

Regulatory Takings and Environmental  
Regulatory Evolution: Toward a Macro  
Perspective

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# REGULATORY TAKINGS AND ENVIRONMENTAL REGULATORY EVOLUTION: TOWARD A MACRO PERSPECTIVE

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## INTRODUCTION

In this Essay, I want to place regulatory takings in the context of what I think is a broader movement in the evolution of modern environmental regulation. I will argue that one of the currents affecting the intersection of regulatory takings and environmental regulation is a rearward pendulum swing in the evolution of environmental regulation generally.

I will then offer two perspectives from which to view this swing and the related takings cases. The first is a blunt Critical Legal Studies ("CLS")<sup>1</sup> critique, casting this movement as an open political conflict between traditionalists and progressives. I will contend, that, ultimately, this critique is insufficient.

The second perspective suggests that our conversation about the development of environmental regulation is a vital balm and distraction from very discomfoting choices we have made in the shadows of our public debates. I will contend that we have chosen to consume the biosphere almost as fast as we know how, to the profound detriment of the unrepresented future. I will suggest that submerging the consequences of our shadow choices and assuaging our guilt is one of the primary functions of our environmental regulatory debates and the intersecting takings cases.

This second perspective renders inadequate the blunt CLS critique of the regulatory takings doctrine and environmental regulatory evolution generally. It suggests that a more traditional view of doctrinal evolution—*viz.*, that doctrine responds to the objectively discernible needs of our society—better explains the developments in this area.

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1. The CLS movement emerged in the 1970s as an effort to expose the fallacy of the claim that the law, and "justice" under the law, could be objectively and coherently understood within our legal system. Owen Fiss, *What is Feminism?*, 26 ARIZ. ST. L.J. 413, 424 (1994). CLS scholars asserted that the development of the law was essentially an exercise of political will and power, and that the product of that process was inherently indeterminate and could not be logically or neutrally applied to individual cases. *Id.*; WALTER F. MURPHY & C. HERMAN PRITCHETT, *COURTS, JUDGES, & POLITICS* 7 (4th ed. 1986).

## I. NURTURING AND PRUNING

Let me suggest first that modern environmental regulation, as characterized principally by the foundational federal statutes enacted since 1970, covering air, water, and the landbase, emerged and grew in an atmosphere of emergency. Operating in this atmosphere of emergency, the organism was openly nurtured by necessity-driven decisionmaking.<sup>2</sup>

This is illustrated in many of the decisions that arose from the foundational statutes. For instance, I think we see this in some of the RCRA<sup>3</sup> corrective action cases,<sup>4</sup> cases dealing with passive disposal<sup>5</sup> and retroactive application issues,<sup>6</sup> cases shoring up the confused and troublesome formula for defining hazardous waste,<sup>7</sup> CERCLA<sup>8</sup> cases confronting *ex post facto* challenges,<sup>9</sup> and, in various judicial treatments of pre-enforcement review issues.<sup>10</sup> These decisions exhibit a necessity-driven bias that only superficially grapples with very troublesome aspects of the regulatory organism, one that, if taken seriously, might have fatally weakened it.

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2. Elsewhere, I have argued that such perceptions of necessity may be sufficient to overcome any of our artificial societal self constraints (e.g., constitutions, conceptions of liberty, individualism, freedom); that all of these abstractions may yield ultimately to the concern at the base of Maslow's hierarchy—physical survival. Nicholas J. Johnson, *EPCRA's Collision with Federalism*, 27 *IND. L. REV.* 549 (1994).

3. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6986 (1988 & Supp. V 1993) (amending the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6922k (1988 & Supp. V 1993)).

4. See, e.g., *Inland Steel Co. v. EPA*, 901 F.2d 1419 (7th Cir. 1990).

5. See, e.g., *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 840 (4th Cir. 1992) (stating CERCLA imposes liability on party who owns facility at time hazardous waste is leaking because, "Any other result would substantially undermine CERCLA's goal of encouraging voluntary cleanup.").

