March 1994

Roundtable Discussion: Science, Environment, and the Law - Fourth Panelist

Edward W. Warren

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol21/iss2/9

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z381N8W

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
"Good science" and rules that encourage its use are important in today's debate about environmental policy. But they are far less critical than substantive law in explaining the many changes that have accompanied the triumph of "environmentalism" over the last two decades. The toxic tort liability explosion, for example, is not exclusively, or even primarily, attributable to "junk science" in the courtroom. Nor can overregulation of some environmental risks be explained only by government reliance on shoddy science or the pyramid of unrealistic assumptions in risk assessments. Substantive law, as set forth in both statutes and judicial decisions, has played a more important role in bringing about the current obsession with environmental risks than have the procedural rules for handling scientific evidence. Reforming the present system, then, will require not only procedural or evidentiary rule changes but, more fundamentally, adjustments in the underlying tort and statutory environmental law.

This talk will briefly address the role courts appropriately might play in tempering the wasteful excesses of some of today's substantive environmental and tort laws. First, I will give a few examples of why substantive rules are so important; then I will discuss the role courts traditionally played in curbing excesses akin to those we see today; and finally, I will compare the relative merits of three ways in which the courts might help to restore some balance to private and public environmental law.

A sea change has overtaken the law of toxic torts since Judge Wisdom's 1973 *Borel* decision rewriting the notice and warning requirements governing toxic tort actions.1 Judge Wisdom, probably unwittingly, opened floodgates through which have poured over the last twenty years a torrential "liberalization" of the substantive tort law. However warranted in the context of asbestos-exposed installation workers, this *Borel*-sparked trend has led other jurisdictions to recognize novel causes of action, such as causing an increased risk or an increased fear of cancer, or necessitating community health programs...
to monitor whether such increased risks or fears are later borne out.\textsuperscript{2} Pursued as class actions, such open-ended theories impose nearly irresistible financial and public relations pressures on companies to pay large settlements to well-heeled plaintiffs attorneys, who never even need to present junk science in the courtroom. Moreover, with causes of action so loosely framed, the Supreme Court was surely on solid ground in \textit{Daubert} in holding that a trial judge might properly consider almost any scientific evidence (whether peer-reviewed or not) relevant, depending upon the underlying cause of action.\textsuperscript{3}

Today's public environmental law is, to a large extent, just as open-ended as these novel toxic tort actions. The Safe Drinking Water Act (the SDWA), for example, has been interpreted as requiring zero-risk maximum contaminant level goals (MCLG's) and non-detect maximum contaminant levels (MCL's) for enforcement purposes.\textsuperscript{4} These stringent drinking water standards, in turn, are viewed as "relevant and appropriate" requirements under section 121 of the Superfund Amendment and Reauthorization Act (SARA), with the result that potentially responsible parties (PRP's) are often forced to "pump and treat" contaminated ground water to MCL levels and to remove or incinerate contaminated soil when containment or similar remedies would often be more efficient and cost effective.\textsuperscript{5} Considering only the case of the common solvent, trichloroethylene, observers have predicted that this combined reading of the SDWA and SARA will result in cleanups by the Department of Defense, the Department of Energy, and private parties costing as much as $100 billion.\textsuperscript{6}

This Superfund example, while extreme, is mirrored by provisions under other environmental statutes. Several hundred billion dollars, for example, have been spent attempting to achieve ambient air quality standards set under the Clean Air Act (the CAA) without regard to the magnitude of risks presented or the costs of compliance.\textsuperscript{7} An

\begin{itemize}
\item \textsuperscript{2} See Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993); Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987).
\item \textsuperscript{3} Daubert v. Merrell Dow Pharmaceuticals Inc., 113 S. Ct. 2786 (1993).
\item \textsuperscript{4} See 42 U.S.C. § 300g-1(b) (1988) (requiring EPA to set MCL's and MCLG's); NRDC v. EPA, 824 F.2d 1211, 1214-17 (D.C. Cir. 1987); International Fabricare Inst. v. EPA, 972 F.2d 384, 390-91 (D.C. Cir. 1992) (interpreting these provisions).
\item \textsuperscript{5} See 42 U.S.C. § 9621(d)(2)(A)(i) (1988) (indicating that cleanups should meet the limitations set by the Safe Drinking Water Act). In practice, the question of what this requirement means is quite complicated. For example, does compliance mean that the MCL must be met at the drinking water tap, in the aquifer beneath the property, or at the property boundary? Government project officers at specific sites have nearly unlimited discretion regarding these matters.
\end{itemize}
expansive reading of the Clean Water Act's water quality standards could be similarly wasteful if nondegradation requirements are rigidly imposed on upstream sources.\(^8\) And, without congressional or presidential interventions such as occurred in the spotted owl case, the Endangered Species Act could effectively halt development in many more circumstances.\(^9\)

