption Claim in <i>Silkwood</i> , January 11, 1984 | 231 |
| 3.46 | President Reagan’s EPA Personnel Problem, March 12, 1983 | 233 |
| 3.47 | <i>Chevron U.S.A., Inc. v. NRDC</i> : A Set of Rules for All Seasons, June 25, 1984 | 235 |
| 4. | THE REHNQUIST COURT: FROM INDIFFERENCE TO ANTAGONISM | 247 |
| | Constitutional Triumphs: Property Rights Ascendant | 247 |
| | Revisiting Familiar Territory: Reading Closely, Narrowing NEPA, and Deferring | 257 |
| | Beyond the Printed Page: The Debate over Legislative History | 269 |
| | Standing: A Proxy for Skepticism about Environmentalism? | 272 |
| | <i>Documents</i> | |
| 4.1 | Private Property Rights Advocacy in the Supreme Court, May 22, 1986 | 281 |
| 4.2 | The Wait Is Over: The Supreme Court Majority Finds a Suitable Regulatory Takings Case, June 9, 1987 | 283 |

| | | |
|------|--|-----|
| 4.3 | The California Coastal Commission Explains Its Exaction of a Public Easement Across a Private Beachfront Property, May 26, 1982 | 286 |
| 4.4 | The Supreme Court Rules Against Coastal Regulators in <i>Nollan v. California Coastal Commission</i> , June 26, 1987 | 289 |
| 4.5 | South Carolina Studies the Effects of Beach Erosion, March 1987 | 293 |
| 4.6 | The Supreme Court Finds in <i>Lucas</i> that South Carolina Has Effectuated a Total Regulatory Taking, June 29, 1992 | 296 |
| 4.7 | Florida Supplements Supreme Court Takings Law by Passing the Bert Harris Act, May 18, 1995 | 300 |
| 4.8 | Environmental Skepticism During the Oral Argument in <i>Dolan v. City of Tigard</i> , March 23, 1994 | 301 |
| 4.9 | Seeking to Check Congress with a Presidential Signing Statement, October 6, 1992 | 303 |
| 4.10 | CERCLA, the Classic Creature of Compromise, December 2, 1980 | 304 |
| 4.11 | President Reagan Reluctantly Signs SARA, October 17, 1986 | 306 |
| 4.12 | Commerce Clause Complications in <i>Pennsylvania v. Union Gas Co.</i> , June 15, 1989 | 307 |
| 4.13 | Under What Conditions Can a Parent Corporation Be Liable for a CERCLA Violation? June 8, 1998 | 310 |
| 4.14 | The Forest Service Grants a Special Use Permit After Considering the Environmental Impact of a Proposed Ski Resort, July 5, 1984 | 314 |
| 4.15 | Reagan's CEQ Eliminates the "Worst Case Analysis" Obligation, August 9, 1985 | 316 |
| 4.16 | Does This New Information Warrant a Supplemental EIS? February 21, 1985 | 320 |
| 4.17 | The End of a Long Environmental Battle in the Methow River Valley, January 10, 2001 | 321 |
| 4.18 | Breaching the Elk Creek Dam, August 3, 2008 | 323 |
| 4.19 | An "Objective" View of the CWA from Two U.S. Senators, July 22, 1991 | 325 |
| 4.20 | The New President Brings Loggers and Environmentalists to the Table, April 2, 1993 | 327 |
| 4.21 | The Interior Department "Takes" a Sweet <i>Chevron</i> Victory, June 29, 1995 | 329 |
| 4.22 | A Heated Exchange on Legislative History, June 21, 1991 | 335 |
| 4.23 | What Congress Said They Meant Regarding the Regulation of MWC Ash, October 28, 1983 | 340 |
| 4.24 | The Majority in <i>Warth v. Seldin</i> Reconceptualizes Takings Requirements, June 25, 1975 | 341 |
| 4.25 | Reversing Two Cases with One Provision? September 22, 1992 | 344 |
| 4.26 | Attempting to Prove Direct Environmental Injury in <i>Lujan v. NWF</i> , January 28, 1982 | 345 |
| 4.27 | Attempting to Prove Direct Environmental Injury in <i>Lujan v. Defenders</i> , November 6, 1986 | 348 |
| 4.28 | The Majority in <i>Lujan v. Defenders</i> Dismisses the "First Law of Ecology," June 12, 1992 | 350 |
| 4.29 | Disputing the Science Behind an ESA Decision, July 22, 1992 | 355 |
| 4.30 | The Judicial Campaign to Restrict Citizen Efforts to Ensure Compliance with Environmental Laws, June 5, 1999 | 357 |
| 4.31 | In <i>Laidlaw</i> , the Court, Not the Polluter, Decides When an Environmental Dispute Is Over, January 12, 2000 | 360 |

