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Fourth Annual Lloyd K. Garrison Lecture on Environmental Law

Environmental Law and the General Welfare

OLIVER A. HOUCK*

Thank you. It is an honor to be here in New York with you this evening on this 28th anniversary of Earth Day.

I caught my first glimpse of environmental law in New York City more than thirty years ago. A friend from college happened to tell me about his case against a power company that was going to take water from the Hudson River and pump it up a mountain. This was of course Storm King Mountain, the origin of this lecture and of much more in environmental law. You must appreciate that those of us from other parts of the country do not tend to associate New York City with anything like concerns for rivers and mountains. In fact, we do not credit New York for anything environmental at all, and that is a mistake because so much in environmental protection started here.

It was *The New Yorker* magazine, in 1962, that published Rachel Carson's *Silent Spring*,¹ perhaps the most influential piece of literature published by that or any other periodical, certainly the most influential in our awareness of the world around us. *Silent Spring*, in turn, prompted scientists at the State University at Stony Brook, on Long Island, to petition for the cancellation of DDT and then Dieldren, the first of many such regulatory battles over pesticides, herbicides and related toxins.²

A few years later the United States Attorney's Office for the Southern District of New York began suing water dischargers under the Rivers and Harbors Act,³ an initiative that broke the

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1. See RACHEL CARSON, *SILENT SPRING* (1962).

2. See Dennis Puleston, *Birth and Early Days*, in *ACORN DAYS* (Rogers ed., 1990).

3. See Rivers and Harbor Act of 1899, 33 U.S.C. §§ 401-467 (1994).

stalemate over federal water pollution control legislation and led to the landmark Clean Water Act.⁴ The New York-based Environmental Defense Fund (EDF) was formed as the country's first public interest environmental law firm, and the slogan of its flamboyant attorney, Vic "Sue the Bastards!" Yannacone, inspired a generation of rising law graduates.⁵ Five such graduates came down to New York from Yale to start the Natural Resources Defense Council (NRDC). Between them, NRDC and EDF would set the mold for public interest environmental law for the next twenty-eight years.

In retrospect, however, the single most important contribution to environmental law from New York, and perhaps from anywhere, was *Scenic Hudson*,⁶ establishing both a public right of standing and a governmental duty to consider the environment. As you know, the Second Circuit decided this case in 1965, five years before the National Environmental Policy Act (NEPA)⁷ and almost a decade before *Sierra Club v. Morton*,⁸ well before acceptance of the principle that private citizens had standing to sue for environmental injury and before NEPA formally required the Federal government to consider alternative, more environmentally-friendly courses of action. When you step back from environmental law and look at the whole, you find that these two elements—citizens standing and the search for alternatives—are the primary engines of practically everything that has succeeded in this field since 1965.

So we find ourselves together in New York tonight, many of you having dedicated your law studies and, for some of us, our adult lives to environmental protection through law. The opportunity this Earth Day lecture provides is to set aside our cases, our courses and our day-to-day and reflect on how environmental law is doing. The answer that I would posit is that we have made real progress, but that we have never been at greater risk of losing it than we are in 1998, for reasons that are quite new. This is the

4. See 33 U.S.C. §§ 1251-1387 (1994); see also William H. Rodgers, Jr., *Industrial Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761 (1971).

5. See Puleston, *supra* note 2, at 23-27.

6. *Scenic Hudson Presentation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 385 U.S. 941 (1966).

7. See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994).

8. 405 U.S. 727 (1972).

thesis I would like to put to you tonight, together with a possible solution.

Let us begin with a question: To those of you who can remember back that far, do you think this country is better off twenty-eight years after Earth Day than it was on April 22, 1970? In one respect this is an easy question to answer, because when you review the programs we now have in place to deal with the contamination of water, air, and hazardous wastes you see dramatic reductions, limitations and new technologies. It has been years since we have had to close down a city the size of Pittsburgh or Los Angeles because the air was too unhealthy to breathe. We used to close them down with regularity. It has been years since the Houston Ship Channel and Cleveland's Cuyahoga River caught fire. People now are fishing in the Cuyahoga, and for that matter in Lake Erie. We have had some stunning success.