Certainly until the New Deal, and somewhat less clearly until the "rights revolution" of the 1960's and 1970's, two principles seem to have guided judicial attitudes toward controversies now addressed by statutory environmental law and toxic tort actions. First, courts generally sought outcomes that maximized overall social welfare.\(^10\) Sometimes this happened explicitly, as in Judge Learned Hand's famous formula,\(^11\) but more often it occurred unconsciously as courts sought economically efficient solutions.\(^12\) A second principle, perhaps only a corollary of the first, was that the law should be compensatory rather than redistributive.\(^13\) Put most simply, neither the public nor the private law should sanction the transfer of wealth from \(A\) to \(B\) except to compensate for harm done to \(B\)'s person or property.

Neither of these two principles holds sway any longer. Compensation has given way to deterrence and punishment as the aims underlying both the public and private environmental law. Redistributive objectives, while rarely explicit, lurk behind many of the tort causes of action and perhaps also the zero-risk statutes mentioned earlier.\(^14\) With considerable justification, legislation is seen only as the product

8. See 33 U.S.C. § 1313(c)(2)(A) (1988) (providing that water quality standards are to be set "to protect the public health or welfare" and to "enhance the quality of water"). This provision has been read to include nondegradation requirements, which can preclude any discharge whatsoever by upstream sources. So read and applied nationwide, water quality requirements enforced through National Pollutant Discharge Elimination System (NPDES) permits could impose enormous costs for little improvement in stream water quality. See id. § 1342 (establishing the NPDES permit program).


11. Judge Learned Hand's tort formula imposes liability if the burden of risk avoidance (\(B\)) is less than the injury (\(L\)) multiplied by the probability of injury (\(P\)). See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1943).


14. Redistributive objectives are relatively infrequent in environmental regulation because the risks and the eventual costs of reducing risks usually are spread over the general population. Direct transfer payments generally are a more efficient means of shifting wealth from one segment of society to another than substantive statutes with redistributive goals. See Herman B. Leonard & Richard J. Zeckhauser, Cost-Benefit Analysis Applied to Risks: Its Philosophy and Legitimacy, in VALUES AT RISK 40 (D. MacLean ed., 1985).
of deals among special interest groups in pursuit of their private objectives.\textsuperscript{15} The contest among such groups is allowed to continue in the courts under broadened standing doctrines, with the beneficiaries of social legislation seeking to win through litigation further gains not clearly secured in the legislative process.\textsuperscript{16} The judiciary, once composed of unconscious adherents of welfare-maximization opposed in principle to redistributive "justice," are now seen by conservatives as "activist" proponents of "overregulation" and its consequences for individual and economic liberty.

Although now mostly forgotten, the truth is that conservatives once relied heavily on the courts to protect citizens from government incursions on economic as well as personal liberties. Should anyone wish to return to that era? And, even if desirable, is it possible? If the answer to either of these questions is no, what other alternatives exist? In short, what is practical and how do we weigh the risks of an "activist" judiciary against the benefits of skeptical courts predisposed against "public choice" deals that substitute distributive aims for wealth maximization and efficiency? I propose to explore these questions by discussing three possible approaches that courts might take in reviewing the actions of government agencies and in fashioning the elements of tort causes of action.

