

THE LEGITIMATE REACH OF THE ENVIRONMENTAL REVOLUTION

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This Essay addresses the question: “have environmental statutes and regulations gone too far?” There are three ways to think about this question. First, does the current manifestation of environmental regulation exceed the scope and intent of the enacting Congress? Second, does the current environmental regulatory regime extend too far into state sovereignty? That is, has the federal government usurped state authority to regulate in this area? And finally, even if the first two questions are answered in the negative, does federal environmental regulation curb private property rights in ways that are untenable or unlawful?

Let me set the stage for my response to each of these questions. I am the voice of debate here—the liberal in this symposium, the self-professed environmentalist, and the environmental plaintiffs’ lawyer—so it will not come as a surprise to you that my answer to each of these questions is “No.” Let me explain why.

I began teaching environmental law more than twenty years ago, and it is now the case that my students usually are too young to personally recollect the era that is often referred to as the “Environmental Revolution”—or even know much about the state of the world, legally and physically, at the time of that revolution. The Environmental Revolution in the United States occurred in the late 1960s and early 1970s.¹ During the Nixon administration—that is, with a Republican President and slim Democratic majorities in the House and Senate—we saw the en-

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1. Jerry L. Anderson, *Essay: The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 396 (1995).

actment of all the major statutes that today govern federal-state and federal-private relations with respect to the environment.²

The National Environmental Policy Act³ was enacted in 1970, and that same year extensive Clean Air Act amendments⁴ revamped the Clean Air Act⁵ and set most of its current structure. Of course, it was amended pretty significantly in 1990,⁶ but major structural portions of it were set in place in 1970. In 1972, substantial amendments⁷ were made to the Federal Water Pollution Control Act,⁸ which is what we now think of as the Clean Water Act. And, in 1973, the Endangered Species Act was passed.⁹ Those laws marked a dramatic revolution in the role of the federal government with respect to environmental protection.

So, if we want to know whether the current implementation of those statutes goes beyond what those Congresses intended and what the Republican President signed into law, we have to ask ourselves: “What problems motivated this environmental revolution and what powers did Congress think it had in its arsenal to direct toward those problems?”

In the years leading up to the Environmental Revolution, the public bore witness to environmental crises with increasing frequency. In the 1950s, 1960s, and 1970s, major urban rivers would regularly catch fire.¹⁰ They were, in effect, simply chan-

2. *Id.*

3. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370f (2006)).

4. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970); see Karen Wanderscheid, *The Environmental Protection Agency's "Major Emitting Facility" Definition and Its Effect on Ethanol Facilities: A Review of the Amended Rule and Its Potential Pitfalls and Successes in South Dakota*, 53 S.D. L. REV. 548, 551-54 (2008) (highlighting the various amendments to the Clean Air Act along with their respective contributions to its present structure).

5. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7671q (2006)).

6. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

7. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972).

8. Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)).

9. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2006)).

10. See *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974) (citing a Supreme Court case involving a fire on the Schuylkill River in Philadelphia and taking judicial notice of many instances of the Rouge River in Dearborn, Michigan, and the Cuyahoga River in Cleveland, Ohio repeatedly catching

nels for industrial waste, untreated sewage, large garbage, and other sorts of commercial waste.¹¹ All of these things were dumped into rivers, to stagnate there or to flow downstream into a lake or the ocean.¹²

A contemporaneous description of the Cuyahoga River, which runs through Cleveland, states: “[T]he lower Cuyahoga River . . . is a waste treatment lagoon. At times, the river is choked with debris, oils, scums, and floating globs of organic sludges. Foul smelling gases can be seen rising from decomposing materials on the river’s bottom.”¹³ An errant spark could easily ignite the surfaces of such a river, causing a spectacular river fire.

The nation’s air was similarly polluted. In the 1950s and 1960s, major air pollution episodes sent thousands of people to the hospital, literally gasping for breath. Los Angeles, for example, was plagued by daily smog alerts that killed hundreds of people and sent thousands to the hospital.¹⁴

The consequences of human development were also threatening the very existence of other species. Some very salient species, mostly birds, were simply dying off because of the unconstrained use of certain pesticides, which was making their eggshells too thin for them to reproduce.¹⁵ So when Rachel Carson wrote about DDT in *Silent Spring*,¹⁶ it was perceived to be the big environmental issue of the day—the climate change of that era.¹⁷

fire in the prior ten years); Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 *FORDHAM ENVTL. L.J.* 89, 93 (2002).

11. Adler, *supra* note 10, at 95.

12. See, e.g., *Ashland Oil & Transp. Co.*, 504 F.2d at 1326.

13. Arnold W. Reitze, Jr., *Wastes, Water, and Wishful Thinking: The Battle of Lake Erie*, 20 *CASE W. RES. L. REV.* 5, 7–10 (1968) (quoting Hearings on Water Quality Criteria for the Rocky Cuyahoga, Chagrin, and Grand River Basins and their Tributaries Before the Ohio Water Pollution Control Board (1968) (statement of George Harlow, Director, Lake Erie Office, Federal Water Pollution Control Board)).

