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WHOSE VALUES ARE PROTECTED BY ENVIRONMENTAL REGULATION? A RESPONSE TO PROFESSOR EPSTEIN*

JEFF L. LEWIN**

I am honored to have been invited to write a response to Professor Epstein's lecture on regulation and contract in environmental law. As usual, he is insightful and provocative.

Being somewhat familiar with Epstein's work and with his style of speaking, I was surprised to find myself agreeing with his primary thesis, at least at a theoretical level. Thus, readers who were hoping for a frontal attack will be disappointed.

On the other hand, readers who were impressed by the lecture may accuse me of quibbling. Although I take issue with much of what Epstein says, my disagreement involves some reading between the lines. The most problematic aspects of Epstein's lecture are buried in his underlying assumptions about the purposes and effects of regulation. Many of his premises are stated so casually that one might not recognize them as being controversial, while others are never expressly articulated.

Epstein posits that a certain level of regulation is necessary and inevitable because of the existence of "externalities" of cost and the ultimate risk of environmental catastrophe. To determine the nature and extent of this environmental regulation, Epstein employs the paradigm of the "single owner": if one person owned all of the Earth's resources, what level of environmental degradation would that person be willing to endure and what limitation on the use of these resources would that person be willing to tolerate in order to maximize the "value" of these resources.

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** Professor of Law, West Virginia University College of Law. This essay is dedicated to Eleanor Rose, Sylvia Klare and Gregory Pearce, and to their children's children. Their mother, Alison Williams Lewin, embodies the values of my hypothetical "single owner" who is described in the essay.

The single owner paradigm is rooted in both economic and moral theory. Economically, the rational single owner can be expected to maximize total value out of pure self-interest, so the decisions of the single owner provide a benchmark for efficient resource utilization. Ethically, the Golden Rule and the Kantian categorical imperative mandate that one impose no burden on others, whether in the form of pollution or of regulation, that one would not impose on oneself. The first half of Epstein's thesis is that the decisions of the hypothetical single owner would establish the economically and ethically appropriate or "optimal" levels of pollution and of regulation. At this theoretical level, I wholeheartedly agree with him.

The second half of Epstein's thesis is that once the optimal levels of regulation and pollution have been established within the society, the "right to pollute" should be viewed as a property right, subject to sale and exchange just as any other property right. Owners of realty should be able to sell their right to be free from pollution or to waive the right to recover damages from pollution. Air and water pollution permits should be as freely assignable as any other licenses. Again, at the level of theory, I agree with Professor Epstein.

Where Professor Epstein and I part company is our assumptions about the level of pollution and regulation that would be established by the hypothetical single owner. And these assumptions, in turn, differ because of our assumptions about who this single owner would be. In a nutshell, Epstein envisions the single owner as a business corporation, whereas in my vision she is a loving parent.

Professor Epstein's single owner seeks to maximize the total value of the Earth's resources. The single owner is a risk-neutral industrial enterprise, and it seeks to maximize its profits from the productive use of the Earth's resources. Regulation represents an interference with economic activity which must be tolerated in order to assure the survival of the enterprise's workers and customers, whose lives have no other intrinsic value. All values are described in terms of costs and benefits. Future costs and benefits are counted, but only as "discounted" to present value at current market rates. Thus, if market interest rates are approximately 10%, costs and benefits seven years in the future count are discounted by 50%, those fourteen years away are discounted by 75%, etc. The importance of intangible

and subjective values is acknowledged, but it is assumed that these can be incorporated by making certain adjustments to the monetizable costs and benefits.

My single owner seeks to maximize the value of the Earth's resources for herself and her children. She seeks to maximize the quality of life by imposing the minimum level of interference with environmental quality necessary to achieve an acceptable level of economic activity. She is risk-averse, and is willing to pay a high price to avoid environmental risks. She does not discount future costs and benefits, but is more likely to forego current use in order to save for her children. She knows that the most valuable resources cannot be measured in dollars. The value of clean air is more than just a reduction in medical expenses and lost wages. The value of a wilderness park is more than the sum of the entrance fees that visitors would pay to use it. The value of a species is not just the sum of what people would pay to see it in a zoo.

