

2014

Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles

Richard A. Epstein

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Richard A. Epstein, "Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles," 37 *Harvard Journal of Law & Public Policy* 23 (2014).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

MODERN ENVIRONMENTALISTS OVERREACH: A PLEA FOR UNDERSTANDING BACKGROUND COMMON LAW PRINCIPLES

RICHARD A. EPSTEIN*

One of the major issues of our time involves the institutional arrangements that should be introduced in response to damage caused by various forms of pollution. In dealing with this issue, there is widespread agreement that pollution from natural sources is a risk to be controlled, and that pollution from human sources creates dangers that are the proper subject of legal constraint, be it by government regulation, state or federal, or by private rights of action under either federal or state law, brought individually or by classes. Any supposed laissez-faire regime that would leave the question of pollution to the “market” is no more plausible than a laissez-faire regime that assumes that the state need not supply some remedy against other forms of aggression that one individual takes against the rest of the world. The only question here is that of technique, which leads those interested to worry about two primary issues. The first involves the proper analytical framework to deal with environmental issues. And the second deals with the distinctive treatment of some specific issues in environmental law. In both areas, it is critical to be attentive to the incentives that the rules create for opportunistic behavior on all sides, the risks of over- and under-enforcement of environmental safeguards, and the administrative costs of putting any complex regulatory scheme into place.

* Laurence A. Tisch Professor of Law, New York University School of Law, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer, The University of Chicago. The following article is extensively revised from comments that I gave at the annual Federalist Society Annual Symposium held in Austin, Texas on March 2, 2013. My thanks to Mikalya Consalvo and Thomas Coyle, New York University Law School, Class of 2015 for their valuable research assistance on the revisions of this article.

The level of choice raised by these issues is not inconsiderable. In particular, this Essay presents extensive differences with Professor Blais's argument¹ that extend to virtually every point of institutional design outside her general condemnation of pollution as a species of harmful conduct.² Before responding to these issues directly, the first Part of this Essay puts the common law framework into perspective and analyzes the role that a correct understanding of both the just compensation principle and the harm principle plays in the overall analysis. Thereafter, the second Part addresses three particular issues: the use of injunctions, the role of knowledge as a form of assumption of risk, and the dangers of environmental exactions.

I. BASIC FRAMEWORK

A. *The Common Law Approach*

The major intellectual challenge in this area is whether it is possible to organize a system of property rights that deals with the larger question of pollution that outperforms the articulation of the common-law rules, as they apply to both public and private nuisances.³ The answer to that question is that the law cannot do better. Therefore, the function of the federal or state governments in these issues ought not to be, in effect, to create a brave new world of weird and uncertain entitlements. Environmental entitlements, such as those that have been created for dealing with wetlands or endangered species, list the preservation of habitat as a nuisance and pollution issue rather than a takings issue, which is how it ought to be classified. Legal modesty should be the order of the day. The role of government at all levels should be to improve the enforcement of the set of entitlements already in place by using collective enforcement actions when the disorganized actions of private individuals are insufficient to deal with pollution risks.

1. Lynn E. Blais, *The Legitimate Reach of the Environmental Revolution*, 37 HARV. J.L. & PUB. POL'Y 13 (2014).

2. *Id.*

3. See, e.g., Jonathan H. Adler, *Is the Common Law the Solution to Pollution*, PROP. ENVTL. RES. CTR. (Nov. 1, 2011), <http://perc.org/articles/common-law-solution-pollution>.

One way to make the point is to turn for a moment to the famous fire on the Cuyahoga River in Ohio in 1969.⁴ The fire was caused by an oil slick in severely polluted water and caused tens of thousands of dollars worth of damage.⁵ The source of the evident institutional breakdown that led to this dramatic event is as follows: The local governments, often subject to political pressure by their major industrial constituents, did not enforce the standard legal rules, set in place to deal with the private creation of public nuisances.⁶ The lax enforcement of these rules led to private parties treating valuable public resources as a useless dump in which they could deposit their waste without limit and resulted in private gain at public expense.⁷ This situation thus replicates the standard prisoner's dilemma game:⁸ All polluters are better off without the pollution, but none unilaterally will stop so long as others can pollute. The appropriate response to this breakdown in social responsibility is not to pass some new huge, unwieldy, and overambitious law. Rather, it is to ramp up effective state enforcement, conferring, if necessary, standing on private individuals who use the rivers to coerce public bodies to take steps to clean up the river.⁹ On that model, the only hard question is how far to push the cleanup agenda, and on this point I believe that many strong environmentalists, including Professor Blais, go wrong.

