



ENVIRONMENTAL LAW • INSTITUTE®

ENDANGERED ENVIRONMENTAL LAWS PROGRAM

BACKGROUND PAPER

Introduction

America's environmental laws are under assault. For more than thirty years, we have all benefited from federal protection of our environment, public health, and natural resources. An impressive body of legislation has been enacted through bipartisan efforts in Congress, signed by both Democratic and Republican presidents, upheld by the courts, and continuously supported by a large majority of the American people. Drafted by Congress but cooperatively implemented by both the federal and state governments, these laws are responsible for improving the quality of the air we breathe, the water we drink, and the land we inhabit.

Recently, however, the very idea of federal environmental law is being challenged. A well-organized movement that calls itself the "new federalism" is advancing arcane legal theories, hostile to federal regulation, in the nation's courts. These theories are not really new, but are a revival of discredited arguments that were used to oppose racial equality laws during Reconstruction, child labor and minimum wage laws in the 1920s and 1930s, and civil rights laws in the 1950s and 1960s. Today, when anti-regulatory ideology has migrated from the elected branches of government to the appointed federal judiciary, such arguments also have the potential to undo the foundation of modern environmental law.

What's at Stake: The Federal Environmental Safety Net

By the late 1960s, there was growing national awareness of the need for increased environmental protection. In large cities, air pollution had gotten so bad that a new term was coined – "smog," combining the worst of "smoke" and "fog"; on some days, drivers in Los Angeles had to turn on their headlights by noon. In a well-publicized incident, the Cuyahoga River in Cleveland caught fire, highlighting the deterioration of the nation's waterways, and the Santa Barbara oil spill showed that even the oceans could be polluted. Widespread indifference to the disposal of hazardous wastes would bear deadly fruit later, in places like Love Canal. Both individual states and the federal government had passed laws that attempted to address these problems. But their patchwork efforts could not meet the scale of modern industrial and municipal pollution, its ability to cross state lines, and wide disparities in resources and effort among the fifty states. The old system, largely based on common-law nuisance theories and the states' general police power to protect public health and welfare, was clearly broken.

Against this backdrop, and with consciousness raised by the first-ever Earth Day in 1970, Congress took action. A bipartisan majority that lasted for at least a decade crafted compromises, reached agreement, and enacted a wave of modern federal environmental legislation, including:

- National Environmental Policy Act (environmental impact assessment), 1969
- Clean Air Act, 1970
- Federal Water Pollution Control Act (“Clean Water Act”), 1972
- Federal Insecticide, Fungicide, and Rodenticide Act, 1972
- Endangered Species Act, 1973
- Safe Drinking Water Act, 1974
- Resource Conservation and Recovery Act (solid and hazardous waste), 1976
- Toxic Substances Control Act, 1976
- Surface Mining Control and Reclamation Act, 1977
- Comprehensive Environmental Response, Compensation and Liability Act (hazardous waste cleanup), 1980
- Emergency Planning and Community Right-to-Know Act (toxic releases), 1986

These laws were drafted by both Democratic legislators such as Edmund Muskie and Republican legislators such as John Chafee. Many of the key laws were signed by a Republican president, Richard Nixon, who also issued the executive order that created the Environmental Protection Agency. And all of them withstood repeated court challenges, including various challenges to their constitutionality.

Equally important, all of these laws were based on a careful consideration of existing pollution control efforts by the federal and state governments. Many of them share a common vision of the respective federal and state roles in environmental protection. Often called “environmental federalism,” this division of labor typically entails the federal government setting national standards, conducting research, and providing funding and technical assistance to the states. The state governments have a great deal of say in how the standards will be implemented within their jurisdiction, and generally take the lead in permitting and enforcement decisions. States generally are allowed, even encouraged, to increase environmental protection beyond the federal standards, which set a national “floor.”