6. See *Wagner Seed Co. v. Bush*, 709 F. Supp. 249 (D.D.C. 1989) (holding that EPA correctly interpreted the reimbursement section of CERCLA to mean that it does not apply to companies in midst of a cleanup when the law was enacted), *aff'd*, 946 F.2d 918 (D.C. Cir. 1991); but see *United States v. Mottolo*, 695 F. Supp. 615, 631 (D.N.H. 1988) ("CERCLA retroactively applies to all response costs incurred by plaintiffs [the government] without limitation to postenactment expenditures.").

7. *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). The D.C. Circuit ruled that the EPA plainly violated the Administrative Procedure Act ("APA") notice and comment requirements in promulgating RCRA hazardous waste definitions, and then gratuitously invited the agency to continue to use these under the emergency circumstances exception in the APA. *Id.* at 752. These definitions have been in place for more than 10 years since that decision, under various exigency-driven judicial and congressional ploys.

8. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

9. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 174-75 (4th Cir. 1988) (dismissing the *ex post facto* charge by declaring CERCLA is not punitive, without mentioning CERCLA's treble damages provisions).

10. See, e.g., *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 317 (2d Cir. 1986) (affirming district court's dismissal for lack of subject matter jurisdiction over challenge on merits to an EPA order, before the EPA had initiated an enforcement action).

As this necessity-driven nurturing gained momentum, it generated several additional phenomena. It heightened our sensitivity to environmental concerns. It shifted our conceptions about the public interest in private property, thus changing our attitudes about the level and scope of regulation the polity would and should bear. It increased the regulatory appetite at all jurisdictional levels. And finally, it tipped the balance in a variety of second-tier decisions in which the conflict between public and private interests presented closer questions.

In the wetlands context, the early regulatory takings arguments were affected by this last phenomenon. In those cases, the Army Corps of Engineers' standard position was that only a particular project had been disapproved.<sup>11</sup> The applicant was welcome to submit another that the Corps might approve.

For small actors with meager resources, this often was a death knell and everyone knew it. But even for larger concerns, after multiple disapprovals it eventually became apparent that, in reality, the only "permissible" property use was woodcock habitat. (For a while, in some regions, the fruitful path was to "donate" or create and donate replacement wetlands.)<sup>12</sup> Absent a backdrop of decisions that were straining very hard to uphold more troublesome aspects of the foundational statutes, this strategy would likely have been less successful.

After roughly thirty years of nurturing, the regulatory organism has grown strong, and is now experiencing a discernable pruning.<sup>13</sup> This is illustrated in a variety of ways. Some examples are the apparent revival of divisibility under CERCLA,<sup>14</sup> cases containing subtle but revealing rhetorical flourishes,<sup>15</sup> as well as open regulation bashing for which Justice Scalia has been notable,<sup>16</sup> and, perhaps even more illustrative, defensive EPA give-backs<sup>17</sup> on early successes in the area of

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11. See, e.g., *Formanek v. United States*, 18 Cl. Ct. 785 (1989).

12. See generally David Salvesen, *Banking on Wetlands*, URBAN LAND, June 1993, at 36.

13. This atmosphere of emergency can reemerge around new legislation and may produce a weak vestige of the nurturing we saw during the organism's infancy. I think the passage of, and states' acquiescence to, the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11050 (1988 & Supp. V 1993), is an example of this. See Johnson, *supra* note 2.

14. See, e.g., *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-71 (3d Cir. 1992).

15. See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) ("To the point that courts could achieve more of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits."); *Alcan*, 964 F.2d at 270 n.29 ("[i]t seems clear that a defendant could easily be strong-armed into settling [with EPA]").

16. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2898 n.12, 2899 n.14 (referring to "stupid" legislative staffs and legislatures "plundering landowners").

17. See EPA's rulemaking broadening the lender liability exemption under CERCLA. 57 Fed. Reg. 18,344 (1992) (to be codified at 40 C.F.R. pt. 300).

lender liability.<sup>18</sup> In a very rough way we can cast the Court's recent regulatory takings cases, and many other episodes,<sup>19</sup> merely as backlash. But I think there is something more going on.

## II. UNPACKING THE PENDULUM SWING

As I mentioned, the nurturing phase expanded public tolerance for regulation by increasing public sensitivity to the interdependence of all aspects of the environment. That generated an important subtext: virtually everything we do in modern America, either directly or through its cumulative effect, consumes or despoils resources. If we really are serious about conserving the biosphere, it will require regulation and drastic change in virtually every phase of modern American life. This poses the question that is crucial to putting takings jurisprudence, and the general state of environmental regulation, into perspective. Have we made the decision to do all that is "necessary" to, in MTV parlance, "save the planet?"