The private law of nuisance contains, of course, a strong prohibition against pollution of neighboring properties and public waters.¹⁰ Yet that basic regime of strict liability is also offset by a *de minimis* or a live-and-let-live rule,¹¹ which says, roughly

4. See generally Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 *FORDHAM ENVTL. L.J.* 89 (2002).

5. See Kristi Umbreit, *Cleveland Marks 20th Anniversary of River Fire*, AP NEWS ARCHIVE (June 22, 1989), <http://www.apnewsarchive.com/1989/Cleveland-Marks-20th-Anniversary-of-River-Fire/id-1903c96b7dc542d43f57b4d96e903883>.

6. See Adler, *supra* note 4, at 101–05.

7. *Id.*

8. See generally ANATOL RAPOPORT & ALBERT M. CHAMMAH, *PRISONER'S DILEMMA* (1965).

9. Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 *CHAP. L. REV.* 1, 17–18 (2001).

10. See, e.g., *Mayor of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1057–58 (D.N.J. 1993); *Rylands v. Fletcher*, [1868] 3 L.R.E. & I. App. 330 (H.L.).

11. See, e.g., *The King v. Tindall*, (1837) 112 Eng. Rep. 55, 6 Ad. & El. 143 (finding no public nuisance when harbor “in some extreme cases rendered less secure”);

speaking, that once the state has gotten rid of ninety-nine percent of the pollution at any particular site, and received in exchange a large net benefit, it adheres to the economic law of diminishing marginal utility, and resists any temptation to double down on expenditures and thus drive pollution levels to zero.¹² Knowing when to quit is as important as knowing when to proceed. Any support for creating a pollution-free river fails if it overlooks the need to set marginal benefit equal to marginal cost.¹³ In so doing, advocates of a pollution-free position have gone a bridge too far by inventing problems that need no solution. Now the environmentalists themselves become the social problem.

B. *The Compensation Principle*

These dangers can be avoided. Those who say “either we do everything, or it is as though we have done nothing,” have deviated from a principle that was best articulated by one of the most prominent of the 19th century English libertarian judges, Baron George Bramwell.¹⁴ In his great decision in *Bamford v. Turnley*,¹⁵ Judge Bramwell explicitly related the law of nuisance to modern accounts of social welfare years before these were formalized. He wrote:

The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case,—whenever a thing is for the public benefit, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the

Taylor v. Bennett, (1836) 173 Eng. Rep. 146, 7 C. & P. 329 (temporary muddying of a well). For discussion, see Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 82–87 (1979).

12. See Richard A. Epstein, *Regulation—and Contract—in Environmental Law*, 93 W. VA. L. REV. 859, 875–76 (1991).

13. See generally Terry L. Anderson, *Markets and the Environment: Friends or Foes?*, 55 CASE W. RES. L. REV. 81 (2004).

14. Richard A. Epstein, *Introduction: Baron Bramwell at the End of the Twentieth Century*, 38 AM. J. LEGAL HIST. 241, 243–44 (1994) (providing an overview of the intellectual development of Baron Bramwell).

15. (1862) 122 Eng. Rep. 27.

gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway.¹⁶

In making this general statement, Judge Bramwell showed a deep awareness of the just compensation principle, which all too often is shunted aside today, even though it functions exactly as Bramwell envisions: It is a financial constraint on government that does not allow one person to impress his will on others without paying the just freight.¹⁷ It is for that reason that he takes into account the interests of all persons, not just those who benefit from the improvement, which makes his articulation of the principle a worthy forerunner to the development of the Paretian formulas around 1900¹⁸ and the Kaldor-Hicks formula (or hypothetical compensation formula) some forty years later.¹⁹ One sense of the strength of the common-law system of

16. *Id.* at 33.

17. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

18. Pareto optimality is a state of resource allocation in which it is impossible to make any one individual better off without making at least one individual worse off. See Gerard Debreu, *Valuation Equilibrium and Pareto Optimum*, 40 *PROC. NAT'L ACAD. SCI. U.S.* 588, 588 (1954); Amartya Sen, *Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms*, 45 *Oxford Econ. Papers* 519, 520–21 (1993). The phrase is named after Vilfredo Pareto, an Italian economist who developed the concept in his book, *Manual of Political Economy. Pareto Optimality*, POLICONOMICS, <http://www.policonomics.com/pareto-optimal/> (last visited Dec. 2, 2013). When resources are initially allocated among a group of individuals, a change in the allocation that makes at least one individual better off without making any other individual worse off is called a Pareto improvement. See Debreu, *supra*, at 588–92; Pareto Optimality, *supra*. An allocation is Pareto optimal when no further Pareto improvements can be made, meaning that there is no possibility of redistribution in a way where at least one individual would be better off while no other individual ends up worse off. See Debreu, *supra*, at 588–92; Pareto Optimality, *supra*. For its application to eminent domain, see EPSTEIN, *supra* note 17, at 8, 200–01.

19. The Kaldor-Hicks requirement is generally regarded as less stringent than the Paretian requirement because it only requires that one party be able in principle to pay compensation to a second in ways that would leave them both at least as well off as before, so that Pareto improvements are properly regarded as a subset of Kaldor-Hicks improvement whereby both parties are better off. See J.R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696, 700–03 (1939); Nicho-

entitlements is that it tends to generate strong Pareto efficient outcomes from the ex ante perspective.²⁰

To show the common law's efficiency, it is important to illustrate how this system of private rights works. Exclusive possession means, among other things, the protection against invasion by pollutants from other sources, subject to the constraint that de minimis or low level interferences are not to be enjoined.²¹ In those cases where there are reciprocal damages among two or more parties, no action need be allowed at all, because each person is compensated for the loss of some environmental purity by his or her own greater freedom of actions.

C. The Harm Principle

In making this argument, it is critical not to include other supposed harms in the analysis. Indeed, one of the terrible intellectual mistakes of the environmental movement is to expand the definition of "harm" so that it rejects the common-law distinction between those harms that are cognizable by legal action and those harms that are properly treated as *damnum absque injuria*.²² The basic argument that one wants to make about this is as follows: There are all sorts of things that can happen to anyone that leave him worse off than he was before. But once we understand how these particular harms fit into a larger calculus of social interaction, the last thing we want to do is to make them actionable for the simple reason that there is a perfect negative correlation between the particular private social loss and overall social gain.

las Kaldor, *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549, 550 (1939).

20. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 17 (1987).

21. Richard A. Epstein, *Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming*, 121 *YALE L.J. ONLINE* 317, 321 (2011).

22. See *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct.App. 1959); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *WIS. L. REV.* 975, 1025–27 (1982) (explaining the theory of *damnum absque injuria*). For a general account of the dangers of expanding the harm principle, see Richard A. Epstein, *The Harm Principle—and How It Grew*, 45 *U. TORONTO L.J.* 369 (1995).

Two famous illustrations demonstrate this point. First, competition always hurts competitors who are less fortunate or nimble in any given market. But that grim fact does not mean we ought to enact a law of fair competition so that people cannot enter with new products or undersell established parties.²³ Second, one cannot say by virtue of the fact that his neighbor has built the same house on his land that he has built on his own, that by blocking his view the neighbor has committed a harm that ought to be regarded as actionable. If one takes that premise seriously, there will be no development at all. The first person of two nearby neighbors would never be allowed to build anything at all because that would necessarily inhibit the right of the neighbor, whose view is blocked, to build.²⁴ These sequential issues must be understood if we are to make sure that environmental law, like nuisance law, does not just look at snapshots of party interactions, but explicitly accounts for the temporal dimension. On that premise, the correct question is to ask whether, within the confines of nuisance law, allowing both homes or neither home is the appropriate approach. If the effort is to maximize the value of the joint properties, the clear choice is that it is better to let both build than neither. Blocking of views both ways is a critical part of that system. If that allocation does not work, it should be possible to vary it by contract, which is often the approach when large numbers of nearby units are part of a single planned development.²⁵

Yet this principle is systematically violated when environmentalists argue, either under some false analogy to common-law principles or under expansive modern statutory notions, that current landowners are in possession of some protective-view shed, and the absurdities abound. Someone says, "You know, he wants to build a model home on the other side of the hill, and the mere fact that he is building it is sufficient stress to me that I ought to be able to protest and to stop this particular

23. See Richard A. Epstein, *Labor Unions: Saviors or Scourges?*, 41 CAP. U. L. REV. 1, 9–10 (2013).

24. *Mohr v. Midas Realty Corp.*, 431 N.W.2d 380, 382 (Iowa 1988) ("Because every new construction project is bound to block someone's view of something, every landowner would be open to a claim of nuisance.").

