

Debate: Faction and the Environment

*Michael Greve, First Panelist**

I have progressed a little since editing the book Judge Ginsburg mentioned. I have a new agenda, which is as follows: I will first try to persuade you that the environment has been formative of American constitutional and administrative law in the sense that it was perceived as a unique and urgent problem demanding innovative legal solutions, which then became paradigmatic for the legal system at large. Then, I will argue that the courts have begun to retreat (1) from the assumption that the environment is so special as to require innovative legal doctrines, and (2) from the doctrines themselves. I will try to explain why the courts have done so. I confess at the outset that my balanced position on the courts' change of heart is an unqualified "Hallelujah."

Let's start with what you can call the ecological paradigm (or "truism," as environmentalists call it):¹ everything is connected to everything else. If you thought that the world is a seamless web that is interdependent, complex, and, above all, incredibly fragile, what legal arrangements would you want?

The first thing that happens is that property goes by the boards. Even the most ardent property rights advocate will admit that you cannot use your property for aggression or to harm others. But this nuisance exemption eats the property title itself, if anything and everything you do on or with your property potentially inflicted an externality on someone else. The only thing that is left of the free use of your property is your obligation to keep it in its natural state as part of a functioning ecosystem.²

The second implication of the ecological paradigm is the flip side of the first: if everything we do affects everyone else, everything has to be subject to a political process that knows no outsiders, but ropes in every "concerned" citizen. *Anyone* must be allowed to pipe up, no matter how remote his connection to the issue at hand. And since you cannot pipe up effectively if you cannot sue, we should grant standing

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1. See, e.g., Joseph L. Sax, *The Constitutional Dimensions of Property: A Debate*, 26 *LOY. L.A. L. REV.* 23, 32 (1992) ("The ecological truism that everything is connected to everything else may be the most profound challenge to established notions of property.").

2. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 *STAN. L. REV.* 1433, 1438 (1993).

to anyone with the wits to shout "global warming" in a crowded courtroom. (Judge Ginsburg will recognize this line because it is his.)³

The third implication of the ecological paradigm is a very simple view of politics and of government failure: on the one side are environmental values, and on the other are all the special parochial interests. The latter will always win unless we take special measures to protect the former. *This* is the critical government failure, and in order to prevent it, you would want the courts to give full effect to symbolic congressional commitments to zero risk, absolutely clean air, and totally clean water. Conversely, the exercise of discretion and the consideration of tradeoffs, especially tradeoffs between costs and benefits, are, on this view, evidence of agency capture by special interests, which the courts must counteract. This intuition is where hybrid agency procedures and the hard look doctrine have their origin.

There are few, if any, constitutional protections against regulatory takings, practically unlimited standing, and the whole rigmarole of modern judicial review. Taken together, these amount to a coherent agenda of pervasive hostility towards private orderings or, in a word, statism. One can, of course, be a statist on grounds that have nothing to do with the environment, but the environment is what has been driving the statist agenda. If one thinks of the leading cases on takings, standing, and judicial review since the late 1960's, the vast majority of them were environmental and health and safety cases.

Now, as I mentioned at the outset, I think the courts have begun to reject the ecological, statist paradigm. Before I get to the reasons, let me give you a few examples in each of the areas that I mentioned.

The takings case I have in mind is, of course, *Lucas*.⁴ Professor Joseph L. Sax has argued that *Lucas* can be understood only as an explicit rejection of the ecological paradigm;⁵ and just this once, I will agree with him. *Lucas*' basic principal that the state owes compensation for regulation that goes beyond the confines of the common law of nuisance is limited, first, to land use as opposed to commercial transactions and, second, to complete as opposed to partial takings.

The case that Justice Scalia has in mind is a state prohibition on *any* land use, no matter how traditional. What *Lucas* aims at is not a general theory of takings; instead it is aimed at preventing the state from putting landowners under an affirmative obligation to maintain undeveloped land in its natural state to support the ecosystem. One can debate whether *Lucas*, on its facts, was that case. But Justice

3. *City of Los Angeles v. NHTSA*, 912 F.2d 478, 484 (D.C. Cir. 1990) (criticizing elimination of standing requirements "for anyone with the wit to shout 'global warming' in a crowded courthouse").

4. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

5. Sax, *supra* note 2, at 1439.

Scalia clearly thought it was and decided to draw a line in the sand, so to speak.

