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Environmental Regulation and the Constitution

James E. Krier
Michigan School of Law, jkrier@umich.edu

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ENVIRONMENTAL QUALITY IMPROVEMENT ACT

See: Environmental Regulation and the Constitution

ENVIRONMENTAL REGULATION AND THE CONSTITUTION

Indirectly, at least, the Constitution provides the federal government with power to regulate on behalf of environmental quality, but it also sets limits on the power. It sets limits, likewise, on the regulatory power of the states. What it does not do, at present, is grant the "constitutional right to a clean environment" so avidly sought in the heyday of environmental concern, the decade of the 1970s. Thus, the one unique aspect of the general topic considered here has no doctrinal standing; the remaining aspects are matters of doctrine, but they are not unique to environmental regulation. It is quite sufficient, then, merely to illustrate the wide range of constitutional issues that arise in the context of environmental regulation, and to suggest the nature of the debate on the question of a constitutional right to an environment of good quality.

Environmental lawmaking at the national level of government—whether by Congress, the executive, or indeed the federal courts—became important only in the 1970s, but the beginnings reach back well into the nineteenth century, if not farther. This history, especially the strong federal presence of recent years, makes apparent the significant constitutional authority of the central government in regard to the environment. Granting that it is a government of LIMITED POWERS, and mindful of occasional suggestions "that these powers fall short of encompassing the breadth of concerns potentially subject to environmental regulation," one can still conclude, with Philip Soper, "that no conceivable measure reasonably intended to protect the environment is beyond the reach" of federal authority.

The most important source of federal power to regulate in the environmental field is found in the COMMERCE CLAUSE. The clause, especially as it pertains to congressional authority to regulate activities *affecting* commerce, has been so expansively applied by the federal courts as to justify federal control of virtually any problem of environmental pollution. Some pollution sources, such as automobiles and ships, move in INTERSTATE COMMERCE; other sources manufacture products that do so; pollution affects such mainstays of interstate commerce as agricultural commodities, livestock, and many raw materials; pollutants themselves can be seen as products, or at least by-products, moving "in commerce" across state lines. An imaginative federal district court relied upon this last theory to sustain the Clean Air Act in *United States v. Bishop Processing Company* (D.Md. 1968).

These views lend support not only to the federal air pollution control program but also to programs concerning noise, pesticides, solid waste, toxic substances, and water pollution. Regarding the last especially, Congress can draw on its unquestioned authority over navigable waters, and on the willingness of the federal courts to regard as navigable any waters of a depth sufficient, as someone once said, to float a Supreme Court opinion.

The federal government can draw on other sources of power, at least on a selective basis, to support programs of environmental regulation. The property clause of Article IV, section 3, for example, gives Congress the power to "make all needful Rules and Regulations respecting" the property of the United States. In *Kleppe v. New Mexico* (1976) the clause was relied upon to sustain the Wild Free-Roaming Horses and Burros Act of 1971 as a "needful regulation" "respecting" public lands, against New Mexico's claim that the federal government lacked authority to control the animals unless they were moving in interstate commerce or damaging public lands. It seems clear that under the property clause Congress may regulate the use of its own lands, and perhaps adjacent lands as well, to protect environmental conditions and promote ecological balance on government property.

Other powers relevant to environmental regulation include the TAXING POWER, which presumably would authorize effluent and emission fees to control pollution; perhaps the ADMIRALTY power, as a basis for controlling pollution from ships; and the power to approve INTERSTATE COMPACTS, as an indirect means by which to impose federal environmental standards on compacting states, as the Court suggested in *West Virginia ex rel. Dyer v. Sims* (1951), involving a compact among eight states to control pollution in the Ohio River system. And the Supreme Court may draw on its ORIGINAL JURISDICTION to shape a FEDERAL COMMON LAW of pollution in suits between states or between a state and the citizens of another state.

