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THE AMERICAN LEGAL SYSTEM AND ENVIRONMENTAL POLLUTION

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An editorial comment introducing an issue of *Look* devoted primarily to the environment crisis observed: "The laws that allow pollution to engulf us must change."[1] Surely this oversimplification was not intended as a suggested solution, but it nonetheless supports the surprising but popular misconception that pollution is a legal problem that can be solved wholly or partly by repealing old laws, passing new laws, and fathering litigation. These actions may help alleviate ecological problems or be necessary to accomplish their solution, but successes at controlling pollution through legislative, litigative, or even judicial activism must not prevent lawyers or laymen from realizing that the environment crisis and its perpetuation result from complex, deep-seated socio-economic, scientific, and political conflicts. The legal system may at times push ahead or lag behind societal resolution of these conflicts, but ultimately it must and can only reflect and implement the resolutions and solutions reached by society as a whole. The legal system must not and should not decline to fulfill its role of reflection and implementation; efforts to fulfill a greater role, other than on a temporary and sui generis basis, will only camouflage and disappoint long-range solutions.

THE EXAMPLE OF EFFORTS AT LEGAL CONTROL OF AIR POLLUTION

The legal system's inability to resolve or sufficiently alleviate the environment crisis without a societal commitment to that effect is illustrated by considering the current legal framework for air pollution control in the United States. Characteristically and symtomatically such examination must be made at various governmental levels—federal, interstate, state, and local—and must consider public, private, and group efforts.

FEDERAL LEGISLATION

The United States was without a federal regulatory law relating to air pollution until the passage of the Federal Air Quality Act of 1967.[2] Previous federal legislation, the Clean Air Act of 1963,[3] for example, primarily con-

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1. LOOK, April 21, 1970, at 4.

2. Air Quality Act of 1967, 42 U.S.C. §§ 1857-57*l* (Supp. V, 1965-1969), *amending* 42 U.S.C. §§1857-57*l* (1964).

3. Clean Air Act of 1963, 42 U.S.C. §§1857-57*l* (1964).

cerned research, study, and financial assistance to state and local air pollution control programs, but the Air Quality Act as enacted in 1967 was regulatory in that it obligated each state to adopt air quality standards deemed adequate by the United States Department of Health, Education and Welfare (HEW).[4] Furthermore, if a state's standards were not approved by HEW, or if a state did not adopt standards, the federal agency was empowered to promulgate standards for that state.[5]

The Act contemplated each state enforcing its own standards, but the federal agency had enforcement powers when a state did not reasonably enforce its standards and an emergency health situation or interstate pollution existed.[6] Note, however, that if a state did not enforce its standards, and the nonenforcement did not result in either interstate pollution or an emergency health situation, the federal agency could not intervene.[7] Also, the general standards to be established under the Act were only ambient air standards,[8] and no provision was made for national emission standards for stationary sources of pollution.[9] In short, although many might disagree with the recommendations of the Nader-Esposito "Task Force Report on Air Pollution," few could seriously refute its conclusion that "the Air Quality Act of 1967, central legislation for federal air pollution control, is a hopeless failure."[10]

In 1970 Congress attempted to salvage the Act from the impotence of its provisions by significantly amending it.[11] The amendments that were finally agreed upon after considerable conflict among the House, Senate, and President over the matter[12] have strengthened several aspects of the Act. Stringent

