



Volume 61 | Issue 3

Article 3

10-24-2016

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Recommended Citation

Todd S. Aagaard, *Environmental Regulation and Environmental Rights*, 61 Vill. L. Rev. 385 (2016).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol61/iss3/3>

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2016]

ENVIRONMENTAL REGULATION AND ENVIRONMENTAL RIGHTS

TODD S. AAGAARD*

IN 1971, Ferdinand Fernandez published a short article entitled *Due Process and Pollution: The Right to a Remedy* in Volume 16 of the *Villanova Law Review*.¹ On the occasion of the *Law Review*'s sixtieth anniversary, as I reviewed past volumes looking for articles focused on my primary area of scholarly interest—environmental law—Fernandez's article piqued my interest for several reasons.

First, Fernandez published the article in 1971, at the advent of modern American environmental law. Fernandez presumably wrote his article in 1970, perhaps the most important and formative year in the history of environmental law. That year, the National Environmental Policy Act became law, President Nixon created the Environmental Protection Agency, and twenty million Americans participated in the first Earth Day.² The Clean Air Act and Clean Water Act quickly followed, in 1971 and 1972, respectively.³ Although the roots of environmental law extend well back into the nineteenth century, the early 1970s effectuated a revolution that formed the modern field of environmental law as we now know it and created the foundation for much of what constitutes the field now, more than forty-five years later.⁴

Second, Fernandez's article, although brief, grapples with a fundamental, existential question for environmental law: what kind of legal framework should be used to effectuate environmental protection? Although such questions continue to arise in environmental law, in the early 1970s they were especially significant as environmental law was being created on a relatively blank slate. A topic that might now strike some as appropriate merely for academic musings was at the time very much an open question relevant to the practicing bar.

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1. Ferdinand F. Fernandez, *Due Process and Pollution: The Right to a Remedy*, 16 VILL. L. REV. 789 (1971).

2. See 42 U.S.C. §§ 4321–4370h (2012); see also Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970) (to be codified at 5 U.S.C. app.); Denis Hayes, *Environmental Law and Millennial Politics*, 25 ENVTL. L. 953, 954 (1995).

3. See generally 42 U.S.C. §§ 7401–7671q (2012); see also 33 U.S.C. §§ 1251–1387 (2012).

4. See, e.g., Holly Doremus, *Preserving Citizen Participation in the Era of Reinvention: The Endangered Species Act Example*, 25 ECOLOGY L.Q. 707, 717 (1999); see also Robert L. Fischman, *What Is Natural Resources Law?*, 78 U. COLO. L. REV. 717, 720 (2007); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1459 (1996). See generally Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1137–60 (2010).

Third, Fernandez was an attorney in private practice in California at the time he wrote the article, but would go on to become a federal district court judge and, subsequently, a judge on the Ninth Circuit Court of Appeals. Thus, *Due Process and Pollution* reflects the ruminations of someone very much interested and actively involved in the creation of law. Although Fernandez addressed his article to a topic of scholarly interest, he wrote it from a very pragmatic perspective.

I. DUE PROCESS AND POLLUTION

Due Process and Pollution is not lengthy, and its line of argument is relatively easy to summarize. Fernandez started with a strong call to action against environmental threats: “[A]ssaults have been made upon air and water The earth is reeling from attacks by [various forms of pollution].”⁵ Natural resources “are being ravaged and destroyed.”⁶

Fernandez then moved quickly from arguing for the importance of redressing environmental harms to the question of what the law could do to help.⁷ He identified three potential sources of legal framework for environmental protection: common law, legislation and regulation, and the U.S. Constitution.

Of these three options, Fernandez was most skeptical—dismissive, even—of legislation and regulation. This skepticism was apparently not confined to the environmental realm, but extended generally to all legislation and regulation: “Unfortunately, it is often ingenuous to place one’s hope in the legislative process, since legislators are subjected to lobbying pressures and often find it necessary to compromise and avoid enacting real solutions. Executive enforcement, likewise, has often been rather lax.”⁸

Having rejected legislation, Fernandez was only slightly more optimistic about using common law to prevent or redress environmental harms. “Many of the rules and approaches” in the common law, he argued, “seem to present almost insurmountable obstacles.”⁹ Balancing tests used to define tort duties “put[] the little person at the mercy of the more powerful.”¹⁰ Latent injuries that do not manifest until long after exposure pose problems for proving causation and damages.¹¹ Fernandez argued, however, that tort law could be reformed to accommodate more effective

5. Fernandez, *supra* note 1, at 789 (footnotes omitted).

6. *Id.* at 790.

