

From Common Law to Environmental Protection: How the Modern Environmental Movement Has Lost Its Way

**By
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ABSTRACT

In this paper I examine the common law roots of environmental protection as it existed in the law of nuisance. At a conceptual level, the insistence on nontrespassory invasions was a good touchstone for liability, when suitably modified to take into account the live-and-let-live doctrine for low-level nuisances. Administratively, the system foundered when discharges from large number of sources harmed large number of private parties. But the centralization of administrative authority is justified solely on the ground that it reduces transaction costs, and not as the source of some novel set of entitlements. Following that rule makes it possible to avoid three major flaws of modern environmental law in both state and federal systems. The first is to allow compliance with statutory requirement to a private party from liability or the government from paying just compensation for the pollution it causes. The second is to allow the government to require that parties comply with extensive permit requirements that halt activities wholly without any showing of imminent or actual harm. The third is to obscure the distinction between harms caused and benefits conferred, in ways that allow the government to restrict, without compensation, private uses of land that do not constitute nuisances at common law. The systematic disregard of the efficient common law rules on pollution and land use produce two forms of mischief: too much tolerance of pollution; and too much regulation of land use in the absence of pollution.

The purpose of this paper is to ask a simple question, which involves the integration of administrative and common law, both at the state and the federal level. The question involves both the question of whether such an agency is needed, and if so how should it be configured. To most people the answer is that a robust and powerful agencies of this sort, both state and federal are strictly necessary, even though these were not in evidence in the United States until 1970. In part this claim for and EPA-like agency rests upon the view that the common law system,

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particularly one that embraces the theory of laissez-faire capitalism is unable to deal with the types of nuisance and pollution issues that lie at the center of modern environmental work. Given the size of that void, and the ever greater demands for cleaner air, water and land, the case for some comprehensive, centralized, and national centralized regulation seems evident, especially since environmental harms to air and water migrate quickly from location to location

I think that the conventional account seriously overstates the case for comprehensive regulation to deal with these environmental, issues. There is indeed a real need for such agencies, but an equal need to confine their substantive mission so that it conforms with the set of common law entitlements as these were fashion through the law of nuisance and kindred areas. The purpose of the new administrative agencies is on the enforcement side solely to overcome the transaction obstacles of private law enforcement. In other situations, state action amounts to an entrenchment of common law property rights in order to acquire certain property interests to public use, for which just compensation is required either as a constitutional matter for state initiated matters.

In order to make out claim in concrete fashion, I shall proceed as follows. Initially, I shall outline the set of common law rules that developed, ironically, during the period of laissez faire to deal with nuisances, and explain how they were well tailored to deal with the twin questions of both pollution control and the control of legislative and administrative bodies. Next I shall discuss where and why this system breaks down in practice, given an explanation that depends exclusively on the relative transactions costs of various remedies. Third, I shall then indicate how within a unitary jurisdiction the common law remedies interact with systems of legislative control in ways that all too often *reduce* the level of environmental protection below that which is supplied by the common law rules. Fourth I shall explain how this basic argument carries over to a federal system when it becomes necessary to integrate both the private law and statutory remedies with a two-tier system of governance. As part of the inquiry, I shall compare this system with a system of private law enforcement where the relevant parties are states, not individuals or firms. Once again the conclusion is the same. One major risk of

federal environmental regulation is that it reduces the common law safeguards against pollution, while ironically imposing unnecessarily heavy costs of private development that poses no systematic environmental risk. In all of these areas, it becomes necessary to explain the relationship between state or federal remedies that private parties or the government may impose as of right and those which government actors, either state or federal, should be allowed to impose only upon payment of just compensation.

I. Common law principles of nuisance law. The debate over the scope and use of the nuisance law ties in directly to indictments of laissez faire, which for these purposes I treat as a close proxy for classical liberalism. The standard New Deal indictment, in the words of the late distinguished historian Arthur Schlesinger, claims that the “laissez-faire market gave us sweatshops, child labor, pollution, unemployment, class war and the Great Depression.”¹ This overwrought trope does not diminish with time, for in his column Phosphorous and Freedom, Paul Krugman asserted that the single word “phosphorus” summed up the foolishness of the libertarian fantasy, that markets could summon up the wit to allow for collective controls against pollution.²

The historical record is exactly the opposite. The simple point is that no defender of laissez-faire has ever claimed that markets could solve the problem of pollution. The sole debate was always over the proper mode of dealing with this issues. Historically, nuisance is a very old tort, whose substantive content has proved remarkably constant over time.³ Thus the standard definition reads:

California Civil Code §3479. Nuisance Defined

¹ Arthur Schlesinger Jr., The Liberal Opportunity, The American Prospect December 4, 2000, available at <http://prospect.org/article/liberal-opportunity>.

² Paul Krugman, The Libertarian Fantasy, New York Times, Monday, August 11, 2014. For my more detailed refutation of Krugman see Richard A. Epstein, Setting Krugman Straight, Hoover Defining Idea, August 19, 2014, available at <http://www.hoover.org/research/setting-krugman>

³ See, e.g. Joel Franklin Brenner, Nuisance Law and the Industrial Revolution, 3 J. Legal Stud. 403 (1974)

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

The elaboration and refinement of nuisance law, moreover, took place at the height of laissez-faire, roughly speaking the period between 1850 and 1900, when increased industrialization created new sources of pollution from factories, steamships and railroads that exceeded in scope an intensity the stench whenever a farmer burnt weeds on his land. Those major, and mobile, pollution sources did call for an immediate response because pollution shows no favorites. Air and water pollution are highly mobile, and are carried by wind and tide, so that no one is immune to their adverse consequences. At no point did anyone ever think that the principle of freedom of contract, so central to classical liberal theory, stood as an obstacle to tort liability for nuisance. Freedom of contract allowed people to exchange goods and services on whatever terms they saw fit. But it had nothing to say about the externalization of harm by force and fraud against strangers.