The TREATY POWER provides yet another basis for federal environmental quality and conservation measures. The leading case here is MISSOURI V. HOLLAND (1920), sustaining the Migratory Bird Act of 1918. Congress enacted the legislation in question in order to give effect to a treaty between the United States and Great Britain. Missouri, claiming "title" to birds within its borders, sought to prevent a federal game warden from enforcing the Act. The Court, through Justice OLIVER WENDELL HOLMES, rejected the state's contention. Treaties, under the SUPREMACY CLAUSE, are the "supreme Law of the Land"; so too are acts of Congress " NECESSARY AND PROPER for carrying into Execution" the treaty power vested in the president and the Senate. *Missouri v. Holland* is of particular interest because the Court upheld the Migratory Bird Act notwithstanding the fact that a similar act, not based on a treaty, had earlier been invalidated as beyond the scope of congressional power. As Soper remarks, the case "accordingly seems to stand for the proposition that Congress may do by statute and treaty what it has no power to do by statute alone."

The specific basis for the state's claim in *Missouri v. Holland* was the TENTH AMENDMENT, which reserves to the states powers not delegated to the United States by the Constitution. The provision introduces the subject of constitutional limitations (as opposed to powers) that may apply to programs of environmental regulation, and illustrates a limitation applicable only to the federal government, and not to the states.

The Tenth Amendment figured prominently in a series of cases involving the federal Clean Air Act and decided by several courts of appeals in the 1970s. A central question in the cases was whether the amendment foreclosed the federal Environmental Protection Agency from promulgating regulations compelling various implementation and enforcement measures by the states, under threat of fines and imprisonment for recalcitrant state and local officials. The courts of appeals divided on the question, at least one of them intimating a constitutional violation, one explicitly finding no violation, and one interpreting the Clean Air Act in such a way as to sidestep the issue. The Supreme Court granted certiorari and heard argument in several of the cases, but it ultimately declined to reach the merits because counsel for the United States conceded that the regulations in question would have to be rewritten to eliminate requirements that states adopt implementation and enforcement measures. The Court's later decisions in HODEL V. VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION (1981) and *Federal Energy Regulatory Commission v. Mississippi* (1982) show that Congress can constitutionally place great pressures on the states to regulate, so long as it uses indirect means for doing so.

Another constitutional limitation operating upon state but not federal environmental protection programs arises from the supremacy clause. The limitation may come into play in two common respects. One of these involves PREEMPTION and is illustrated by BURBANK V. LOCKHEED AIR TERMINAL, INC. (1973), where the Court concluded that federal legislation, including the Noise Control Act of 1972, reflected a congressional intention to "occupy the field" of aircraft noise regulation; hence, Burbank's noise ordinance was held invalid under the supremacy clause. The second application of the clause is illustrated in *Hancock v. Train* (1976) and *Environmental Protection Agency v. State Water Resources Control Board* (1976), in which the Court held that the supremacy clause sheltered federal facilities from permit requirements imposed by state governments pursuant to the Clean Air Act and the Federal Water Pollution Control Act, respectively, absent a clear congressional indication to the contrary.

The remaining constitutional limitations on environmental regulation apply more or less equally to state and federal government alike. We can put aside the general question of state *authority* to regulate on behalf of the environment. States, unlike the federal government, are not creatures of limited powers. It has long been acknowledged that the STATE POLICE POWER justifies the widest range of health and safety measures insofar as the federal Constitution is concerned, absent some conflict with supreme federal law. This generalization stood fairly firm even during the most active period of SUBSTANTIVE DUE PROCESS review by the federal judiciary. And it bears mention, regarding health and safety measures, as the Court said in *Northwestern Laundry v. Des Moines* (1916), that "the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property or subject the occupant to large expense in complying with the terms of the law or ordinance."