One might answer that we are still on the fence; that we continue to act on the open invitation to regulate but have not yet decided how much comfort we will sacrifice in order to halt or at least slow the rate of biospheric consumption. For a traditionalist, concerned about how far an undisciplined response to the invitation to regulate will spin out, the concept of regulatory takings is an attractive way to force the public to assign some priorities to the items on its regulatory menu.<sup>20</sup> If this is what is happening, the growth of the regulatory takings doctrine and the pruning phase generally are adequately explained by a blunt CLS critique. This view is plausible. But I think it is wrong.<sup>21</sup>

I believe we have in fact decided whether or not to do what is "necessary," and have decided not to. Rather, we have affirmatively decided to pursue our current lifestyle, with superficial limitations. In

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18. See *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

19. See, e.g., *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (granting pre-enforcement review where EPA's access order constituted a compensable taking).

20. Although it is ironic to make this observation here, a related value is protection of the ultimate minority. If regulation is free to the community, its costs are forced onto the single individual who alone is left to fight the community decision that damages him peculiarly and exclusively. In this respect, I think the takings decisions are appealing.

21. I do think there is a genuine micro-level disagreement between traditionalists on the one hand, who are committed to resource consumption sufficient to sustain "freedom and liberty" in something like the manner in which it was conceived during a time characterized (albeit falsely) by boundless resources, and progressives on the other hand, who are willing to move away from 18th century conceptions of "liberty" in the interest of the "environmental preservation" and other 20th century concerns. On a superficial level, the development of the regulatory takings doctrine and the evolution of environmental regulation reflect this. But the distance between the two positions is far less than the tone of the debate suggests.

the shadows of that choice is a decision to consume the biosphere nearly as fast as we know how.

The evidence lies in the drastic consumption-reducing measures we are not discussing, as well as the affirmative public decisions that disclose the limits of our political will to make any fundamental lifestyle changes. These things reflect a shadow conversation in which we have concluded that our current lifestyle, if moderately controlled, will not threaten our children's children or theirs, and we have decided to indulge our appetite for comfort and convenience to the profound detriment of the unrepresented future—by which I mean generations so removed in time that we are emotionally and morally disconnected from them.<sup>22</sup>

First, let us look at one of the things we are not discussing seriously. What would it take to reach a plateau of sustainable living? The "Center for Sustainable Living" project at Wilson College, in Chambersburg, Pennsylvania, actually moves toward its description. Detractors call it the "Hippie Project." The sustainable living it projects is a pre-industrial lifestyle that, by contemporary standards, is hard and dirty.

That model, if it is even close to what is "necessary," poses revealing questions that we already have answered. Are we willing to give up our cars? Are we willing to abandon fossil fuel generated electricity? Are we willing to avoid nuclear energy until we have resolved the spent rod problem? Are we willing to do without the truckload of poisonous conveniences we all can find under the sink or in the garage? Are we willing to stop waste disposal in surface waters? Are we willing to essentially nationalize the land base in order to make decisions about resource use of the magnitude necessary to "save the planet"? Will Americans vote to embrace sustainable living—in effect, a highly managed but virtually pre-industrial society?

Not in our wildest dreams. We have chosen a course of biospheric consumption over sustainable living. True, we are left with our faith in future miracles, but I suspect the unrepresented future would choose something much more limiting for us.

There is also evidence of our shadow choices in the details of our foundational environmental statutes and regulations, particularly in the exceptions, without which ordinary people would suffer serious lifestyle disruption. Some examples are the RCRA household waste

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22. How long do we believe the biosphere will sustain anything close to our current lifestyle? A million years? Half a million? Fifty-thousand? Five hundred? Fifty? As we contemplate these questions several things happen. At some point, we lose our sense of moral responsibility for future generations.