The paradigmatic tort was trespass, which involved the direct application of force against the person, chattels, or land of another individual. Nuisance, as defined above was the close analogy. The usual remedies against these forms of pollution was stringent, both to land and water was stringent. With respect to past harms, the defendant had to make good the losses caused. With respect to future harms, the first line of defense was the injunction that could be invoked for nuisances in process or for those which were imminent.⁴ Any relief prior to that time was generally disfavored on the ground that it could unduly stop productive activities that did not cause harm. The injunction, when issued, did not have to shut down the defendant's activities entirely. Its primary objective was to stop the

⁴ Strobel v. Kerr Salt Co., 58 N.E. 142 (N.Y. 1900) (allowing nuisance actions to downstream victims of pollution in a riparian system); Arizona Copper Co. v. Gillespie, 230 U.S. 46, 57 (1913) (enjoining pollution in a prior appropriation system).

pollution with as little collateral dislocation to the defendant's operations as possible. In practice, the English and American judges adopted a two-fold strategy.⁵ First, impose an injunction, subject if need be to appropriate conditions, to deal with the major threat. Then supplement the injunction with damages to "clean up" the losses that remained behind. The basic rule observes standard marginalist principles. The injunction is allowed up to the point until any dislocations on the other side become massive. Unlike the law of trespass generally, the nuisance law has always tolerated low-level background interferences under a live-and-let principle, which recognizes the simple fact that moving to a pollution-free environment is too costly.⁶

The most famous articulation of that live-and-let live principle is by that staunch libertarian, Baron George Bramwell, who defended the result as early as 1860 in explicit welfarist terms. He knew that in low levels of pollution in high transaction costs situation should be tolerated on the ground that each party was better off with the right to inflict some low level pollution even at the cost of having to endure similar pollution himself.⁷ The theory on which this rested was: "The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive to 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."⁸ Writing well ahead of his time, Bramwell did not clearly focus on the refined differences between the Pareto and the Kaldor-Hicks

⁵ For a discussion of the traditional rules, and how these have been altered in the patent space by the Supreme Court's decision in *eBay v. MercExchange*, 547 U.S. 388 (2006). It is worth noting that in this patent regulatory scheme, the protective power of injunctions has been effectively diminished as well. The Supreme Court claimed that its own *eBay* test just applied "traditional principles of equity," but that claim is clearly incorrect. For a thorough demonstration, see Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accident Revolution? The Test for Permanent Injunctions*, 112 *Colum. L. Rev.* 203, 219-219 (2012).

⁶ For the firmer trespass rule, discussed in *Gergen et al, supra*, see *Pardee v. Camden Lumber Co.*, 73 S.E. 82, 85 (W. Va. 1911), noting that "a clear case of trespass by the cutting of timber should always be enjoined."

⁷ See *Bamford v. Turnley* 122 Eng. Rep. 27 (Ex. 1862)

⁸ *Id.* at 33.

standard, and for good reason. If the parties in question were all in symmetrical positions, then what works for one person works for all others. And with low level harms that assumption is in general plausible, so that the Pareto standard is in practice satisfied. In asserting this proposition, Bramwell clearly understood the fundamental principles of methodological individualism. Every statement about social welfare must be derived from statements about the welfare of all individuals.

This common law system had other features that require some brief notice. One serious problem with certain nuisances involves the problem of coming to the nuisance, raised in the *Sturges v. Bridgman*,⁹ the case that Coase used to illustrate the problem of social cost. That decision was ingenious because of the way in which it deal seriatim with the spatial and temporal dimensions of ordinary nuisances. Thus if pollution begins before a plaintiff develops or uses his land, the law denied him immediate relief for the want of some actual harm. But by the same token, it suspended the operation of the statute of limitations so that once the actual conflict began the defendant was required to dismantle his noxious operations, but given some short interval in which to remove the danger before actual harm began. The rule maximized joint welfare by allowing the polluting activity to take place until it caused actual harm.

It is instructive to see how this system of private enforcement broke down with public nuisances, which typically involved either pollution of public waters or the blocking of public roads. In these cases, the facts of each individual case involve conduct that is a wrong under the nuisance law. But the transaction costs of getting a remedy are prohibitive relative to the costs of private suit. So an ingenious compromise was developed as early as 1536, which illustrate the transition from private law to environmental law.¹⁰ Some public body was tasked with two responsibilities. One to remove or abate the nuisance in question. The second was to fine or otherwise punish the wrongdoer for the offense. The rules in question explicitly recognized the key role that transaction costs played in the overall

⁹ 11 Ch. D. 852 (1879).

¹⁰ Anonymous, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536).

analysis. Where these costs were small relative to individuated injury, then the private tort remedy survived. Those were typically cases of serious property damage or bodily injury. Where the transactions costs overwhelmed the cost of suit public enforcement was put into place, but only in those cases where the live-and-let-live rule was not satisfied—i.e. where the consensus was that the reciprocal harms caused exceeded the parallel benefits to all concerned. In the typical case, the general damages were delay from blockage on a public road, where the appropriate response was public action that removed the obstacle and fined the defendant for the inconvenience caused to others. The link between compensation and deterrence which is a common feature of most private actions was broken. The role of public regulation was to enforce the common law rules on damages and injunctions where the private costs of enforcement were prohibitive. But the purpose here was to have the public law imitate and backstop the private rules of entitlement, but not to reverse them, as modern environmental statutes have done.

Statutory interventions. This quick account of the common law rules sets the stage for the next generation of statutory innovations, which developed exactly the same time as these substantive rules of development took place. The basic problem is simple to state. Under version of nuisance law just sketched out looks only at the *outputs* of various kinds of behavior. The question of how a defendant should alter its conduct to avoid the pollution in question was, except in rare and extreme cases, a problem for that polluter to solve. The logic of the system was that once the boundary conditions were established, the sensible potential polluter had all the incentives needed to find an efficient solution to keep the pollution at home. The advent of statutes changed this regime in the following sense. Now the legislature intervened in order to set explicit standards of conduct that major enterprises (a variation from the earlier days) had to comply with in order to undertake their activities. There are all sorts of good reasons for imposing these statutory duties. The harms in question could be quite serious and perhaps irreparable. The actors may not have the resources to pay damages. The needed safeguards are easy to understand and in most cases to implement. Use spark arresters to prevent the spread of fire; use a settling pond to make sure that

contaminated waters did not reach a river. There was little complaint about these narrowly tailored precautions for the simple reason that there was no subsequent point in the production cycle where such a sensible protection against manifold expected harms from the ordinary operation of trains could take place. To be sure, these harms are not imminent in any individual sense. But the precaution in question is applicable against many variations of the same harm, some of which will occur sooner or later, so that this flexibility in the timing of the remedy does not appear to raise any public choice problems. Again, no defender of laissez-faire opposed them.