She is not so naive, however, as to believe that there will be a free lunch, that hard choices can be avoided, or that protection of the environment can be accomplished without substantially restricting the material well-being of the planet's current residents, especially those in the world's least-developed regions. For her, determining the optimal levels of pollution and of regulation is not a simple balancing of costs and benefits; it is Sophie's Choice, for which some of her children must suffer and die if others are to live.

The perspective of my single owner differs from Professor Epstein's in other important respects. Although environmental catastrophe is an "abyss" to be avoided, Epstein analogizes most environmental hazards to such evanescent inconveniences as cooking fumes or the noise from an electric shaver. (pp. 866-67) Accordingly, he devotes disproportionate emphasis to discussion of low level reciprocal harms, correctly noting that they do not give rise to nuisance liability under the substantial injury doctrine and the "live and let live" rule. Epstein treats the current level of technology and resource use as a given and is skeptical about our capacity for conscious regulation. Hence, he seems to take it for granted that regulation must be approached incrementally (pp. 861-862).

My owner sees the effects of acid rain and the hole in the ozone, and she fears that we may already have poisoned our wells. She recognizes that incremental approaches may not suffice to reverse several hundred years of environmental degradation, the pace of which has been accelerating in the second half of the twentieth century. Given the inherent limitations of our knowledge and the potential irreversibility of ecological damage, she sees far more risk from under-regulation than from over-regulation. It is environmental damage, not environmental regulation, that ought to proceed marginally and incrementally.

Ultimately, our difference is one of perspective. Professor Epstein would solve the problem of regulation with reference to the common law of nuisance (pp. 862-864), but the common law of nuisance cannot tell us which of our two perspectives should prevail. As Epstein notes, the common law abandoned the simple physical invasion test as being both over- and under-inclusive. Today, the common law of nuisance employs a "reasonableness" standard that actually embodies *both* of our perspectives.¹ From the perspective of an industrial enterprise, the reasonableness standard prohibits activity that is unreasonable insofar as it generates more costs than benefits. From the perspective of the victim of pollution, the reasonableness standard provides protection against unreasonable interference, regardless of the value of the polluter's activity. If nuisance law has not resolved the contradiction between the defendant-centered and plaintiff-centered perspectives on its reasonableness test, then it cannot be of much help in deciding the perspective from which the single owner should view environmental regulation.

Our differing perspectives also lead me to question certain aspects of the second half of Epstein's thesis, concerning the transferability of environmental rights. Although we agree that such rights generally

1. My most recent discussions of the law of nuisance appear in Lewin, *The Silent Revolution in West Virginia's Law of Nuisance*, 92 W. VA. L. REV. 235 (1990), and in Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALBANY L. REV. 189 (1991). Professor Epstein's complex views on this topic are found in Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979) (discussed at pages 256-58 of my Albany article). In contrast to the defendant-centered tone of the current lecture, in his earlier article Epstein essentially takes a plaintiff-centered view of nuisance law.

should be assignable, we often disagree on the identity of the owners of these rights. In my view, private property is the creation of the government, and all property is held subject to the right of government to impose reasonable regulations to promote public health, safety, and welfare. Epstein would give far more scope to the rights of the owners of resources, requiring the government to compensate them for most restrictions on development.²

Our conflicting perspectives are illustrated by the judicial response to wetlands regulation. Courts sharing Epstein's viewpoint analyze wetlands regulation from the perspective of the potential developer, and they invalidate restrictions on wetlands development as a "taking" of the owner's property. Courts sharing my views judge these regulations against the backdrop of the current pattern of resource use, and they uphold these regulations as a legitimate prohibition of the "nuisance" that would result from wetlands development.