On the other hand, for those of us old enough to remember the year 1970, the towns and landscapes in which we were born are quite different from those in which we now live; indeed, they are barely recognizable. They are not simply the same places with more people; they are entirely new places. The hills surrounding Atlanta, Georgia, are being bulldozed for subdivisions at the rate of 300 acres per week. The Front Range of Colorado is disappearing into tract housing at an even more rapid rate, and that rate will continue the next day and the next until the Colorado foothills resemble the outskirts of New York City.

It is the same for Boise. It is the same for Phoenix, Las Vegas and Salt Lake City. The American west is the fastest growing metropolitan area in the country. New communities are springing up at every interchange and around every new airport with names like Willowshire and Berkshire Brooke. They all seem to end in a silent "e," and they have gates and large fountains to water their lawns. They buy their water from agriculture or they simply take it for free from fish and wildlife, and they say to those who ask questions, "What, are you against *people*?" So we shrink, without a satisfactory answer to this question, from a country of diverse landscapes to a country of a homogeneous, manmade few.

The truth is that while we have struggled successfully toward the control of pollution, our efforts to manage natural resources have simply failed. Our five percent of the world population continues to gobble up one third of its assets, and about half of these go into the gas tanks of Ford Expeditions and ever-larger Suburbans with ever-decreasing miles per gallon. Anyone who

thinks these resources are cost-free needs to come see what oil and gas production has done to, say, coastal Louisiana. How can America look with a straight face to a nation like Mexico and say, "You have to stop catching those turtles in your shrimp nets!" Where do we get off telling *anyone* to take better care of the environment? For environmental historians of the twentieth century, the question about America will be: Were we the Messiah that brought the message of stewardship and protection to the world, or were we the Pig that ate it? It is going to be a close call.

So if my thesis is roughly true, we may conclude that in pollution control we have had a significant amount of success, but in natural resources we remain largely out of control. The question then becomes: Why is that? The answer, in large part, lies in the nature of environmental law, in what has evolved to work and what has not. Having participated in this evolution, I would suggest to you this evening three ingredients that have been decisive in the success we've known: transparency, alternatives and citizen enforcement.

The first element is transparency—of the decision and of the information on which it is based. Think of this, those of you who are students and those of you who might still remember when you were: Can you recall the first time you read NEPA? Were you disappointed? An environmental impact statement—is that all the law requires? Yet that process and the transparency it has brought to government decision-making has been remarkably curative. It was the same process of disclosure after all that brought about the corporate income tax of 1915; the reason Presidents Taft and Roosevelt advocated that tax was not to develop revenue for the United States Treasury, but to get a handle on what corporate America was doing.⁹ The same impetus, following the stock market crash of 1929, led to securities regulation based, once again, on disclosure. Today, perhaps the most powerful pollution reduction incentive in this country, the Toxic Release Inventory (TRI), simply discloses levels of emissions.¹⁰ As for the impact of these disclosures, listen to the Chemical Industry Council of New Jersey: "We are doing things to reduce emissions because of the TRI program. I'll be honest with you, [it] probably would not have oc-

9. See Majorie Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 *IND. L.J.* 53, 113-120 (1990).

10. See Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001, 11023 (1994).

curred if that data had not become public.”¹¹ Here is Schalatter Steel Corporation of Fort Wayne, Indiana: “Quite frankly, we’ve got one objective. We want to get off that list.”¹² Disclosure is embarrassing, information is power, and it is exactly this embarrassment and power that are so threatening about environmental protection, and so effective.

The second great American innovation has been the institutionalization of alternatives as the primary mechanism of pollution control. You have to appreciate that our country has gone about pollution control in a very American way, and few things are more American than technology. With regard to environmental law, you would think that its standards and requirements would be based on science. You would think that science would tell us what harmful effects there would be from a given activity, and then we would tailor that activity to accommodate those effects. Nothing in environmental law has wasted more resources and delivered fewer results. The science is just not there. No effort has been more elusive than relating health standards to toxic emissions or to state implementation plans under the Clean Air Act.¹³ The inquiry has worked no better for managing water pollution or hazardous waste.

Instead, from a nation of tinkers America came up with a new approach, Best Available Tinkering. Although each statute has its own language—BAT, BACT, MACT—they are essentially the same thing: American can-do technology.¹⁴ Every time technology-based limits are imposed, the pollution loadings plummet, industry by industry, across the board, with no noticeable decrease in production. This is a primary reason why there has not been much progress in pollution control, and why there has not been much progress in natural resources management. Natural resources and land use are not often susceptible to a Best Available Tinkering approach. How do you tinker with an open-pit copper mine? Or a suburban shopping mall? We are left to deal with natural resource and land use issues with the old science-based inquiry: How much of this abuse can the environment take? Too often the answer is: Who knows?