The public choice dynamics, however, change rapidly on the question of how the tort law should treat should the compliance with the regulatory structure once the physical harm has occurred. This problem can in fact arise in two cases. The first is where a private party claims the defense of statutory compliance. The second is when the government and its agents claim the same defense—with momentous consequences for the theory of limited government.

The theory of strict liability in tort for harms to *strangers* holds a party responsible for the harm that it causes by way of trespass or nuisance, regardless of the level of precaution taken. But a common strand of negligence law injects some uncertainty into the situation. Then as now, there is much sentiment for the proposition that the defendant that takes some due level of care should not be held responsible for any harm that ensues—a principle that I have long resisted on a multitude of grounds.¹¹ The argument is thus made that compliance with the statute constitutes good care, and thus excuses the defendant from harm. The implicit argument is that so long as the defendant has taken the optimal level of care, no further action is needed.

¹¹ The most famous articulation of this principle, is *United States v. Carroll Towing*, 169 F.2d 159 (2 Cir. 1947), defended in economic terms by Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972). For the strict liability response, see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973), for an early defense of the principle, and Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Legal Stud. 49 (1979), for its application to nuisance law.

One difficulty with this negligence principle as a straight common law matter is that no one knows where that tipping point of optimal care is.¹² There is thus a serious notch problem whereby the defendant, who is deemed to have must missed the due care cut-off, must bear huge liabilities, while the defendant that has crossed that unknown and unknowable point bears none. Locating the tipping point is located is *not* the major problem when the applicable standard of behavior is set by statute. But the exclusive reliance on the statute does raise serious public choice problems. How does one know whether the legislature has set the right or wrong standard of care?

In this connection, the errors can run in two directions. The first is to set a statutory standard of care too high. There is no doubt that a legislature can set that standard so as to shut down, for example, all coal firing plants.¹³ But there is always strong political resistance to those high standards, because people need heat, electricity, trains, boats, and cars. It is of course possible that the legislature or administrative agency standard will set the too high, at which point there is nothing that the judicial system can do to rectify that mistake so long as the statute is constitutional, which under the American system it almost always is. The best it can do is to follow the usual strict liability rule under which the (high) legal standard is irrelevant, at which point there will be (too few) accidents that occur, relative to the high costs of their prevention. In that legal environment, tort liability will be less of a problem than fines for noncompliance.

But the other possibility on standard setting is more troublesome. Interest-group politics could result in setting a standard of care that is too low, such that a defendant can evade responsibility for the higher level of accidents caused by showing compliance with the statute. Just that defense to liability was accepted in

¹² See, e.g., Mario Rizzo, Law Amid Flux: The Economics of Negligence and Strict Liability in Tort, 9 J. Legal Stud. 291 (1980).

¹³ EPA, Clean Power Plan Proposed Rule, available at <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule>. The EPA describes its rule as common sense. The critics beg to differ. See, e.g. Neela Banerjee, 12 States Sue the EPA over proposed power plant regulations, August 4, 2014, LA Times, available at <http://www.latimes.com/business/la-fi-epa-lawsuit-20140805-story.html>.

the famous 1860 case of *Vaughn v. Taff Vale*.¹⁴ But in this situation the strict liability rule turns out to be more robust. The lower standard may excuse someone from a statutory fine. But the liability for the individual harm caused remains regardless of care levels, so that the defendant cannot plead compliance with the statute as a defense against tort liability. Not by accident, just that position was taken by Baron Bramwell (who wrote *Bamford v. Turnley*) in connection with fires set by sparks from a traction engine on the simple but powerful ground that the enterprise that cannot afford to pay correct tort damages and still turn a profit should be allowed to fail.¹⁵ In essence the key insight is that robust tort remedy works well in all states of the world. It does little harm when statutory standards are set too high, because the frequency of liability will be low. But it does a great deal of benefit when the statutory standard is set too low. Keeping the independence of the two systems is the key to sound environmental policy.

The same economic analysis applies to government actions as well as private ones. Only here the dynamics shift because of the strong deference that some, but by no means all, courts give toward government actors. It is therefore instructive to observe the reception of the English decisions into American constitutional law, in part through the overlay of the takings clause, where once again the distinction between general and special damages informs much of the relevant legal developments. On this point, it is sufficient to compare two early cases, both of which raised the same issue confronted in England. Thus in *Transportation Company v. Chicago*,¹⁶ the question was whether the Northern Transportation Company, which operated on leased premises on a block located between the Chicago River and LaSalle Street could sue the City for its temporary loss of access to its own leased facility from the street and river, which required it to rent other docks and sheds to carry out its operation. These damages were admittedly consequential in character insofar as the City at no time occupied any

¹⁴ *Vaughn v. Taff Vale Ry.*, 157 Eng. Rep. 1351, 1354 (Ex. 1860)

¹⁵ *Powell v. Fall*, 5 Q.B. 597 (1880).

¹⁶ *Transportation Co. v. Chicago*, 99 U.S. 635 (1879).

portion of the plaintiff's premises. It should be taken as a given that normally the loss of street or water access would have been actionable if done by a private party. The temporary nature of the blockage would reduce the level of damages but not impair the validity of the claim. Nor would the want of any negligence have excused the defendant under a theory of strict liability. Nonetheless, the Court held that the no such action was allowed.