Epstein correctly argues that if the government is forced to buy out the rights of the developers, it is unlikely to engage in over-regulation. On the other hand, putting the cost on the government is likely to lead to under-regulation because the citizenry cannot afford to pay protection money to every developer who threatens environmental destruction.

Our perspectives lead to very different conclusions concerning the *Hodel* case,³ which upheld legislation mandating that strip miners return the land to its "approximate original contour." Epstein complains that this law is inefficient because restoration to original contour on steep slopes could increase the amount of leaching and physical damage. He says that "the right accommodation . . . is to require restoration of land to a safe state, at the owner's expense," but the government should bear the cost for its "aesthetic concern about returning the land to a state that existed prior to the mining." (p. 875)

2. For Epstein's controversial views on the proper scope of government regulation, see R. EPSTEIN, *TAKINGS* (1985).

3. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

I see several problems with Epstein's analysis. First, he incorrectly assumes that because restoration to original contour could be inefficient in *some* cases, it must be generally inefficient. Then, based on this initial error, he incorrectly presumes that the only rationale for the original contour requirement must be aesthetics. Finally, Epstein ignores the significant feature of the law which led the Court to reject the plaintiffs' facial challenge: "a 'steep-slope' operator may obtain a variance from the approximate-original-contour requirement by showing that it will allow a postreclamation use that is 'deemed to constitute an equal or better economic or public use' than would otherwise be possible."⁴

Epstein's proposed regulation would be both unworkable and unfair. Under his vague "safe state" standard, operators could assert that any minimal restoration was sufficient, which would put the burden on the government to litigate or to offer to pay for further restoration. In effect, operators would be able extort substantial compensation for their restoration efforts. Such a rule would invite abuse, and it ultimately would leave the operators with very little restriction on their "right" to strip coal.

The challenged provision actually represents an excellent example of regulation and contract in tandem. The "approximate-original-contour" standard is a "bright-line" rule which serves as an approximation of a "no environmental damage" standard, and it reserves for the government any gains that may be obtained by variance from that standard. The operator is prohibited from altering the original contour, but the operator can "purchase" the right to do so by offering the public an equal or better economic or public use than would be possible with the original contour.

One final caveat. Although I agree that environmental property rights should be transferable, I get uncomfortable whenever the government begins to sell off our environmental heritage. The government almost always settles for too low a price. Federal range land and national forests are leased at bargain rates, and western water

is essentially given away as a subsidy to agribusiness. At least these are renewable resources. We have thus far successfully resisted proposals for sale of our national parks. States and local communities, however, are more likely to succumb to temptation and cash in on the burgeoning demand for solid waste disposal sites, especially if there are "externalities of benefit" in the form of direct or indirect personal gain to public officials.

If the private owners of our resources can purchase environmental property rights at bargain-basement prices, the initial assignment of environmental property rights to the government would yield only a short-term boon to the public treasury, rather than a long-term protection against environmental degradation. Sometimes it is better to emulate Ulysses and tie oneself to the mast, in this case binding ourselves with the yoke of inalienability, because we cannot trust ourselves or our representatives to hold out for a high enough price.⁵

In conclusion, I have no quarrel with Professor Epstein's theoretical description of the roles of regulation and contract in environmental law. Our differing perspectives on the necessity of environmental protection lead to a vast divergence, however, in the amount of regulation we would allow and in the bargaining leverage we would reserve for the government. Differences in degree can become differences in kind, and Professor Epstein and I advocate very different kinds of environmental regulation.

5. Although the government may set too low a price on the sale of national resources, it does not follow that it would be preferable to leave these resources in private hands from the outset. (From an economic perspective, it makes no difference whether these resources started out in private hands or were acquired from the government at bargain prices, for in either case economic theory predicts that the resources eventually will be transferred to their highest valued private use.) The point here is that the highest valued use of a resource is often a *public* use that would be destroyed by any transfer to private ownership.