The federal environmental laws also serve important goals of fostering democracy and citizen participation in government decisions. While the details vary from statute to statute, almost all require some degree of public involvement in rulemaking, permitting, and other major decisions; create public access to industry and government information and a “right to know” about certain kinds of toxic releases to the environment; and allow for citizen lawsuits to enforce environmental laws when state and federal regulators have failed to pursue enforcement action. Environmental cases testing these procedural rights have set important precedents that affect many other areas of federal and state law.

In short, federal pollution control and natural resource statutes represent the “safety net” for environmental protection. They are directly responsible for the improvements to our health, environment, and quality of life that we have enjoyed over the last thirty years. Drivers in L.A. and elsewhere no longer need to use headlights at noon; major rivers no longer catch fire; and the

dangers of hazardous waste are well known and highly regulated. No one, including current supporters of a limited federal role in environmental issues, questions the extensive progress that has been made over the past three decades of the present system (for example, see http://www.epa.gov/newsroom/headline_062303.htm). While problems remain to be solved, the solutions will continue to depend upon and build upon the foundation laid by Congress during the 1970s and 1980s.

What's the Problem: The Rise of "New Federalism"

Who, then, is opposing the time-tested system of federal and state cooperation in implementing environmental law? Individuals, companies, and even entire industries have always had, and will continue to have, legitimate reasons for questioning specific details or interpretations of federal law and testing them in court. Others genuinely believe that state government should be the primary source of environmental regulation with minimal federal oversight, and are willing to accept a high degree of uneven and inconsistent environmental protection among the states in the bargain. But the current assault goes much deeper; it is the product of a broader movement that is hostile to the very notion of regulation, especially by the federal government. This movement has been highly successful in reviving once-discredited economic and legal theories and transferring them from the political arena into the nation's courtrooms.

The institutions that support anti-regulatory positions are well-known and influential, and include both philanthropic funders and the policy think-tanks they fund.¹ On the legal front, the significant developments were the 1982 creation of the Federalist Society (www.federalist.org), and the rise of ideological litigation firms such as the Pacific Legal Foundation (www.pacificlegal.org), Washington Legal Foundation (www.wlf.org), and Mountain States Legal Foundation (www.mountainstateslegal.org), who champion an array of anti-regulatory causes in the courts.

During the 1980s, what had been a group of self-styled outsiders began to acquire political power, and their anti-government rhetoric occasionally rose to the level of official policy. Controversial figures such as EPA Administrator Anne Gorsuch and Secretary of the Interior James Watt – both alumni of the Mountain States Legal Foundation – held prominent positions in the Reagan Administration. Ms. Gorsuch's tenure was cut short due to rising public protest, and former Administrator William Ruckelshaus was brought back to EPA to repair the damage.

In 1988, President George H.W. Bush appointed respected environmentalist William Reilly as Administrator, and supported comprehensive new clean air legislation. At the same time, however, Vice President Dan Quayle chaired the "Council on Competitiveness," an executive-branch body that attempted to enact through administrative means deregulatory changes that could never have been passed in Congress. Public awareness of the importance of the federal judiciary briefly spiked with the Supreme Court nomination battles over Robert Bork

¹ See, for example, the web sites of the Olin Foundation (www.jmof.org), Scaife Foundations (www.scaife.com), and Bradley Foundation (www.bradleyfdn.org); and the American Enterprise Institute (www.aei.org), Heritage Foundation (www.heritage.org), and Competitive Enterprise Institute (www.cei.org).

(1987) and Clarence Thomas (1992), both of whom have deep pedigrees in the neo-conservative community. By 1994, Newt Gingrich brought his “Contract With America” into a newly Republican House of Representatives, but had only limited success delivering on promised legal reforms such as “regulatory impact analysis” and a dramatic expansion of property rights.

During the Clinton Administration, litigation became a preferred tool of the anti-regulatory movement. Conservatives who previously had decried “the litigious society” and “activist judges” now discovered the utility of lawsuits, especially suits raising constitutional issues. At their best, these suits provided another forum for political debates emerging in the larger society; at their worst, they became an opportunity to invite unelected judges to tinker with legislation that had massive popular support. These invitations increasingly were accepted, as a core group of conservative activist judges began to place their stamp on federal law. With the election of President George W. Bush, who has vowed to appoint more federal judges in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia, the judicial threat to environmental, civil rights, and labor law has never been greater.