A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded.¹⁷

This particular rule applies even for "the consequential damages caused to persons specially injured."¹⁸ This proposition has the following consequences. First, it allows simple legislation to undo the distribution of rights and duties for public nuisances that usually apply to private parties, which the opinion candidly acknowledges. Second, no examination whatsoever is given to the question of whether the statutory authorization set the correct standard of care for the action, or indeed any standard at all. To be sure, it is odd to see how the government could fine itself for small injuries to a diffuse population. But it is easy to see how it could be forced to compensate an particular private party for the disproportionate harm that it suffered, and that this rule should apply not only to loss of access but also to physical damages caused to the property in question. This constitutional inversion means that government agencies now have the power to inflict environmental damage on private parties without compensation, which in turn suggests that state misbehavior can become a serious source of environmental damage. The decision in *Transportation Co.* took an exception to the earlier decision in *Pumpelly v. Green Bay*

¹⁷ Id. at 540.

¹⁸ Id. at 541.

*Co.*¹⁹ where the permanent flooding of land was regarded as an actionable taking even though the government unit in question did not retain title to the water. But that case was a physical invasion, which this one was not. The Court thus elevated the distinction between blocking entry and physical injury to constitutional status, even though the common and statutory definitions (as with California) rules took, and still take, the exact opposite position.

In contrast, with *Transportation Co.*, note the push back in the 1913 case of *Richards v. Washington Terminal*,²⁰ written by Justice Mahlon Pitney who like Baron Bramwell was one of the few consistent small-government classical liberal judges. In *Richards*, Washington D.C. authorized underground construction work done that required the government contractor to use fans to remove toxic gases from the tunnel where they cascaded onto the plaintiff's land. If *Transportation Co.* had been faithfully followed, these harms would have been adjudged as noncompensable, given their statutory authorization. But in this instance, Justice Pitney placed explicit reliance on the just compensation portion of the takings clause, and through its application replicated the distinction between general and special damages developed at common law, giving constitutional to the claim that the special damages suffered by this individual plaintiff, by virtue of the location of his property. Pitney's decision, after citing *Vaughan v. Taff Vale*, stressed the difference between the two bodies an "omnipotent" Parliament that could explicitly authorize the taking of property for public use without just compensation, and the American legislatures that were bound by the Fifth Amendment.²¹ Doctrinally, *Richards* tracked the 1536 decision in *Anonymous*.

These Supreme Court decisions are important not only for their doctrinal nuances, but also for two larger reasons. The first is that they raise in stark form the question of whether or not the state can immunize itself from damages to private

¹⁹ 80 U.S. 166 (1872).

²⁰ 233 U.S. 546 (1913).

²¹ *Id.* at 552.

property owners by passing statutory authorizations that just bars these actions. The judges who accept that proposition are willing to let statutory language override constitutional guarantees, by concluding there are two types of laws, one that binds the ordinary people and one that binds the government, where ordinary people are always on a shorter leash than government. No theory of limited government can survive this intellectual rupture in tact. The modern consequences are enormous because there is no conceptual gap between the traditional nuisance and the modern environmental law except that potential scope of the latter is far greater than the actual scope of the former. It follows therefore that taking the rule derived from *Transportation Co.* weakens the system of environmental protection by exempting the key player from all of its strictures so long it secures, as it always can, statutory authorization for its own behavior. Only Pitney's position cuts in the opposite direction, at it was in many American cases,²² and which eventually came to prevail in modern New Deal cases, including those decided by New Deal justices, most notably Robert Jackson.²³

Nonetheless the modern cases continue to show a real reluctance to hold the government responsible for the harms that its own actions cause, even though the only salient difference between the government and a private defendant is that the government can always decide to resist an injunction, so long as it is for a public use (today, widely conceived) so long as it will pay the freight. As it is clear that sound principles require the government to compensate for the property that it destroys as well as the property it takes. But in modern law, the issue is hopelessly clouded by the implicit thumb on the scale in favor of government action. This development is fostered by two separate developments. First, there is a view that the doctrine of

²² Id. at 553 (noting the variety of cases).

²³ The closest parallel involves *United States v. Cress*, 243 U.S. 316 (1917) where Justice Pitney, consistent with *Richard* held that an assertion of federal power under the Commerce Clause did not wipe out private riparian rights, without just compensation. That decision was gutted in *United States v. Willow River*, in the strongly statist decision of Justice Robert Jackson. For my detailed comparison of the two cases see, Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, in *Property in Land and other Resources* 317 (Daniel H. Cole & Elinor Ostrom eds 2012).

sovereign immunity protects the government against liability for its own torts, unless it consents to be sued. That doctrine makes a good deal of sense in those cases in which government officials act in a regulatory capacity on such questions as to whether to approve a new drug or an new airplane design. It becomes too much to impose tort liability across the board lest every decision in which a government agent is required to chose between two competing claimants. The business judgment rule protects private trustees and directors who have to make such decisions, and it is not too much to offer similar protection to government officials who have to make these choices. There has long been a serious debate over whether that protection should be per se or only for decisions made in good faith. In practice, there is hopeless confusion on this matter, but the good faith standards when used tend quickly to verge to an absolute immunity that is often granted to those trusted with decisions.²⁴ But whatever the correct resolution to this problem, it should not carry over to those cases where the routine business activities of the government cause injury to strangers. A strong move to that result was taken in the Federal Tort Claims Act²⁵ whose central provision states, subject to major exceptions not relevant here that the United States “shall be liable. . . in the same manner and to the same extent as a private citizen under like circumstance. . . .” The same theme is found in Section 1346(b) applicable “for injury loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” The use of the word phrase “negligent or wrongful” has been held not sufficient to cover strict liability for ultrahazardous or abnormally dangerous

²⁴ For some of the confusion, see *Barr v. Mateo*, 360 U.S. 564, (1959)(absolute immunity) and *Butz v. Economou*, 438 U.S. 478 (1978)(qualified immunity). See also, the Federal Employees Liability Reform Act of 1988, 28 U.S.C. §2679(b)(1), moving back to *Barr*

²⁵ 28 U.S.C. §§2671-2680 (2011).

activities, such as shipping dangerous substances,²⁶ or supersonic booms,²⁷ even though such liability is routinely imposed on private defendants.

There is a further complication, evident from the discussion of *Transportation Co.* and *Richards* that these cases spill over into takings, and just that has happened here. Two recent cases show first a diffident, and then a hostile response to the willingness to impose liability on the grounds that these tortious activities create a double-barreled liability under the takings clause.

