

AGAINST THE EPA, ABSURDITY IS NO DEFENSE

JEREMY A. RABKIN*

The term “revolution” accurately describes what happened in the 1970s in the realm of environmental regulation. The way we started looking at things in the 1970s really was a dramatic change from the way we looked at them previously.

In fact, a look in the *Oxford English Dictionary* will reveal how much has changed even in our use of the word “environment.”¹ Its first uses came in the nineteenth century, as people began discussing Darwinian theory about how environment affects evolution. There the word meant “habitat” — something relatively local in which particular species live, and which they must either adapt to or migrate from to survive.²

It was not until well into the twentieth century that broader meanings developed. Under the label of “environmental psychology,”³ people began talking about influences on human beings, but that sense was still somewhat focused. They meant the family, the home, the neighborhood in which people grow up. I think the earliest references to “environment” on a very large scale came in discussions in or about the Soviet Union. People spoke of eliminating crime and changing human nature by controlling the “human environment.”⁴ But even there, they meant only the one-sixth of the earth that was the Soviet Union.

* Professor of Law, George Mason University.

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1. See *Environment*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.ezp-prod1.hul.harvard.edu/view/Entry/63089?redirectedFrom=environment&> (last visited Dec. 2, 2013).

2. *Id.*

3. See, e.g., Robert Gifford, *Environmental psychology: Manifold visions, unity of purpose*, 29 J. ENVTL. PSYCHOL. 387, 387–89 (2009).

4. See, e.g., Richard W. Miller, *A Comparison of the Basic Philosophies Underlying Anglo-American Criminal Law and Russian Criminal Law*, 23 U. KAN. CITY L. REV. 62, 82 (1954–1955).

It is not until the 1970s that we find terms like “environmental advocate” and “environmental engineer,” where the use of “environment” signifies the whole natural world.⁵ The first conference that the United Nations sponsored on the environment was in 1972, and its title was “The Conference on the Human Environment”⁶—implying the whole world could be seen as one connected “environment.” There is something inherently, let us say, Promethean about this: We need to control the whole world because everything is related to everything, and therefore everything is part of one, all-encompassing environment.

My first point is that if we think about environment this way, we are going to make ourselves and everyone else crazy, and we are going to have a very difficult time recognizing the rights of individuals to do things differently because our regulatory outlook will be totalistic. I want to talk briefly about the Clean Water Act⁷ because I think it is a good illustration of this problem.

The statute is from the early 1970s. Congress did not then think it could regulate all bodies of water in the country and so enacted a statute covering only “navigable waters.”⁸ But the EPA has interpreted this jurisdiction in ways that have become increasingly extreme and draconian.⁹ Even though the Supreme Court has repeatedly emphasized limits,¹⁰ the EPA and the Army Corps of Engineers continue to think in this totalistic way: Everything is connected to everything. The environment is a vast encompassing network. The whole world is at stake. And so you cannot build your own house on your own land because that would be selfish.¹¹

5. See *Environmental*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com.ezp-prod1.hul.harvard.edu/view/Entry/63090?redirectedFrom=environmental&> (last visited Dec. 2, 2013).

6. See Jerry Pubantz & John Allphin Moore Jr., *United Nations Conference on the Human Environment*, ENCYCLOPEDIA OF THE UNITED NATIONS (2d ed. 2008), <http://www.fofweb.com/activelink2.asp?ItemID=WE53&iPin=EUNN0397&SingleRecord=True> (last visited Dec. 2, 2013).

7. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 817 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)).

8. See *id.*

9. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 729-30 (2006) (describing four applications of the Clean Water Act).

10. See, e.g., *id.* at 731-32 (limiting the types of bodies of water to which the Clean Water Act applies); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) (same).

11. For an example of this argument, see *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012).

The first case to address the scope of “navigable waters” was *United States v. Riverside Bayview Homes*¹² in 1985. At that time, the Supreme Court was still in a somewhat accommodating mood, so it held that in the Clean Water Act, “navigable waters of the United States”¹³ could be read to refer not just to navigable waters, but also to adjacent bodies, which could flow into navigable waters.¹⁴

Fifteen years later, there was *Solid Waste Agency v. U.S. Army Corps of Engineers*.¹⁵ In that case, the Army Corps of Engineers tried to stop a group of ten Chicago suburbs from building a solid-waste disposal site. The site was about ten miles from any kind of flowing water, but it had been a quarry. So after heavy rains, water would sometimes accumulate in it, creating a small artificial pond.¹⁶ The federal government argued that the site was subject to regulation because it supported vegetation, and migratory birds stopped there.¹⁷ The Supreme Court rejected this argument, holding that the pond was in no sense navigable water.¹⁸

A few years later came the case of *Rapanos v. United States*,¹⁹ in which a Michigan man was trying to develop land some twelve miles from any flowing stream.²⁰ The EPA, however, argued that the land was sometimes soggy, that adjoining areas were even soggier, and that some man-made drainage ditches were already considered wetlands.²¹ Justice Scalia responded for the plurality that this reading stretched language “beyond parody”—from “navigable waters” to “transitory puddles” of the United States.²²

Yet the EPA continued on this path. Last year there was *Sackett v. EPA*.²³ The plaintiffs wanted to build a house near a lake in Idaho. Technically, one could navigate the lake, but could not get anywhere from it because it was not connected to any rivers. The plaintiffs were building a house not on the lake, but

12. 474 U.S. 121 (1985).

