

# IMPRIMIS

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## "The Real Environmental Crisis: Environmental Law"

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California Oil and Gas Producers" in *Landman*, "Regional Government Threatens Private Property" in the *Pacific Business Review*, and "Clean Air's Dirty Politics" in the *American Spectator*. ▲



*Preview: Although universally agreed that it is vital to protect our environment, attorney Robert Ernst notes that there is great controversy over how to do so. Increasingly, environmental disputes are being settled by government agencies, and the laws they create, enforce, and adjudicate (in clear violation of the principle of separation of powers) endanger another precious resource—our liberty. Mr. Ernst spoke at Hillsdale College's Center for Constructive Alternatives seminar, "Politicization of the Law: Landmark Decisions and Trends in U.S. Legal History," in November, 1993.*

**A**ll too often these days, the laws designed to protect our environment do more harm than good. The instances where environmental laws have led to incredible waste of resources are legion. The laws favor false crises instead of real environmental problems and even create greater problems than they were made to eliminate. Scare campaigns against acid rain, asbestos, toxic waste, carcinogens, global warming, and global cooling are just a few examples.

Even worse, such laws are instruments of tyranny. According to the modern view of environmental protection, men count not more than the grass upon which they walk. It is no wonder that this view attracts adherents who have little appreciation or patience for the nuances of ordered liberty, or that the laws it produces are actually contrary to the rule of law.

### The Rule of Law

**T**he rule of law is essential to a free society. We obey the law so we do not have to obey other men. Most of us assume that the Magna Carta (1215 A.D.) established the rule of law as the foundation of the British and American legal systems, but the rule of law is in reality thousands of years old. According to Nobel Laureate F. A. Hayek, the Greek concept of *isonomia* has gradually developed into "equality before the law," "government of law," and "the rule of law."

Unwritten codes of conduct honored by ordinary people in their daily lives have also helped secure the rule of law. For example, there is near universal understanding of the principle, "third man out." When two men are brawling, the crowd may eject a third who enters the fray. All civilized people also agree that crimes like rape, assault, and murder must be punished and that private property and civil rights must be protected.

But what is most important to remember about the rule of law is that it depends on the voluntary adherence of citizens and the separation of powers, which protects citizens from the arbitrary authority of the state.

The antithesis of the rule of law is not anarchy but a tyranny of laws. When there are state-enforced rules for every occasion, the state is omnipotent. The Roman historian Tacitus said it best: "The more corrupt the Republic, the more laws." Too many laws destroy the rule of law because individuals will not voluntarily honor them. And when they do not voluntarily honor the law, society disintegrates.



## The Rise of Radical Environmentalism

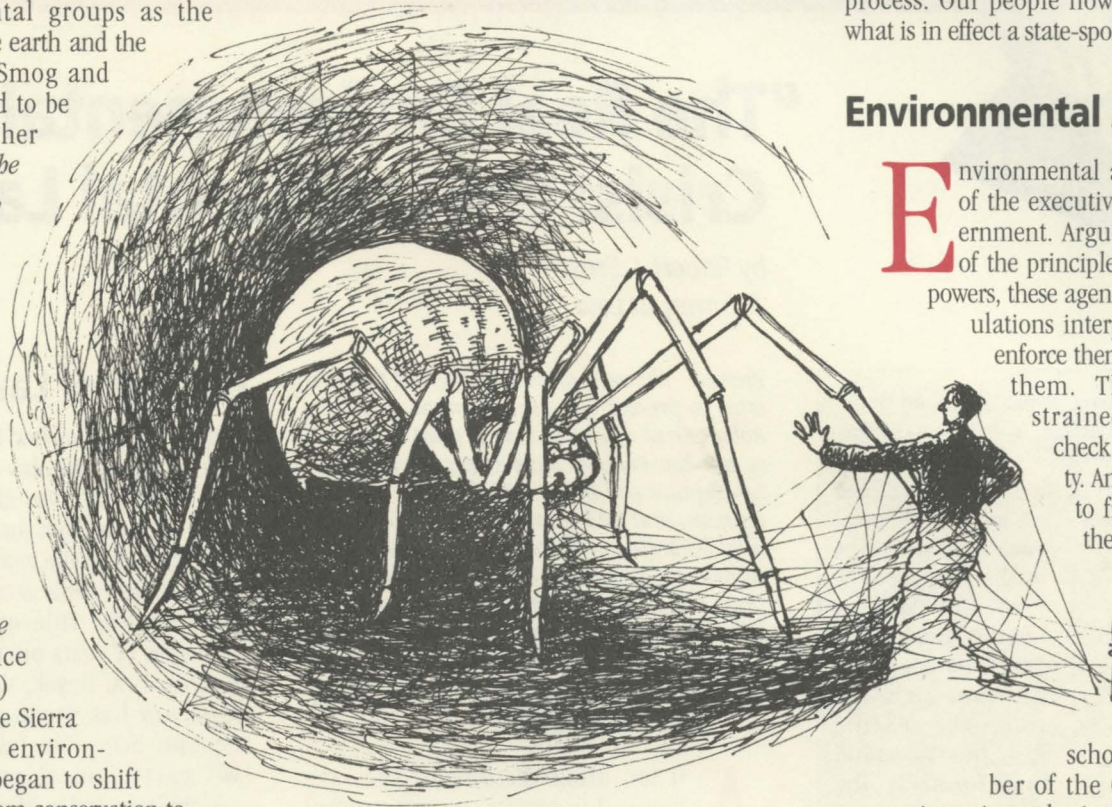
From the mid-1960s to the present day, legislators have been pressed to create so-called environmental laws to cure what has been popularized by environmental groups as the destruction of the earth and the death of man. Smog and pollution seemed to be everywhere. In her 1962 bestseller, *The Silent Spring*, biologist Rachel Carson set the tone by summoning apocalyptic visions of the effects of DDT and other pesticides. (Scores of imitations have been published since, including the controversial book, *Earth in the Balance* by Vice President Al Gore.)