In *Arkansas Game & Fish Commission v. United States*,²⁸ the United States Army Corps of Engineers authorized the upstream release of water that caused flooding of Arkansas lands that caused serious damage to the roots of downstream trees owned by the Arkansas Commission, which promptly sued for damages. The tort liability in these case for ordinary parties should be established under the rule that it is not permissible to damage the property of A in order to protect one's own property, without compensating for the loss. But the Supreme Court rejected a clear application of that principle and remanded that case for further hearing. In the Supreme Court, the government had argued that "Whether the damage is permanent or temporary, damage to downstream property, however foreseeable, is collateral or incidental; it is not aimed at any particular landowner and therefore does not qualify as an occupation compensable under the Takings Clause."²⁹ In making that statement, the government insisted, in line with past case authority, that only an occupation of lands, not its destruction, is the source of tort liability— itself a distinction that is never applied to private defendants. The Supreme Court sidestepped that decision, and remanded the case for determination under a squishy and formless balancing test the takings inquiry that among other things

²⁶ See *Dalehite v. United States*, 346 U.S. 15 (1953)(huge explosion) See, e.g., RESTATEMENT (SECOND) OF TORTS §519. GENERAL PRINCIPLE.

²⁷ *Laird v. Nelms*, 406 U.S. 797 (1972)(sonic boom), even though strict liability theories against private parties are well established against these ultrahazardous or abnormally dangerous activities.

²⁸ 568 U.S. ___, 133 S. Ct. 511 (2012).

²⁹ *Id.* at 521.

found relevant to the takings inquiry “the degree to which the invasion is intended or is the foreseeable result of authorized government action” without ever explaining why it mattered.”³⁰ The want of a clear rule can only weaken the connection between public and private law that is so essential in this area.

The most significant decision in this area, however, is probably *Mildenberger v. United States*.³¹ There the United States undertook an extensive project on the Okeechobee Waterway, which diluted the salt concentration, which in killed off downstream oyster beds, leading to further damage of other forms of marine life, including crabs, sponges, fish, and birds.³² The Court rebuffed the claimants right of action for the damage that the government action caused to their riparian interests, when the runoff from Lake Okeechobee carried many nutrients from agricultural activity that damaged the ecosystem. The liability of any private party for that kind of conduct is beyond doubt, given the extensive defense of riparian rights against private nuisances, applicable in both riparian and prior appropriation principles.³³ The common law covers cases in which pollution turns a fresh-water stream into a salt-water stream.³⁴ But not when the government engages in that conduct, at which point the Federal Circuit, speaking through Judge Arthur J. Gajarsa held that riparian rights did not include the right to not have your water fouled from

³⁰ This inquiry was part and parcel of the balancing tests used for “regulatory takings” under the Supreme Court’s decision in *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978). That decision, like *Arkansas Game & Fish* deserves all the criticism that is heaped upon it for dividing the law of servitudes into two halves, using a per se rule for occupations and a low-based rational basis standard for land use restrictions. For my views on these recent cases, see, Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 *Touro L. Rev.* 265 (2014); Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 *Brook. L. Rev.* 789 (2013)

³¹ *Mildenberger v. United States*, 643 F.3d 938, 941 (2011).

³² *Id.* at 943.

³³ See, e.g., *Missouri v. Illinois*, 180 U.S. 208, 248 (1901) (dealing with claims of pollution in Missouri from sewage stemming from the reversal in direction of the Chicago river); *Missouri v. Illinois*, 200 U.S. 496, 526 (1906) (rejecting the earlier claim on causation grounds).

³⁴ See, e.g., *Strobel v. Kerr Salt Co.*, 58 N.E. 142 (N.Y. 1900) (allowing nuisance actions to downstream victims of pollution in a riparian system); *Arizona Copper Co. v. Gillespie*, 230 U.S. 46, 57 (1913) (enjoining pollution in a prior appropriation system).

upstream pollution coming from above.³⁵ Because plaintiffs could not show that the law recognized “their compensable interest in having the water adjacent to their properties free of pollution.”³⁶ The reversal of expectations is now complete. Governments may pollute in ways that private parties may not.

Nonactionable harms—herein of pecuniary externalities. I shall now turn to the flip side of this problem. What should be done with respect to those claims that do *not* give rise to nuisance status at common law. In these cases, the doctrinal answer is that there is no liability whatsoever on the ground that any diminution of value is treated as a *damnum absque injuria*—harm without legal injury—or in the equally unhelpful modern terminology a “pecuniary externality.”³⁷ Note this definition;

A **pecuniary externality** is an **externality** that operates through prices rather than through real resource effects. For example, an influx of city-dwellers buying second homes in a rural area can drive up house prices, making it difficult for young people in the area to get onto the property ladder.

This definition is quite useless. There is no clear account of what the “real” economy is, nor even clarity on whether local country dwellers buying first homes create pecuniary externalities. Nor does the definition give us any question, given its total absence of any dependence on a theory of property rights it does not map onto any of the major legal settings in which the notion has, often fitfully, be invoked. Both of the Latin and the economic expressions do not explain why it is that some harms are “cognizable” before the law and the others are not. The issue is one of enormous importance, because under the classical liberal tradition three classes of potential harm are not recognized as actionable under the law. The first of these is competitive losses. The second is the blocking of view. The third is the loss to wildlife from its inability to establish habitat on the property of a private party.

³⁵ *Mildenberger*, 643 F.3d at 948–49.

³⁶ *Id.* at 949.

³⁷ Thus Wikipedia Pecuniary Externality, available at https://www.google.com/?gws_rd=ssl#q=pecuniary+externality ..