7. *See id.* at 791 (noting potential destructive harm of pollution and stating “The question is: What can be done about it?”).

8. *Id.* (footnote omitted).

9. *Id.* at 792.

10. *Id.* at 794–95; *see also id.* at 792 (describing negligence as “an illusory remedy because of the kind of balancing test used in defining duty”).

11. *See id.* at 792.

causes of action against environmental harms, a position he pressed more directly in a subsequent article.¹²

In contrast with his doubt about the value of statutory and common law tools, Fernandez was most enthusiastic about using constitutional law to address environmental harms. The thesis of *Due Process and Pollution* thus argued that constitutions, and the Due Process Clause of the Fourteenth Amendment in particular, provide an attractive and viable framework for environmental protection. Due process, he argues,

requires each state (and the federal government when it has jurisdiction) to provide the people with remedies for injuries caused to their persons or property by pollution, and that when the polluting agent threatens to cause damage over a long period by reason of its chronic presence, injunctive or some similar form of relief must be provided.¹³

Central to Fernandez's argument is the claim that due process applies similarly to government action and government inaction, because "[t]he act of withholding remedies constitutes state action"¹⁴ Fernandez pointed to examples of cases in which courts have held that due process protects against government actions that harm property. "If taking, shifting ownership of, and preventing owners' use of property are all prohibited [by due process], it should follow that removing the remedies which protect the owners' property interests is also prohibited."¹⁵ In other words, due process requires governments to protect people from pollution.

II. THE DECLINE OF SUBSTANTIVE DUE PROCESS

Unfortunately for Fernandez's thesis, substantive due process has turned out to be much more limited than what he envisioned. Supreme Court precedent flatly rejects his position that due process imposes on governments an affirmative duty to protect persons from injuries caused by private third-party conduct. In *DeShaney v. Winnebago County Department of Social Services*,¹⁶ the Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."¹⁷ If due process does not impose a duty to protect, it would seem that Fernandez's thesis fails.

12. *See id.* at 794–95; *see also* Ferdinand F. Fernandez, *Pollution and the Law of Public and Private Nuisance*, 11 CAL. TRIAL LAW. J. 47 (1972).

13. Fernandez, *supra* note 1, at 796.

14. *Id.* at 797–98.

15. *Id.* at 800.

16. 489 U.S. 189 (1989).

17. *Id.* at 195.

III. THE DIFFICULTY OF ENVIRONMENTAL TORTS

Environmental torts have fared somewhat better than constitutional remedies for environmental harms, but also have not developed into the robust tool of environmental protection that Fernandez advocated in 1971. Balancing continues to lead to relatively weak duties.¹⁸ Plaintiffs find it difficult or impossible to demonstrate causation for their injuries when pollution comes from numerous diverse sources and exposure occurs over lengthy periods.¹⁹ Where environmental legislation has been enacted, courts have often held that it displaces common law remedies.²⁰

IV. THE ENVIRONMENTAL REGULATORY STATE

Meanwhile, as substantive due process withered and environmental torts failed to meet Fernandez's expansive prescriptions, environmental legislation and regulation proliferated. Federal environmental statutes occupy thousands of pages of the United States Code and regulate every sector of the contemporary economy. These statutes save hundreds of thousands of lives and generate billions of dollars in economic benefits.²¹ The Environmental Protection Agency, the lead federal environmental agency, has developed into a sophisticated regulatory and enforcement body. Polluters who violate environmental standards often pay steep civil penalties and sometimes face substantial prison terms. Even if our environmental statutes are far from perfectly effective—pollution still threatens public health and welfare—they are undoubtedly the strongest legal tool available to protect the environment.

V. ENVIRONMENTAL LAW, FORTY-FIVE YEARS LATER

Due Process and Pollution is interesting because it reflects a time in which, in the infancy of federal environmental law and when a broad bipartisan consensus supported increased environmental protection, it seemed that all options were on the table. In addition to the strong momentum in favor of environmental law, the expansiveness of constitutional protections at the time made constitutionalizing environmental protection seem much more viable than it seems now. Doctrinal flexibility in tort also

18. See Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1559 (1991).

19. See *id.* at 1556–59.

20. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (holding that Clean Air Act displaces federal common law cause of action to abate carbon dioxide emissions from fossil-fuel fired power plants); see also *City of Milwaukee v. Illinois*, 451 U.S. 304, 314, 332 (1981) (holding that Clean Water Act displaces common law nuisance claim for water pollutant discharges).