4. 42 U.S.C. §1857d (b) (Supp. V, 1965-1969).
5. 42 U.S.C. §1857d (c) (2) (Supp. V, 1965-1969).
6. 42 U.S.C. §1857d (k) (Supp. V, 1965-1969).
7. 42 U.S.C. §1857d (g) (Supp. V, 1965-1969).
8. 42 U.S.C. §1857d (c) (1) (Supp. V, 1965-1969).
9. The standard for emissions from new automobiles is an exception. *See* Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-emption*, 68 MICH. L. REV. 1083 (1970).
10. 1 BNA ENVIRONMENT REP. (Current Developments) at 50 (May 15, 1970). For other evaluations of the Act see Borchers, *The Practice of Regional Regulation Under the Clean Air Act*, 3 NATURAL RESOURCES LAW. 59 (1970); Edelman, *Air Pollution Abatement Procedures Under the Clean Air Act*, 10 ARIZ. L. REV. 30 (1968); Green, *State Control of Interstate Air Pollution*, 33 LAW & CONTEMP. PROB. 314, 319, 320 (1968); Martin & Symington, *A Guide to the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROB. 239 (1968); Middleton, *Summary of the Air Quality Act of 1967*, 10 ARIZ L. REV. 25 (1968); O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROB. 275 (1968); Welch, *Federal Air Quality Act of 1967*, 3 NATURAL RESOURCES LAW. 52 (1970); Note, *The Air Quality Act of 1967*, 54 IOWA L. REV. 115 (1968); Comment, *Air Pollution: The Problem and the Legislative and Administrative Responses of the United States, Pennsylvania and Allegheny County*, 30 U. PITT. L. REV. 633, 640-52 (1969).
11. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (U. S. CODE CONG. & AD. NEWS 6910-57). For a summary of the amendments *see* 1 BNA ENVIRONMENT REP. (Current Developments) at 865-66 (Dec. 18, 1970).
12. The differences between the House and Senate versions of the amending bill [H.R. 17225] are discussed at length in the Statement by the House Conference Managers on the Clean Air Act Amendments, 1 BNA ENVIRONMENT REP. (Current Developments) at 912 (Dec. 25, 1970).

standards are established for automobile emissions, for example.[13] More significantly from the standpoint of an over-all federal air pollution control, the amendments provide for a national ambient air standard,[14] federal emission standards for new stationary sources of pollutants,[15] and for hazardous pollutants.[16] Enforcement power in regard to the federal standards is conferred on the Administrator of the Environmental Protection Agency.[17]

Although one cannot fail to recognize that the Air Quality Act as amended is considerably stronger than the Act as originally enacted, serious defects still exist and the Act falls far short of establishing a comprehensive framework for national air pollution control. For example, the newly enacted provisions in regard to stationary emission control are far less comprehensive than those in the Senate bill, which included a provision for preconstruction review and certification for new stationary emission sources.[18]

The explanation of why even this effective an act has been so slow in being enacted in a nation with so great an air pollution problem lies at least partly in the concepts of federalism to which our nation subscribes. The Air Quality Act still contains the following general policy statement:[19]

> Consistent with the policy declaration of this subchapter, municipal, State, and interstate action to abate air pollution shall be encouraged and shall not be displaced by Federal enforcement action except as otherwise provided by or pursuant to a court order under subsection (c), (h), or (k) of this section.

From a constitutional law standpoint, this restraint on federal action in the air pollution field seems self-imposed. Congress, if it so desired, could pass a very strong act regulating air pollution on a national basis without any

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13. Clean Air Amendments of 1970, Pub. L. No. 91-604, §§202-12, 84 Stat. 1676 (U.S. CODE CONG. & AD. NEWS 6927-44). By 1975 carbon monoxide and hydro-carbon emissions are to be reduced by at least 90% of the emission of those pollutants by 1970 model year vehicles, and by 1976 a comparable reduction is to be made in regard to emission of nitrogen oxides. *Id.* §202(b)(1)(A), U.S. CODE CONG. & AD. NEWS at 6928.

14. *Id.* §109, U.S. CODE CONG. & AD. NEWS at 6914-15.

15. *Id.* §111, U.S. CODE CONG. & AD. NEWS at 6919-21.

16. *Id.* §112, U.S. CODE CONG. & AD. NEWS at 6921-22, which contains the following definition of "hazardous": "The term 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."

17. Pursuant to Executive Reorganization Plan Numbered 3 of 1970, the functions of the Secretary of HEW under the Clean Air Act were transferred to the Administrator of the Environmental Protection Agency.

18. The Senate bill (S. 4358) would have in effect provided for a limited licensing procedure for new industrial installations roughly comparable to the licensing procedure for industry in Western Europe. *See* Juergensmeyer, *A Comparative View of the Legal Aspects of Pollution Control,* 5 SUFFOLK L. REV. 741 (1971).