What nominally links the attacks on each of these areas of law is a renewed emphasis on states’ rights or states’ “sovereign dignity” at the expense of centralized federal power. Celebrated by its supporters as “new federalism,” the ideas gathered under this banner are neither new, nor particularly federalist. Though they purport to derive from the original intent of the American Founders, these ideas at times resemble the long-defunct Articles of Confederation, with its ineffective central government and squabbling state governments, more than the actual Constitution of the United States that supplanted it. And “new federalist” ideas often are selectively applied to certain kinds of cases and not to others, which suggests that many “new federalists” are less concerned with any form of federalism than they are with disabling regulation at all levels of government. Nevertheless, these antiquated theories have begun to enter the mainstream of the American legal system.

Why Constitutional Cases Matter

If litigation has been a weapon of choice for anti-regulatory advocates, then constitutional litigation is the nuclear option. By their nature, constitutional arguments go to the very foundation of environmental and other kinds of laws, and address government’s ability to enact, implement, and enforce such laws in the first place. Their use can result in far-reaching, nationwide consequences that are both intended and unintended.

First, in ordinary statutory cases, a court may simply be asked to decide whether or how Congress has chosen to regulate certain behavior. In constitutional cases, the court often decides whether Congress has power to address the behavior at all. Thus, when a legal issue is decided on statutory grounds, Congress may conclude that the court has “gotten it wrong,” and amend the statute to make its intention clear. But if the issue is squarely decided on constitutional grounds, it is difficult, sometimes impossible, for Congress to overrule that decision. The federal court system, with the Supreme Court at its apex, has the definitive word on constitutional interpretation. This is, of course, an essential feature of our system of divided government, in which the judicial branch serves as a crucial and often final check on the other two branches. It is particularly important in cases involving the kind of individual civil rights and liberties spelled

out in the Bill of Rights, where federal courts have long sheltered unpopular, persecuted, powerless, or insular minorities from the excesses of the majority. When the same heightened judicial oversight is applied to broad economic legislation, however, it can allow a small number of activist judges to impede the progress of programs that a vast majority of Americans support and believe to be in the public interest.

Second, constitutional issues typically are broad and cross-cutting, so that a constitutional decision on a single law can affect many other areas of law, and a questionable decision can set a bad precedent for numerous kinds of cases. Thus, a lawsuit that attacks the Clean Water Act on constitutional grounds can have a powerful impact on the government's ability to administer other, similar, environmental laws, such as the Clean Air Act or Endangered Species Act. Even more, a suit that weakens federal power to protect the environment may also weaken protections under civil rights, labor, and anti-discrimination law. As a result, constitutional challenges often are only partially motivated by concern about the specific law in that case, and may instead reveal the litigants' larger agenda against all forms of federal regulation. A successful attack on the constitutionality of one poorly-drafted or obscure statutory provision can provide leverage for later attacks on well-established, highly popular laws and programs.

Third, constitutional cases often hinge on abstract, technical, or procedural doctrines that anti-regulatory advocates or judges may stretch to obtain a desired result, without reaching the merits of the case. For example, some courts have misapplied constitutional theories about the ability of citizens to sue states in order to dismiss meritorious cases without ever addressing the underlying facts. In the environmental sphere, this occasionally has meant that known polluters or lax state agencies that are clearly violating the law have escaped without having to defend their actual conduct. Widespread misapplication and distortion of such constitutional defenses could effectively abolish federal environmental laws and the express intent of Congress as to how they should be enforced.

Finally, some courts have viewed constitutional litigation as an opportunity to resurrect long-buried legal theories that, for at least the last half-century, have not been accepted by any court. One court recently exhumed the "non-delegation doctrine," which had not seen the light of day in seventy years, to hold that EPA lacked authority to set national air pollution standards; fortunately, the Supreme Court eventually overruled the lower court. Such outdated theories fail to take into account the character of modern industrial democracy and the evolving division of responsibility between the congressional and executive branches, as regulations have grown increasingly technical and reliant upon experts within administrative agencies. Some courts have also occasionally failed to recall that courts may not simply replace a considered executive branch decision with their own views of how important regulatory matters should be decided.