21. See, e.g., U.S. ENVTL. PROT. AGENCY OFFICE OF AIR & RADIATION, *THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020* (2011), available at https://www.epa.gov/sites/production/files/2015-07/documents/fullreport_rev_a.pdf [<https://perma.cc/QAL4-5HTD>].

made common law protections seem more realistic than they have turned out to be.

Forty-five years later, the common law and constitutional due process have played a far weaker role in environmental protection than Fernandez envisioned in 1971. Instead, legislation and regulation have come to dominate the environmental law landscape. Although this historical pathway forecloses, at least for the foreseeable future, Fernandez's argument for the constitutionalization of environmental law, it raises its own deep question for environmental law, and indeed for regulatory law more generally: Was environmental law's movement toward statutes and regulation inevitable, or could environmental law have developed using primarily common law or constitutional law?

I am tempted to think that environmental law's legislative move was inevitable and that legislation and regulation are inherently better suited vehicles for environmental law than the common law and constitutional doctrine. Other areas of law illustrate the difficulty that would be encountered in constitutionalizing a right to environmental protection. For example, state constitutions contain an express right to a public education, and many states attach qualitative descriptors, such as "suitable" or "adequate," to that right.²² Courts have generally been unwilling, however, to find that poor-quality educational programs violate these constitutional rights to a public education.²³ Even where courts do find constitutional violations of rights to public education, they tend to set broad goals and allow the political branches to decide on an appropriate program, rather than directing specific action.²⁴ Thus, even where constitutional litigation has been most successful in enforcing a right to a quality public education, it has only created a structure for effectuating that right, and it has relied on other institutions to create and implement the mechanisms to accomplish the goals set by the judiciary.

A similar pattern seems to have prevailed with a state constitutional right to fair housing. In the landmark 1975 case of *Southern Burlington County NAACP v. Township of Mount Laurel*,²⁵ the New Jersey Supreme Court held that a municipality's power to zone under the New Jersey Constitution carries a constitutional obligation to enact a zoning scheme that creates a realistic opportunity for low—and moderate—income families to

22. See Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 719, 729 (2012).

23. See, e.g., *Agostine v. Sch. Dist. of Phila.*, 527 A.2d 193, 195 (Pa. Commw. Ct. 1987) ("The mandate of Article III, Section 14 of our state Constitution does not confer an individual right upon each student to a particular level or quality of education but, instead, imposes a duty upon the legislature to provide for the maintenance of a thorough and efficient system of public school throughout the Commonwealth." (footnote omitted)).

24. See Bauries, *supra* note 22, at 731; Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1026 (2004).

25. 336 A.2d 713 (N.J. 1975).

find housing. Although, at first impression, the *Mount Laurel* case may seem to be a reason for optimism about constitutional litigation, the reality is more sobering. Other states have not followed New Jersey's lead.²⁶ Even within New Jersey, the *Mount Laurel* Doctrine has not resulted in significant progress toward economic integration.²⁷ As Peter Schuck has observed, it appears that "[h]ousing markets . . . are too complex and dynamic for courthouse engineering."²⁸

These examples could lead one to conclude that environmental issues, education issues, and housing issues are fundamentally problems of public policy that are ill-suited for resolution through common law and constitutional litigation. The balancing and tradeoffs that Fernandez noted as a shortcoming in *Due Process and Pollution* are an inherent part of these public policy problems.²⁹ Legislatures and administrative agencies seem to be better institutions for making the complex policy decisions that balance competing goals in these areas.

That said, a recent development in Pennsylvania law may provide some limited optimism for the vitality of Fernandez's argument that constitution-based environmental rights can be part of an effective legal framework for environmental protection. *Robinson Township v. Commonwealth of Pennsylvania*³⁰ involved a challenge under the Pennsylvania Constitution to Act 13, which regulates oil and gas operations. The

26. See THOMAS W. MERRILL & HENRY E SMITH, PROPERTY: PRINCIPLES AND POLICIES 1098 (2d ed. 2012) ("New Jersey's experience with judicial remedies for exclusionary zoning has been almost unique.").