The first approach relies on the various substantive limits that the Constitution imposes on legislation or judicial lawmaking in the economic area. Possible sources for these limits include the Due Process Clause,\textsuperscript{17} the Contract Clause,\textsuperscript{18} the Excessive Fines Clause,\textsuperscript{19} and, most important of all, the Takings Clause of the Fifth Amendment.\textsuperscript{20} Professor Epstein has written brilliantly on the potential sweep of the Takings Clause,\textsuperscript{21} as well as on the related limits imposed by the "unconstitutional conditions" doctrine.\textsuperscript{22} Much as I respect his scholarship in this area, however, I doubt that the current (or any future) Supreme Court will revert very far in the direction of the much-maligned constitutional oversight of the \textit{Lochner} era Court.\textsuperscript{23}

\textsuperscript{16} \textit{See Jeremy Rabkin, Judicial Compulsions 55-59, 78, 126-28, 311-12 n.20 (1989).}
\textsuperscript{17} U.S. Const. amend. V; \textit{Id.} amend. XIV, § 1.
\textsuperscript{18} \textit{Id.} art. I, § 10, cl. 1.
\textsuperscript{19} \textit{Id.} amend. VIII.
\textsuperscript{20} \textit{Id.} amend V.
\textsuperscript{21} \textit{See Richard A. Epstein, Takings (1985).}
\textsuperscript{22} \textit{See Richard A. Epstein, Bargaining with the State (1993).}
\textsuperscript{23} \textit{See} \textit{Lochner v. New York, 198 U.S. 45 (1905), overruled by Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).}
Why do I consider a vigorous revival of the takings doctrine so unlikely? To begin with, even if the Court once consistently applied the Takings Clause in the manner favored by Professor Epstein,24 employing the doctrine aggressively now would likely lead to a revolutionary (and generally unpopular) downsizing of today's massive administrative state.25 The current Supreme Court, still struggling with the consequences of the Warren and Burger Courts' substantive expansion of protected personal liberties,26 seems not about to create new "economic" rights or to chart an interventionist course in reviewing state, judge-made causes of action.27 The recent Lucas decision is not to the contrary.28 Justice Scalia deserves credit for framing the regulatory takings doctrine in terms of the state's "police power" justification judged in comparison to common law nuisance remedies, but his opinion signals no more willingness than previous decisions to second-guess "rational" legislative judgments or to award compensation where the state takes less than 100% of the regulated party's property interest.29

The second and third possible approaches that courts might adopt in reviewing economic legislation would focus, not on whether the government has the power to enact particular legislation, but rather

24. Many persons tend to mythologize the Lochner era and assume that if it still applied, most wasteful and inefficient government regulation would be constitutionally prohibited. This is a vast oversimplification. In Mugler v. Kansas, 123 U.S. 623 (1887), decided in the Lochner era, the Supreme Court upheld an ordinance effectively prohibiting the operation of a previously lawful brewery even though the property concededly would lose all of its value as a consequence. Likewise, in Powell v. Pennsylvania, 127 U.S. 678 (1888), the Court upheld legislation prohibiting the manufacture of oleomargarine. Similarly, in Miller v. Schoene, 276 U.S. 272 (1928), it excused Virginia from compensating the owner of cedar trees ordered destroyed to prevent disease from spreading to nearby apple orchards.

25. See Epstein, supra note 21, at ch. 15 (progressive taxation); id. at ch. 17 (restructuring welfare system).


27. The Supreme Court's handling of punitive damages is illustrative. In Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), the Court held that the Eighth Amendment's Excessive Fines Clause is inapplicable to disputes between private parties, and accordingly it cannot be used to curb excessive punitive damage awards. Then, in Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), the Court suggested that the Due Process Clause might provide some restraints, only to counter later in TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993), that any such restraints are not very searching.


29. Id. at 2899-2902 (discussing "police power" in relation to common law nuisance), 2893-95 (making clear that complete takings are entitled to compensation). It remains to be seen whether the Court will limit "takings" so narrowly when the challenged regulation does not completely extinguish the petitioner's property right.
on whether it has in fact exercised that power in a democratically accountable manner. Courts have always employed judge-made rules, the so-called "canons of construction," when attempting to determine the meaning of statutory language. One perhaps might expect canons of construction to have become less important after the Supreme Court's landmark Chevron decision ceding interpretative authority for ambiguous statutes to the executive branch, but just the opposite is true. Under Chevron's "first step" (whether Congress has spoken to the precise question at issue), the courts increasingly use canons as they struggle to answer the "how clear is clear" question that precedes deferring to the agency's interpretation. While Chevron formally applies only to federal statutes, similar considerations make construction canons important for construing the many state statutes that have codified torts previously developed under common law.