What "New Federalism" Means for Environmental Law

In their quest to undermine environmental law, anti-regulatory advocates and "new federalists" use four main approaches:

- **Limiting the federal government's power to set and enforce uniform national standards that protect our air, water, land, and public health.** Recent cases have challenged

the long-standing authority of the federal government to regulate on a nationwide basis. These arguments rely on the same discredited “states’ rights” theories that were raised in opposition to modern labor laws in the 1920s and 1930s and to civil rights laws in the 1950s and 1960s. Taken to the extreme, they have the potential to roll federal authority right back seventy years or more.

When Congress enacts socioeconomic legislation, it often invokes its power under the *Commerce Clause* of the Constitution, which grants Congress the power to “regulate Commerce ... among the several States.” From the very beginning of the Republic, this clause has been read broadly to support federal jurisdiction over the “channels” of interstate commerce, such as roads and waterways, as well as “activities affecting” interstate commerce. While attempts have been made to restrict this basic authority, notably at the beginning of the last century, these ultimately were abandoned as logically incoherent and unworkable in practice. Thus, for seventy years or more, the Commerce Clause has allowed the federal government to reach even activities that at first blush appear to be purely intra-state activities, but in the aggregate have a nationwide impact. For instance, Congress has used the Commerce Clause as the basis to outlaw racial discrimination at hotels or other public accommodations, to set a national minimum wage for employees, and to enact anti-pollution laws.

Even businesses that are often the object of regulations generally prefer the level playing field that arises from following national rules, rather than a patchwork of state laws. For example, without national minimum standards for pollution controls, companies in certain states might be greatly disadvantaged competitively vis-à-vis their competitors in states with different pollution control requirements. The presence of national standards thus provides predictability and, in some instances, a reduced regulatory burden on business.

Recently, however, there have been numerous challenges to the scope of Congress’s authority under the Commerce Clause. A bare 5-4 majority of the U.S. Supreme Court has struck down laws that banned guns in school zones and provided federal protection for women who are victims of domestic violence – laws that enjoyed broad public support, but fell prey to a broader agenda of limiting federal power. Anti-environmental groups then used these precedents to attack the constitutionality of long-standing federal laws such as the Clean Water Act, the Safe Drinking Water Act, and the Endangered Species Act.

For example, in 2001 a divided Supreme Court on statutory grounds removed federal protection from a significant portion of the nation’s surface waters, including wetlands that provide important pollution and flood control functions and wildlife habitat. The Court even suggested – but did not decide – that such protection might exceed the scope of the federal government’s Commerce Clause authority, a constitutional claim that, if accepted, would severely threaten the scope of the Clean Water Act. Predictably, some lower courts have strained the logic of this case to remove even larger areas of wetlands from federal jurisdiction, and the Bush Administration is attempting to use it to justify new deregulatory initiatives that would weaken other key parts of the Act.

”New federalists” also cite the *Tenth Amendment*, which merely says that the states retain whatever powers are not delegated to the federal government, to argue that federal environmental laws impinge on supposedly “traditional areas of state and local authority,” such as land use or

public health. This argument fails to consider that federal environmental statutes were specifically designed to provide a comprehensive national scheme for controlling the diverse and diffuse byproducts of modern industrial production, not to supplant traditional state nuisance or property law. As Justice John Paul Stevens pointed out in his passionate dissent in the wetlands case, “the Clean Water Act is not a land-use code; it is a paradigm of environmental regulation.... an accepted exercise of federal power.”

• **Barring the federal courthouse door to citizens who have suffered harm.** Another tactic increasingly being employed by anti-regulatory advocates is to limit citizens’ ability even to raise violations of environmental law in federal court. Almost all federal environmental laws have a “citizen suit” provision, which allows citizens and citizen groups to serve as “private attorneys general” who can enforce the law in court when agencies fail to take action. Especially in a time of limited budgets, these suits are a critical supplement to the ability of both federal and state agencies to monitor polluters and to enforce environmental standards against them.