27. See, e.g., SARAH FLETCHER, CTR. ON LAW IN METRO. EQUITY, TOOTHLESS: AN ANALYSIS OF THE EFFICACY OF NEW JERSEY'S AFFORDABLE HOUSING POLICY (2015), available at <http://www.clime.newark.rutgers.edu/publications/report/toothless-analysis-efficacy-new-jerseys-affordable-housing-policy> [<https://perma.cc/2QXY-EMG3>] (arguing that "enforcement of [the Mount Laurel Doctrine] has proven to be nearly impossible"); see also Peter H. Schuck, Op-Ed., *Bringing Diversity to the Suburbs*, N.Y. TIMES, Aug. 8, 2002, available at <http://www.nytimes.com/2002/08/08/opinion/08SCHU.html> [<https://perma.cc/N6BF-9PTB>] ("[The Mount Laurel Doctrine] has done little for low-income families. Statewide, developers have built almost 15 times more market-rate units than affordable units—and most of the latter would probably have been built anyway. The affordable units, moreover, are disproportionately occupied by people of relatively high socioeconomic status . . .").

28. See Schuck, *supra* note 27.

29. See Todd S. Aagaard, *Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law*, 60 DUKE L.J. 1505, 1533 (2011) ("Tradeoffs between conflicting uses [of environmental resources] . . . are an important animating force in environmental decisionmaking."); J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 529 (2007) (noting tradeoffs in housing policy); Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573, 589 (2013) (noting that "[c]ourts can plausibly see tradeoffs before them; but they are ill-equipped to make the kind of tradeoffs that move policy forward" and offering education finance as example of policy area in which this observation holds true).

30. 83 A.3d 901 (2013).

Pennsylvania Supreme Court held that Act 13, insofar as it preempted some local regulation of oil and gas operations, violated the state constitution.³¹ A plurality of the court held that the statute violated the state's Environmental Rights Amendment, and Justice Baer, concurring in the judgment, would have held that the statute violates substantive due process.

Echoing *Due Process and Pollution*, both the plurality and Justice Baer's opinions express an obligation for government to protect landowners from environmental harm. Both opinions fault Act 13 for disabling local governments' authority to protect citizens from environmental harm through local land use regulation. Justice Baer's opinion provides an example of what due process protection for environmental concerns can look like in a contemporary setting. Justice Baer would have held that Act 13 violates substantive due process by usurping local municipalities' duty to impose and enforce community planning: "[M]eaningful protection of the acknowledged substantive due process right of an adjoining landowner to quiet enjoyment of his real property can only be carried out at the local level," and disabling local regulation thus effects a violation of substantive due process.³²

Although *Robinson Township* and *Due Process and Pollution* similarly oblige governments to protect landowners from environmental harm, *Robinson Township* falls significantly short of fully endorsing the strong judicial role Fernandez envisioned. Fernandez seems to have advocated a substantive individual right to protection from pollution—for example, an obligation whereby the government must protect against harmful groundwater contamination. *Robinson Township*, by contrast, adopts a more structural approach that does not guarantee the individual any particular level of environmental quality, but rather mandates a legal and institutional structure conducive to protection of the individual from environmental harm. Unlike substantive individual rights, structural constitutional mandates can be seen as supporting, rather than supplanting, democratic debate by giving discretion to the political branches to choose the appropriate course of action within broad bounds set by the courts. Structural mandates thereby respect the comparative institutional advantages of the political branches over courts in resolving complex issues of public policy.

That said, *Robinson Township* is not necessarily the clearest model for constitutionalizing environmental protections. In particular, the opinions somewhat elide the distinction between a negative duty not to harm and an affirmative duty to protect, as Fernandez did in *Due Process and Pollution*. When a state legislature prevents a local government from regulating oil and gas development, and as a result allows oil and gas development to

31. *See id.* at 1000 ("Sections 3215(b)(4), 3215(d), 3303, and 3304 violate the Environmental Rights Amendment [of Pennsylvania Constitution.]").

32. *Id.* at 1001 (Baer, J., concurring).

cause environmental harms against landowners, has the legislature *acted* (by preventing local government from acting) or has government merely *failed* to act to protect landowners? What is the import of this? Was Fernandez correct back in 1971, that a robust constitutional duty to protect against environmental harm can be an important tool of environmental law, or is *Robinson Township* just inviting trouble?