ENVIRONMENTAL LAW

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ARTICLES

Ex Nihilo—The Supreme Court's Invention of Constitutional Standing 849

Bruce J. Terris

There are few requirements of constitutional law more firmly established than the requirement that the federal courts do not have jurisdiction unless the plaintiffs show injury-in-fact. Dozens of Supreme Court decisions since the 1920s have so held. However, in none of these cases has the Court made a serious effort to set forth the basis for this doctrine. Repetition should not be able to establish a constitutional doctrine that has no other support.

The simple explanation for the lack of justification is that no such justification could be made. The language of Article III, which gives federal courts jurisdiction over "cases" or "controversies," obviously begs the question unless there is evidence that the Framers meant these words to require a showing of injury. However, the annuls of the Constitutional Convention provide no support for such an interpretation and several law journal articles by distinguished legal scholars provide considerable evidence that British and American courts before and after the adoption of the Constitution entertained litigation where the plaintiffs asserted rights of the public at large. While the Supreme Court has invoked the separation of powers to support the injury requirement, standing, unlike the political question doctrine or the ripeness requirement, does not distinguish between litigation infringing on the powers of the President and Congress and litigation that does not. Indeed, the establishment of standing as a constitutional requirement denies Congress the power to decide federal court jurisdiction. Even if practical considerations would justify the establishment of a constitutional doctrine, they do not weigh in favor of the injury requirement. The Court should therefore end the standing doctrine and allow Congress to exercise its constitutional power to define federal court jurisdiction.

Soundscape History and Environmental Law in the Supreme Court..... 895
Brian S. Tomasovic

Today's technology unleashes new, digitized information resources with immense scale and speed. This Article examines one such resource—the archive of audio recorded proceedings of the United States Supreme Court—appraising, for the first time, its value to those who study and practice environmental law. From hundreds of hours of audio across six decades, a history of environmental litigation sounds forth, imparting rich lessons on advocacy, judicial reasoning, and the Court's role in the development of environmental law. The Article organizes itself in three major parts, furnishing insights on: oral advocacy in the environmental docket; the voices from the bench; and the audience for prospective engagement with any selection or subset of recordings. Serving partly as a listener's guide, the Article defines the reach of environmental litigation in the audio archive and demonstrates its unique value as a tool for learning and the professional betterment of environmental law scholars and practitioners.

Bias in Environmental Agency Decision Making 957
Robert R. Kuehn

Allegations of bias in administrative environmental decisions are common and seemingly increasing because of the significant economic and political interests in many disputes. From high profile national oil spills to local land use matters, parties to environmental proceedings allege conflicts of interest, favoritism, prejudgment of outcomes, comingling of prosecutorial and adjudicatory functions, ex parte communications, and improper political influence.

Where bias occurs, it can significantly impact the implementation and enforcement of environmental laws. Biased proceedings can undermine the goals of environmental laws by causing prejudiced decisions not grounded in law or fact, ultimately harming public health and the environment. The mere perception of unfair proceedings can undermine the credibility of environmental agencies and erode support for and compliance with environmental programs.

Despite the prevalence of allegations of bias and their impacts, there has been no systematic effort to address the types of improprieties that arise in environmental proceedings and the application of legal rules governing bias in those proceedings. This Article addresses that gap through both a doctrinal and empirical examination. It examines the basic principles governing fairness in administrative proceedings and illustrates how environmental cases have dealt with allegations of biased decision makers. It then provides the results of the first comprehensive empirical study of cases dealing with bias in environmental proceedings, finding that while courts do not often find agency decisions unlawful on grounds of bias, claims have increased over the last four decades and, in some types of cases, have reasonable rates of success. The Article concludes with observations

on addressing bias and suggests reforms that would provide greater fairness in the handling of potential bias issues.

The Tragedy of the Vital Commons 1021
M. Alexander Pearl

The concept of the Tragedy of the Commons is well known, but it does not adequately capture the gravity of harm caused by the mismanagement of certain common pool resources (CPRs). Not all commons are created equal; some are more important than others. If the common pasture where cows graze is overused and rendered barren, the community shifts to a vegan diet. But, if the groundwater aquifer used to grow soybeans and other foods is exhausted and no water remains for extraction, then individuals, families, and entire communities perish. Present commons scholarship is unable to differentiate between varying levels of importance among commons resources. I correct that problem by introducing the model of the Vital Commons. This is a type of CPR that is both vital to human existence and supports a massive population. The Earth's atmosphere and groundwater aquifers are two important examples of Vital Commons. Overuse of either creates a tragedy—but it appears like an apocalypse. The traditional response to tragic overuse of a commons is the creation of private property. Using this technique with a Vital Commons, however, makes things far worse and only expedites the coming catastrophe. Informal norms or principles of private ordering are also completely ineffective at sustaining the long-term health of a Vital Commons. Instead, the only answer to the tragedy of the Vital Commons is the wholesale removal of property rights to this essential and depleted resource.

