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EVOLVING CONSENSUS: THE DYNAMIC FUTURE OF ENVIRONMENTAL LAW AND POLICY

*Ronald H. Rosenberg**

As Americans we dwell on the present. Recent events are the most important ones, and they capture individual as well as public attention. Today's news is the focus; we seem to forget that important public policy issues—such as environmental protection—have a history, a past. These issues do not spring to life instantaneously but rather reach us with a background. In the Pacific Northwest, for example, federal land managers, wood products companies, and environmentalists are currently embroiled in a debate over questions regarding the coexistence of commercial timbering practices and old-growth forests and endangered species.[1] While this environmental issue of the 1990s presents us with the choice between either socioeconomic harm or environmental benefits, it is but a continuation of resource use/conservation conflicts, which have emerged over the years. Nearly seventy-five years ago, a similar conflict over natural resource use arose over the proposed damming of the Hetch Hetchy Valley in the Sierra Nevada mountains for use as a water supply reservoir and hydroelectric generating facility for San Francisco and other parts of northern California.[2]

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1. *See generally* CHRISTOPHER MANES, GREEN RAGE 84-106 (1990) (discussing conflict between timber companies and environmentalists surrounding tree harvesting in Pacific Northwest, including commercial practices, government regulation, and environmental concerns such as danger to wildlife diversity, water quality, soil productivity, beauty, and solitude).

2. The conflict highlights the split in the conservation movement between the competing objectives of "wise resource use" and "preservation." The damming of the Hetch Hetchy Valley in Yosemite National Park pitted the City of San Francisco against John Muir and the newly formed Sierra Club. Opponents to the project sought to organize national opposition to the plan, describing it as a desecration of a unique natural resource. Writing about the debate, John Muir said, "Dam Hetch Hetchy! As well dam for water-tanks the people's cathedrals and churches, for no holier temple has ever been consecrated by the heart of man." JOSEPH M. PETULLA, AMERICAN ENVIRONMENTAL HISTORY 320 (2d ed. 1988) (quoting John Muir). Ironically, Muir also had the financial support of Pacific Gas and Electric behind him, since the emerging municipal utility did not wish to alienate its electric customers. In 1914, with the support of the Roosevelt Administration, Congress authorized construction of the reservoir. *Id.*

An American environmental history exists, spanning a period at least as long as there have been human beings on this continent modifying the natural world with their activities.[3] Consequently, any consideration of our society's relationship to its environment should be considered to be part of a continuum of legal, social, and political development. Where we stand today should be considered in terms of this lengthy interaction between humans and nature. How we treat our natural world reveals much about our cultural values and the effectiveness of our social institutions.

With this sense of connection to earlier times and previous responses to environmental problems, it is also important to understand that social and political attitudes about the natural environment can change. An environmental resource—such as air, water, or wildlife—at one time can be considered unimportant to a society, yet at another time it can be viewed as being critically important and highly valued. These resources also can be viewed in terms of their current use value. The demise of the American bison[4] and the deteriorated condition of some American rivers provide unfortunate examples of this latter phenomena.

Similarly, the definition of a significant "environmental problem" and the specification of an appropriate societal remedy may differ substantially over time. For example, air pollution has been defined in various ways during the last century.[5] In the 1890s, it was considered the black industrial smoke in Pittsburgh; in the 1950s-1960s automobile-cre-

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3. *See, e.g.*, WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983); ALFRED W. CROSBY, ECOLOGICAL IMPERIALISM: THE BIOLOGICAL EXPANSION OF EUROPE, 900-1900 (1986).

4. The extermination of American buffalo herds reflected the policies of extreme resource exploitation and suppression of Native American tribes. While buffalo met important nutritional and clothing needs of the Native Americans, buffalo also met the domestic and international demand for food, clothing, and sport. In the years following the Civil War, millions of buffalo were killed by sports enthusiasts, professional hunters, and railroad interests. At the end of the nineteenth century, buffalo had virtually disappeared, the cattle industry was in place, and the Native Americans largely were confined to their reservations. *See* PETULLA, *supra* note 2, at 215.