25. See, e.g., *McCartney v. Schuette*, 54 N.W.2d 462, 463 (Iowa 1952).

application." Claims like that have been asserted,²⁶ and they completely unbalance any sensible system of land use development. Many people can profess to that unique sensibility, but the social losses are large when one person can hold up a development that stands to benefit many others by such a complaint. There is no halfway house on these issues. The parties who wish to establish this extensive view of self are bound to condemn the view-shed interest on payment of just compensation, just as Judge Bramwell had it in 1862.²⁷ It is not permissible to expand the definition of what counts as an actionable harm by passing some federal or state statute that reverses the common-law understanding on this critical point. Unfortunately, that bull-in-the-china-shop approach is now a standard part of the environmental playbook. That action is still highly counterproductive as a matter of first principle. Being adopted by Congress or the States does not make it more palatable. Indeed, once just compensation is required, these demands disappear like winter snow in summer heat because the ability to exaggerate by cheap talk is ended.

Given this analytical framework, Professor Blais, for example, is correct to note that the Takings Clause applies to environmental issues,²⁸ but she is utterly confused in how that Clause applies when she limits its application to cases where one person is singled out for special treatment.²⁹ The command of the Takings Clause—"nor shall private property be taken for public use, without just compensation"³⁰—neither says nor implies that if the state does not single out, it can subject any subset of citizens to whatever land use restrictions it wishes to impose. Under the standard doctrine of torts, if someone runs down another person, we say it is a tort. But if that person runs a light and kills everyone on a bus, no one says, "Well, this misfortune is something that has happened to everybody; therefore, nobody ought to mind because these losses cancel out in the wash." The wrongs in the bus case do not cancel out to ze-

26. See, e.g., *Mohr*, 431 N.W.2d at 381–83.

27. *Bamford v. Turnley*, (1862) 122 Eng. Rep. 27, 33.

28. See Blais, *supra* note 1, at 20–22.

29. See *id.* at 21–22.

30. U.S. CONST. amend. V.

ro. Rather, consequences are magnified. So, if that driver had saved all his passengers, the outcome would be a gigantic plus. When the bus crashes, however, the losses cumulate so that the outcome becomes a disaster.

Once this point is forgotten, there are no firm limits on the scope of the harm principle that parallel those limitations found in the common-law area. This process was demonstrated in the United States Supreme Court's interpretation of the Endangered Species Act (ESA)³¹ in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.³² The Supreme Court treated the destruction of habitat on private property as a form of "harm" to species that can be redressed without compensation.³³ That decision encourages exactly the wrong type of aggressive land use regulation. By expanding the harm principle, the government is incentivized to pay no heed to the private losses its activity generates.

The ESA contains first a list of "prohibited acts" in Section 9(a) that makes it "unlawful for any person [to] . . . take any such species within the United States or the territorial sea of the United States."³⁴ The statutory definition of "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."³⁵ Thereafter, the regulations expanded the reach of the statute with the promulgation of this rule: "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act [sic] may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."³⁶ One serious difficulty with this definition is that it marginalizes the role of Section 5 of the ESA, which speaks about land acquisition by "purchase, donation, or otherwise."³⁷ If one applies the broad definition of

31. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1351-44 (2006)).

32. 515 U.S. 687 (1995); see also Richard A. Epstein, *Babbitt v. Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation*, 5 SUP. CT. ECON. REV. 1 (1996).

33. *Sweet Home*, 515 U.S. at 702, 708.

34. § 9(a), 83 Stat. at 893-94 (codified at 16 U.S.C. § 1538(a)(1)).

35. 16 U.S.C. § 1532(19).

36. 50 C.F.R. § 17.3 (1994).

