Diversity, Specificity and Environmental Policymaking: An Introduction

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The precise beginning of the modern era of environmental law is a matter of dispute. Some observers believe that period began with the publication of Rachel Carson's classic work *Silent Spring,* which raised alarms regarding the hazards of the pesticide DDT to the natural environment and human health. Other experts trace its beginning to the *Scenic Hudson Preservation Conference v. Federal Power Communication* case, in which a coalition of conservationists successfully challenged the federal licensing of a proposed hydro-electric pumped storage facility that was to be built at Storm King Mountain in the Hudson River Valley of New York State. Still others maintain that the modern environmental era was born in April, 1970 at the first Earth Day celebration, a widely publicized event that provided a dramatic demonstration of the depth of public concern with pollution and environmental conservation and catalyzed the passage of a host of federal environmental statutes in the early 1970s.

Whatever the date of its commencement, however, one attribute of the current regime of environmental law seems beyond dispute: the field has branched off in a variety of different directions as some longstanding environmental problems have been alleviated, new ones have been discovered, and tides of public opinion have ebbed and flowed across the American political shoreline. Since its beginnings, environmental law has gained importance—and grown in complexity—at federal, state and local levels alike. Moreover, its proliferation has not been limited to new legislation. Environmental law also consists of a voluminous body of regulations and case law. It is now a remarkably intricate, diverse, multi-faceted field, with lingering areas of indeterminacy and numerous sub-specialties.

The four articles that comprise this issue provide a good illustration of environmental law's rich variation. Professor Richard Grosso's provocative piece, "The Legality of Carrying Capacity-Based Environmental Land Use Permitting Decisions," focuses on the approach to Land Use and Environmental Law adopted by the State of Florida. Grosso begins by summarizing the broad range of federal and state laws that authorize and require planning

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2. 354 F.2d 608 (2d Cir. 1965).
Grosso openly advocates “aggressive” use of land use regulation to stem the ongoing destruction of ecosystems and the conversion of farmlands to urban uses. Taking account of sustainability concerns and the precautionary principle, he calls for “an honest and frank discussion” regarding Florida’s finite amount of land and the state’s “financial and practical ability to sustain unlimited land development.” In Professor Grosso’s view, current federal and state laws concerning planning and environmental decisions in Florida and elsewhere provide governmental officials with “ample authority to ensure the sustainability of fiscal and ecological resources.” What is needed, he contends, are elected officials who have the political will to “act boldly to protect the future of the places over which they have jurisdiction.”

Valerio Spinaci’s piece, “Lessons from BP: Deepwater Oil Drilling Is An Abnormally Dangerous Activity,” addresses a topic that is narrower in scope, but no less important: the applicability of the common law doctrine of strict liability in lawsuits arising of the catastrophic BP oil spill blow out of 2010. In Spinaci’s view, that doctrine “constitutes the best way to remedy (the BP oil spill) and to prevent further oil spills from occurring.”

Spinaci begins his analysis by contending that the applicable federal laws do not preempt the application of tort law principles. He examines relevant provisions of the federal Clean Water Act and the Oil Pollution Act, along with pertinent case law, to demonstrate that these statutes allow for the application of state common law as a supplementary source of liability for oil spills.

Spinaci then describes the nature and historical development of the doctrine of strict liability. He considers its case law origins in the landmark case of *Rylands v. Fletcher*, and its evolution in various versions of the American Law Institute’s Restatement of Torts. Spinaci summarizes the state of the law of Florida with regard to strict liability. Finally, he provides a detailed discussion of the ways in which deepwater drilling for oil and gas satisfies the “abnormally dangerous activities test” of §§519 and 520 of the Restatement (2d) of Torts. As Spinaci sees it, judicial application of the doctrine of strict liability in this context provides an appropriate incentive for oil companies to take precautions to avoid oil spills. It also rightly requires them to bear the burden of spills that they do not avoid.
Sidney Ansbacher’s essay, “Stop the Beach Renourishment: A Case of MacGuffins and Legal Fictions,” is in part a critique of the Supreme Court of the United States’ decision in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection. More substantially, however, Ansbacher’s piece is a detailed examination of the evolution of the general law of private property rights in England and the United States, and the historical development of public rights in (and under) water, the public trust doctrine, and private riparian and littoral rights alongside navigable waters. Ansbacher’s thesis is that, given the number of changes that have occurred in the law over time, it is difficult to conclude, as the Supreme Court did in Stop the Beach Renourishment, that there is any settled law in the State of Florida regarding “who owns what on the waterfront.” He criticizes the Court for too quickly dismissing what he believes is the most settled body of Florida law regarding riparian rights, and for choosing to cite and obscure a decision of a lower state court as the best guide to Florida law in this area. Like Valerio Spinaci’s article, Sidney Ansbacher’s detailed essay serves as a reminder that, while much of the field is relatively new, environmental law is inextricably bound together with longstanding common law notions and doctrines, and that judicial decision-making remains an integral part of environmental law’s development.

Finally, Ekateryna Drozd’s article focuses on a theme also explored by Richard Grosso: the critical importance of sound science in the development of environmental policies. Drozd assays—and defends— a regulation proposed by the United States Environmental Protection Agency (EPA) requiring numerical criteria for water quality standards that address nutrient pollution. Her analysis begins with an explanation of the nature and causes of eutrophication that is human generated and that which is naturally occurring, as well as the environmental impacts of eutrophication. Drozd then describes the proposed EPA regulation (especially as it may affect the Everglades), its development, and its rationale. Finally, her essay distinguishes narrative from numerical water quality standards. She argues that numerical standards provide the certainty needed to minimize the impacts of nutrient pollution. In Drozd’s opinion, EPA’s proposed nutrient standards present “a great way to rectify many years of inaction and delay in attempting to fix the nutrient pollution problem in Florida and other states.”

This varied set of articles is likely to be of interest to readers of various sorts. Obviously, its individual pieces will interest those who desire to learn more about certain specific topics such as Florida’s approach to growth management, judicial review of limited growth and moratoria ordinances, the BP

oil spill, the applicability of strict liability to oil spills in general, judicial takings, the history of property rights, riparian and littoral rights, the Clean Water Act’s water quality standards, eutrophication, and the future of the Everglades. Beyond these narrower concerns, however, articles in this issue will also be of value to readers with an interest in such broader themes as the overall importance of environmental regulation, the criticality of sound science to the development of viable environmental policies, the continuing role of the common law and judicial decision-making in the evolution of environmental legal doctrines, the roles of federal, state and local governments in environmental policy-making, sustainability, the precautionary principle, and the environmental jurisprudence of the Supreme Court of the United States.

In sum, the articles that follow this introduction not only reflect the extraordinary variation that exists within the environmental law, but also contribute—in a number of ways—to the field’s continued growth and vitality. They merit the time and attention of scholars, students, judges, lawyers, policymakers, and general readers alike.