5. To call a substance "pollution" is to express a value judgment that the material is socially undesirable. The evolution in thinking about emissions from homes and factories as something harmful and illegal did not occur consistently throughout the nation. For instance, during the late nineteenth and early twentieth centuries, many city leaders viewed the smoke created by industrial facilities as a sign of prosperity and employment. In fact, Pittsburgh, Pennsylvania, was proudly known as the "Smoky City." However, during this same period, many cities also attempted to suppress the emissions of smoke as a public nuisance. *See* SIDNEY EDELMAN, THE LAW OF AIR POLLUTION CONTROL 74 (1970). In 1916 the United States Supreme Court upheld a smoke control ordinance that called smoke a public nuisance and prohibited the emission of dense smoke in portions of the city of Des Moines, Iowa. Northwestern Laundry v. City of Des Moines, 239 U.S. 486 (1916).

ated "smog" in Los Angeles was its defining feature; and finally the technologically sophisticated 1990s speak of it in terms of small diameter particulates. Determining just what constitutes an environmental problem does change over time, depending upon shifting perceptions of environmental danger and social desires for differing levels of environmental quality. It is important to note that this is a dynamic definition that is constantly modified to suit collective demands. Also, the definition of a social or environmental problem greatly affects our understanding of when and to what degree the problem is "solved."

As our nation moves towards the threshold of the twenty-first century, it seems an appropriate time for us to take stock of the significant developments our society has produced in the field of environmental protection during the last several decades. Looking back over the past twenty-five years, one would have to be impressed by the degree of societal interest and activity in matters of environmental protection. On the most superficial level, the political and popular culture has embraced environmentally protective goals and images. Environmental destruction usually is depicted in a negative light and heroic characterizations often are accorded to those protective of environmental values. This trend even has spilled over into the political sphere, with at least one recent president describing himself as the "environmental President"[6] and many other congressional leaders emphasizing their support for environmental or "green" issues.[7] Popular culture increasingly reflects proenvironmental images such as the motion pictures *The Pelican Brief*,[8] *FernGully*,[9] and *Medicine Man*,[10] and the children's cartoon series *Cap-*

6. Paul Houston & Douglas Jehl, *Bush Sets 10-Year Plan for Clean Air*, L.A. TIMES, June 13, 1989, at I1, I16 (noting that Bush has pledged to be "an Environmental President"); *see also A White House Chill on Global Warming*, NEWSWEEK, Nov. 13, 1989, at 47 (stating that George Bush wanted to be the "environmental president").

7. *E.g.*, AL GORE, EARTH IN THE BALANCE (1992) (examining quality of air, soil, and water, and arguing that only radical rethinking of our relationship with environment can save earth's ecology for posterity).

8. Army Archerd, *Just for Variety*, DAILY VARIETY, Dec. 15, 1993, at 4 (discussing PELICAN BRIEF (Paramount 1993) and noting that it revolves around "major environmental issue").

Pelican Brief is a movie based upon the book by John Grisham, in which two U.S. Supreme Court Justices are murdered because industrialists believe that the Justices' strong views regarding environmental protection will obstruct the progress of future business ventures. PELICAN BRIEF (Paramount 1993).

9. David J. Fox, *How Green Is Hollywood's Valley?*, L.A. TIMES, Oct. 6, 1991, (Calendar), at 25, 27 (discussing FERNGULLY (Twentieth Century Fox 1992) and describing it as "environmentally sensitive" movie).