19. 42 U.S.C. §1857d(b) (Supp. V, 1965-1969).

fear of violating constitutionally recognized doctrines of federalism.[20] The federal government, moreover, is reluctant as a political, if not a legal, matter to interfere with air pollution problems that are not clearly interstate. This reluctance is fortified by the preference of many industries, including those that would be most affected by strong air pollution control legislation, for state rather than federal control.[21]

A combination of constitutional and political factors, reinforced by the activities of various pressure groups, have thwarted effective national control of air pollution through the decision that the separate states should be given the first responsibility to solve the air pollution problem. Furthermore, the federalism ideas used to support leaving pollution control to the states have been used in turn to argue against state efforts at control.[22]

Interstate Compacts

A possible method of avoiding the problems that federalism concepts create for regional control is through the use of interstate compacts.[23] Although some progress has been made in the area of water pollution, through the use of such compacts,[24] only four compacts dealing with interstate air pollution have advanced beyond the proposal stage. None is in effect. Congress has failed to provide the necessary consent legislation for three of them, and one of the states, which is a party to the fourth, has not enacted the compact.[25]

The lack of success in establishing interstate compacts regarding air pollution is especially significant since the Air Quality Act envisages regional

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20. *See* Edelman, *Federal Air and Water Control: The Application of the Commerce Power To Abate Interstate and Intrastate Pollution*, 33 GEO. WASH. L. REV. 1067, 1078-87 (1965).

21. A major reason for this preference is the assumption that state officials will be more understanding to industrial problems. Furthermore, differing state laws and enforcement make "state shopping" by industries possible. *See* note 29 *infra* and accompanying text.

22. For example: "Ten major oil firms filed suit May 11 in Kennebec County Superior Court challenging the constitutionality of a new Maine antipollution law covering coastal shipment of petroleum. The law provides for a half-cent per barrel charge on oil products imported into Maine. The fee goes into a Maine coastal-protection fund which would be used to pay for cleanup expenses of oil spills when the source of the spill is unknown. The oil firms argued in their complaint that the law constitutes an illegal state intervention into foreign and interstate commerce." 1 BNA ENVIRONMENT REP. (Current Developments) at 55 (May 15, 1970).

23. *See* Green, *supra* note 10, at 315; Weakley, *Interstate Compacts in the Law of Air and Water Pollution*, 3 NATURAL RESOURCES LAW. 81 (1970).

24. "[A] variety of water pollution abatement compacts have been negotiated. These compacts range from strong regulatory documents, such as the New York Harbor (Tri-State) Interstate Sanitation Compact and the Ohio River Valley Water Sanitation Compact to mere declarations and pledges of member states to coordinate their efforts in the enactment of uniform laws and regulations for the abatement and control of Pollution." Weakley, *supra* note 23, at 82.

25. The three proposed compacts submitted to Congress are: Illinois-Indiana, Mid-Atlantic, and Ohio-West Virginia. The Kansas-Missouri compact was passed by the Missouri General Assembly but rejected by the Kansas General Assembly. Green, *supra* note 10, at 326-28.

control through their use.[26] The unimpressive record of interstate pollution compacts necessitates the conclusion that, although interstate compacts theoretically provide instruments of regional control without direct intervention by the federal government, their actual operation has provided no basis whatsoever for considering them effective substitutes for federal control.[27]

State and Local Programs

All states presently have air pollution control laws. Unfortunately, very few states have truly effective programs to effect and implement those laws. One can quickly appreciate the weakness of the state programs by examining their budgets. The average annual state expenditure for air pollution control was only 4.8 cents per capita when recently computed.[28]

An important, if not essential, political-economic factor underlying the weakness of most state laws and control programs is that, absent a national standard and an effective national control program, stern enforcement of strict standards by a state subjects it to the possibility of losing industries to states with less stringent laws or less effective control programs. In this era of competition for industry the prospect of industries moving to another state can be a strong political deterrent to state officials who would otherwise advocate environmental protection.[29]

The efforts and results of some local governmental units are more encouraging. Their expenditures, for example, average more than five times that of the states on a per capita basis.[30] In fact, about the only successful air pollution

26. 42 U.S.C. §1857a (c) (Supp. V, 1965-1969).

27. Weakley is more optimistic: "The interstate compact approach to air and water pollution abatement problems is sound and is consistent with the fundamental philosophy upon which our Federal governmental system is based. Use of the compact device in the field of pollution abatement has not been sufficiently expanded nor adequately implemented to demonstrate its full effectiveness. A proper interlacing of Federal and interstate agencies offers the greatest promise for the fulfillment of the urgent need for a truly effective solution to the pollution abatement problems with which this county is faced." Weakley, *supra* note 23 at 88, 89. Unfortunately, Weakley does not give any basis for expecting sufficient expansion or adequate implementation. For a less optimistic evaluation see Green, *supra* note 10, at 315.