The BILL OF RIGHTS may bear on state and federal environmental regulation just as it may bear on regulation

generally. Recent cases illustrate the point. Thus the FIRST AMENDMENT came into play in *Metromedia, Inc. v. San Diego* (1981), where a local ordinance controlling billboards and the like for the sake of safety and aesthetics was invalidated insofar as it pertained to noncommercial advertising. In *Air Pollution Variance Board of Colorado v. Western Alfalfa Corporation* (1974), the issue was whether the FOURTH AMENDMENT prohibition of unreasonable searches and seizures was violated when a health inspector entered the grounds of a pollution source to make an opacity check of smoke coming from a chimney. The Court held the entry lawful under a line of cases sustaining "open field" searches. In *United States v. Ward* (1980), the Court held that civil penalties imposed for violating certain provisions of the Federal Water Pollution Control Act pertaining to oil spills were not "quasi-criminal" so as to implicate the Fifth Amendment RIGHT AGAINST SELF-INCRIMINATION (or, presumably, the Sixth Amendment's procedural restrictions applicable to criminal prosecutions). Similarly, *Atlas Roofing Co. v. Occupational Safety and Health Review Commission* (1976) held that administrative civil penalty provisions of the Occupational Safety and Health Act did not contravene the SEVENTH AMENDMENT right to TRIAL BY JURY.

In principle, the takings clause of the Fifth Amendment might be thought to contain the most significant restriction on state and federal environmental regulation. The clause, which applies to the states through the FOURTEENTH AMENDMENT, provides: "nor shall private property be taken for PUBLIC USE, without JUST COMPENSATION." It is clearly recognized that a government regulation can work a taking, but it is seldom held that it actually does. Most environmental regulations challenged on taking grounds are alleged to reach too far, to reduce value too much, and thus to transgress the bounds drawn by Justice Holmes in one of his most famous—and least informative—generalizations, uttered in *Pennsylvania Coal Co. v. Mahon* (1922): "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The statement suggests that if a regulation reduces property value by a great deal, a taking will be found. In practice, however, the courts tend to look not at value lost but value left. If the regulation leaves significant value intact, then usually it will be upheld. The central case in point is PENN CENTRAL TRANSPORTATION COMPANY V. NEW YORK CITY (1978), upholding New York's historic landmark preservation law as applied to Grand Central Terminal, notwithstanding very large losses to the terminal's owners. In any event, the takings clause has little bite in the context of conventional environmental regulation because control of nuisance-like activities has long escaped takings challenges even if the value of the regulated property is reduced to zero. Because virtually any environmental regulation can be characterized as a nuisance control measure, virtually none is likely to be regarded as a taking.

The state and federal governments, then, may regulate rather freely on behalf of environmental quality, but are they constitutionally obliged to do so? Nothing in the federal Constitution says as much. There are arguments that diligent and imaginative searching would find the right between the lines of text, chiefly in the "penumbra" of the Bill of Rights, or as a fundamental personal right protected by the NINTH AMENDMENT, or as a right "implicit in the concept of ORDERED LIBERTY" and guaranteed by the DUE PROCESS clause. The Supreme Court and all but a few federal district courts have been unmoved by these arguments. Courts generally have displayed an unwillingness to make the difficult business of environmental policy a matter of constitutional principle, a point reflected in state court decisions holding that state constitutional amendments setting out environmental rights are not self-executing but require, rather, legislative implementation. The courts, quite obviously, feel ill-equipped to play a role thought better suited to legislatures. It is not that the environment is somehow less important than other recognized constitutional values, but rather that it is less amenable to adjudication.

Richard B. Stewart summarizes the arguments in this regard: a constitutional right to environmental quality would give courts ultimate responsibilities for making resource allocation decisions beyond their analytic capabilities; for trading off allocative efficiency and distributional equity without any principled means by which to do so; and for engineering and implementing dynamic policies through the clumsy and apolitical means of litigation. Stewart adds:

> A familiar justification for constitutional protection of given interests is that they are held by a "discete and insular" minority or are otherwise chronically undervalued because of basic structural defects in the political process. This rationale has been utilized by advocates of a constitutional right to environmental quality, buttressing it by claims that environmental degradation violates "fundamental" interests in health and human survival and implicates the fate of future generations that are unrepresented in the political process. But the spate of environmental legislation enacted by federal and state governments over the past ten years flatly contradicts the general claim that the political process suffers from structural defects that necessitate a constitutional right to environmental quality [*Development*, 1977: 714–715].

Whether future generations will agree is an open question.

JAMES E. KRIER
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