Over the past decade, a small but vocal minority of federal judges, led by Supreme Court Justice Antonin Scalia, have attempted to restrict the basis for such environmental citizen suits. Advocating a narrow reading of *Article III* of the Constitution, which states simply that the role of federal courts is to resolve “cases” and “controversies,” these judges have questioned citizens’ legal “standing” to bring lawsuits based on anything other than a narrow range of economic injuries. As a result, citizen groups have had difficulty defending the long-term ecological, aesthetic, and recreational interests that are at the heart of many environmental and public lands cases. Fortunately, Justice Scalia’s position, which Justice Harry Blackmun once vividly described as a “slash-and-burn expedition,” has now been rejected by a majority of the Supreme Court. Nevertheless, some lower-court judges still find occasion to use highly subjective standing determinations to keep environmental plaintiffs out of their courts, without regard to the merits of the underlying complaint.

Similarly, environmental citizen suits and other kinds of federal suits have run afoul of *Eleventh Amendment* “sovereign immunity” defenses, which also can lead to outright dismissal of even a meritorious case. This arcane doctrine arises when private parties attempt to sue a state government or state entity in federal court. Historically, it emerged in the context of common-law claims made against a state treasury, such as claims for damages from a breach of contract; states could not be made to answer these claims in federal court. But it was long thought that Congress could override state immunity, and grant citizens the right to sue states for violating federal laws and citizens’ federal rights.

However, the Rehnquist Court recently has said that Congress may only authorize such suits in cases involving very specific kinds of racial or gender discrimination. A narrow majority of five justices has repeatedly held that this limitation is needed to protect the “sovereign dignity of the state” – an abstract concept that the Court freely admits is found nowhere in the *Eleventh Amendment*’s text. In short, by denying citizens the ability to vindicate their federal rights in federal court, sovereign immunity doctrine elevates state governments and agencies above individuals who suffer environmental harm, employment discrimination, or civil rights violations at the hands of these same agencies. It also elevates them above Congress’s attempts to fix such problems through the democratic process.

In the environmental context, this theory of state sovereign immunity has blocked citizen suits under the Surface Mining Control and Reclamation Act, the national coal-mining law. The suits attempted to get West Virginia and Pennsylvania officials to abide by existing federal mining standards for practices such as mountaintop removal, which levels mountains, dumps the waste in nearby valleys, and eliminates hundreds of miles of freshwater streams. By granting sovereign immunity, these decisions give tacit approval for state agencies to continue to ignore the law as mining companies destroy thousands of acres of the Appalachian ecosystem. They have forced a West Virginia judge to dismiss a case even though state officials openly admitted in his courtroom that their practices had long been in violation of federal law. Similar Eleventh Amendment defenses have been raised, so far unsuccessfully, to citizen suits under the Clean Air Act and the Endangered Species Act.

- **Prohibiting states and localities from passing laws more stringent than federal standards.** Despite claims that their goal is merely to devolve regulatory power to state and local governments, the “new federalists” also have a tendency to challenge state and local efforts to set environmental standards that are more stringent than federal standards. Under our system of environmental federalism, the federal government usually sets the minimum standard; unless the federal statute explicitly prohibits it, states and localities may set even stricter standards to protect their citizens and environment. Yet when this occurs, “new federalists” often veer from their ostensible desire to empower states, read the applicable federal law broadly to eliminate state and local authority, and argue that the federal government rules supreme.

