

Outline

I. Introduction

My question:

Building on this literature, the motivating research question I would like to pursue is: how does this destabilization of the Commerce Clause pertain to the enforceability of current federal environmental regulation?

II. Mismatch between Environment and Legal structure of US

A. The United States constitution presents no “environmental” principle.

1. What does environment mean in a legal sense? (Lazarus 2004) (Lee 2006)

2. Effect of changing ecological theories (Tarlock1993)

a. Environmental regulation will continue to have a hard time fitting within the Constitution and our legal structure, more generally? (Wolf 2005) (Lazarus 2004) (Lazarus 2005)

4. Alder and the rise of a new environmental conservatism:

a. The environmental regulation must adapt to the constitution and the realities of federalism (Alder 2005, 2007)

III. The Commerce Clause (Coenen 2004)

A. One of the primary sources of constitutional legitimacy for federal environmental regulation: (Percival 2002)

1. Just for reference: Article I Section 8 of Constitution lists the enumerated powers of the legislative branch of the federal government. “The Congress shall have Power: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;”

2. The history of Supreme Court interpretation of this clause is not linear or unambiguous. (Obrien case book 2008) (Percival 2002)

3. Narrow reading in 19th century

a. See *US v. E.C. Knight Company* (1895), *Hammer v. Dagenhart* (1918)

4. However, since the 1930's the clause was interpreted broadly, allowing for legislation like the Civil Rights Act and most of the country's environment legislation to be considered constitutionally established.
 - a. Creates a dual lines of precedent, increasing judicial discretion (Greve 1996)
- IV. Judicial discretion, Judicial activism and reversal of precedent(Graber 2005)
 1. Judicial Activism of the Left in the Warren court has paved the way for right wing activism. (Keck 2004) (Johnson 1987)
 - a. Justice Douglas was the most adamant environmentalist on the Court. His view on precedent was activist. (Douglas 1949)
 2. Empirical effect of Precedent Reversal on Lower Courts' Decisions (Johnson 1987)
 - a. Stare Decisis
 - b. Event history (Benesh and Reddick 2002)
 - c. Principle-Agent model (Songer et al. 1994)
 3. Effect on regulators- gap in the literature? Why my research question is an important transition between regulatory literature and legal literature
- V. Commerce Clause starting with *US v. Lopez* (1995): The Supreme Court's interpretation of this clause has been destabilized.
 1. Because environmental regulation is already a mismatch for the US political system, the reversal of precedent creates a significant amount of instability. (Klein J.A. 2002) (Greve 1996)
 2. Though the literature on this recent change it is far from conclusive and there is some controversy there is a general sense that the current reinterpretation (narrowing) of the Commerce Clause will problematize our current environmental legislation. (Lazarus 2004) (Liptak 2009) (Saad 2003)
- VI. Case study of SWANNC and the jurisdiction of the Clean Water Act : a current focal point in the literature
 1. SWANNC is major case that has destabilized the jurisdiction of the Clean Water Act (CWA) (Baumgartner 2005) (Fitzgerald 2003)

a. The SWANNC case and the indeterminacy that it has created in the lower courts leaves the EPA without the certainty that it can avoid court in its attempts to enforce the CWA (Klein, C. A. 2003).

2. Generalizability:

a. Speaks to the nature of environmental law:

1.) Its current status and inherent difficulty fitting into the legal structure of the US (Lazarus 2004)

b. This case also speaks to the power of the Supreme Court to affect other branches of government through its activist decisions and disregard for precedent (Duhigg and Roberts 2010)

2.) The direction my research design will describe.