14. See N. Brian Winchester, *Emerging Global Environmental Governance*, 16 *IND. J. GLOBAL LEGAL STUD.* 7, 9 (2009).

15. Andrew P. Morriss & Roger E. Meiners, *Property Rights, Pesticides, & Public Health: Explaining the Paradox of Modern Pesticide Policy*, 14 *FORDHAM ENVTL. L.J.* 1, 23–24 (2002).

16. RACHEL L. CARSON, *SILENT SPRING* (1962).

17. See Derek Redmond, *Importing Death as a Part of Free Trade: An Argument for a Prohibition on the Importation of Foods Containing the Residue of Banned Pesticides*, 27 *WM. & MARY ENVTL. L. & POL’Y REV.* 231, 231–35 (2002).

That is what the physical world was like in the years leading up to the Environmental Revolution. But what was the *legal* world in which Congress was operating? This may come as a shock, but in the early 1970s there were perceived to be virtually no—and I mean *no*—Commerce Clause restrictions on the scope of federal power to address problems of national significance relating, however indirectly, to interstate commerce. For the fifty years preceding *Lopez*, the conventional wisdom was that the Commerce Clause was not so much a limited, enumerated power but rather a grant of plenary authority to Congress.¹⁸ So Congress thought at the time of the Environmental Revolution that it had expansive authority to adopt any laws necessary and proper for addressing the health and welfare problems resulting from uncontrolled interstate pollution.

The Environmental Revolution also preceded the development of modern standing law. Before the Environmental Revolution and the development of the health-and-welfare administrative state there “was no distinctive body of standing doctrine.”¹⁹ Rather, standing depended on whether Congress had created a legal right and a concomitant cause of action.²⁰ Thus, when it passed legislation during the Environmental Revolution, Congress was not aware that the Court would articulate minimum constitutional requirements for standing and apply those to limit the reach of citizen’s suit provisions.²¹

So what did Congress do in this context? It enacted substantively sweeping environmental protection laws with expansive citizen’s suit provisions. The Clean Air Act, for example, directs the EPA to set minimum national ambient air-quality

18. See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443–55 (1987) (describing and lamenting the expansion of federal power under the Commerce Clause after the New Deal); Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 167 (1998).

19. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988); see also Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591 (2010).

20. See Sunstein, *supra* note 19, at 1434.

21. See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

standards, which it requires the States to implement.²² The Clean Water Act set an incredibly ambitious goal to eliminate all discharges into navigable waterways by 1985.²³ Suffice it to say that we are not there yet, but that was the goal in 1972: to have eliminated discharges into navigable waterways within thirteen years. The Endangered Species Act of 1973 sets an absolute prohibition on the taking of an endangered species by anyone anywhere in the United States.²⁴ Several years later, the full force of this prohibition was felt when the Court enjoined continued construction of the Tellico Dam to protect a newly discovered species of perch called a snail darter.²⁵

In addition to sweeping substantive provisions, each of these major environmental statutes contains an extraordinarily expansive citizen-suit provision.²⁶ The Clean Air Act's citizen-suit provision is illustrative:

Any person may commence a civil action on his own behalf . . . against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . .) who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation²⁷

These provisions authorize citizens to enforce the Environmental Revolution when the state will not.²⁸

Given this context, it would be virtually impossible for the current regulatory regime to exceed what those Congresses intended. They wanted to enact statutes that would clean up our

22. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, §§ 107–108, 84 Stat. 1676, 1678–79 (codified at 42 U.S.C. §§ 7407–08 (2006)).

23. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 101, 86 Stat. 816, 816 (codified at 33 U.S.C. § 1251(a)(1) (2008)).

24. Endangered Species Act of 1973, Pub. L. No. 93-205, § 9, 87 Stat. 844, 893 (codified at 16 U.S.C. § 1538(a)(1)(B) (2008)).

25. *TVA v. Hill*, 437 U.S. 153 (1978).

26. See 42 U.S.C. § 7604 (Clean Air Act); 33 U.S.C. § 1365 (Clean Water Act); 16 U.S.C. § 1540(g) (Endangered Species Act).

27. 42 U.S.C. § 7604.