10. *Id.* at 27 (discussing MEDICINE MAN (Disney/Touchstone 1992) and describing it as movie with "environmental message").

tain Planet.[11] Popular music[12] and novels[13] also contain many environmental themes. Beyond this, even American consumerism reflects the popular identification with environmental values. Advertising messages increasingly tout the environmentally sensitive characteristics of consumer goods and product packaging. Public opinion polls reflect public attitudes that consistently rank environmental protection as an extremely important and broadly supported public value.[14] The past quarter century also has been marked by this enhanced public consciousness of environmental matters, as well as an increased pressure upon the instruments of government to protect and preserve an ever-expanding vision of environmental quality. Undoubtedly, popular concern with environmental matters and the elevation of this topic as a subject of wide-ranging public policy interest must be viewed as a notable and characteristic element of this period of U.S. history.

Over the course of two-and-a-half decades, American society has come to consider environmental issues in a wide variety of contexts. The meaning of environmental protection has dramatically expanded beyond the traditional confines of nuisance-related pollution control and abatement. For instance, while the 1969 burning of refuse floating on Ohio's Cuyahoga River highlighted the severe yet longstanding problem of industrial water pollution,[15] this period also witnessed the inclusion of other diverse issues within the modern lexicon of environmental inter-

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11. Chris Willman, *Al Gore Is Leading Man in this Year's EMA Ceremony*, L.A. TIMES, Sept. 29, 1993, at F6 (noting that *Captain Planet* received award at annual Environmental Media Awards Ceremony for its incorporation of environmental themes).

12. "Sound Action," produced by Concerts for the Environment and featuring bands such as the Violent Femmes, Michelle Shocked, Robert Cray, and Midnight Oil, has become an increasingly important part of Earth Day. The music laments the problem of diminishing natural resources and environmental advocates. Richard Harrington, *On the Beat: It's Easy Being Green: Earth Day Set for Post Pavilion*, WASH. POST, Apr. 21, 1993, at B7. The popular songs "Down Eastern Alexa" and "Where Do the Children Play?" lament the disappearance of our natural resources as the world becomes more populated and technically advanced. *See* BILLY JOEL, *Down the Eastern Alexa*, *on* STORMFRONT (Columbia Records 1989); CAT STEVENS, *Where Do the Children Play?*, *on* TEA FOR THE TILLERMAN (A&M Records 1971).

13. An example of a novel with an environmental theme is AL GORE, EARTH IN THE BALANCE (1992), which was recently within the top twenty on the *New York Times* Best Seller List. *Paperback Best Sellers: June 20, 1993*, N.Y. TIMES, June 20, 1993, § 6, at 28.

14. *In Search of Balance*, STN, Apr., 1993, at 6, *available in* LEXIS, News Library, Mags File.

15. In June 1969, the Cuyahoga River, passing through Cleveland, Ohio, burst into flames from oil-soaked debris floating in the water. This spectacular pollution episode focused the nation's attention on environmental matters and, specifically, water pollution. *See* PETULLA, *supra* note 2, at 413-14. Earth Day took place in April 1970, *id.* at 414, and the Federal Water Pollution Control Act Amendments were enacted in 1972. Pub. L. No. 92-500, 82 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.A.).

ests. Today such interests as endangered species protection, oil spill control and remediation, safe drinking water, and hazardous waste clean up are regarded as important environmental dangers warranting an effective social response. This extension of the meaning of "environmental interest" reflects both the ecologist's view of an environmentally interdependent world and the growing list of public goods desired by the American people.[16] Certainly public awareness of a growing number of environmental issues indicates the prominent emphasis the media has placed upon the environment. It also reveals an expansion in public expectations of what government can and should provide to its citizens.

The last quarter century has also revealed great public faith in legal solutions to pressing environmental problems. As unrestrained market forces were perceived to have been responsible for much of the environmental damage in prior years, a legislatively initiated, yet administratively implemented system of environmental regulation was thought to be the best cure. Bureaucratic responses to modern environmental problems were ordered, reflecting the new acceptance of environmental protection as a legitimate government function. During this period Congress enacted at least twenty-five major environmental statutes—some of voluminous proportions and daunting complexity.[17] This surge of congressional action reflected both the success of interest group politics and a naïveté about the complexity and diversity of the problems. It also revealed an exaggerated optimism about the regulatory capacity of administrative agencies. The newly created environmental bureaucracy, the Environmental Protection Agency (EPA), was charged with the responsibility of issuing detailed performance-based pollution control rules for a wide range of industrial categories.[18] During this early period environmental legislation occasionally concentrated the EPA's attention and

