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Foreword: Perspectives on a Legal Revolution

Roger W. Findley

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PERSPECTIVES ON A LEGAL REVOLUTION

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For me and many contributors to this Symposium, its title is a reminder that the bulk of our professional careers—whether as academics, practitioners, or both—not only has been devoted to this area of law but has spanned the entire duration of its existence. Among this group, I am far from alone in having explored many facets of the subject during these years.

Sometimes I wondered whether there was any sense to the twists and turns through which my curiosity, or happenstance, led me. Starting in 1965 with a piece about the influence of taxation and assessment policies on the preservation of open lands, I meandered through, among other things, projects involving agrarian reform in Colombia; protection of a midwestern forest ecosystem from a Corps of Engineers reservoir; preparation of a state constitutional article recognizing every citizen's right to a healthful environment; state regulation of noise from industrial and transportation sources; implementation of the federal Safe Drinking Water Act and Resource Conservation and Recovery Act; urban planning and natural areas protection in Colombia; and pollution control in Brazil. Currently, I am exploring how new international economic incentives—such as contractual or intellectual property rights in natural genetic material, which entitle source countries or indigenous peoples to royalties from genetic "prospectors" like pharmaceutical and seed companies—might contribute to rain forest protection and, more generally, to implementation of the 1992 Rio Convention on Biological Diversity.

In retrospect, my ventures capsulize the stages through which environmental regulation has evolved. The National Environmental Policy Act of 1969 (NEPA) was concerned especially with protecting natural areas and mitigating the adverse effects of development. NEPA and its state progeny focused on how the balance of competing economic and environmental interests, including those of future generations, was to be struck in projects undertaken or permitted by the government.

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Then the mid-seventies brought controversies over detailed statutes for controlling pollution. New concepts became commonplace: ambient environmental quality standards, technology-based and technology-forcing emission limitations, state implementation of federal requirements, federal minimums and federal preemption, nondegradation of pristine areas, and offsets and bubbles to allow both new jobs and environmental improvement in polluted areas.

The eighties opened with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and brought a new focus on toxic chemicals and wastes, risk management in the face of scientific uncertainty, ample margins of safety, and the public's right to information about potential hazards from chemicals stored or released in the community or incorporated into commercial products. The eighties also saw a return, of sorts, to the preregulatory era, with CERCLA's embrace of common-law tort concepts. In addition to the possibility of administrative penalties and injunctions, past and present generators and transporters of hazardous wastes—as well as owners and operators of disposal sites, including unsuspecting purchasers, and even creditors—faced massive civil liabilities for clean ups, without regard to fault.

Now, in the nineties, while the earlier problems and responses continue, we see new programs and emphases involving economic incentive systems, protection of endangered ecosystems and the global commons, and the relation of free trade to environmental protection. Sulfur dioxide emission allowances for coal-burning power plants nationwide are bought and sold on the Chicago Board of Trade, and similar permits for sulfur and nitrogen oxides emissions by industrial plants in southern California are traded in Los Angeles. Secretary of the Interior Bruce Babbitt proposes new approaches to achieving consensus among environmentalists, mining and timber companies, ranchers, and the government for protection of forests and grazing lands. An international panel concludes that U.S. restrictions on tuna imports, intended to protect dolphins in nonterritorial waters from drowning in certain nets used by foreign tuna fleets, violate the General Agreement on Tariffs and Trade's prohibitions on trade barriers not necessary to environmental protection within the United States' own borders. And a revolution breaks out in Mexico, with the Maya of Chiapas claiming that the North American Free Trade Agreement will lead not only to their further impoverishment but also to destruction of the last great tropical rain forest in North America.

The purpose of the present Symposium is to pause and reflect on this quarter century of legal revolution, to see what lessons we can draw from

it, and to suggest new and perhaps more fruitful directions for the future. Without trying to be exhaustive, I shall give some cryptic clues to the contents of the following Essays, which appear in alphabetical order according to the authors' names.

The Essays offer many insights concerning how we got where we are, what was done right, and what could have been done better. Jacob Dumelle, a longtime member and chairperson of the Illinois Pollution Control Board, articulates the plight of the regulator, obliged to adopt rules amid inadequate information, impediments to communication within the agency, and political concern for reappointment. James Krier and Donald Stever further explore the implications of regulating without adequate information, especially at the limits of scientific knowledge. Krier also stresses the tendency of regulators to ignore both difficult problems and difficult solutions until there are no other alternatives. John-Mark Stensvaag focuses on how "fine print"—language hidden in regulations, crafted by or for regulated economic interests, and leading to unexpected (except by its authors) results—is a major factor distorting and retarding environmental protection. Meanwhile, Zygmunt Plater argues that the main reason why regulation has progressed as far as it has is the activism of private citizens and environmental organizations, facilitated by innovations like expanded standing in administrative and judicial proceedings and citizen-suit provisions in environmental laws.

Two academics, Thomas McGarity and William Rodgers, Jr., conclude that "radical" regulatory approaches like technology-forcing and total bans—for example, prohibiting the addition of lead to gasoline and the destruction of endangered species' habitats—have often worked better than more flexible, media-quality-based and feasibility-based approaches. However, Turner Smith, a practitioner, argues that Congress and the regulators have not understood the dynamics of environmental controls in our free-market economy. He criticizes "unrealistic" laws like those calling for zero discharge of some pollutants and for excessive clean ups of waste disposal sites. Carol Rose similarly advocates regulation aimed at "optimal" pollution and rejects all-or-nothing solutions.