The standing cases are a pair of decisions, both also written by Justice Scalia, called *Lujan v. National Wildlife Federation*⁶ and *Lujan v. Defenders of Wildlife*.⁷ In both cases, the Supreme Court first found that the environmental plaintiffs had failed to demonstrate a specific "injury in fact." This in itself is telling because these are the first environmental cases of this sort. In both cases, though, the Court went much further and undermined the basic assumptions on which environmental litigation has been built.

National Wildlife Federation is directed against programmatic litigation—that is to say, lawsuits that are brought not over site-specific agency decisions but over entire government programs. The case holds that a plaintiff who is affected by a final agency decision made pursuant to a program can challenge only the individual decision, not the program as a whole.

Defenders of Wildlife is even more dramatic. It holds that Congress may not abrogate fairly substantial injury-in-fact requirements for environmental plaintiffs, at least not in suits against the government. In effect, it declared the citizen suit provision of the Endangered Species Act⁸ unconstitutional. It probably did the same for all other citizen suit provisions,⁹ and there is one in almost every environmental statute.

You can reach the results of *Defenders of Wildlife* and *National Wildlife Federation*, first, only if you are not terribly preoccupied with giving full force and effect to congressional declarations of public values. The whole point of environmental citizen suits is, in the late Judge Skelly Wright's words, "to see that important legislative purposes heralded in the halls of Congress are not lost or misdirected in the vast hallways of the federal bureaucracy."¹⁰ Justice Scalia's response to this position is that a lot of heralded purposes *ought* to get lost or misdirected.¹¹ (Laughter.)

6. 497 U.S. 871 (1990).

7. 112 S. Ct. 2130 (1992).

8. 16 U.S.C. § 1540(g) (1988).

9. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992) ("Read for all it is worth, the decision invalidates the large number of statutes in which Congress has attempted to use the 'citizen-suit' device . . .").

10. *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

11. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983). As Professor Sunstein has correctly pointed out, Justice Scalia's opinion in *Defenders of Wildlife* is based squarely on this article. Sunstein, *supra* note 9, at 164-65.

Secondly, you can reach these results only if you are not overly concerned with agency capture. The point of programmatic litigation is precisely to catch the agency early and at a very general level of decisionmaking, before it gets off track and caves in to interest groups. *National Wildlife Federation* frustrates that intention, and intentionally so.

The same impulse lies behind several recent judicial review cases. Let me briefly discuss three cases that I think are trend setters: a Fifth Circuit decision called *Corrosion Proof Fittings v. EPA*,¹² written by Judge Smith, and two D.C. Circuit decisions written by Judge Williams, *Competitive Enterprise Institute v. NHTSA*¹³ and *International Union v. OSHA*.¹⁴ The decisions reversed and remanded, respectively, an EPA asbestos ban, NHTSA's decision not to lower automobile fuel economy (CAFE) standards, and OSHA requirements for certain industrial safety devices called "lock out/tag out" rules.

In the interest of saving time, I have to oversimplify greatly now. But the judges who decided these cases and some of the lawyers who handled them are in the audience, and when I am done up here they can complicate matters to their hearts' content. What the three cases have in common is that they all focus on the tradeoffs in environmental policy rather than on congressional intent, as measured by lofty declarations, or on agency capture. They ask whether the *result* reached by the agency is reasonable, and they conclude, not surprisingly I think, that it is not.

In the asbestos case, EPA had ignored its own data showing that the available asbestos substitutes would kill more people than the banned asbestos products.¹⁵ A regulation with that effect seems unreasonable; at least, it did so to Judge Smith. In the CAFE case, NHTSA ignored incontrovertible evidence that higher standards lead to smaller cars, which kill more people. Judge Williams said, in a nutshell: "You, NHTSA, can have your 'blood for oil' policy, but you better explain to us that *that* is the choice, and you better explain to us whatever tradeoff you eventually decide to make."¹⁶ Finally, in the OSHA case, Judge Williams told OSHA to adopt an interpretation of the statute that would somehow constrain the agency's discretion and make it compare the costs and benefits of regulation in some coherent fashion.¹⁷ Taken together, these cases signal quite a dramatic shift away from transcendental environmental values.

12. 947 F.2d 1201 (5th Cir. 1991).