International Power on "Power" 1063
Steven Ferrey

Can international power be effectively used to control "power"? Electricity is deemed the second most important invention in human history and is now linked inextricably to irreversible international climate change. Power sector carbon emissions must be solved for a solution to the international problem of climate change. Many large developing countries are underwriting the biggest push in world history into high carbon-emitting coal-fired power, which will destroy world goals. The United Nations scientific panel in late 2014 concluded, with high certainty, that we are passing the point of being able to control increase in world temperature to less than 2 degrees Celsius—3.8 degrees Fahrenheit—the so-called "tipping point" of the Planet's climate. The Kyoto Protocol, the world's attempt at climate control, as it stands today is not sufficient to meet the challenge. Tightening the screws of international law is necessary.

This Article examines the various comparative international, national, and subnational legal tools now addressing what many consider the most pressing world problem, with a comparison of U.S. and international tools. The issue of legal mechanisms is at a critical point—China, India, and the other large developing countries are

deploying a massive build-out of coal-fired power generation plants that alone will make world climate goals unattainable, unless different regulatory tools are immediately deployed. This Article assesses where we are going and what international law is and is not doing, and uses these lessons to chart a successful path forward to sustainability.

A Foreordained Formality: The Utter Uselessness of Environmental Impact Statements for Federal Actions in Experimental Forests..... 1115
Matthew Dearden

This Article criticizes the courts' application of the National Environmental Policy Act (NEPA) to federal actions in experimental forests. Further, this Article questions whether environmental impact statements (EISs) have any utility at all in experimental forests. Under NEPA, federal agencies must prepare EISs for actions that have a significant effect on the environment. However, EISs only operate as intended when these agencies integrate NEPA early in the planning process and seriously consider lower-impact alternatives. When agencies learn how courts will review their actions, it is possible for agencies to follow the correct procedures for an EIS without complying with the spirit of the law—taking a hard look at their proposed action and various lower-impact alternatives to determine if they are doing their part to protect the environment. Therefore, this Article contends that federal actions in experimental forests have become unreviewable, both because of the unique nature of experimental forests, and the incentive for agencies to be disingenuous in drafting impact statements.

ESSAY

Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?..... 1139
Richard J. Lazarus

Professor Joseph Sax's environmental law scholarship has inspired generations of lawyers and legal scholars, including my very first law review publication in 1987, which questioned the way that some public interest advocates were enlisting Sax's seminal work on the public trust doctrine to champion environmentalist causes. In our last conversation not long before his passing, Joe asked me whether I still believed now what I wrote in 1987 with the benefit of almost three decades of hindsight. This Essay expands on the answer I gave Joe that evening. The Essay first acknowledges the significant ways in which I clearly fell short in anticipating trends in environmental law, and for that reason, I agree that my original thesis warrants revision—especially with regard to the role of the public trust doctrine as a viable basis for defeating regulatory takings challenges. Next, the Essay discusses how, by contrast, I would not change my thesis in other respects and why, for that reason, I question the efficacy of relying on atmospheric trust doctrine theories in litigation to address the pressing issue of global climate change. The Essay is especially critical of atmospheric trust doctrine advocacy that relies on unduly

harsh and demeaning criticism of existing environmental law and the career public servants who strive for its effective implementation.

COMMENT

A Missed Opportunity for Whooping Cranes—and Western Water Authorities—on the Texas Gulf Coast 1163
Jonah Sandford

Throughout the American West, water diversions pursuant to vested rights are straining the region's limited freshwater supplies. Meanwhile, many Endangered Species Act (ESA)-listed species are dependent on minimum flows in these same depleted rivers and streams for survival. This places western water authorities in an unenviable position: they are under enormous pressure to honor existing water rights to the fullest extent possible, while also avoiding "take" of flow-dependent listed species. This predicament was central to *Aransas Project v. Shaw*, a recent Fifth Circuit case brought in response to the deaths of twenty-three endangered whooping cranes on the Texas Gulf Coast. The cranes had died as a result of insufficient freshwater flowing into San Antonio Bay, where the only self-sustaining, non-captive flock of whooping cranes spends their winters. Plaintiffs alleged that officials of the Texas Commission of Environmental Quality, by failing to adequately manage freshwater flows in the two major river systems flowing into the bay, were liable for take of the cranes under section 9 of the ESA. The Fifth Circuit disagreed, finding a lack of proximate causation: according to the court, it was not reasonably foreseeable that the agency's management practices would cause the crane deaths.

This Comment first argues that the court's proximate causation analysis was flawed and inconsistent with that of other courts who have addressed the issue of section 9 liability for regulatory entities. Further, the case illustrates how little guidance lower courts have received from the Supreme Court as to what is "reasonably foreseeable" in this context, allowing different courts (with varying dispositions towards the ESA) to reach opposite results on similar facts. The decision is especially unfortunate because the plaintiff's requested relief—that defendants develop a Habitat Conservation Plan (HCP) for whooping cranes and apply for an incidental take permit—is a reasonable and appropriate solution for the problem facing water authorities across the West. An HCP for whooping cranes could have served as a model for regulators struggling to balance their obligations under the ESA with the realities of their states' water permitting schemes. The Comment provides some thoughts about what such an HCP might look like, and expresses hope that—with or without court orders—these plans will begin to be developed and implemented for listed riparian species.

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