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WILL THE MEANS JUSTIFY THE END OF ENVIRONMENTAL LAW? ENVIRONMENTAL LAW MUST UNDERGO REASONED LEGISLATIVE DEBATE

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As we examine the course of environmental laws in this country, the pressures on existing laws and what ends we should be aiming for in the future, it is necessary to explore the animating policy decisions and innovations of these laws. But we also must be courageous enough to openly debate the policy decisions underlying those laws and whether they represent the best way forward for our society. If we fail to do so, the existing statutory structure will continue to be hollowed out and made less and less useful and applicable until we will have an end to environmental law as we know it.

In this essay, I will describe the pressures that are currently being put upon environmental law, explain how those pressures are related to a failure to debate environmental and other societal values, and propose that we have the strength to preserve and/or alter environmental laws to meet the needs of today's country and world.

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I. Today's Environmental Law: Class B Office Space

Environmental law as we know it has seen better days. When major federal statutes were first passed, they reflected bold policy choices, effective regulatory innovation, and models for much of the world. Today they are beset

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by executive power that wants to implement various “policies” despite legality, a political and social environment that labels them as impediments to growth and the poor, plus a changing climate with impacts that the statutes were not designed to address. What were once shiny and new are now decidedly “Class B” and in need of an upgrade.

But as those who follow environmental law know, there have been no major changes or statutory updates in environmental law since the 1990 Clean Air Act Amendments.¹ Even the rising challenge of climate change could not push a new law over the line as 2009 and 2010 saw the failure of a 4-year process to hone and pass a climate change law.²

Because of the lack of statutory innovation or changes, almost all changes in the practice of environmental law have come through the executive branch as new rulemakings or guidance documents.

“As a result, the EPA has become confined to incomplete and variable implementation of a set of laws and policies that, with few exceptions, were put in place more than thirty years ago. It has been chronically underfunded and subjected to increasing burdens of proof, oversight, and litigation; and with changes in presidential administrations, its priorities have repeatedly been subjected to radical swings and even attempts at fundamental reversal.”³

Many of these executive pushes, from the George W. Bush administration’s attempt to reform New Source Review under the Clean Air Act to the Obama administration’s Clean Power Plan to address greenhouse gases from the electricity generating sector have either been overturned as contrary to statutory text or have been criticized as legally problematic.⁴ To paraphrase the bible, “do not put your new policies in old statutes because you will make an expensive mess.”⁵

¹ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at various portions of 42 U.S.C. 7401-7671q (1994)). I do not include the brownfields amendments of 2002 as a major environmental law change. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002), amending various sections of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675).

² Brad Plumer, *Why has climate legislation failed? An interview with Theda Skocpol*, WASH. POST (Jan. 16, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/01/16/why-has-climate-legislation-failed-an-interview-with-theda-skocpol/?noredirect=on&utm_term=.69ca38ef3e10.

³ Richard Andrews, *The EPA at 40: An Historical Perspective*, 21 DUKE ENVT’L L. & POL’Y F. 223, 226 (2011).

⁴ *New York v. EPA*, 370 U.S. App. D.C. 239, 443 F.3d 880 (2006); Jonathan H. Alder, *Supreme Court puts the brakes on the EPA’s Clean Power Plan*, WASH. POST (Feb. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.f73d8a4067dc.

⁵ Mark 2:21–22 (“No one sews a piece of unshrunk cloth on an old garment. If he does, the patch tears away from it, the new from the old, and a worse tear is made. And no one puts new wine into old wineskins. If he does, the wine will burst the skins—and the wine is destroyed, and so are the skins. But new wine is for fresh wineskins.”).