28. See, e.g., Rebecca M. Bratspies, *Human Rights and Environmental Regulation*, 19 N.Y.U. ENVTL. L.J. 225, 264 (2012) (describing the role of citizen suits in enhancing enforcement of environmental law when the state will not or cannot enforce); cf. Pamela S. Karlan, *Forward, Democracy and Disdain*, 126 HARV. L. REV. 1, 27 (2012) (making the same point about the attorney's fees provisions of the Civil Rights Act of 1964).

world, and they hoped that all of us would enforce those statutes when the political branches lost their will. Since then, the reach of those statutes has been called into question by post-*Lopez* decisions applying the Commerce Clause as a limit on federal authority²⁹ and the enforcement of them has been significantly impeded by the development of standing law beginning in the mid-1980s.³⁰ The latter now makes it quite easy for regulated entities—like industry or land owners—to get into court but quite difficult for environmental plaintiffs under citizen suits to get into court to enforce these statutes.³¹

In light of all this, it is fair to say that federal environmental regulation today does not extend beyond the reach intended by the Congresses that enacted the statutes comprising the Environmental Revolution. That is why I answer “no” to the first question.

The second question, again, is this: Even if Congress intended environmental regulation to extend as far as it currently does, is this regulatory regime unduly interfering with state sovereignty? I approach this issue two ways.

The first is theoretical. We all know about externalities, which help explain why markets do not always allocate production resources efficiently and why certain decisions should be centralized and others decentralized. Environmental issues, it seems to me, are the very essence of the type of decisions that should not be decentralized and given to the States.³² In general, a federalist system allows us to experiment and find the regulatory regime

29. See, e.g., *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–74 (2001) (declining to defer to the Corps' broad interpretation of its jurisdiction over intrastate wetlands because it would raise serious constitutional questions under the Commerce Clause).

30. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 551, 560–62 (1992).

31. See Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1, 42 (2010).

32. See, e.g., Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 573 (1996) (noting that “the central reason for environmental regulation is to mitigate the impact of market failures that emerge from uninternalized externalities”).

that works best for each state.³³ But that sort of approach does not work with interstate environmental problems.³⁴

The reason is, of course, that these problems are not local. Air pollution migrates: a factory in Ohio might emit pollutants that fall as acid rain in New England. Discharges into Lake Michigan from industry in Chicago may wash ashore in Milwaukee. The habitat of the once-endangered gray wolf spreads across six Rocky Mountain States.³⁵ In each case, which state should be sovereign when it comes to regulation? As a theoretical matter, because pollution and endangered species do not always respect state boundaries, neither can regulatory sovereignty in this domain.

Moreover, from a legal perspective, none of the statutes from the Environmental Revolution unduly intrudes on state sovereignty because each leaves ample room for state autonomy.³⁶ The Clean Air Act, for example, instructs the EPA to set national ambient air-quality standards (NAAQS) but permits the States to draw up their own plans for implementing these standards.³⁷ Under this cooperative federalism, the State of Texas, for example, can decide whether it will build more oil refineries in Beaumont and force Dallas to have light rail to reduce auto emissions, or leave driving unaffected in Dallas but cut down on refineries. Similarly, although the Endangered Species Act prohibits both private and public action that would harm a threatened or endangered species (including adversely modifying its critical hab-

33. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1233–35 (1992) (arguing that competition among the States for industry will not necessarily lead to increasing pollution).

34. The congressional hearings leading up to the Environmental Revolution cited the interstate spillover of pollution as a primary justification for federal regulation. See Esty, *supra* note 32, at 601–02.

35. Press Release, U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service State Agencies Release 2012 Annual Report for Northern Rocky Mountain Wolf Population (Apr. 12, 2013), available at http://www.fws.gov/mountain-prairie/pressrel/2013/40122013_annual_wolf_report.html.

36. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995) (noting that “[t]he Clean Air Act, the Clean Water Act, RCRA, and the Safe Drinking Water Act all require EPA to establish minimum national standards that can be implemented and administered by states subject to federal supervision”).

37. 42 U.S.C. § 7410(a) (2006). See also Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1108 (2009) (discussing the role of the States in implementing the NAAQS).

itat), state, local, or private entities may establish a Habitat Conservation Plan for a covered species and then seek an Incidental Take Permit that exempts them from liability for any takings occurring as a result of authorized development.³⁸ Other statutes also leave ample room for state autonomy, within the constraints of protecting national values. Thus, both theoretical and practical concerns lead me to answer the second question “no.”

The third question concerns the appropriate degree of respect for private property rights. It asks: Does the current extent of environmental regulation unduly interfere with autonomy and liberty by limiting private property rights? Again my answer to this question is “no.”

To be sure, the Environmental Revolution conferred expansive regulatory authority on federal agencies with respect to private land use. As a result, in some circumstances industry must adopt prescribed pollution control technology under the Clean Air Act,³⁹ and obtain a Clean Water Act permit before discharging any pollutant from a point source into navigable waters.⁴⁰ In addition, businesses and individual landowners must obtain permits from the Army Corps of Engineers before they can deposit dredge or fill material into a wetlands,⁴¹ and cannot develop their property in any way that “takes” a protected species or adversely modifies its critical habitat.⁴² It is my view, however, that none of these regulatory schemes creates an unwarranted or unlawful intrusion into private property rights.