In each of these cases it is not possible to deny the fact that some one is worse off in each of these cases in, it seems, the “real” economy. The legal decision to preclude the actions is best understood, although historically not always so rationalized, as refusing to allow actions for private harm that do not advance overall social welfare. That is surely the point with respect to competition, where an action by a disappointed competitor against his rival necessarily entrenches the first with some measure of monopoly power. It is also true with respect to the second, the ability to prevent the blocking of views necessarily inhibits all development of all land. And the argument that the denial of habitat protection counts as a harm, means that any party, public or private, can stop the development on the private property of others by claiming that its animals use that property for their own benefit. Under this inversion of right, one neighbor could stop another from building on his own land so that he remains in the position to allow his own cattle to graze on the property in question. The rule leads to a transaction-costs nightmare because such claims for lost or impaired use can be maintained simultaneously by an indefinite number of persons, which means that any given landowner must buy back the right to exclude from each of them successively, which is an impossibility.³⁸ By way of example, the only time an open range solution is viable is on arid land when no one wishes to exclude others from his own property, where animal branding and water rights, both exclusive, are the key determinants of value. But the moment that more intensive and specific uses of land, e.g., agriculture, are possible, then the traditional accounts of land that stress the right to exclude (save under limited conditions of necessity) becomes the dominant paradigm, enforceable by injunctive relief subject to the caveats set out above.³⁹ The system of property rights is thus complete for all forms of behavior. Nuisances are subject to damages

³⁸ For discussion see Kenneth R Vogel, "The Coase theorem and California animal trespass law," 16 J. Legal Stud. 149 (1987). Including the name Coase in the title indicates the key rule that the rival rights specification have on contracting out of the original distribution.

³⁹ For a well recognized defense of this position, see Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998). Note that this definition tends to underplay the critical role of access rights, as in the *Transportation Co.* case.

and prohibition. But the private efforts to create by fiat, i.e. legislation decree, servitudes over either people's property require compensation, whether done by private or public parties should be greeted with the same skepticism as legislative actions that immunize private or public parties from liability for their nuisances. It now remains to show what has happened to this framework under modern federal environmental regulations.

Federal Environmental Protection. There is little doubt that the Environmental Protection is regarded as an essential portion of the federal regulatory system. But it is important to see how these federal initiatives map onto the conceptual framework set out above. At this point, one question is how to organize that system in the absence of any explicit statutory framework to deal with disputes that arise across state lines, which is common with respect to both water and air pollution. The issues, as before involve both the public regulation of ordinary nuisance suits and the also the regulation of conduct that is declared a nuisance by government decree.

The initial question in this inquiry is how common law principles apply to these situations. These could come up in two contexts. The first is ordinary suits that involve nuisances that start in one state only to cause harm in another. At this point the major questions involve both choice of the legal form and the choice of the substantive law to cover the case. The former decides where the suit is to be heard, and the latter decides whose particular law should govern. The principles that are used to resolve these disputes in nuisance cases are not dissimilar to those which arise in ordinary tort suits, where there is always a difficult question as to whether the plaintiff must go to the defendant's forum or the defendant can be hailed into the plaintiff's.⁴⁰ In those cases where there is some prior arrangement between the parties, the correct answer usually involves following the contractual stipulations

⁴⁰ See, for the classical case, *World-Wide Volkswagen, v. Woodson*, 444 U.S. 286 (1980), forcing the plaintiff in a product liability case to sue a car dealer in his home state.

the parties chose on the ground that these usually lead to an efficient allocation.⁴¹ Those options are not available in nuisance cases, so that the courts are forced to make hard choices based on some hypothetical contractual choices between the parties. The process is one that is not easy to decide, but which in most instances are not too important, given the relative infrequency of these harms.

The more important development involves situation where the harms that originate in one state are alleged to produce major dislocations in another. In these situations, it is clear that the United States Supreme Court has original jurisdiction over disputes between two states,⁴² so that neither could force the other into a forum that was hostile to its interests, even in disputes that involved the states in their representative capacity for their citizens. In practice, these disputes were resolved in accordance with the general common law principles of nuisance, not tied to the law of either state, where the court took care to be sure that requisite causal connection between upstream emissions and downstream harms was established, dismissing on the merits cases where these conditions did not hold.⁴³

At this point, the question arises, what comes next if some injunctive or damage relief is required. At this point, each state has to allocate the damages collected or received, on this points, the best approximation are the common law rules on apportionment that seek to assign blame to the amount of pollution that causes harm.⁴⁴ In general these rules should be done in accordance with formula, because a definite system of property rights reduces the probability that persons who bear a greater percentage of their liability will be able to foist some share of their costs on other responsible parties, a problem that can arise depending on the

⁴¹ For the common result, see *Carnival Cruises Lines v. Shute* (1992), which imposes modest restrictions on freedom of contract that normally do not bind.

⁴² See *Missouri v. Illinois*, 180 U.S. 208 (1901)

⁴³ See, e.g., *Missouri v. Illinois*, 200 U.S. 496 (1906), dismissing complaint after a close examination of the evidence, by Holmes, J., at his best.

⁴⁴ For the general rules, applicable here, see Restatement (Second) Torts, § 433A: Apportionment of Harm to Causes; for its application to joint causation issues in pollution cases, see *In re Bell Petroleum Services*, 3 F.3d 889 (5th Cir. 1993). Note that pollution cases with multiple causes are commonplace. They are much less common with ordinary collisions.

rule used in settlement negotiations.⁴⁵ The movement from individual to state disputes is capable of resolution in accordance with standard principles.

The next stage in the argument arises when federal legislation is introduced into the matter, at which point the earlier choice between the *Taff Vale* and *Powell v. Fall* rule starts to bind. One key case that illustrates the difficult is *Milwaukee v. Illinois*, which went through two stages, the first of which⁴⁶ was based on the law in place before the passage of some key amendments to the Clean Water Act in 1972.⁴⁷ and the second after the passage of those 1972 of Amendments.⁴⁸ The purpose of those amendments was to strengthen the federal fight against pollution, but in one key respect it had the precise opposite effect. The doctrine of federal preemption essentially displaces all state law, whether by common law or by statute that is thought inconsistent with the federal scheme unless Congress explicitly authorizes their survival⁴⁹ Applying this doctrine, the Supreme Court held that the

⁴⁵ The two basic rules are these, illustrated in the simplest case with only two defendant where the total damage is thought to be \$100, with the amount of pollution attributable to each \$50. Under both rules, once the first defendant settles, he is immune from suit by the second, for otherwise the settlement will take place. Under the setoff rule, the amount payable by the second defendant is reduced by the amount paid by the first. Accordingly, under the *pro tanto* rule if that party settles for say, \$25, then the second defendant could be held for \$75, leading for a rush to settle early, at least where the codefendants cannot form a binding alliance. Alternatively, under the *proportionate share* rule, the plaintiff who settles the first case for \$25 extinguishes half of his claim, and thus can recover at most \$50 from the second. It is as if the two claim were wholly independent in fact, so that there is now no advantage from early settlement. The proportionate share rule is thus more robust. For conflicting decisions see, *McDermott, Inc. v. AmClyde and River Don Casings, Ltd.*, 511 U.S. 202 (1994). For an economic analysis, see Louis Kornhauser & Richard Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. Rev. 427 (1993).