Even in cases in which the legislative branch was essentially “called out” to clarify or change laws, such as with Clean Water Act jurisdiction, Congress has refused the invitation.⁶

II. Why Won’t We Renovate?

The failure to address needs in our environmental laws is often put down to political differences, and to a certain extent this is true. After working on the 1990 Clean Air Act Amendments and introducing the “no net loss” of wetlands policy, President George H.W. Bush was said to have remarked that because of politicization, no Republican will ever get credit for environmental policies so it wouldn’t help in winning elections.⁷

Richard “Pete” Andrews has written extensively about the politicization of environmental law and he traces much of it to the Republican rejection of efficient regulation at the altar of no regulation at all:

“While environmental protection remained a widely supported and largely nonpartisan value for the general public, among elected politicians and interest groups it became a surrogate for an increasingly ideological and partisan conflict over the role of government regulation in achieving it. This reframing of the issue pitted liberal Democrats, and a dwindling minority of moderate Republicans, against an increasingly vocal anti-government core of the Republican Party which was augmented on individual issues by Democrats from districts whose businesses were burdened by environmental regulations.”⁸

This was seen most clearly in the Reagan Administration’s deregulatory push (particularly for CERCLA) and the general deregulatory push championed by Newt Gingrich in the “Contract for America” in the 1994 Congressional campaigns.⁹

A deregulatory agenda would seem generally hostile to environmental policies, but those progressives and environmental advocates who opposed these deregulatory agendas have contributed to environmental legal ossification and the possible death of environmental law. How? By holding on to statutory stasis when a dynamic world calls for change. In our Class B office context, it is as if the

⁶ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁷ See generally, Scott Waldman & Benjamin Hulac, *This is when the GOP turned away from climate policy*, E&E NEWS (Dec. 5, 2018), <https://www.eenews.net/stories/1060108785>.

⁸ Andrews, *supra* note 3 at 225.

⁹ See Martin Tolchin, *The Rush to Deregulate*, N.Y. TIMES (Aug. 21, 1983), <https://www.nytimes.com/1983/08/21/magazine/the-rush-to-deregulate.html>; see generally Jennifer Harper, *When the GOP 'loudly and proudly' spoke up: The Contract with America turns 20*, WASH. TIMES (Sep. 25, 2014), <https://www.washingtontimes.com/news/2014/sep/25/two-decades-later-contract-america-turn-20/>.

owners of the office building are afraid to think about improvements for fear that they might lose their grandfathered status in a world that has been changing building standards. Environmental advocates and progressives are afraid to even debate our outdated environmental laws because they would rather have the ill-fitting protections that already exist than take a chance on losing protections entirely. The problem is that this lets the rest of the world proceed with its environmental debates without the benefit of environmental laws strongest advocates forcefully making the case as to why existing foundational rights should be preserved even as we debate better statutory improvements.

It would be hard to find better core policies than outlined in our major environmental statutes. After all, the Clean Air Act, the Clean Water Act, RCRA, and CERCLA enshrine the very important idea that health and environmental amenities should trump economic and efficiency considerations in at least some cases.¹⁰ As I have written before, these core principles can be seen as human rights issues similarly enshrined in common law.¹¹ This is an important principle and in any environmental statutory update or debate, it should either be agreed upon as foundational or at least acknowledged as the important normative idea it is. As stated in a prior article:

“If we don’t understand the right to an environment and why we have this right, we may lose it, regulatorily or legislatively, to our great detriment. **Understanding we have a right is necessary to compare and weigh the right against other rights and entitlements**, and thus find the appropriate balance between competing interests.”¹²

Unfortunately, by simply assuming that this foundational right should carry us through all debates, or perhaps because of a fear that this right will be subverted, progressives have simply sat on their laurels and avoided debate about our environmental laws altogether. This has had the paradoxical effect of burying the importance of these environmental rights and ceding the terms of debate to those who would necessarily weaken environmental laws, without having a real discussion about important values and environmental statutory improvements. Progressives are so wedded to the “grandfathered” use of the Class B office space from the 1970s, that they are even afraid to discuss whether they could preserve