These are the people who are unrepresented in this conflict against us. They will have a drastically different view about the choices we should have made. I suspect they will be appalled at the gross consumption, despoliation, and waste of air, water, and land that defines western civilization and the American dream.

exemption,<sup>23</sup> the EPA's special treatment of municipalities under CERCLA,<sup>24</sup> and the extraordinary efforts creating a privileged class of potentially responsible parties ("PRPs") in revealing instances where the resource despoiling aspects of everyday life are at the root of potential environmental liability.<sup>25</sup>

We see a separate category of examples in the development of what I will call "soft environmental" regulation. Historic preservation regulations are some of the best examples. The resources and political capital we spend on this style of regulation,<sup>26</sup> reflects our broader decision to focus on the quality of our current lifestyle to the detriment of the unrepresented future.

### III. A PERSPECTIVE ON OUR SHADOW CHOICES

It is true that our environmental debates reflect superficial conflict between traditionalists and progressives about modulating the foundational statutes and on second-tier issues such as regulatory takings. But fundamentally, we have already decided what conditions make life worthwhile. What we primarily curtail through regulation is action that diminishes the quality of our consumption.

If the intersection of regulatory takings and environmental regulation is part of this phenomenon, the predictable CLS critique is not adequate. My observations suggest that our generation is unified through our consumptive lifestyle in a conflict against the unrepresented future. If this is so, a CLS critique explaining the regulatory takings cases as conservative backlash is not fully explanatory.

Indeed, one needs to return to more traditional critiques of doctrinal evolution—explaining doctrinal development as a response to the objectively discernable needs of the age—to close the gap. That critique proceeds this way: regardless of their outcomes, our conversations about regulatory takings and other environmental issues serve all of us. They are a balm on our collective conscience. They distract us from the guilt of having so utterly vanquished the unrepresented future. Our need for this balm and distraction is strong, first, because

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23. 42 U.S.C. § 6921(i).

24. See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1205 (2d Cir. 1992) (describing EPA's policy of selective CERCLA enforcement benefitting municipalities).

25. See *B.F. Goodrich Co. v. Murtha*, 815 F. Supp. 539, 542 n.4 (D. Conn. 1993) (abandoning the standard view that the presence of a hazardous substance, regardless of concentration, triggers CERCLA liability, in order to release "mom and pop" PRPs from liability). *But see* *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D.N.Y. 1991) (sustaining Alcan's status as a PRP, despite proof that Alcan's waste contained concentrations of hazardous substances no greater than those found in breakfast cereal and milk).

26. Regulatory takings as a concept to curb otherwise unlimited regulatory appetites may usefully serve as a counterweight to the unbridled regulatory mind-set that is fueled by cost-free regulation. Indeed, the result may be more direct. If it is difficult for regulators to predict what might in fact be deemed a regulatory taking, it might force distinctions between serious regulatory goals and whims.

our ethos abhors the unfair fight<sup>27</sup> (of which our conflict with the unrepresented future is the archetype) and, second, because collective guilt is one of our most powerful social phenomena.<sup>28</sup> Because our need is so great, this balming effect emerges as a primary function of our environmental regulatory debates and doctrinal movements.

#### CONCLUSION

Our debates permit us to enjoy the fruit of our shadow choices without the paralyzing guilt that moral actors might expect to accompany such decisions. The debate reminds me of a political advertisement on television some years ago. It showed a look-alike of "Tip" O'Neill as the symbolic Democrat thundering down the road in a big gas guzzler, smoking a big cigar and laughing wildly, while the gas gauge edged toward empty. Adjusted slightly, the image is apt here. This time we are all in the car. The gauge is still edging toward empty. We are still laughing and smoking. But periodically, we stop to demonstrate our essential morality, by having a strident conversation over whether the solution is to turn the radio up or down.<sup>29</sup>

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27. The growth of unconscionability and undue influence doctrine in contract law are examples.

28. It has played a role in eliciting the wrenching changes of the civil rights movement, and some have argued that it drove even more wrenching decisions 100 years earlier. See BERTRAM WYATT-BROWN, *LEWIS TAPPAN AND THE EVANGELICAL WAR AGAINST SLAVERY* (1969); GILBERT H. BARNES, *THE ANTISLAVERY IMPULSE: 1830-1844* (1964).

29. So what does it mean if I am right? Maybe all it means is that our conversations should be less strident. Some of us should be less self-righteous, others less condescending. Maybe that is enough.