As part of the solution to Southern California’s severe air pollution problem, a regional air quality district recently required that companies and governments that operate certain fleets of vehicles buy the lowest-emission vehicles available under federally-approved California standards. Opponents of more stringent environmental regulation immediately challenged the requirement by pointing to the *Supremacy Clause* of the Constitution, which provides that federal law is the “supreme Law of the Land.” They argued that the district was preempted under the Clean Air Act from requiring such purchases because only the federal government could regulate emissions from vehicles. Both the trial court and the appellate court rejected this argument, and noted that the air quality district has the right to regulate purchases of vehicles, which is not the same as directly regulating the manufacture of or actual emissions from vehicles. The U.S. Supreme Court, however, has agreed to hear an appeal of this case and is scheduled to decide it this term.

- **Requiring compensation from public coffers for reasonable regulation of the environment and public health and safety.** Another approach for undermining environmental protection is to make it prohibitively expensive for governments, federal or state, to regulate. The *Fifth Amendment* to the Constitution states that “private property [shall not] be taken for public use, without just compensation.” This same basic “eminent domain” power allows government to condemn or take private land and use it, for example, to construct roads, as long as compensation is paid. Certain regulations that have a similar effect of restricting property use may be considered “regulatory takings,” even if there is no physical occupation of the property.

Such takings generally require a balancing of private interests and the public interest to determine whether compensation will in fact be paid. So-called “property-rights” advocates have stretched this theory to challenge environmental and land-use regulations at all levels of government, claiming that even minor restrictions must be paid for from public coffers. Taken to an extreme, these arguments have the potential to make even reasonable, long-standing regulations prohibitively expensive to implement. They also belie the “new federalists” professed concern for state power, since the vast majority of takings cases are brought against state and local governments.

In one recent case, the U.S. Department of Agriculture, exercising its mandate to protect public health, placed restrictions on industrial chicken farms suspected of selling salmonella-infected eggs. As a result, the company had to sell its suspect eggs at a lower price than it otherwise would have received. The company challenged these restrictions as a taking of private property, and demanded compensation. The Court of Federal Claims agreed, rejecting the USDA’s argument that its regulation was a proper use of the government’s regulatory power, and holding that USDA must compensate the company millions of dollars for its reduced profit on the eggs. By requiring the government to compensate for such basic regulatory actions, decisions like these could undermine the enforcement of environmental and health regulations just as effectively as if they had been repealed.

What Could Happen: Shredding the Federal Environmental Safety Net

These cases, and others like them, directly threaten the principles that were woven into the environmental safety net of the 1970s and 1980s: sound national standards, an open role for citizen participation in the development and enforcement of those standards, and the overall ability of government to regulate in the public interest. Unchallenged, “new federalism” would undo the cooperative balance that was carefully struck between federal and state governments to implement and enforce our environmental laws. The intangible “sovereign dignity of the states” would override the concrete harms suffered by individuals when state agencies fail to carry out their duty to protect their own citizens. And an extreme view of “property rights” could in effect give any individual veto power over federal or state legislation designed to protect the greater public good.

Without this safety net, we can foresee a return to the crisis of the late 1960s. Absent uniform federal standards and enforcement capability, the states would return to a patchwork of conflicting rules that is both harmful to the environment and bad for business. This is even more likely given the current fiscal crisis afflicting many states. While opponents of federal regulation argue that states would fill any gaps left by EPA, the reality is that most states have neither the budget nor the staff resources to do so, and depend heavily on federal assistance and involvement. Left unaccountable to the federal government or to their own citizens, states would be free to follow the path of least resistance, and slash existing standards, rules, and services. And even if a state should manage to overcome these obstacles and implement strict environmental protections, the supposed proponents of states’ rights are sure to argue that the state is preempted by federal law or by the takings clause, as they have done repeatedly in the past. As is the case in labor law and civil rights law, calls for “decentralization” or “states’

rights” in environmental law typically turn out to shorthand for decreased environmental protection and enforcement.