16. A public good is defined as a "commodity whose benefits may be provided to all people (in a nation or town) at no more cost than that required to provide it for one person. The benefits of the good are indivisible and people cannot be excluded." PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 913 (12th ed. 1985). The private sector does not provide public goods because the benefits are dispersed so widely across the population that no single firm or consumer has an incentive to provide them. Some examples of public goods are national defense, lighthouses, parks, and dams. *Id.* at 48-49, 713.

17. J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOY. L.A. L. REV. 825, 827-28 (1994) (listing at least 25 major environmental statutes passed by Congress since 1964).

18. In 1969 President Nixon established the Environmental Quality Council to advise the President on environmental matters and to ensure that federal policies and programs were incorporating environmental quality matters. Exec. Order No. 11,472, 34 Fed. Reg. 8693 (1969). By 1971 the EPA had been formed and was appointed to serve along with other federal agencies on national commissions affecting the environment. *See* Exec. Order No. 11,613, 36 Fed. Reg. 14,299 (1971).

resources upon highly visible, well-publicized environmental issues—often at the expense of problems presenting greater public health and environmental risks. Sometimes major sources of environmental pollution were all but ignored by the EPA and Congress. Nonpoint source water pollution and hazardous air and water pollution control are a few examples.[19]

The first twenty-five years of environmental regulation witnessed a slow evolution in agency capacity and the development of a new category of law practice—environmental law.[20] During this period, environmental statutes triggered the creation or expansion of a number of federal agencies and subagencies whose principal concerns involved matters of environmental regulation. While implementing the varied and often highly detailed congressional commands, these federal agencies have created extensive regulatory programs complete with detailed standards, permit obligations, and enforcement sanctions. In addition to this federal response, most state legislatures replicated this statute and agency-based structure by adopting or implementing state and local laws. As we reflect on the past quarter century, our society must imagine what the present state of our air, water, land, wildlife, and public health would have been without the development of our system of environmental control. On this we may only speculate. Most observers would agree that environmental protection regulations could be improved in the next quarter century. The discussion that follows describes the values and ideas that should shape our environmental law in the next twenty-five years.

Despite the continuous social development of a national environmental policy during the last quarter century, we must remember that our society and economy constitute a complex system of interrelated parts. Thus, the development of effective and economically feasible environmental regulations is bound to take time. Although we are an impatient people, we must understand that environmental protection is a multifaceted subject with substantial complexities and internal conflicts. Our goal should be to improve our environmental regulation so we may achieve broadly supported environmental goals. Over the next quarter

19. Many problems associated with hazardous wastes were not addressed until much later. For example, Congress first addressed the problem of leaking underground storage tanks in 1984. Laura J. Nagle, *RCRA Subtitle I: The Federal Underground Storage Tank Program*, 24 Envtl. L. Rep. (Envtl. L. Ins.) 10,057 (Feb. 1994).

20. Reynolds Holding, *Attorneys Find New Specialty: Environmental Rules Help Local Law Firms*, S.F. CHRON., Apr. 8, 1991, at C1 (describing growth of environmental practice groups in San Francisco law firms despite recession).

century, I believe that American environmental policy should follow five basic themes.