¹⁰ See generally 42 U.S.C. § 7412 (2018) (illustrating that under the Clean Air Act, when setting the Maximum Achievable Control Technology (MACT), cost of implementation is not a consideration); 33 U.S.C. § 1313 (2018) (illustrating that when setting water quality standards under the Clean Water Act, the EPA does not consider the economic cost of setting such a standard); 42 U.S.C.S. § 6924(a) (2018) (requiring that the EPA promulgate regulations establishing performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste as may be necessary to protect human health and the environment); 42 U.S.C.S. § 9601(14) (illustrating that there is no concentration or quantity requirement for a hazardous substance to be regulated under CERCLA).

¹¹ Victor B. Flatt, *This Land is Your Land: Our Right to the Environment*, 107 W. VA. L. REV. 1 (Vol. 1), (October 2004).

¹² *Id.* at 3 (emphasis added).

most of the prior use of the building while still improving it. Not that this fear is misplaced. These core values are generally not discussed in policy decisions as such, but find themselves being surreptitiously addressed and potentially dismantled in policy implementation debates. Multiple examples exist of EPA policies carrying Trojan Horse provisions under a different rule or guidance.¹³

III. How We Lost Sight of the Foundational Priorities

One of the major innovations in the environmental legal movement that began with the Clean Air Act in the United States was the abandonment of the health or environmental based only standards in favor of strict technological controls on pollution sources.¹⁴ But the very effectiveness and ubiquity of these technological approaches, coupled with complacency that the underlying environmental values would never be challenged, changed how scholars debated environmental policy.¹⁵ Environmental law debates started to focus on efficiency of control mechanisms, particularly the potential efficiencies achieved by market mechanisms over so called command and control approaches.¹⁶ David Brooks sees this as part of a change in policy analysis over the last 40 years that have put more focus on economic efficiency while ignoring or downplaying other values.¹⁷ While analysis of policy efficiency is an important undertaking in any regulatory system, many lines began to blur so that economic efficiency debates morphed into economics, not human rights, as a normative question.

Thus, due at least in part to complacency or fear on the part of environmentalists, much of our environmental law policy debate (such as it is and was) seemingly revolves around which policies we should be using, but in reality are loaded with normative questions as well.¹⁸ Debating norms such as human rights to environmental protection without actually engaging in that policy debate

¹³ Harvard Law School Environmental and Energy Law Program, *Memorandum on EPA's Proposed Changes to New Source Review in ACE*, <http://eelp.law.harvard.edu/wp-content/uploads/NSR-proposal-summary.pdf>; Sean Reilly, *EPA Tucks Major Permitting Change into Climate Proposal*, E&E NEWS (August 21, 2018), <https://www.eenews.net/stories/1060094875>.

¹⁴ 33 U.S.C. § 1311 (2018) (technology standards for point sources); 42 U.S.C. § 7411 (2018) (technology standards of performance for new source review).

¹⁵ ROGER BROWNSWORD ET AL., *THE OXFORD HANDBOOK OF LAW, REGULATION AND TECHNOLOGY* 1196 (2017).

¹⁶ See generally Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1341-51 (1985) (arguing against command-and-control regulation and advocating a system of regulation based on market mechanisms); Daniel J. Dudek & John Palmisano, *Emissions Trading: Why Is This Thoroughbred Hobbled?*, 13 COLUM. J. ENVTL. L. 217, 222-23 (1988) (advocating market mechanisms as a preferred strategy for pollution control).

¹⁷ See David Brooks, *Remoralizing the Market*, N.Y. TIMES (Jan. 11, 2019), at A23.

¹⁸ See generally Thomas W. Merrill, Symposium, *Innovations in Environmental Policy: Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275, 276 (2000) (“As befits a controversial subject, the literature on command-and-control versus market mechanisms is primarily normative.”).

openly is indeed dangerous. Unfortunately, not engaging in the debate isn't going to be effective either.