The issue is not merely what *could* happen, it is what *will* happen unless the “new federalist” threat continues to be met and repelled. Scholars have argued that because some courts have refused to adopt “new federalist” theories in certain cases, this is a moot issue. To the contrary, proponents of these theories continue to bring cases across the nation, winning some and losing others. If they had gotten their way in cases brought in just the past few years, it would have had – and may yet have – the following results:

- Many public drinking water supply systems would no longer have to meet minimum federal standards for contaminants in drinking water;
- Federal power to limit development of as much as 50% of the wetlands in the United States would be eliminated, with no state regulatory program to replace it;
- Endangered species that do not cross state lines or directly impact interstate commerce would no longer be protected from destruction of their habitat and eventual extinction;
- State authorities could continue to refuse to implement federal environmental laws with impunity;
- Government would have to pay businesses who sell contaminated products that sicken Americans in order to remove the products from the stream of commerce;
- State authorities would be able to repudiate agreements and settlements they enter into with private citizens, without the citizens having any federal recourse; and
- State employees who expose wrongdoing regarding environmental issues can be terminated by the state, and will not be able to invoke federal whistleblower laws.

These outcomes, some of which have already come to pass, will continue to be sought by activist litigators and judges in courtrooms across the nation.

Further, the decisions presently coming from the federal judiciary are merely a preview of things to come. President Bush has adhered to his campaign promise to nominate more conservative judges in the mold of Justices Scalia and Thomas, and even exceeded it. Membership in the Federalist Society has now become a near-prerequisite for consideration for the federal bench. The main proponents of “new federalism” and other anti-regulatory theories are being rewarded with nominations to key appellate courts, in an attempt to ensure that these once-fringe theories will survive and shift judicial thinking even further. There also is a distinct tendency to favor nominees in their late thirties and early forties, whose lifetime appointment will shape our laws for decades into the future. Given the documented anti-regulatory stances of many of these nominees, it is entirely possible that the environmental safety net so carefully constructed over the years will be lost.

What ELI Is Doing About It

The Environmental Law Institute (ELI) has a special affinity with federal environmental law. Chartered on December 22, 1969, the same day the National Environmental Policy Act was passed, ELI was specifically created to track, report on, and help define this newly created field. Having spent more than thirty years as the preeminent research and education institution in environmental law, policy, and management, the Institute cannot ignore this attack on the legal foundations of environmental protection.

ELI believes that the existing system of environmental law, with its essential features of concurrent federal and state jurisdiction, broad rights of citizen participation, and regulatory powers that surpass common-law rules, has been highly effective in achieving environmental protection goals. ELI has created its Endangered Environmental Laws Program to address these issues, and joined with Community Rights Counsel and the Brennan Center for Justice to form the Partnership for Constitutional and Environmental Law. The Program and the Partnership will defend the law of environmental protection through a comprehensive agenda of research, education, and outreach.

The Endangered Environmental Laws Program will seek to educate and inform the legal profession, the media, and the general public of the dangers posed by “new federalism” and other fundamental challenges to environmental law. It will produce legal research and opinion pieces, convene seminars and other public events, and may intervene as *amicus curiae* in selected cases that raise foundational issues of constitutional and environmental law. The Program has already conducted research, authored publications, and held three seminars, in Chicago, Washington, D.C., and New York, that brought together nationally-renowned experts to discuss this threat to our environmental laws. Additional seminars are planned for San Francisco and other cities. ELI has launched the Endangered Environmental Laws Program website (www.endangeredlaws.org) as a resource to the press and the general public, and plans additional media coverage as well.

The Partnership for Constitutional and Environmental Law brings ELI together with two organizations that have converged on these issues from very different perspectives and that offer unique strengths in fighting to protect environmental safeguards. Community Rights Counsel (www.communityrights.org), an environmental law firm, has extensive experience litigating and publicizing constitutional threats to environmental protection on behalf of its state and local government clients. The Brennan Center for Justice (www.brennancenter.org), a legal think tank, collaborates with a broad coalition of advocates for civil rights, disability rights, labor, health care, child care, and other constituencies that are impacted by judicial rulings that limit national power and access to courts.

For more information regarding the Endangered Environmental Laws Program or the Partnership for Constitutional and Environmental Law, see www.endangeredlaws.org, or contact Jay Austin (austin@eli.org, 503-775-5705) or Scott Schang (schang@eli.org, 202-939-3865) at the Environmental Law Institute.