First, we must recognize the need to adapt to changing conditions both in the natural environment and in the political-legal system. This response to change will be an important measure of the overall success of our environmental policy during this period. We must understand that environmental policies are created on a number of levels: global, national, regional, and finally, local. The environmental rules adopted at each level are important, and each level of action influences the others. Policy makers must comprehend that this multilevel system of environmental control is here to stay and that the slogan "think globally, act locally" actually reflects the intricacy of the system. As we consider making federal or state environmental decisions, it is important to understand the ramifications at the global or multinational level as well as the local or municipal level. Policy implications of actions taken in both directions should be carefully considered and their implications should be analyzed. A prime example of this interplay occurs in the international trade agreement arena where recent trade pacts such as the North American Free Trade Agreement (NAFTA) and the General Agreement for Tariffs and Trade (GATT) contain provisions or side agreements relating to environmental protection.[21]

Second, it is important that American environmental policy take a more holistic view of environmental problems. It is important that environmental regulation not be undertaken with a rigid and formalistic rule structure. We must focus on the ultimate goal of achieving environmental improvement. This need to undertake a unified analysis of environmentally damaging activities will require an understanding of the interconnection between various aspects of these activities. For instance, the control of air pollution through the use of smokestack scrubbers or other devices can create a solid waste disposal problem in the residue

21. *The Showdown*, THE ECONOMIST, Nov. 13, 1993, at 23, 26 (discussing environmental side agreements to NAFTA).

Article I of GATT is the most favored nation status clause. Waivers from the provision have been granted when a country's general health and welfare may be jeopardized by extending most favored nation status to another. General Agreement for Tariff & Trade, Oct. 30, 1947, art. I, 61 Stat. A12. Article XI provides an exception to the general commitment to no nontariff trade barriers in order to allow countries to enforce their own health and safety regulations. *Id.* art. XI, 61 Stat. A32. Both of these provisions are meant to include environmental regulations. Though there is no explicit mention in the GATT of environmental protection as a justification for limiting trade, states are entitled to legitimately restrain trade under Article XX if "necessary to protect human, animal or plant life or health" and they may impose measures "relating to the conservation of natural resources." *Id.* art. XX, 61 Stat. A60.

resulting from the removed air pollutants. This intermedia consideration is extremely important because the policy of reducing air emissions can result in a worsening of solid waste and groundwater contamination problems. Every environmental problem should be assessed in terms of the overall impact of controlling individual aspects of the activity. It may be that different situations will result in different optimal combinations of controls and regulations. This, of course, flies in the face of uniform technological control. However, it is worthy of consideration in light of our separate consideration of different aspects of environmentally damaging activities. Our emerging law and policy should strive for the integration of all environmental controls to produce the optimal set of pollution and natural resource use results.

Third, as we move into the next century, it is vitally important to expand our base of knowledge. We need to know more about ecological systems and environmental sciences generally. How are the intricate systems of nature affected by new land development, new products, and new technology? This knowledge will be important to the development of engineering approaches and technology, which hopefully will result in the development of environmentally benign production technologies and development strategies. These technologies should encourage production principles emphasizing efficiency and waste reduction. This expansion of environmental knowledge will enhance a philosophy of pollution prevention in our manufacturing sector thereby avoiding the creation of environmental problems through the use of efficient new processes that do not create residuals. Ultimately, this will involve the use of new scientific and engineering know-how to advance old-style conservationist goals. This view places great faith in scientific and engineering advances as agents of positive change in the environment. Our regulatory system and environmental programs should encourage this progression.

It is also important that high-quality environmental knowledge is available to policy makers and regulators so their judgments are informed by the best possible technical information. While there may never be a perfect data base upon which to support regulatory decisions, legislators, agency personnel, and the regulatory community should acquire the most accurate and reliable scientific information so that speculation and uncertainty in regulation will be kept to a minimum. On the individual level, there should be environmental education at all levels of our educational system. Inculcating the understanding of the environmental impact of personal actions can serve to educate the populace of the significance of actions taken at the individual or family level. This knowledge can also help people clearly understand public policy issues

considered by the government. A greater knowledge of the environmental implications of personal actions can also make individuals more receptive to the adoption of new environmentally beneficial rules. The current widespread support of recycling and solid waste reduction programs is undoubtedly attributable, in part, to an emphasis on the environment in elementary and secondary school curricula. Further education, both at this level and generally in society, would help the public understand new environmental policies and increase chances that the policy goals will actually be achieved.