28. O'Fallon, *supra* note 10, at 287.

29. "[T]he economics of industrial competition among states and municipalities substantially eliminates unilateral action by a state or local authority toward correction of any particular problem." Weakley, note 23 *supra*. It is interesting to note in this regard that the House Commerce Subcommittee report on H.R. 17255 comments on the granting of power to the Secretary of HEW to establish national emission standards: "The purpose of this new authority is to improve ambient air quality throughout the United States by precluding the construction at any location in the United States of new plants which come within the category of large-scale polluters, or which generate extra-hazardous pollutants. At present emission standards for stationary sources are established by the states both for new and existing plants. Emission standards for new plants will preclude efforts on the part of states to compete with each other in trying to attract new plants without assuring adequate control of emissions from those plants." 1 BNA ENVIRONMENT REP. (Current Developments) at 3 (May 1, 1970).

30. O'Fallon, *supra* note 10, at 288.

control programs in the United States are those of local governmental units, but the future of successful local programs is in doubt because of the emphasis in the Air Quality Act on control at the state level.[31]

Private Rights

Many instances of air pollution involve violations or infringements of private rights that harmed individuals may protect through litigation founded on property, tort, or other private law principles.[32] Assertions of these private rights, even if the private litigant has only personal recovery as a motive for bringing the suit, have control consequences. They lead to injunctions against future pollution, and money judgments obtained from polluters make pollution expensive and thereby economically motivate greater control of pollution.[33]

The causes of action that private citizens are successfully using against individual or corporate polluters include nuisance,[34] trespass,[35] negligence,[36] strict liability,[37] and products liability or consumer protection.[38] Individuals are also bringing suits on the theory of inverse condemnation against all levels of government that are often protected from suits based on the other theories mentioned above by doctrines of sovereign immunity.[39]

The most significant development in this area, and perhaps in the entire pollution control field, is the increased number and activity of groups of individuals formed to initiate suits against private and public polluters.[40] For example, one group is leading the present legal campaign against the use

31. O'Fallon, *supra* note 10, at 288, 289.

32. *See* Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L. J. 1126; Morse & Juergensmeyer, *Air Pollution Control in Indiana in 1968*, 2 VALPORAISO L. REV. 296 (1968); Seamans, *Tort Liability for Pollution of Air and Water*, 3 NATURAL RESOURCES LAW. 146 (1970); Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254 (1970).

33. For a general analysis of economic incentives, see Gerhardt, *Incentives to Air Pollution Control*, 33 LAW & CONTEMP. PROB. 358 (1968).

34. *E.g.*, Hulbert v. California Portland Cement Co., 161 Cal. 239, 119 P. 928 (1911). *See also* Juergensmeyer, *supra* note 32, at 1128; Roberts, *The Right to a Decent Environment; E=MC2: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970); Comment, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107 (1968).

35. *E.g.*, Martin v. Reynolds Metals Co., 221 Ore. 6, 342 P.2d 790 (1959). *See also* cases cited in Juergensmeyer, *supra* note 32, at 1128.

36. *E.g.*, Greyhound Corp. v. Blakley, 362 F.2d 401 (9th Cir. 1958), *cert. denied*, 362 U.S. 918 (1959). *See also* cases cited in Juergensmeyer, *supra* note 32, at 1128.

37. *E.g.*, Waschak v. Moffat Coal Co., 379 Pa. 441, 109 A.2d 310 (1954). *See also* cases cited in Juergensmeyer, *supra* 32, at 1128.

38. Esposito, *Air and Water Pollution: What To Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32, 38-40 (1970).

39. *See* Roberts, *supra* note 34, at 680.