⁴⁶ *Milwaukee v. Illinois*, 406 U.S. 91 (1972).

⁴⁷ Federal Water Pollution Control Act Amendments of 1972

⁴⁸ *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

⁴⁹ Its constitutional origins lie in the Supremacy Clause, Art. VI, ¶ 2:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

For the basic Supreme Court explication, see *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230-231 (1946), which has spawned an enormous literature.

“comprehensive” scheme of federal regulation precluded the application of the state law action for common law nuisance on the ground that private right of action to disrupt the balance of convenience that Congress intended. In reaching this conclusion, (then) Justice Rehnquist paid no attention to the relative efficiency of the two alternative regimes, thinking the question solely as one of statutory interpretation. But the simple observation is that the administrative system can introduce far more massive public choice complications than the legislative battles referred to in *Taff Vale*. Keeping the private right of action separate from this administrative morass is the best means to preclude endless public deliberations over pollution before any action can be taken. Yet right now, it seems clear that the EPA, and the parties that appear before it, have multiple ways that to slow down prompt and effective control of pollution.. Not only can it draft regulations that make it difficult for private parties to sue. It can also enter into strategic settlements with individual polluters that can call for major delays and modest fines on polluting defendants that are fear weaker than those available at common law. Thus in the well-named *Association of Irrigated Residents v. EPA*⁵⁰ the operators of some toxic animal feeding operations enter into a pollution control agreement with the EPA over a gradual timetable over which to introduce pollution controls. The EPA was stymied in its effort because it had to show that the pollutants emitted crossed some minimum statutory threshold. The plaintiffs and other similar groups were shut out of the negotiations because of the EPA’s to enter into a settlement of any enforcement action is done at EPA discretion and thus is not reviewable in any Court. It is important to note that *Irrigated Residents*, which reflects general administrative law, has drastically truncates private rights. At common law, all such persons could bring any lawsuit no matter what the public agency did, so that its foibles and delay could not prejudice private rights. But under *Irrigated Residents* the aggrieved parties lost in both directions. They could not sue, and they could not participate in the EPA’s settlement negotiations that had a direct impact of their

⁵⁰ 494 F.3d 1027 (D.C. Cir. 2007).

interest. The conflict of interest between the two parties is too great to require extensive comment.

Nonactionable Harms—Made Actionable The difficulties with EPA enforcement also runs in the opposite direction. By virtue of the fact that it need not be bound the contours of the common law of trespass and nuisance, the EPA and similar agencies are free to extend their powers to activities that could never be limited or enjoined under common law principles. In this case, the early and aggressive use of government remedies can impose needless restrictions on development that are far better controlled by more focused restrictions that are imposed at a later point in the cycle. The difficulties here can take place both at the rulemaking and the enforcement stages.

As to the former, one instructive decision involves the habitat protection regulations that have been promulgated by the Department of Interior under the Endangered Species Act. Thus in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,⁵¹ the Supreme Court held that the Department of Interior, did not have to compensate individual landowners for the loss in the use value of their land when it imposed habitat protection on private parties. The statutory language under the Act requires that no person (including all private parties and state governments) may “take” an endangered or threatened species. Department of Interior Regulations then stipulate that “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁵² Thereafter, the regulations further note that the term “harm” “means an act which actually kills or injures wildlife. Such act 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.”⁵³

⁵¹ 515 U.S. 687 (1995)

⁵² 16 U. S. C. § 1532(19).

⁵³ 50 CFR § 17.3 (1994).

The clear notion here is that the failure to supply the needed habitat should be treated as tantamount to killing the animal in question. That view is at sharp contrast with the common law (and the earlier Roman law) rule that allows the state to condemn whatever habitat it wants—a power that is explicitly conferred on Congress under the ESA⁵⁴—so long as it pays the owner for the loss of value associated with its occupation of the land or restrictions on its use. The use of the condemnation power is appropriate here because there has never been a conception of tort law that holds that any property owner has to hold its land or water available to either wild animals or animals owned by other individuals. To hold otherwise, is to say that the government can simply decree (as indeed it has done) that the common rules governing cattle trespass are suspended—unless the landowner buys them back from the government

There is, moreover, a transaction costs explanation for the superiority of common law configuration of rights over the new legislative version. The right to exclude means that only person is now in a position to enter into contracts over the use of its lands. It will only do so when the gains that it gets from the license fees exceed the loss of its use value. The government on this view may force the exchange under the takings clause only if pays the landowner the sum, allowing it to assign any economic surplus to the public at large. Put otherwise, in using its condemnation power, the government does not face the holdout risk that private parties seeking habitat face, so long as it pays the landowner its opportunity cost. At this point, the government faces an honest constraint on valuation which tends to limit it to higher valuation.

Note what happens if the initial entitlements are reversed. Now both the federal and the state government can decree at no cost their entitlements, with scant regard for the private costs imposed. Yet it is no longer possible to have a clean rule whereby these rights, once taken by designation, can be reacquired by the landowner. All of this rights instability leads to a complex “exaction” game, on

⁵⁴ See, 16 U. S. C. § 1534, authorizing federal action; see also § 1535, allowing for state cooperation in land acquisition.

which more later, where the government agency demands that the landowner “mitigate the damage” that private development causes to its environmental easement,⁵⁵ whose existence depends exclusively on the same kind of legislative largesse that allows the government to decree that its nuisance-like harms should not be regarded as actionable at all. It follows therefore that the current mindset in dealing with environmental risk strips out the just compensation both when the government causes a nuisance, or restricts the ordinary (nonnuisance) like behavior of private parties.