37. § 5(a), 83 Stat. at 889 (codified at 16 U.S.C. § 1534(a)(2)).

harm, the government can designate habitat under the broad definitions of "take" and "harm" which occupy the field. Justice Stevens claims that Section 5 is not a dead letter because there are occasions where the government would prefer to take land immediately without waiting for the occurrence of some harm.³⁸ But so long as any threatened harm (or even one single instance of harm) can trigger the finding of a prohibited act under Section 9, the number of instances where that option will be needed is small. Indeed, the true risk in this case is that the government will rarely make the private calculation that it should pay full market price for extensive habitat when it can finesse the situation and get virtually all that it wants by making habitat designations. Yet at no point in his defense of the broad rendering of the ESA does Justice Stevens ever address the central problem of government abuse. Indeed, he neatly avoids the problem by appealing to the notion of *Chevron* deference to avoid having to make any more thorough investigation of the issue,³⁹ as is so often the case.

This opposition to the environmentalist posture is not an anti-environmentalist position. Indeed, the correct application of the Takings Clause is designed to deter the government from abusing its extraordinary power of requisition in socially destructive ways. When an individual wants to buy another individual's resources, society requires him to pay the price. The argument in favor of environmental action under the Takings Clause is a generalization of Justice Stevens's position in *Sweet Home*: Since society can coerce an owner, why in the world does the taker have to pay him or her at all? But of course, the correct posture is exactly the opposite. The moment an individual gives somebody else the right to force an exchange for public use, it is all the more important that the Takings Clause's constraint of just compensation be respected in an individual case, lest the government consume everything and anything in their path without any respect whatsoever to the private values that are lost.⁴⁰

38. *Sweet Home*, 515 U.S. at 702-03.

39. *Id.* at 703-04.

40. For the significance of the Takings Clause in this context, see, for example, *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

To take yet another example, many people believe that it is extremely important to have open air in the center of a large city.⁴¹ To that request the proper response is: "Be my guest, so long as you can get the citizens who benefit from this particular open air to pony up sufficient funds to the owner of the land to compensate for his loss," which is the value of the property diminished by virtue of the regulation in question. If it turns out that they are not prepared to pay that sum out of their own revenues, then their claims are all cheap talk. The correct way to approach such situations is the method used in *Lucas v. South Carolina Coastal Council*,⁴² where the trial court essentially said that the state had actually taken the owner's land, so it is proper for the court to require it to take the deed to the property and pay the landowner \$1,232,387.50 in exchange for the land taken.⁴³ Once the state owned the land, it could dedicate it to a wide range of environmental purposes. Yet, what did the defendants do? They looked at the impact on the budget, and they realized that it was unwise to spend and keep land vacant when they could use those dollars better to improve the beach. So, they sold the thing off again to raise the money to achieve proper public purposes.⁴⁴ Incentives matter.

Compensation formulas force people to put their money where their mouths are, and once that happens, they all blink and then retreat. That said, the correct result is not that environmentally concerned parties should back off in all cases, but rather that they should figure out the ends that they want to achieve so that they can buy the inputs needed to obtain them. Thus, the most efficient form of environmental protection under all of these circumstances is achieved through the protection and organization of private-property rights. At that point, people will put more money towards public amenities that they want; nobody wants to own a splendid mansion on a dirt-

41. The planning and development of New York's Central Park provides just one example. See Elizabeth Blackmar & Roy Rosenzweig, *History*, CENTRAL PARK, <http://www.centralpark.com/guide/history.html>.

42. 505 U.S. 1003 (1992).

43. *Id.* at 1009; see also Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1372 (1993).

44. See MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 288–89 (2005).

filled road in a squalid city. As wealth begins to increase, environmental protection will take place through the ordinary political processes of general taxation. There is no need to single out certain targets in this overall process, under the definitions of Pareto improvement and Pareto optimality discussed above.⁴⁵ Modern environmentalists, operating under a faulty definition of "efficiency," like to suppose that there is some other value outside of efficiency that has to be factored in.⁴⁶ But since efficiency is intended to capture the relevant preferences of all individuals in society, the environmentalists offer no non-mystical explanations on how to adjust the welfarist results to take these unspecified values into account. Rather, these values are said to operate as an undefined trump that sits there brooding on high. When somebody starts to put forward some concrete proposal, it turns out to fit under the general theory.

There is no other workable framework out there. The constant invocation of behavioral economics stuff⁴⁷ is essentially a curlicue. It is important in certain cases dealing with adaptive preferences in small group settings, but one reason why it took so long to isolate that list of heuristics and biases⁴⁸ is that their effects are third-order issues compared to the power of self-interest on the one hand and the risk of common errors due to simple neglect, incompetence, or stupidity on the other, both of which have been well understood for centuries.