| | |
|---|------------|
| 5. WILL THE CLIMATE CHANGE? A SHARPLY DIVIDED COURT CONSIDERS GREENHOUSE GASES, OIL SPILLS, AND RISING SEAS | 373 |
| Two “Environmental Terms”: Many Disappointments | 374 |
| Portents or Vestiges? Controversial Victories and Defeats for the Environment | 379 |
| <i>Documents</i> | |
| 5.1 Arguing for Justice Scalia to Recuse Himself in <i>Cheney v. United States District Court</i> , February 23, 2004 | 391 |
| 5.2 Justice Scalia Responds and Decides to Participate in the <i>Cheney</i> Case, March 28, 2004 | 395 |
| 5.3 <i>Winter v. NRDC</i> : A Whale of a NEPA Case, November 12, 2008 | 402 |
| 5.4 Opting Out of Greenhouse Gas Emission Controls, August 28, 2003 | 407 |
| 5.5 Standing Up to the EPA: <i>Massachusetts v. EPA</i> , April 2, 2007 | 412 |
| 5.6 Pushing the Regulatory Takings Argument Too Far, September 12, 2001 | 423 |
| 5.7 Protecting a National Treasure in <i>Tahoe-Sierra</i> , April 23, 2002 | 426 |
| 5.8 SWANCC and the Limits of Deference to Federal Agencies, January 9, 2001 | 432 |
| 5.9 Back to the Regulatory Drawing Board After SWANCC, January 10, 2003 | 438 |
| 5.10 Victims of the <i>Exxon Valdez</i> Run Aground in the Supreme Court, June 26, 2008 | 441 |
| 5.11 Attempting a Post-Gulf-Spill Fix for <i>Exxon Shipping</i> , May 11, 2010 | 450 |
| 5.12 Judicial Takings and Rising Seas: The Problematic Plurality in <i>Stop the Beach Renourishment</i> , June 17, 2010 | 451 |
| 5.13 A Little Green Flavor in Justice Kagan’s Confirmation Hearing, June 29, 2010 | 457 |
| Glossary of Acronyms | 467 |
| Text Credits | 471 |
| Selected Bibliography | 473 |
| Index | 477 |

Introduction

If the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.

Rachel Carson¹

For the past half-century in America, politicians, academic experts, and the media have expressed concern over the state of the environment and over the legitimacy and effectiveness of government strategies designed to combat air and water pollution, to contain and safely dispose of harmful wastes, to preserve the delicate ecological balance, and to rein in large-scale developments that have negative effects on natural resources and human health. The words and phrases of the U.S. Constitution and its first ten amendments address a number of topics that stirred public debate during the formative years of the new republic and that remain controversial even to this day: What role should the central government play in regulating commerce, domestically and internationally? Are there any limits to the power of the federal executive branch? Who makes the decision for the nation to go to war? Where do we draw the line between federal and state power? How should government protect the rights of religious minorities? When, if ever, does free speech lose legal protection? Yet, as noted by Rachel Carson in 1962, unlike these serious and enduring topics, environmental concerns were hardly considered by the framers of the Constitution and by political leaders at the national level for the first one and half centuries of the constitutional republic. We should not be surprised, therefore, that neither the text of the original Constitution nor of any of its amendments directly speaks to the topic of environmental protection.

While incremental forms of American environmental law existed as early as colonial times, it was not until the closing decades of the twentieth century that all three branches of the American government became fully engaged with environmental issues. It is not difficult to identify the primary cause of this engagement: the enactment of several federal environmental statutes between 1970 and 1980, including, but not limited to, the National Environmental Policy Act (NEPA, 1970), the Clean Air Act (CAA, 1970), the Clean Water Act (CWA, 1972), the Endangered Species Act (ESA, 1973), and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA, the “Superfund” act, 1980). Soon after passage, these and other laws were complemented by federal regulations and imitated by legislatures and administrative agencies at the state level.

At the time that this spate of statutory and regulatory lawmaking began, there was no guarantee that the nation’s judiciary, particularly the U.S. Supreme Court, would support its coequal branches in the struggle against pollution and the effort to conserve precious natural resources. Would conservative (anti-regulation) justices target and seek to neutralize these statutory and regulatory provisions that imposed additional costs and