Several authors stress that regulatory priorities have been skewed, with more basic problems being ignored or slighted in favor of less pressing matters. Thus, William Pedersen cites our obsessions with major industrial polluters, simple-minded approaches to protecting human health, and the avoidance of controls on private land use and private conduct. The result has been failure to deal with agricultural and other nonpoint sources of water pollution, with the protection of nature, and

with an environmentally devastating transportation system based on the automobile.

Carol Rose, Kenneth Manaster, Ronald Rosenberg, and Philip Weinberg all address the problem of environmental justice, and the uneven distribution of welfare resulting from implementation of our pollution laws. Rose warns that regulatory choices based on comparative risk analysis across the full spectrum of environmental risks may cluster environmental burdens inequitably on certain segments of society.

The need for greater protection of natural values, endangered species, and ecosystems is stressed repeatedly. Alyson Flournoy discusses how new analytic techniques from the physical and social sciences, which account for complex and uncertain facts, can play a key role in species preservation law. N. William Hines echoes Aldo Leopold in calling for a land ethic for American agriculture. He challenges the notion of private landowner "sovereignty" over land-use decisions and urges greater protection of the soil, wetlands, and endangered species. A. Dan Tarlock questions the scientific foundation of the biodiversity (as opposed to pollution) branch of environmental law, the so-called equilibrium paradigm or balance of nature, which was accepted by ecologists in the 1960s but is now rejected and replaced by a complex nonequilibrium paradigm. From this paradigm shift he finds serious implications for environmental law on many levels, from the basic question of its scientific legitimacy to the modification of biodiversity protection strategies and the application of basic legal doctrines to biodiversity management.

The difficulty of regulating in a context of scientific uncertainty and of rapidly changing scientific knowledge is a principal focus of Daniel Farber's paper. As indicated above, this problem also is addressed by Flournoy, Krier, Rose, and Tarlock. Farber observes that, amid constant change, we still tend to conceptualize environmental problems in static terms: Given the information now available, what is the best solution? He suggests a more dynamic approach that acknowledges the centrality of learning to the enterprise of environmental protection. His strategies include decentralization—moving decision making from federal bureaucracies to smaller units of government and to the private sector—and streamlining the federal regulatory process.

The most obvious way to move decision making to the private sector is to utilize economic incentive systems, like marketable pollution permits. The most prominent and closely watched instance of this approach at the subfederal level is the marketable permit system for industrial emissions of sulfur and nitrogen oxides in southern California. Daniel Selmi puts this new program under the magnifying glass, alerting us to

some uncertainties of implementation: monitoring, blending incentives with command and control, and midstream political tampering. Like Farber, Selmi favors experimentation with decentralization, and relaxation of federal regulation when necessary to accommodate innovative state and local efforts.

Other advocates of alternative approaches to resolving environmental problems include Owen Olpin and Philip Weinberg. Olpin proposes meaningful citizen participation in negotiated decision making by federal land management agencies, in lieu of notice-and-comment rule making. He outlines scenarios in which such a process would be likely to succeed, that is, to produce better rules with fewer delays in implementation. Weinberg suggests state-sponsored mechanisms to facilitate negotiated settlements in Environmental Protection Agency rule-making proceedings and CERCLA controversies.

Three authors focus on the evolution and conduct of the environmental bar. William Futrell is concerned with the relationship between environmental ethics and legal ethics among judges, government lawyers, and the private bar. Kenneth Manaster cautions against the good guys/bad guys dichotomy, in which environmental activists and prosecutors are viewed favorably, in contrast to attorneys representing polluters and natural resource users. Pogo, says Manaster, was closer to the mark: "We have met the enemy and he is us." Like Manaster, Donald Stever notes the diverse specialties of individuals often lumped together as "environmental lawyers." He recognizes three distinctly different environmental bars: the original regulatory/litigation bar, the CERCLA bar (fifty percent of the total, but a potentially endangered species), and the due diligence bar.

Only one contributor looks at the increasingly important area of environmental crimes. Richard Lazarus explains why the process of assimilating environmental protection values into the criminal law has been more difficult than in the case of civil enforcement. He closely examines problems plaguing the Environmental Crimes Section of the Justice Department, and related frictions between Congress and the executive branch of the federal government. However, he concludes that the deeper problems are how Congress defined environmental crimes in the pollution control laws and the institutional collisions fostered by that legislative approach.

Finally, there is the emerging field of international environmental law. As Turner Smith notes, many of the most difficult environmental problems—ozone depletion, global warming, resource depletion, species loss, transboundary pollution, desertification—are global, or at least re-

gional and multijurisdictional. Philip Weinberg stresses the need to reconcile competing goals of free trade and environmental protection and to rethink our relationship with developing countries, which too often are perceived merely as sources of raw materials and repositories for our waste. In the only Essay devoted exclusively to international law, Linda Malone provokes us with a fictitious but entirely credible struggle in the United Nations Security Council over international regulation of unsafe nuclear reactors in the former Soviet Union.

Individually, these twenty-two Essays are fascinating and illuminating commentaries on the history and future of environmental regulation. Taken together, they are the largest collection of papers by the nation's leading experts on environmental law ever assembled in a single issue of a law review. We at Loyola are proud of this Symposium and appreciate the efforts of the authors who made it possible.