IV. How to Start a Renovation

If recognizing that engagement in environmental law debate is a first step, engaging environmental statutory debate by forcefully articulating and defending an individual's rights to be protected from externally imposed environmental dangers and harms is the very important second step. As we look to updating our environmental laws (as we must), this important part of the debate must be front and center. Though there may be lack of polling on this exact question, indications are that Americans strongly support the right of everyone to be free from externally imposed harm for someone else's profit. After all, this normative idea is a basic tenet of the Anglo-American legal system.¹⁹

Moreover, polling data suggests that there is generally support from all Americans to protect the "environment," and interpreters of this data have noted particularly strong concern about immediate environmental threats, such as impacts on human health.²⁰ From studies of risk, this belief is strong even if members of the public would be willing to make an informed decision themselves to undertake environmental or health risk for other benefits.²¹

An examination of the enactment of environmental laws and their implementation also strongly suggests that the normative protection of individual health and safety is a core feature. The preservation of human life and health without concern to economic impacts is a distinctive feature of environmental law.²² This suggests that "in terms of balancing interests, law [and] societal proscriptions demand that we place public health as an interest superior to other mere general, economic human interests."²³

If societal leaders and lawmakers do not believe this to be true or that it should bend to other values, that debate must be held openly and honestly by discussing the normative bases of our environmental laws rather than focus on efficiency of regulation itself. Regulation can be fixed, but values must be

¹⁹ Victor B. Flatt, *"He Should At His Peril Keep it There . . .": How the Common Law Tells Us That Risk Based Corrective Action is Wrong*, 76 NOTRE DAME L. REV. 341, 344 (2001).

²⁰ Steven Cohen, *Understanding How Americans View the Environment*, HUFFINGTON POST (March 24, 2014) ("People know that the planet is under threat, and they are willing to address the most urgent threats — especially if they directly experience them . . . Drinking water in Charleston, West Virginia, air pollution in Paris, or toxics in Brooklyn's Gowanus Canal can be seen, smelled and felt. Americans understand those issues. They understand the threat posed by climate change, but they consider the threats posed by poisoned land, air and water to be a higher priority.").

²¹ Victor B. Flatt, *The Human Environment of the Mind: Correcting NEPA Implementation By Treating Environmental Philosophy and Environmental Risk Allocation as Environmental Values Under NEPA*, 46 HASTINGS L. J. 85, 94 (1994).

²² See 42 U.S.C. § 7401 (providing that the purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population").

²³ Victor B. Flatt & Heather Payne, *Not One Without The Other: The Challenge of Integrating U.S. Environment, Energy, Climate, and Economic Policy*, 44 ENVTL. L. 1029, 1101 (2015).

debated. And it is up to those who do support these normative values to ensure that the public understands what is at stake.

Conversely, the environmental community must be willing to accept that we live in a body polity, and that debate about the priority of values should be allowed, not avoided. While I don't believe even a significant minority of Americans would support human health degradation in exchange for economic growth, how this applies to other environmental amenities and values is less clear. For instance, the Endangered Species Act was amended in 1978 to allow its protections for endangered species to be voided in certain, narrowly limited circumstances.²⁴ Debate at that time was open as to what might be lost, and that was accommodated by making the process difficult. Do we have more scientific information now that lets us better understand gradations in species, animal, plant or habitat protections? I don't know the answer to this, but none of us will if we refuse to engage in the discussion.

It is time to upgrade our statutory office space. I suspect it will be a very similar structure, but I hope that it is one that is more efficient, and better matched to its purpose. Call in the contractor. Discuss what we want and need, and let the renovations begin!

²⁴ Endangered Species Act Amendments of 1978, 95 P.L. 632, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. §§ 1532-36, 1538-40, 1542) (1978) (providing that the Endangered Species Committee (ESC) has the power to decide whether a particular species of plant or animal should be preserved, or whether the species should be doomed to certain extinction).