II. PARTICULAR ABUSES IN MODERN ENVIRONMENTAL LAW

A. *Injunctions—When issued*

One critical issue in all environmental disputes involves the timing of public injunctions against potential private wrongs. The appropriate comprehensive theory has to respond to the challenge of when to introduce public force to enjoin behavior. Discerning the proper time shows the power of the private-

45. See *Pareto Optimality*, *supra* note 18.

46. See, e.g., Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L.J. 1, 3 (1996).

47. See, e.g., Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 316, 320 (2006).

48. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974), an article of stupendous influence.

public comparisons. If the common law got it right on efficiency, then its rules aptly dictate how to deal with uncertain future harms. The law always should wait for imminent peril before enjoining, and then make sure there is a strong strict-liability damage action after the effects so that people will step out of harm's way before they get into trouble.⁴⁹ The problem with the environmentalists is that they require all of these preclearance permits at ridiculous levels so that we get the farce associated with *Sackett v. EPA*.⁵⁰ In *Sackett*, the EPA sought to stop construction on a supposed "wetland" that was separated from the nearest body of water by several lots that had houses built upon them.⁵¹ What possible reason is there to think that routine construction posed any threat to any wetland, when it was perfectly apparent that any supposed threat could be dealt with even after the Sacketts built their home in the ordinary way? The bellicose government decision to seek an injunction would be rebuffed instantly if sought by the owner of some private lake. Yet under the current law, behavior that is unconscionable in the private sphere seems acceptable to government actors who regard themselves as wholly unconstrained by any concerns with private property or with demonstrating the imminence of any potential harms. Further, there is no noneconomic value that justifies the government beating up small people by threatening them with overwhelming fines if they dare challenge a government edict. The government action from start to finish was ugly and odious and should be condemned by all people on all sides of any legitimate environmental dispute.

49. See, e.g., *Wis. Gas Co. v. Federal Energy Regulatory Commission*, 758 F.2d 669, 674 (D.C. Cir. 1985); John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 COLUM. L. REV. 261, 271-72 (1991); Robert L. Glicksman, *Coal-Fired Power Plants, Greenhouse Gases, and State Statutory Substantial Endangerment Provisions: Climate Change Comes to Kansas*, 56 U. KAN. L. REV. 517, 581 & n.374 (2008); Larry D. Silver, *The Common Law of Environmental Risk and Some Recent Applications*, 10 HARV. ENVTL. L. REV. 61, 71-73, 75-77, 80-81 (1986).

50. 132 S. Ct. 1367 (2012).

51. *Id.* at 1370.

B. Knowledge versus Assumption of Risk

The second issue that is raised in these enforcement cases is whether private knowledge that the government may act aggressively should cabin the rights of ordinary people. I know the standard joke runs, "I plan to go out in a public street. I'm going to give everybody an announcement that I'm going to beat them up. So now that you are aware, you assume the risk of injury when you enter onto the public street. And lest any one think that I am churlish or cheap I shall pay you \$5.00 if you are grievously hurt." These pronouncements are the tools of an urban terrorist who by giving notice tells the world, "Don't you do this because we'll do that." That same point applies to notice given by the government that it will restrict the use of land by anyone who purchases it from its current owners.⁵² When people have to buy land with notice that the government is going to restrict its development, the alienation rights have effectively been killed.

The correct view in all of these cases is the common-law view on privity:⁵³ The assignee of the property takes whatever rights the assignor of the property had to protect against that particular imposition.⁵⁴ He is neither better nor worse off than the assignor. That is a common-law rule that starts with contracts and goes everywhere else. It is the efficient rule, it is the correct rule, and it is a regime of terror for somebody to say, "We are going to put environmental restrictions on it today. Anyone that buys it tomorrow takes it subject to restrictions that did not apply to the seller of the property."

C. Exactions

What else do the environmentalists do wrong? The recent case of *Koontz v. St. Johns River Water Management District*⁵⁵ comes to mind.⁵⁶ That case tried to get around the notion that

52. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–30 (2001).

53. See, e.g., *Smith v. Pickford*, 85 F.2d 705, 709 (D.C. Cir. 1936); Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17, 22–27, 31–33 (1990).

54. *Smith*, 85 F.2d at 709; Natelson, *supra* note 53, at 22–27, 31–33.

55. 133 S. Ct. 2586 (2013).