11. WORLD WATCH, Nov.-Dec. 1995 (quoting Harold Bozarth, Chemical Industry Council of New Jersey).

12. *Id.* (quoting Joe Fallon, Slater Steels Corp.).

13. See Clean Air Act, 42 U.S.C §§ 7401-7671q (1994).

14. For a discussion of these technology standards, see Oliver Houck, *Of Birds, Bats and B-A-T*, 63 MINN. L.J. 403 (1994).

The third ingredient to the success of environmental law is also uniquely American. Despite the allegations of black helicopters and environmental "Nazis," environmental law does not rely on governmental czars. We do have an Environmental Protection Agency and a Department of Justice, but our ace in the hole has been an independent judiciary that ordinary people can access to require compliance with law, as they did in *Scenic Hudson*. Here is another homegrown concept, and it is the most important difference between environmental law in the United States and that in, for example, Latin America or, until very recently, the European Union. The substantive laws themselves read almost identically. The NEPA of Mexico, the NEPA of France, the NEPA of Cuba for that matter, read like our own; the European Union directive on environmental impact assessment matches ours in every material requirement.¹⁵ The principal difference is that in Latin America and, historically, in Europe ordinary citizens have not been able to ask courts to enforce these requirements because their interests are seen as "diffuse" and insufficient to establish their "standing." This is why it is so difficult to introduce the reality of, say, NEPA to other countries. You cannot export a public law process to a country that has no tradition of judicial enforcement of public law.

Recently, however, an odd thing has begun to happen. The basic principles of United States environmental law have run into a renvoi in constitutional theory that has left their future very much in doubt.

I will concede here that the hostility to environmental protection expressed by some courts today is, in part, cultural. Hardly a day goes by when Rush Limbaugh or a talk radio clone does not deliver a statement like: "There are more trees in America today than there were at the time of Columbus." It does not matter how absurd the notion is; the fact is that it is being sold to the American people by the hour. Moving up the media chain, we find George Will, who in a recent column flayed American science for presenting "the human species as a continuum with the swine from which the species has only recently crept," and for "viewing mankind with the necessities of nature."¹⁶ There is a strong cultural resistance to the notion that we are part of nature, and do not hover some tiny distance above it. We hear this same resistance in candidate Pat Buchanan who complained during the last

15. See Council Directive 85/337, 1985 O.J. (L 175) 40.

16. George Will, *Pondering History's 'Might Have Been,'* TIMES-PICAYUNE, Feb. 23, 1998, at B-7.

Presidential campaign that environmentalists had “turned Easter into Earth Day and worship dirt.”¹⁷

With this resistance in mind, it was not surprising to see the 104th Congress propose a hit-list for environmental law. Nor was it a surprise that none of these attacks succeeded. If environmentalists cannot successfully argue over more-trees-at-the-time-of-Columbus or the need for clean water, they do not deserve to carry their flag. In any robust debate—a debate that is centered on the political process—environmentalists should welcome these questions and the opportunity to respond in kind. One lesson from the 104th Congress was that the American public is not going to tolerate a legislative dismantling of environmental programs.

Enter the judiciary, with a mind of its own about environmental protection and a new willingness to find that, on a variety and ever-growing number of grounds, it is unconstitutional. To appreciate this new development, let me review with you seven examples of the emerging constitutional environmental law agenda. Mine is not a definitive statement on these cases or issues; such an analysis will require more qualified constitutional scholars on each than I. What I want to present to you instead is a montage, a fast-frame impression of these issues so that they become the continuum of judicial thought that they actually are.

The first issue involves the reconstruction of the Commerce Clause, the constitutional basis for most environmental law. The opening wedge was *Lopez*,¹⁸ which invalidated federal regulation of guns in school zones. Right on its heels we find *Wilson*,¹⁹ declaring that Congress does not have authority under the commerce power to regulate isolated wetlands, followed by *National Association of Home Builders*,²⁰ currently on appeal, challenging Congress’ authority to protect a localized endangered species.