When compared with constitutional doctrines, construction canons provide a less powerful but potentially more discriminating tool for judicial oversight of legislative action. Let me caution, however, that construction canons, like other forms of judge-made law, are not inherently "neutral" and hence may be manipulated by tenured judges to usurp the lawmaking role constitutionally assigned to democratically elected legislatures. Professor Sunstein's ambitious effort, suggesting over seventy separate (and extraordinarily substantive) canons would have precisely that effect; indeed, his canons, if ever adopted, would probably expand the state's role almost as much as Professor Epstein's takings doctrine would contract it.

But is it possible to suggest a form of construction canon that minimizes the risk of judicial "activism," while at the same time helping to assure that the key legislative tradeoffs will actually be made by elected representatives instead of judges insulated from the democratic process? Professor (now Judge) Easterbrook once suggested what he called a "meta-rule of statutory construction" that would limit courts to deciding only those questions "anticipated by the framers and expressly resolved in the legislative process." Under this approach, when a statutory provision does not clearly resolve the issue

32. See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 520.
presented, the court must revert to common law sources (i.e., contract, tort, property, etc.) to decide the dispute between the parties. Judge Easterbrook’s presumption in favor of private ordering echoes the canon that statutes in derogation of common law should be narrowly construed; similarly, it would be enforced by the same sort of legislative “clear statement” requirement that accompanies other construction canons.35 And like other clear statement rules, Judge Easterbrook’s meta-rule would promote democratic decisionmaking by requiring that legislators actually debate and decide the central resource tradeoff questions so often left unresolved by key environmental provisions.36

What can be said for and against Judge Easterbrook’s meta-rule of statutory construction? First, it is democratic, not only because legislators rather than judges would make the hard choices, but also because the legislative process (perhaps regrettablably) need be no more constrained by constitutional limits than it is today. Second, although less far reaching than a revival of the takings doctrine, Judge Easterbrook’s private ordering presumption could stop judge-made expansion of regulatory programs or the creation of new tort causes of action never explicitly provided by Congress or state legislatures.

On the other hand, Judge Easterbrook’s rule appears difficult to reconcile with Chevron, because Judge Easterbrook would require Congress to clarify ambiguous statutory provisions, instead of allowing courts to defer to the executive branch lawmaking when Congress itself has not decided an issue. The resulting intolerance of legislatures’ “punting” on key policy questions causes Judge Easterbrook’s meta-rule to resemble the supposedly discredited nondelegation doctrine.37 Moreover, unless one takes an activist view of the judicial role, the reasoning behind Judge Easterbrook’s meta-rule is

---


37. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). The nondelegation doctrine has occasionally affected how statutes are interpreted, but the United States Supreme Court has not employed the nondelegation doctrine to invalidate any statute since the New Deal. See RONALD A. CASS & COLIN S. DIVER, ADMINISTRATIVE LAW 18-33 (1987).
arguably circular—when did Congress decide that only it could make the hard choices—although perhaps that could be said to follow from Article I and the overall structure of the Constitution.

These are the considerations that prompted my colleague, Gary Marchant, and me to suggest a much narrower approach. We maintain that the Administrative Procedure Act 38 contains what might be called a “mini-rule of statutory construction,” somewhat analogous to Judge Easterbrook’s meta-rule. Specifically, we argue that the APA’s “arbitrary, capricious” prohibition should, in light of the APA’s text, purpose, and history, be interpreted to create a presumption that Congress always intends that its legislative provisions “do more good than harm.” 39 By “more good than harm,” we mean that, unless otherwise clearly spelled out in the legislation, Congress’ words should always be interpreted in a manner that maximizes overall societal wealth and promotes efficiency. Like Judge Easterbrook’s meta-rule, our mini-rule favors democratic outcomes and allows even openly redistributive or punitive legislation, provided that Congress acts explicitly and takes political responsibility for its choices.

Our suggested more good than harm rule follows in the tradition of Chevron, which presumes that interpretative authority has been delegated to the agency unless Congress has clearly stated the opposite. 40 While less powerful than either the takings doctrine or Judge Easterbrook’s meta-rule, our proposal would do much to reorient environmental regulation while remaining faithful to the limited judicial role favored by conservatives. Our suggestion, of course, is at best a partial answer to the problems discussed in the beginning of my presentation. It would, for example, do nothing to address state toxic torts, whether grounded in statutory or common law. But a partial solution is at least better than holding out unrealistic hopes that the Supreme Court will ever again “reconstitutionalize” economic regulation and restore the predictability to which property rights were once entitled.

Thank you.