40. There is almost infinite variety in the nature and organization of these groups and thus far no study of them seems to have been made.

of ecology-disturbing pesticides.[41] Some courts have recognized the importance of these private or "quasi-public" groups and have begun resolving questions of "standing" and "aggrieved party" in their favor.[42]

The activities and importance of these private groups continue to increase. Several groups have initiated shareholder derivative suits against large corporations on the theory that pollution results from the mismanagement of corporate property, thereby making corporate directors and executives answerable to their shareholders.[43] Furthermore, recent federal and state legislation creates private causes of action as part of air pollution control programs[44] and new theories for private actions such as process liability are being proposed.[45]

The existence of these private groups and the importance of their activities demonstrate the ineffectiveness of existing governmental control. Private groups cannot and should not hope to provide any long-term substitute for govern-

41. For a report on the most recent decisions regarding Environmental Defense Fund's DDT litigation, *see* 1 BNA ENVIRONMENT REP. (Current Developments) at 115 (June 5, 1970).

42. *See, e.g.,* Scenic Hudson Preservation Conference v. Federal Power Comm'n. 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).

43. Esposito, *supra* note 38, at 40-41.

44. The 1970 Amendments to the Air Quality Act added a provision to the Act for citizen suits. The provision provides:

"CITIZEN SUITS

"Sec. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

"(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

"(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

"The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be." In regard to state legislation: "The Michigan legislature approved June 27 [1970] a bill which would permit private citizens to sue polluters. The bill provides that a citizen has the right to seek from the court an injunction against the state, an industry, or private group for allegedly polluting the environment." 1 BNA ENVIRONMENT REP. (Current Developments) at 230 (July 3, 1970).

45. "The amount of pollution is determined by the process of manufacturing, as well as the devices used to recapture pollutants after production. In a sense then, the process becomes the product. The process is determinative of the extent of the pollution product. It is this relationship which is at the base of the theory of process liability. If process is a product, then just as the manufacturer is liable for the reasonably foreseeable consequences of the usage of his product, so should he be responsible for the consequences of the process of manufacturing employed. If he creates pollutants and they injure, he should be responsible, and his process of manufacturing should be at issue." Miller, *Air Pollution Control: An Introduction of Process Liability and Other Private Actions,* 5 N. ENG. L. REV. 163, 168, 169 (1970).

mental activity, but they are at least establishing a firm, deep-rooted foundation of public support for granting "sufficient priority" to nation-wide pollution control. Hopefully, this support will eventuate in effective governmental control.

In fine, efforts to control air pollution to date have been inadequate. Federal statutes that were slow to be passed are even slower to be implemented. Interstate compacts, though enthusiastically drafted and proposed, are delayed by state legislative committees or congressional committees. State statutes often permissive in terms are applied even more permissively, and local ordinances are the basis for more variances than citations. In the courts, common law remedies that have theoretically been available for centuries to victims of pollution and environmental deterioration have only recently found their way into judicial opinions favoring private or quasi-public pollution controllers.

PROPOSALS AND CONCLUSIONS

How can one explain this failure—or, if one is less severe, lack of success? The answer, it is submitted, is not that the United States needs more or better statutes and ordinances or that we need more litigants (although both may help) but that our society needs to give environmental protection *sufficient priority* from a political, social, economic, and scientific standpoint. By "sufficient priority," it is meant that the United States must allocate the requisite funds, manpower, and other resources to solve or sufficiently alleviate our worsening environmental crisis.

Granted that in the struggle for that goal legislators should be prompted to pass more and better laws, and individuals and private groups should be encouraged to bring more and better fought suits. Nevertheless, it would be erroneous to think that these are the ultimate goals or that their attainment is more than a relatively minor accomplishment; for only when sufficient societal priority has been accorded pollution problems can laws and legal remedies be maximally effective. Those interested in the legal aspects of the problem have failed to adequately examine the changes in the American legal-political system necessary to effectuate the granting of sufficient priority to environmental control and protection. It is submitted that there are at least four such basic changes.

First, we must elevate the concept of priority for environmental protection to the level now occupied by civil rights, religious freedom, freedom of speech, and the like. That is, the right to clean air and water or, more broadly, a decent environment must be recognized as a constitutionally granted and protected right. It has been suggested that the United States Constitution embodies principles of the right to life, liberty, and the pursuit of happiness that would support judicial elevation of environment rights to constitutional protection.[46] But if there be any doubt on this point, present proposals for

46. *See* Esposito, *supra* note 38, at 45-51; Roberts, *supra* note 34, at 686; Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

direct constitutional amendment to this effect should be supported.[47]

Second, we should and must remove the stumbling blocks thrown in the path of progress in environment control by outdated concepts of federalism. The nations of Western Europe have discovered that environment protection must be placed ahead of nationalism.[48] We in the United States should also realize this and change our legal framework and orientation so that environment problems are recognized as national and international, rather than local, problems. In other words, the priority to be given to environment control should be done on a nation-wide and not a state-by-state or regional basis. It has been observed that most of the federalism restraints by which the federal government feels bound in the pollution field are self-imposed;[49] the times appear ripe for a less limited view. Furthermore, as regards international control, the United States and other countries should be prepared to yield sufficient national sovereignty to enable supranational bodies to function in the area of environment control.