13. 33 U.S.C. § 1362 (2006).

14. *Riverside*, 474 U.S. at 139.

15. 531 U.S. 159 (2001).

16. *Id.* at 163.

17. *Id.* at 164–65.

18. *Id.* at 174.

19. 547 U.S. 715 (2006).

20. *Id.* at 720.

21. *Id.* at 729–30.

22. *Id.* at 733–34.

23. 132 S. Ct. 1367 (2012).

some distance removed. In between, in fact, other people had already built other houses.²⁴ But the EPA forbade the Sacketts from building their house, because the land in question might sometimes get damp.²⁵ In its incredibly draconian system of control, the EPA sent a letter acknowledging that while the Sacketts had already laid down gravel, and not of a polluting variety, they would have to remove it. If they did not, they would be fined \$37,500 a day, and the fine would be doubled because the Sacketts were warned.²⁶ So the fine was \$75,000 a day, and it would have been two or three years until the Sacketts had a chance to challenge the fines if enforcement action were taken against them. The Supreme Court ruled that the Sacketts deserved to have a day in court to challenge whether the EPA could hold this ferocious sanction over their heads.²⁷

Professor Lynn Blais has argued that since we have had this regulatory regime for forty years, people should know that if they buy lands that are moist, the federal government might intervene.²⁸ But actually, they cannot always know because of the obscurity and complexity of the rules and exceptions.²⁹ Is it enough to be five, seven, or eight miles away from navigable water? I think the reason this regime has persisted for forty years is not that people have gotten used to it, but that chal-

24. *Id.* at 1370–71.

25. See Greg Stohr, *Mike and Chantell Sackett vs. the EPA*, BLOOMBERG BUSINESSWEEK MAGAZINE, Aug. 11, 2011, www.businessweek.com/magazine/mike-and-chantell-sackett-vs-the-epa-08112011.html.

26. *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring) (noting that “[i]f the owners do not do the EPA’s bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order)”).

27. *Id.* at 1374 (holding that “the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review”).

28. See Lynn E. Blais, *The Legitimate Reach of the Environmental Revolution*, 37 HARV. J.L. & PUB. POL’Y 13, 21–22 (2014).

29. See Barbara Cosens, *Resolving Conflict in Non-Ideal, Complex Systems: Solutions for the Law-Science Breakdown in Environmental and Natural Resource Law*, 48 NAT. RESOURCES J. 257, 257 (2008) (describing the difficulties inherent in applying law to complex environmental systems); David Gerger, *Environmental Crime: An Analysis of “Fair Notice” and “Intent,”* 63 TEX. B.J. 746, 747 (2000) (arguing for the use of the “fair notice” doctrine and a renewed focus on the “intent” element of a crime to safeguard citizens as “complex and obscure” environmental laws are enforced); Lowell Rothschild, *Before and After Sackett v. U.S. Environmental Protection Agency*, 59 FED. LAW. 46, 50 (2012) (concluding that substantial confusion still exists regarding the question of which wetlands are subject to federal jurisdiction and which are not).

lenges are hard and dangerous to bring because the EPA threatens people with retaliation. It is reminiscent of totalitarian regimes where there was, of course, much violation of law, as, for example, by listening to forbidden foreign broadcasts; but when private citizens did engage in prohibited activity, they lived in perpetual fear that they might be found out and that something terrible might happen to them. This is not the kind of country we want to have. Government in a free country should not be able to ruin you and then go after your children.

As it stands we have disputes about how to interpret the Clean Water Act. As with other kinds of environmental legislation, there are canons of interpretation, rules about what kind of presumptions courts should have in applying them. We have the absurdity doctrine,³⁰ but it did nothing in this context. Five circuit courts looked at the policy in *Sackett* and permitted it.³¹ The absurdity doctrine does not work where the background assumption is that government can sometimes terrorize people, so that Congress might well have intended to do that. We need more substantive constraints.

One might be surprised to discover, while looking through the other canons of interpretation in this context,³² that there is no presumption in favor of private property. There are, to be sure, a number of presumptions about federalism.³³ They do not limit

30. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)) (noting that acceptance of the government's interpretation in that case would result in "an absurd and unjust result which Congress could not have intended"); see generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393–408 (2003) (tracing the development of the absurdity doctrine and noting reasons for its use).

31. See *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 564 (10th Cir. 1995); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1419 (6th Cir. 1994); *S. Pines Assocs. v. United States*, 912 F.2d 713, 714 (4th Cir. 1990); *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 568 (7th Cir. 1990).

