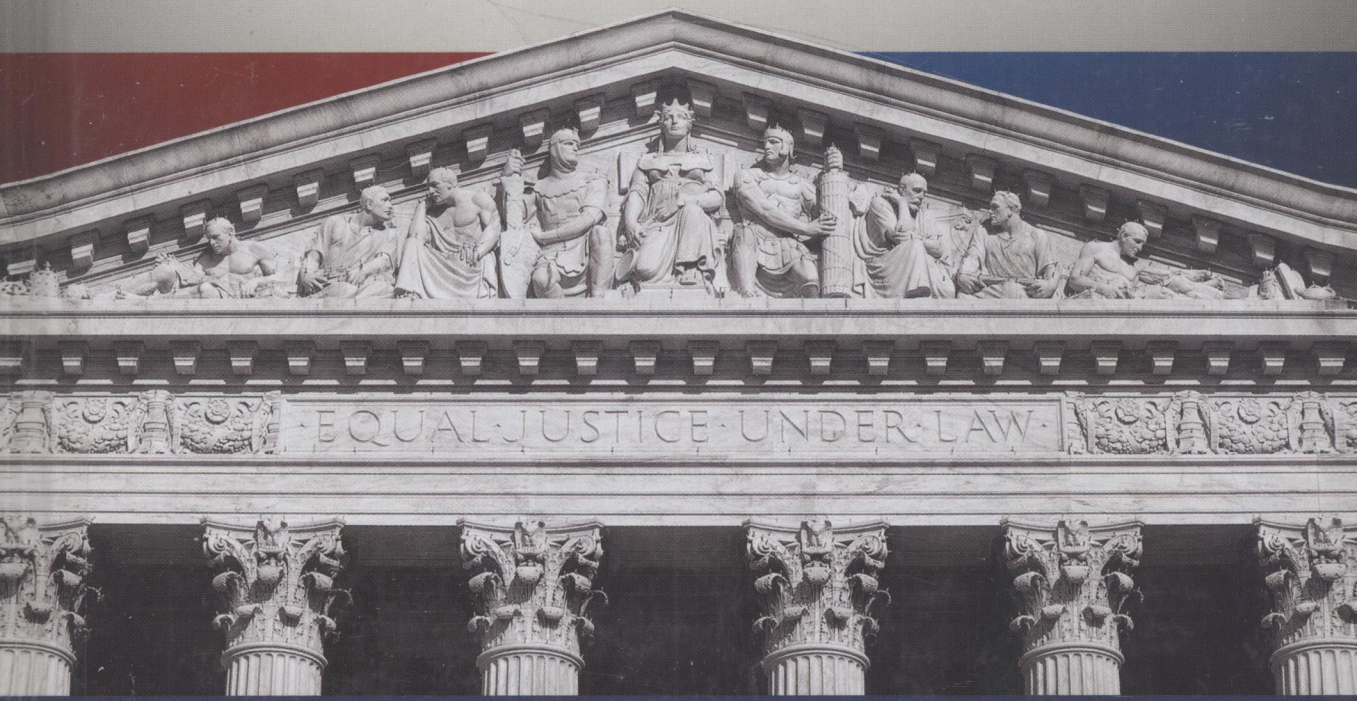
THE SUPREME COURT'S POWER IN AMERICAN POLITICS

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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The Supreme Court and the Environment

The Supreme Court's Power in American Politics Series

Melvin I. Urofsky, *Series Editor*

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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

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

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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 Carson[1]

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