The second reconstruction is the flip side of the Commerce Clause, the dormant Commerce Clause, which inhibits state regulation of interstate commerce. Since *Philadelphia v. New Jersey*,²¹ states have suffered a half-dozen setbacks from the Supreme

17. HIGH COUNTRY NEWS, Sept. 1995, at 1 (quoting campaign speech of Patrick Buchanan).

18. See *United States v. Lopez*, 514 U.S. 549 (1995).

19. See *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

20. *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 118 S.Ct. 2340 (1998).

21. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Court alone in their attempts to protect their own environments from the impact of out-of-state waste.²²

A third reconstruction is the renaissance of the Tenth Amendment, long dormant as a barrier to national programs. Following *Printz*,²³ and its invalidation of the Brady Bill on Tenth Amendment grounds, we find decisions declaring federal programs requiring state remedial actions—for lead in school drinking water, for example—to be a violation of the Tenth Amendment and an invasion of “state sovereignty.”²⁴

Another well-documented innovation with environmental law squarely in its sights is in the resurrected law of takings, holding that even if a federal or local agency is regulating for the public good and within its authority, there is an increased likelihood the taxpayer will have to pay for it.²⁵ And of course, without the means to pay for it, regulatory programs fail, which was the intent of those raising this issue in the first place.

Yet another arena of judicial revisionism arises under the Eleventh Amendment, barring citizens from enforcing federal requirements against state in federal court.²⁶ The Supreme Court’s lead has prompted a new wave of challenges to federal pollution control and hazardous waste laws.

Yet more sweeping in its impact is the resurrection-with-vengeance of the standing requirements for citizen suits. The Court’s holdings in *National Wildlife Federation*²⁷ and *Defenders of Wildlife*²⁸ were restrictive enough in their formalistic requirement for proof of individualized, future harm. This formalism reached Catch-22 proportions in *United States Steel*,²⁹ holding that even if the government has caused citizens direct and individualized injury, and even if citizens care enough about that injury to have brought litigation for declaratory relief, they still lack standing unless the courts can provide “redress.”

22. For a discussion of these decisions and their effects, see Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155 (1997).

23. See *Printz v. United States*, 521 U.S. 898 (1997).

24. See *Acorn v. Edwards*, 81 F.3d 1387 (5th Cir. 1996).

25. For a summary discussion of the revived takings doctrine, see Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law and the Due Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171 (1995).

26. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

27. *National Wildlife Federation v. Lujan*, 497 U.S. 871 (1990).

28. *Defenders of Wildlife v. Lujan*, 504 U.S. 555 (1992).

29. See *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978).

A late-blooming and similarly tricky revision has now appeared in the doctrine of ripeness or, alternatively articulated, the constitutionally-required separation of powers. Courts will only review agency action that is final, both because until then the issue is not "ripe" and because such review would interpose the judiciary into the affairs of the executive branch. Now comes another Catch-22: No agency planning process arrives at anything final. Plans can always be changed. And there is always a subsequent step; if only rolling the bulldozer. Ergo, federal plans are unreviewable.³⁰

One emerges from this montage with, at the least, a headache. It is like watching a food fight. The kids are throwing the milk. They are throwing anything at hand. Even the teachers are throwing. Whatever is in the Constitution that can be thrown, they are throwing. Whatever was intact is breaking and whatever was standing up is going down. In language that barely conceals a rage against the machine and a glee in tearing it down.

The logic of this revolution is not always consistent. We find one line of cases saying the federal government has no authority to act under the Commerce Clause, which leads us towards the Freeman and the Idaho militia. We find another line of cases finding the federal government immune to citizen suits, which leads back towards the Court of Louis the XIV. But the Supreme Court does not have to be consistent. It is supreme, it is leading the revolution, and it is basing its revolt on the Constitution. Which means, among other things, that the principles of law now being announced are virtually immutable. No matter what you or your elected representatives might think or enact by popular will, no one can do anything about it. This is the Constitution speaking.

Which leads us to the last question of the evening: What *can* be done about it? I have no easy answer to this question. A little environmental education might be useful, along with a lot more judicial restraint on the ideological front. But I have a closing thought on the intellectual issue in play here, which is the relationship between environmental law and the Constitution.

What we need in environmental law is to recognize a new legal and moral ground, one more direct and compelling than the Commerce Clause and others used in the past to support environmental goals. The Constitution begins: "We the people of the United States, in order to form a more perfect Union, [and in order

30. See *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998).

to provide for] the general Welfare . . .” and goes on to enumerate several other purposes.³¹ (It does not, here, mention commerce). A more specific general Welfare provision appears in Article I, section 8, in conjunction with the taxing and spending power.³² To date, the authority of this clause has been interpreted as limited only to taxing and spending. The leading citation is *Butler*,³³ a Supreme Court decision so venerable that it struck down a depression-era agriculture program because “agriculture” was not mentioned as a federal power in the Constitution.