56. For my extensive discussion of the case, see Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589 (2013).

the state must pay for what it wants to take by inventing a very large notion of "harm," and then announcing that some duty of environmental mitigation shall be imposed upon all landowners who have the temerity to want to build on their own land without creating a nuisance to anybody.⁵⁷ The performance on every side of this particular argument was lamentably incompetent in terms of the way in which it was organized.

At the beginning of oral argument, Justice Sotomayor and Justice Ginsburg asked bluntly if the plaintiff wished to challenge the doctrine of environmental mitigation,⁵⁸ to which the lawyer said no.⁵⁹ That was the first mistake. What the lawyer should have said is, "Yes, there is no more pernicious doctrine in the entire armory of environmental law than that one because it upsets the proper relationship of private property to the state." What is the danger in this case? It lies in the ad hoc view that the government somehow owns an environmental easement over all property, which it will waive only if private individuals engage in acts of environmental mitigation.⁶⁰ Suppose the government wants to buy some land to preserve it as a wetland. Normally, the cost goes to the general public budget. Knowing that the payments have to come from the public treasury, the state will tend to buy land that is not prime for development but will instead choose more suitable lands located in some relatively isolated place. That choice gives the state more bang for its buck. But the moment the state can condition permits on the willingness to devote cash or land to environmental mitigation, we are back to the same broad definitions of harm that worked so badly in *Sweet Home*. The state is now in a position to coin money at will by simply announcing, like the robber, "If you wish to build on this land, what you now have to do is buy for us ten acres of land somewhere else which we will put in perpetuity into a nature trust." How does the government, or for that matter the Court, decide that ten acres, five acres, or two acres is the appropriate offset? How do you de-

57. *Id.* at 2592–94.

58. Transcript of Oral Argument at 3–4, 6–7, *Koontz*, 133 S.Ct. 2586 (No. 11-1447).

59. *Id.* at 7.

60. See Richard A. Epstein, *The Supreme Court's Mischievous Environmental Easement*, POINTOFLAW.COM (Feb. 5, 2013), <http://www.pointoflaw.com/archives/2013/02/richard-epstein-the-supreme-courts-mischievous-environmental-easement.php>.

cide whether or not the particular environmental restrictions have to be limited to the part in question, as the private individuals in *Koontz* argued,⁶¹ or whether or not you have to repair some public infirmary or water bill or something else far away from the premises?

There is no way in which anyone can decide these questions at all. The environmentalists keep building up their position by demanding ever stronger exactions. That is an absolute abuse of government power, and it also leads to inefficient environmental results. The correct test under the Takings Clause in any and all cases runs as follows: Where the state wishes to place in public solution land that is worth more to the public in its natural state than it is to a private developer, it can condemn the land and create a Pareto improvement. But no such improvement is attainable when the state says, "What you have to do is to give this land worth X if you want to build." In response to that mandate, the owner is forced to weigh the loss of development rights against the amount of things that he has to sacrifice, which gives neither the government nor the public any reliable measure of the relative values, private and social, of the land in question. The right comparison is whether or not the value of the land is greater in public than in private hands. The only way the law achieves this end is to demand that the government unbundle the development rights from the exaction and thereby insist that the state pay for what it wants. The *Koontz* situation is another illustration of government cheap talk; if the Management Board had to pay to take over these development rights, it would have resorted to general tax revenues to finance its purchase of the development rights.

III. CONCLUSION

The somber conclusion is that no one can park their knowledge of sound common-law principles at the door if they hope to get environmental law right. The overall analysis requires creating institutional arrangements that call for the constant comparison of the proposed gains from government actions with their losses. By that test, there is absolutely nothing

61. Transcript of Oral Argument, *supra* note 58, at 20–21.

wrong with a version of the Takings Clause that insists that government at all levels actually has to pay for land that it wants to dedicate to wetlands or to any other purpose. In fact, this is exactly the correct way of doing things because it forces a democratic society to put these matters on budget.⁶² This would eliminate the amount of political entreaty, the endless and pointless litigation that takes place, and the waste of resources, which does nobody any kind of good. What is wrong with the modern environmentalists is that their preoccupation with ends makes them dreadful on matters of means, that is, technique and social organization.

62. For one nice statement of this view, see *Pennell v. San Jose*, 485 U.S. 1, 21–22 (1988) (Scalia, J., dissenting in part) (“The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes [Under the Takings Clause,] this is the only manner that our Constitution permits.”).