13. 956 F.2d 321 (D.C. Cir. 1992).

14. 938 F.2d 1310 (D.C. Cir. 1991).

15. *Corrosion Proof Fittings*, 947 F.2d at 1221, 1224, 1227.

16. *Competitive Enterprise Inst.*, 956 F.2d at 325, 327.

17. *International Union*, 938 F.2d at 1324.

What accounts for this shift away from the ecological paradigm? I think that we have learned, and that there is a broad consensus, that the command-and-control system we have in place simply is not working. We now have a much better understanding of the flaws and of the paradoxical effects of the system. In particular, there is a growing understanding of two aspects of environmental regulation. The first concerns efficiency; the other concerns the role of interest groups. I will discuss these in turn.

As to efficiency, I think it can be shown that the legal instruments we have invented to address allegedly unique environmental needs have made matters worse, not better. For example, we were told that environmental protection is simply too important to care much about mere property and its selfish owners. That left legislators free to pretend that resources are not scarce and that an ounce of environmental protection is worth any amount of money (so long as it is someone else's). But now that we have destroyed property values all across the country, one really has to ask: "Where are all the billions of dollars in benefits that we were promised?" It seems to me it is only when one reintroduces property rights—along the lines of *Lucas*, but much further—that one has at least a rough proxy for a "willingness to pay" criterion, which should help efficient resource allocation. (South Carolina, by the way, had to compensate Mr. Lucas and then acquired title to his property. What did it do with it? It offered it up for sale for development.)

Efficiency concerns are also implicated by environmental standing doctrine. Maybe citizen suits have helped on occasion to vindicate environmental values. But it seems to me that the two major problems in environmental policy are, first, what Judge Breyer has called "tunnel vision"¹⁸—that is, the tendency to pursue safety without regard to the law of diminishing marginal returns and far, far beyond the point at which the gains outweigh the costs—and, second, the mind-boggling fragmentation of a regulatory system that requires a particularly high degree of policy coordination and integration. Environmental lawsuits have contributed greatly to tunnel vision and fragmentation. In fact, that is precisely why they are brought: environmentalists want to push the agency further than it is willing to go, and they want a piece of the agenda. Limits on citizen standing will not guarantee a more balanced and coordinated policy, but I think they are a necessary condition.

Finally, it is high time to orient judicial review away from Congress' symbolic policy commitments and from the agency capture par-

18. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 10 (1993).

adigm. These premises have produced scores of judicial decisions holding that environmental agencies cannot consider costs and other tradeoffs.¹⁹ These, too, have contributed to tunnel vision and fragmentation. Instead of sending EPA off on a wild goose chase after minuscule risks in the name of congressional intent and for fear that anything short of zero risk tolerance might reflect "capture," I think it makes much more sense to focus on what matters: does this *result* make sense, or is it obviously insane?

This leads me to my final point, which concerns the role of interest groups in environmental regulation. I think the courts have come to recognize that the simple dichotomy between environmental values, on the one hand, and special interests, on the other, has long outlived whatever usefulness it may once have had. Their perspective now is that environmental interests are interests like any other.

This is certainly the logic of *Lucas*, which treats the state's recitation of environmental objectives—accurately, I think—as little more than a cover for rank extortion. It is also the logic of the two standing cases, which say something along the following lines: "We will not allow environmentalists to come into court as the guardians of the public interest and congressional intent." But if they show us that they have an interest or, in the vernacular, that they are pigs at the federal trough just like dairy farmers or welfare clients, we will grant them standing and hear them out.

It is also the perspective of the judicial review cases I mentioned. In these cases, the courts no longer pretend that environmental interests are higher values that ought to be exempt from the ordinary give and take of politics, and thus they reject a view that, as I have tried to show, induces systemic agency failure. Rather, they assume that as a general rule, environmental interest have no better claim on scarce collective resources than any other interest that clamors for recognition.

This perspective is not as edifying as that of a judiciary embarked on the quest for meaning and values in environmental politics, but I think it is far more realistic.

19. See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (congressional intent in passing Endangered Species Act was to "halt and reverse the trend towards species extinction whatever the cost"); *NRDC v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc) (remanding hazardous air pollutant regulation because EPA considered costs in setting emission standard); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982) (EPA prohibited from considering cost in setting ambient air quality standard).