32. See generally ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); WILLIAM N. ESKRIDGE ET AL., *CASES AND MATERIALS ON STATUTORY INTERPRETATION* (2012).

33. See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (noting the lack of "a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit" while emphasizing that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use"); ESKRIDGE ET AL., *supra* note 32, at 861–63.

congressional power as much as older constitutional doctrines used to do, but at least they bring federalism concerns into the discussion in court decisions. But private property, too, is in the Constitution.³⁴ Why not presume that Congress did not mean to deprive people of the use of their property without compensation? Then wherever the answer is that Congress clearly did have this intention, we can decide whether it was excessive. But now there is not even a presumption, which to me indicates that we have gotten carried away with the idea that the federal government should get its hands, its little pinkies, its fingernails into the remotest corners of the country. Something is out of control. It is the function of a legal system to provide some kind of limiting framework—some kind of overall orientation—and it is about time we got started on that project.

Now, one might ask, “Why not simply insist on more solid constitutional doctrines to limit ‘taking’ of private property, as Professor Richard Epstein advocates?” I confess that when I read Professor Epstein’s work on this, I think, “That is so clear. That is so compelling. I am totally persuaded. Why is there no one else with us?” So I do not offer my proposal to detract from the value of his larger arguments. But I do think in real life one should have fallbacks—and what I am proposing is a more modest program just as a fallback—until there are five Epstein students on the Supreme Court. Then I will be happy to go along with the full-blast version.

Finally, let me add a word about climate change. People say, if the global climate is at risk, we must have a global-scale policy response. This is the mirror image of the debate we had in the past decade about terrorism and security. There the positions were reversed. People on the left said, “That danger is so abstract, and it will justify anything. You will be doing surveillance of everyone, and you will be intruding on everything, and we do not want to give up civil liberties for policy concerns that are so all-encompassing and yet so abstract.”³⁵ And now

34. U.S. CONST. amend. V.

35. See Jennifer Stisa Granick & Christopher Jon Sprigman, Op-Ed., *The Criminal N.S.A.*, N.Y. TIMES, June 27, 2013, <http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html?pagewanted=all> (“The government claims . . . it may seize all of our phone call information now because it might conceivably be relevant to an investigation [later] . . . That is a shockingly flimsy argument—any data might be ‘relevant’ to an investigation eventually.”).

with climate change, the left says, "Well, climate change is a real threat. It is really scary. It is not like having some buildings blown up here or there. That could happen anywhere."³⁶

It would be helpful if everybody could acknowledge that we want to have a legal system that guards us against hysteria, that guards us against overreacting to things that actually are serious threats, but still need to be seen in perspective. We do not want to empower the government to do anything at all that comes into its head, just because there is a real threat the government is confronting. It seems to me that the terrorism threat is more immediate. We actually did have a big building blown up, and we actually do have people trying to blow up other buildings, whereas the global-warming threat is, "If you don't do anything, in a hundred years Greenland could be a lot smaller than it is now." It sounds kind of worrisome; on the other hand, it is a hundred years off, so who knows what could happen in the meantime?

Even granting that global warming is a cause for concern, I do not think that allows us to conclude that the government must have power to control everything it seeks to control, and that we should always defer to government and to experts in the government in this area. Nor can it justify programs to protect people from the foreseeable consequences of their own decisions. Here, I am in total agreement with Richard Epstein.³⁷ People are living in places where nature has told them, "This is a dangerous place to live." They have already gotten the message. I just do not see why the government should say, "Well, let us make it easier for you to adapt by helping you to move." It is up to them whether they want to take the risk. We should not subsidize their adjustments.

Let me close by returning to the absurdity doctrine. Richard Epstein said that the fines imposed on the Sacketts seemed, in context, absurd.³⁸ To many of us, the whole policy there

36. See Ban Ki-Moon, Op-Ed., *The Ice Is Melting*, N.Y. TIMES, Sept. 17, 2009, http://www.nytimes.com/2009/09/18/opinion/18iht-edban.html?_r=0 ("The Arctic is our canary in the coal mine for climate impacts that will affect us all Fail to act, and we will count the cost for generations to come. Climate change is the preeminent geopolitical issue of our time.").

37. See generally Richard A. Epstein, *Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles*, HARV. 37 J.L. & PUB. POL'Y 23 (2014).

38. *Id.* at 35.

seemed more than absurd. It seemed altogether insane. But as that case shows, there can be very extreme policies that are not “absurd” in the courts’ understanding. So it is not enough to ask whether a particular policy is “absurd” or even “insane”—in some highly abstract sense of those terms. That will not be sufficiently protective, because courts have gotten accustomed to the idea that Congress sometimes does intend very extreme policies that might strike an ordinary person as a bit crazy. So we need to ask whether the policy is excessively burdensome, from a constitutional perspective, given constitutional protections for property rights. That is a different question and one that is better aimed.