Third, the concept of absolute private ownership of property, which has been used to condone property use inconsistent with social needs, must yield to a full recognition of *ownership* as a *social function.* We should recognize that ownership is not an absolute right but a right that is permitted and protected to the extent it is consistent with the needs of society at a given time. This social function theory of ownership, so closely akin to the original theory of ownership of land in the common law, has been inherent in our legal system at least since the passage of the New Deal legislation.[50] Yet

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47. The proposed constitutional amendment states: "Section 1. The right of the people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and esthetic qualities of their environment shall not be abridged.

"Section 2. The Congress shall, within three years after the enactment of this article, and within every subsequent term of ten years or lesser term as the Congress may determine, and in such manner as they shall by law direct, cause to be made an inventory of the natural, scenic, esthetic and historic resources of the United States with their state of preservation, and to provide for their protection as a matter of national purpose.

"Section 3. No Federal or State agency, body, or authority shall be authorized to exercise the power of condemnation, or undertake any public work, issue any permit, license, or concession, make any rule, execute any management policy, or other official act which adversely affects the people's heritage of natural resources and natural beauty, on the lands and waters now or hereafter placed in public ownership without first giving reasonable notice to the public and holding a public hearing thereon.

"Section 4. This article shall take effect on the first day of the first month following its ratification." H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968).

For a discussion of the amendment by one of its sponsors, see Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability,* 55 CORNELL L. REV. 666, 671-72 (1970). *Compare* FLA. CONST. art. II, §7, which provides: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."

48. *See generally* ASSOCIATION POUR LE DÉVELOPPEMENT DU DROIT MONDIAL, LA DÉFENSE DE L'HOMME CONTRE LES POLLUTIONS (1970).

49. *See* Note, *supra* note 46, at 459.

50. One of the few recent discussions of the social function theory of ownership is the mimeographed but unpublished lectures of Professor M. E. Kadem of the University of

aesthetic zoning and urban renewal statutes and projects have been constantly subjected to and often destroyed by contentions that they constituted unconstitutional interference with private property rights.[51] That pollution control laws have been only slightly attacked on such grounds reveals the intrinsic impotence of the laws and their further emasculation by poor enforcement. Police power and public health concepts may not insulate such laws or their (hopefully) more potent successors from future constitutionally based attacks unless the priority of environment protection laws over private property rights is made clear by constitutional change or interpretation.[52]

Fourth, it should be realized that the ultimate and necessarily concomitant objective of any program for protection of the environment from pollution is the establishment of resource allocation and management programs. No program that consists primarily of "thou shalt not" laws will effectively solve the environment crisis. Environment control and protection must be viewed as only one facet of the over-all problem of deciding how, when, for what purposes, and by whom the resources of the United States are going to be used and developed. The dearth of attention given this need for society-wide management and planning is perhaps the most shocking aspect of current discussions of environment problems—and doubtless the clue to why present and past attempts at solution have been so ineffective.[53] Our goal should be

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Geneva prepared for the Faculté International pour l'Enseignement du Droit Comparé. Professor Kadem in thse lectures, entitled *La Notion et lesLimities de la Propriéte Privée en Droit Comparé,* dates the acceptance of the social function theory of ownership in the United States from the enactment of the major items of New Deal legislation. It would seem that the early court decisions upholding the constitutionality of zoning without compensation, such as Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), deserve at least equal credit.

51. For an analysis of the problems involved in shifting of air pollution legislation from public health concepts to zoning and planning concepts, see Pollack, *Legal Boundaries of Air Pollution Control—State and Local Legislative Purpose and Techniques,* 33 LAW & CONTEMP. PROB. 331, at 339-42 (1968).

