Previous posts have introduced the concept of environmental property rights, given a number of examples of such rights, and explained how various kinds of EPRs that appear quite different are actually closely related. Today's post argues the EPRs could actually change constitutional rulings in favor of the environment. I develop this argument in detail in a recent paper, but here is the basic argument for three important constitutional issues: standing doctrine, takings law, and congressional power under the commerce clause.

With respect to each of these three constitutional issues, the basic logic is quite simple:

- ***Standing.*** A key element of standing is "injury in fact." Injuries can harm property interests as well as personal ones. Thus, possession of an EPR can provide a basis for standing, with the loss of value to the EPR registering the injury in fact.
- ***Takings.*** To determine whether property has been taken without just compensation, we must first know what property interests the owner originally had and what the owner is left with. EPRs that are held by third parties can subtract from the first category; EPRs that are granted the property owner can add to the second category. These effects can undermine any claim that the owner's property has been taken.
- ***Congressional power*.** EPRs can connect otherwise non-federal activities with federally regulated ones. EPRs can also trade in interstate commerce. Because of these effects, Congress may be able to influence activities that are otherwise outside the commerce power.

Admittedly, it is unlikely that EPRs will transform the constitutional regime governing environmental law. Their effect will be felt at the margins, making the environmental side of the case a little bit stronger than it would otherwise be. But in today's Supreme Court, most of the battles are fought at the margins rather than through dramatic doctrinal changes. In these small-scale battles for environmental protection, EPRs may shift the balance in favor of constitutionality.

EPRs also offer an avenue for actors outside the federal judiciary – Congress, state legislatures, and state courts – to shift the boundaries of what the federal courts will allow. Thus, creative use of EPRs provides an opening for positive change during an era in which the federal judiciary itself may be inhospitable to environmental claim.

For a more detailed discussion of EPRs, their constitutional implications, and

citations, see this paper*.*