Where Constitutional Law and Environmental Law Intersect

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By James May

Is it constitutional for a city, say Wilmington, Chester, or Harrisburg, to condemn homes along an historic riverfront for economic development? For Pennsylvania to prohibit trash tankers bearing foreign flags bound for Marcus Hook, Pennsylvania? For New Jersey to prohibit from its waters imported from New York City? For the United States Fish and Wildlife Service to address the disproportionate effect of color on getting a federal court order to address the disproportionate impact of a state’s land use policies? What does the U.S. Constitution have to say about all this?

Wideener Law School is on the forefront of an emerging field of law that explores the intersection between constitutional law and environmental, natural resources, and land use law. From environmental enforcement and compliance to real estate and urban redevelopment, it matters to you. Thirty years ago, constitutional issues rarely arose in environmental law. Nowadays, nearly two in three federal environmental, energy, and land use cases are decided on constitutional grounds. In the 300 federal environmental cases decided in the last 18 months, constitutional issues arose in nearly 200. These 200 cases involved 18 different types of constitutional questions, including the extent to which courts can hear environmental cases (standing and mootness), the president can keep policy information secret (executive privilege), and the degree to which federal courts can regulate activities that are historically or arguably intrastate in nature (commerce clause), delegate congressional prerogatives (non-delegation doctrine), impel states and state officials to follow federal environmental policies (preemption, property, and spending clauses; and the Tenth and Eleventh Amendments), search and seize (Fourth Amendment), and compensate for conversion of private property for public use (Fifth Amendment), or address environmental issues under the due process, property, spending and general welfare clauses.

Constitutional environmental law is also emerging in practice at the state, local, and international levels. Two dozen states and 70 foreign countries have constitutional provisions that address the environment and natural resources. The intersection of constitutional and environmental law influences other areas of law, including real estate, land use, public policy, civil procedure, workplace safety, tax, and international law. In short, it’s a good bet that a random case in environmental law could decide or be decided on a principle of constitutional law, thus making it an essential field to alumni, students, faculty, and the communities we serve.

Transition in the Supreme Court makes it all the more likely that the Constitution will continue to play an essential role in environmental law. In particular, Justice O’Connor’s retirement may lead the Court to revisit the Rehnquist Court’s notions of federalism, separation of powers, and property rights. For instance, last term the Supreme Court decided that the Fifth Amendment allows the government to “take” private property for the “public use” of economic redevelopment. In Kelo v. New London, the Court by a 5-4 majority upheld a decision by the City of New London, Connecticut to condemn 15 homes in the Fort Trumbull neighborhood for the sole purpose of furthering economic redevelopment around a planned pharmaceutical research facility. The decision allows governmental officials to condemn private property for the purpose of increasing tax revenues and promoting economic development. In Lingle v. Chevron, the Court found in another 5-4 opinion that it is not appropriate for a court to inquire into whether use of eminent domain authority under the Fifth Amendment “substantially advances” legitimate state interests, as it would when examining state action under the due process clause. Just these two opinions reverberate in daily decisions made about urban redevelopment, smart growth, water and air quality, preservation of open spaces, traffic, schools, crime, and environmental, land use, and energy policies.

Our faculty often publish and speak about the intersection of constitutional and environmental law. We’ve examined the constitutional dimensions of environmental citizen suits, the extent of constitutional protections for the environment under state and international law, whether states have constitutional standing to combat global climate change, and whether the equal protection clause of the Fourteenth Amendment of the U.S. Constitution provides a basis for addressing the disproportionate effect of environmental policies on communities of color (See page 14). We plan to continue to monitor and report about developments in the field.

Professor James R. May directed the Environmental and Natural Resources Law Clinic from 1992 to 2004. He has served as chair or vice chair of various committees and task forces of the American Bar Association’s Section on Environmental, Energy, and Resources.