Of course, this kind of logic went out a long time ago. Overlooking the phenomenon that this kind of thinking seems to be coming back with every new revelation from the Supreme Court, the interesting thing about *Butler* was the question in that case: Is the power to provide for the general welfare restricted to the other enumerated powers of the Constitution? Which is to ask: When Congress taxes and spends, does it have to be for a specifically-stated purpose, like the U.S. Navy, or may it be for other public concerns? Every court has since responded that Congress may spend for *any* purpose, so long as it is nationally important, which takes us half of the way there. Now, if Congress can tax and spend for the public welfare, beyond other explicit authorizing language of the Constitution, why may it not *regulate* for the public welfare as well?

At the end of the day, is not General Welfare what environmental law is about? Did we enact clean air standards in order to protect commerce? Do we protect the Bald Eagle and the Delhi Sands Flower-Loving Fly in order to encourage trade in specimens? Did the Civil Rights movement integrate lunch counters across the American South in order to facilitate the sale of hamburgers? Do not these reasons trivialize the issue and ourselves? There is a value, in life and in law, in saying what we are really doing. Here is a statement on the eve of the Clean Water Act by its principal author, Senator Edward Muskie:

Can we afford clean water? Can we afford rivers and lakes and streams that continue to make life possible on this planet? Can

31. U.S. CONST. preamble. The preamble to the U.S. Constitution states: “We the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” *Id.*

32. U.S. CONST. art. I, § 8.

33. *See United States v. Butler*, 297 U.S. 1 (1936).

we afford life itself? These questions were never asked when we destroyed the waters of our nation, and they deserve no answer as we finally move to restore and renew them. These questions answer themselves.³⁴

This is not the language of interstate commerce. It is the language of general welfare, and to those that would argue that I am stretching the Constitution, I am. But let me observe that what are being called constitutional law scholarship and constitutional law opinions today would have been laughed out of a constitutional law class not long ago. Times change. If they can stretch—and they are stretching mightily—so can we.

Eighty years ago, the Supreme Court faced a fundamental question of federal constitutional authority over a seemingly peripheral issue to the nation's welfare, the regulation of waterfowl hunting. The question was whether the United States had the power to protect migratory birds. The statute which purported to do so had no Commerce Clause support; Commerce Clause jurisprudence had not yet developed in that direction. Instead, the United States went and signed a treaty with Britain and then based its law on the treaty.³⁵ The states responded with the legal argument that if the government lacks authority in the Constitution to begin with, it certainly may not go out and manufacture its authority by signing a treaty.

Justice Holmes, for the Court, held otherwise. In "matters of the sharpest exigency for the national well-being," he wrote, "the federal power will be found."³⁶ He went on:

[We] may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in

34. Environmental Policy Division, *reprinted in*, Legislative History of the Water Pollution Control Amendments of 1972, at 164 (1973) (statement of Sen. Edward Muskie).

35. See Convention for the Protection of Migratory Birds in the United States and Canada, Aug. 16, 1916, U.S.-U.K., 39 Stat. 1702, T.S. No. 628.

36. See *Missouri v. Holland*, 252 U.S. 416, 433-434 (1920) (citation omitted).

question does not contravene and prohibitory words to be found in the Constitution . . . We must consider what this country has become in deciding what that amendment has reserved.³⁷

What, now, is the "light of our experience" with environmental harm and its threat to life on earth? Is environmental protection a matter of "sharpest national exigency," on at least an equal plane today with protecting migratory birds in the day of Justice Holmes? And if so, should we not find the power?

Now, sixty days after Holmes' opinion in *Missouri v. Holland*,³⁸ thirty-five years after *Scenic Hudson*³⁹ and twenty-eight years after the first earth Day, it is time for us to reroot environmental law on grounds that more fully support what is involved, what we must do, and the real reasons why. Because it is in the General Welfare.

37. *Id.* at 433-434.

38. *See Missouri v. Holland*, 252 U.S. 416 (1920).

39. *See Scenic Hudson Presentation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 385 U.S. 941 (1966).