Fourth, the next twenty-five years should also see a clarification of public values concerning environmental interests. During this period a consensus should arise regarding what environmental policies or objectives are most important to achieve. For example, social consensus could form around achieving environmental sustainability so that our public and private decisions consider both the short- and the long-term implications of individual actions. This concept of sustainability could serve as a general overarching policy, which could influence numerous subsidiary environmental positions.

Americans must also decide what their environmental goals are. What is most important to the largest number of people? Establishing our environmental values should help policy makers determine which environmental interests are worthy of protection. However, it is important that we understand that "You can't have it all." It will be necessary to prioritize environmental values and to understand that environmental policy cannot achieve all possible goals desired by all segments of the society. There are costs associated with the achievement of environmental goals. As a society we must decide which costs to bear. In this regard, environmental policy making is ultimately a function of political choice.

Further, when we articulate new environmental values it is important to consider distributional considerations of both the environmental benefits and the environmental costs. The recent considerations of racial and socioeconomic impacts of existing environmental policies point out the need for this continuing sensitivity and awareness of seemingly neutral agency decisions and legislative policies.[22] We have learned that environmental decisions have different effects on different people depending upon where they live, where they work, and their socioeconomic status.

22. Environmental hazards fall disproportionately on the poor and minority communities. *See* Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 397-98 (1991).

Thus, we should also consider distributional dimensions so questions of equity and fairness inform the ultimate policies chosen.

Finally, we must consider developments in the legal structure of our environmental policy-making apparatus. Should we continue the existing heavy reliance on regulatory controls to improve environmental conditions? If so, how can the process of environmental regulation be improved, simplified, or streamlined? These are questions of incremental change to our regulatory systems. We must be especially concerned about the potential for multigovernmental regulation of the same activity. It is extremely important that our policy consolidates regulatory controls in the most efficient and effective method. This will certainly require enhanced intergovernmental cooperation and the allocation of different roles throughout our regulatory system. The evolution of our environmental law over the past quarter century has not focused enough attention on this important issue.

Another legal matter worthy of significant consideration is the problem of environmental overregulation, that has currently been framed in terms of the constitutional takings doctrine.[23] It will be important over the next few years to clarify the parameters of uncompensated regulation for environmental purposes.[24] Uncertainty as to the legitimate boundaries of takings regulation certainly affects both governmental regulators and private property owners adversely. Developing new compensation mechanisms is needed to distribute the extreme burdens of environmental regulation more fairly. Land condemnation should be undertaken in the cases of complete regulatory dominance.

In addition to regulatory responses to environmental problems, the next quarter century should see an increase in the use of nonregulatory mechanisms. While environmental law has begun to emphasize market alternatives to regulatory controls, the next two-and-a-half decades should see a more sophisticated and blended approach. Environmental law will combine the best features of regulation with market-based incen-

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23. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). In *Lucas*, the U.S. Supreme Court held that regulations that deny the property owners all "economically beneficial use" of their land constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. *Id.* at 2895 & n.8.

24. For example, the courts have yet to determine what constitutes the total deprivation of use that triggers the categorical taking. If courts limit the scope of total deprivation to merely total deprivation of value, the *Lucas* decision will have minimal impact. If, however, total deprivation means that the purchaser cannot achieve a reasonable return on his investment, then *Lucas*'s impact will be substantial. William Funk, *Revolution or Restatement? Awaiting Answers to* Lucas' *Unanswered Questions*, 23 ENVTL. L. 891, 894 (1993).

tives and education techniques to achieve a higher level of environmental protection.

Ultimately, the future environment of our nation and the world depends upon the collective ability of individuals, firms, and governments to reach a consensus on environmental goals and achieve them. Every generation selects the world it will live in by conscious choice or by inaction. Considering the significant threats to public health and the quality of the natural environment that face us today, our society is making decisions that shape its environmental future. Let us hope that we have the wisdom, foresight, and social consensus to make the right choices.