52. This issue is raised by Mr. Welch of the E. I. duPont Co. in his attack on national emission standards: "It is fundamental that before pollution can be abated, pollution must exist and in this vein, it will be interesting to see how far a court will allow police powers to be stretched under the guise of abatement of pollution." Welch, *Federal Air Quality Act of 1967,* 3 NATURAL RESOURCES LAW. 52, 58 (1970).

53. It is not often that one hears even a vague reference to the problem such as that made by former Congressman Quigley at the ABA National Institute on Air and Water Quality Control:

"In the final analysis, however, the real challenge to society will come not so much from any one type of pollution but rather from the synergistic effect of all kinds of pollution. The total pollution load will prove to be far greater than any of its parts. And our society is not likely to effectively cope with the threat of pollution as long as it continues to go at the problem on a case-by-case basis or with a category-by-category approach. Effective air pollution control invariably results in a water pollution problem of some magnitude and, as already noted, the end product of effective air and water pollution is almost certain to result in a solid waste disposal problem. Applying the best technical knowledge now available we seem to solve one problem by creating another.

"The fact that at the federal, state and local level we have separate agencies to deal with each of the problems of air, water, solid waste, and noise, adds mightily to the confusion and ineffectiveness of our category approaches to the solution of pollution. But even if we

the institution of a permit system for the allocation of most natural resources whereby a permit from an administrative agency would be required for any proposed industrial or commercial use of land, water, minerals, timber, and other natural resources. The criteria for the issuance of such permits should include need for the product, quantity of the resource, demographic and economic effects on the geographic area involved, and of course the environmental and ecological effects of the proposed use with particular regard to air, water, noise, and aesthetic pollution.

The establishment of a legal and administrative framework for such a permit system will admittedly present a formidable task. Nonetheless, precedent exists in the United States. A permit system for allocation of the right to use water resources is now in operation in a majority of states and is being considered in many others. The fact that several states have without serious constitutional, that is, taking-of-property-without-compensation, objections adopted the permit system for allocation of water resources as a substitute for private ownership-oriented riparian principles suggests the acceptability of the permit concept in our legal system. Acceptability would be guaranteed by full recognition of the social function theory of ownership as discussed above.

Furthermore, the administrative bodies and regimes that have been established to implement the permit system or other regulatory concepts of water resource allocation offer guidelines and starting points for the establishment of permit-issuing authorities for all major natural resources. In fact, perhaps the best way to commence the establishment of a permit system framework would be to expand the powers and activities of existing water management bodies.[54] Not only would such an approach have the advantage of using existing administrative machinery, but it would be consistent with the very basic role water resources play in the development, exploitation, and protection of

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had only one pollution control agency at each level of government we would still have a lot of control agencies. The solution is not in the abolishment of the separate control agencies or in the creation of one super national control administration. The most effective, economic and workable solution to pollution is to be found in the development of new institutions or management arrangements which do not now exist in our laws or societies.

. . . .

"The fact of the matter is that the federal government is not really the administration to effectively deal with the air pollution problems confronting the Chicago, Illinois-Gary, Indiana area. But then neither is Illinois or Indiana or Chicago or Gary. What is needed is a management arrangement, which, at the moment, I am not able to define. One of these days some smart lawyer hopefully will." Quigley, *Law, Lawyers and Pollution*, 3 NATURAL RESOURCES LAW. 112, 116, 117 (1970).

There are at last legislative rumblings which indicate that resources allocation will soon receive at least attention and hopefully implementation. *See* McCloskey, *Preservation of America's Open Space: Proposal for a National Land Use Commission*, 68 MICH. L. REV. 1167 (1970).

54. The Southwest Florida Water Management District offers a good example of an existing water management agency that could be used as the beginning framework for a natural resources allocation agency.

most other natural resources. Local, state, or even regional water management —become resources management—boards would of necessity be coordinated by a national board, which would insure the formulation and implementation of national priorities. Furthermore, the powers of the local, state, and regional bodies would of necessity transcend political boundaries since natural resources do so themselves. Perhaps here also water management experience suggests the ideal jurisdictional unit—the basin area.

It is submitted in conclusion that only when law-oriented environmentalists have effected these four needed changes in our political-legal system will the American legal system be able to successfully implement any societal resolution that environment control is to be given sufficient priority to solve the present crisis and to prevent its recurrence.