Rather, landowners are protected from federal overreaching by the Takings Clause of the Fifth Amendment. That clause provides: “[N]or shall private property be taken for public use, without just compensation.”⁴³ Although Professor Epstein has argued that the Takings Clause protects landowners from any uncompensated limitation on their property rights that deviates from a common law baseline,⁴⁴ this view has never gained

38. See Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 45–47 (2011) (describing Habitat Conservation Plans and Incidental Take Permits).

39. 42 U.S.C. § 7411 (2006).

40. Compare 33 U.S.C. § 1317(a) (2006), with 33 U.S.C. § 1342 (2006).

41. Compare 33 U.S.C. § 1311 (2006), with 33 U.S.C. § 1344(a) (2006).

42. 16 U.S.C. § 1538(a)(1)(B) (2006).

43. U.S. CONST. amend. V.

44. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 35–62 (1985).

widespread acceptance, either in the academy or the courts.⁴⁵ Instead, the Court and many scholars view the Takings Clause as serving the same purpose as the rest of the Bill of Rights—that is, as a countermajoritarian protection from overreaching political majorities.⁴⁶ Under this conception, the power of eminent domain is expansive so long as just compensation is paid,⁴⁷ and regulatory takings doctrine is designed to detect and invalidate land use regulations that “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁴⁸

To identify regulations that unduly single out landowners to bear disproportionate burdens, the Court looks to three factors: the extent of the economic impact, the degree of interference with reasonable investment backed expectations, and the character of the government action.⁴⁹ With this understanding of the concerns underlying the Takings Clause, consider two points. First, the wetlands protection provisions of Section 404 of the Clean Water Act is one of the environmental regulatory schemes most often criticized as unduly interfering with private property rights by limiting development on protected wetlands.⁵⁰ Yet this provision was enacted more than forty years ago. As noted above, the Takings Clause protects the *reasonable* expectations of property owners. Contemporary landowners can hardly claim surprise when told that they cannot destroy the protected aspects of their wetlands property for private gain. If the landowner bought the property recently, she cannot have a reasonable investment backed expectation of profiting from extensive development of the sensitive land. If she bought her property decades ago, she is likely to be able to recoup a

45. Indeed, it is an extraordinary proposition that over the course of centuries the common law has, by fits and starts, produced in our own era the perfectly efficient allocation of rights as among property owners, and as between them and the government.

46. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 39–60 (1990) (examining the countermajoritarian difficulty in constitutional interpretation).

47. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005).

48. *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

49. *Id.* at 124.

50. See Katrina Fischer Kuh, *When Government Intrudes: Regulating Individual Behaviors that Harm the Environment*, 61 *DUKE L.J.* 1111, 1141–43 (2012) (describing takings-based opposition to the Section 404 permitting requirements).

reasonable return on that old investment by taking advantage of mitigation opportunities that permit modest development.

Second, the Endangered Species Act's prohibition on adverse habitat modification is also often criticized as an unlawful intrusion on private property rights.⁵¹ But, as noted above, the Takings Clause protects individuals from being singled out by the government to bear burdens that should be borne by the public as a whole. The Endangered Species Act, however, can hardly be a tool for singling out individual landowners. Rather, the Act applies nationally wherever endangered species are found,⁵² and they tend to be found in places that the Congress could not have predicted. So buying land that is home to endangered species is like buying property that happens to lie on a sinkhole. It is unfortunate, maybe even tragic. All the houses around that sinkhole will have to be evacuated, and further building will not be possible.⁵³ But no one is being singled out in a sense that would call for protection by a countermajoritarian provision of the Constitution. The owner has been affected by an unfortunate act of nature, not by unconstitutional government regulation.

This Essay concludes where it began—by rejecting concerns that contemporary environmental statutes and regulation go too far. The current environmental regime does not exceed the expectations of the enacting Congresses, nor does it unduly interfere with legitimate claims of state sovereignty. Finally, the protections of the Takings Clause ensure that this regime does not unduly interfere with private property rights.

51. See Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355 (1994) (discussing the arguments in favor of compensation for land use limitations imposed by the Endangered Species Act and proposing a more measured solution).

52. 16 U.S.C. § 1538(a)(1) (2006) (prohibiting the taking of any species "within the United States" that are listed as endangered pursuant to the Endangered Species Act); see also *TVA v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

53. This hypothetical is intended to invoke the *Lucas* Court's reference to "the corporate owner of a nuclear generating plant [who] is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). Just as that directive would not constitute a compensable taking, neither does the Endangered Species Act's prohibition on "taking" a protected species that is found on private property.