To give some sense how the exaction games works, it is useful to consider briefly two of many key decisions. The initial Supreme Court foray into this area was in *Nollan v. California Coastal Commission*,⁵⁶ in which the government sought to acquire a lateral easement that ran on private property in front of the Nollans small beachfront home. Normally easements are possessory property interests for which the government must pay cash. At this point, it will only do so if taxpayer dollars produce public benefits that exceed the just compensation levels. But in *Nollan* the Commission sought to create an end run around these rules by refusing to grant the Nollans a permit to build a new and larger house (in no sense a nuisance to anyone) unless they deeded the easement over. Virtually all the Nollan neighbors found this offer irresistible because the new construction rights were worth multiples of the lost public easement. The Nollans just built and dared the Commission to sue them, which it did. Justice Scalia wrote for the majority in a five-to-four case, noting that the situation was out-and-out extortion and refused to honor the deal. But he did say that this deal was bad only because there was no substantial nexus between the restriction imposed and a legitimate government interest. He did say that the Coastal Commission could have held up the permit if it had sought to protect a view

⁵⁵ For a discussion of this mischievous notion, see Richard A. Epstein, *The Bundling Problem in Takings Law: Where the Exaction Process Goes off the Rails*, forthcoming. See also Richard A. Epstein, *The Supreme Court's Mischievous Environmental Easement*, PointofLaw.com, February 5, 2013, available at <http://www.pointoflaw.com/archives/2013/02/richard-epstein-the-supreme-courts-mischievous-environmental-easement.php>.

⁵⁶ 483 U.S. 825 (1987).

spot covenant (i.e. one that does not require private parties to enter the Nollans land) for drivers down the Pacific Coast Highway, located landward of the Nollan property.

Scalia's misguided distinction misses all the relevant issues in this area. The relevant question in these cases is whether it makes sense to create the public easement. In both the lateral crossing and the view spot easement, that issue depends on whether the gain to the public exceeds the loss to the private party. By bundling together entitlements, it is impossible to know whether this has happened or not. Thus if either of these servitudes is worth \$1000 to the government and costs \$5000 to the Nollans, they should not be taken. But both will be surrendered if the only way to get a building permit worth \$10,000 is to surrender the easement. Whether we speak of a covenant or an easement, the logic is the same in both cases. Yet the desire to fragment what at private law is a unified law of servitudes (covering both easements and covenants leads to an artificial distinction that does not reflect the social function of the takings clause, which is to use coercion to move resources to a higher value use when the costs of voluntary transactions is prohibitive.

The utter confusion of this situation is seen in the most recent of the exaction cases, *Koontz v. St. Johns Water Management District*,⁵⁷ where the landowner sought to build on his waterfront lot, part of which was upland and part wetland. By this time, the environmental easement was well established in American law, so the only question was how much Koontz had to pay to repurchase his building rights from the water district. One the question of whether he could build, the District gave him two sets of choices. The first was to deed a conservation easement over all but one acre of his land to the Water District in exchange for his building permit. The alternative to build on four acres of the land but to finance at some uncertain price the repair of ditches and culverts located at some distance from his own. Neither of these choices addresses the question of whether the environmental benefits are worth the loss of the development rights. Yet one of these deals with the land itself,

⁵⁷ 570 U.S. __133 S. Ct. 2586 (2013).

and thus looks more like the view spot easement, and the other deals with general repairs. But it is hard to draw any clean distinction between the two given that the Water District gave Koontz the expanded choice of taking which of the two deals that he preferred. But both of these deals are off limits if the law of nuisance requires that the District show some kind of nuisance, which for the simple building it could not.

Note the situation was quite different for the second of the issues in the *Koontz* situation, which was whether Koontz had to build certain types of settling ponds and other defenses against the runoff from his land created by the new construction. To the extent that his alteration of the property did create a run off risk, we have a traditional tort situation, where it is perfectly proper to ask what form of injunctive relief is required. The task is always fraught with risk. Let the precautions be too lax, and there is uncompensated loss, unless he also can insure against a risk, which after the fact may be difficult to trace to his activities. Alternatively, the local authority could set the restrictions too tightly so as to de facto stop all construction. But this problem only presents the standard question of shaping.

Conclusion. The central thesis of this paper is that the rules that govern private actions between neighbors in the environmental area should carry over to dealing with governments. In this regard, it is critical to note that the transference fails in both direction. Conduct that is covered by the nuisance law for private parties often gets a pass when done by the government. Conduct, chiefly relating to the use or development of land, that is protected under the common law is now subject to massive regulation by the government. The two sets of errors do not cancel each other out they cumulate.

What is needed therefore is a fundamental reworking of environmental law so both sides of the common law accommodation are protected. In particular, in dealing with pollution, the bridge between the older and more modern cases can be made explicit. The four key features of the common law of nuisance was their focus on various forms of pollution. First, was no differentiation in the rules based on the type of pollutant involved, or the type of property that was injured. Second, legal

intervention was postponed until the last possible moment to avoid overregulation. Third, there was a mix of damages and injunctive relief for these nuisances. Fourth, there is no reason why this system cannot work for public nuisances of any size kind or description, even in those cases where no one individual is subject to specialized harm. So long as the common law rules were efficient—and they were—the transition from public to private law deals only with the *mechanism* of enforcement in the event of high transaction costs, and not with a transformation of these substantive rules.

At this point, it becomes clear where the intellectual difficulties of modern environmental law begin, as all four of these constraints are systematically violated. First, the substantive entitlements under air and water pollution law often differ dramatically. Second, the definition of harms that the government can regulate without compensation are expanded to cover not only the cases of invasive nuisance, but such matter as the preservation of wetlands and farmlands as habitat for the protection of various types of endangered species. Third, the remedies in question are not postponed until harm is imminent or actual, but instead an elaborate set of permits, long in advance of any palpable harm must be obtained before any activity can take place. The combination of these factors means that there is over-intervention on such matters of habitat protection and underprotection against traditional forms of government conduct. A sensible legal system would realize that neither of these transformations is justified by any greater awareness of the importance of environmental issues today. Quite the opposite conclusion is justified. Now that environmental issues are more important than ever, it is more important than ever to get them rightly decided.