At the time, the Sierra Club and other environmental groups began to shift their emphasis from conservation to protest against capitalism and technology. Their leaders organized a highly sophisticated public relations and political campaign to make every new radical proposal and militant organization seem mainstream—from the Audubon Society of birdwatchers to the Earth First saboteurs in a few decades. A rock tune by The Doors exclaimed the sentiment of the era:

“What have they done to the earth?  
What have they done to our fair sister?  
Ravaged and plundered,  
And ripped and bit her.  
Stuck her with knives in the side of  
the dawn.  
And tied her down with fences and  
dragged her down.”

The philosophical basis of the radical environmentalists' worldview is pantheism. Earth is part-divine, part-human, crucified like Christ by unnamed persecutors. While intellectuals and the popular press postulated that God was dead, radical environmen-

talists resurrected paganism. They did not call for a variation of Judaism or Christianity; these worldviews were blamed for polluting the earth. Instead they were proposing a totally different ethic exalting nature and lowering man to the level of plants and animals.



The pantheism of radical environmentalists in the 1960s-1970s (carried on by the New Age movement today) represented a near-complete rejection of the philosophy of America's founders and, I suspect, a majority of American citizens. It also represented a profound disrespect for the rule of law and individual liberty, which the founders strove to guarantee. The 19th-century French writer Alexis de Tocqueville repeatedly observed that Americans cherished their freedom of faith in true religion and that freedom of religion was vital to America. He further noted that pantheism was a seduction to democracies that must be vigilantly guarded against. The simple truth is that America is fixed to its Judeo-Christian foundations and that pantheism is inimical to that bond.

For their part, politicians ducked the issue. They ignored the faulty theology (as well as the faulty science) behind the environmentalists' vision. They then passed broadly worded laws, leaving their implementation to executive agencies like the

Environmental Protection Agency (EPA), and ran for cover. Once in the hands of the executive agencies, the laws took on a life and liturgy of their own. Our representatives dodged their legislative responsibilities by passing the torch to unelected bureaucrats. Our executives were powerless to halt the process. Our people now must adhere to what is in effect a state-sponsored religion.

## Environmental Agencies

Environmental agencies are part of the executive branch of government. Arguably in violation of the principle of separation of powers, these agencies write the regulations interpreting the laws, enforce them, and adjudicate them. They are unrestrained by any real check on their authority. And they are hostile to freedom based on the rule of law.

Recently, I listened to a former star professor at a prominent Eastern law school, now a member of the Clinton administration, depict all officers of corporations as polluters whose lust for profit leads them to commit heinous environmental crimes. He promised a massive regulatory drive to end the “rape” of Mother Earth that supposedly began during the Reagan/Bush era. His concluding warning was: “Corporate officers, the halcyon days are finished, and we’re going to get you.”

He clearly has no sense of the purpose of law, which is to guarantee and protect freedom—freedom for men to operate enterprises for profit, to speak out against injustice, to see redress for wrongs committed by other individuals or by the state. He caricatures corporate America as a conspiracy of huge, irresponsible smokestack industries. He is not alone: Most bureaucrats do the same.

They are starting to demand that shareholders in businesses accused of polluting must pay exorbitant fines, wiping out any return on their investment. The idea is to personally punish them for having invested in those businesses. Contrary to fundamental legal precepts defining traditional criminal conduct, environmental laws currently



mandate punishment of corporate officials for the negligent acts of their employees, even when they did not have knowledge of the negligent acts.

Environmental agency bureaucrats reject the idea that the law is about freedom—they seek only to punish. They regard themselves as a special breed: enviro-cops. A few courageous journalists have bucked the media establishment and reported on the enviro-cop's latest victims:

- Viktor Posgay was sentenced to serve time in prison for removing a heap of trash, thousands of old auto tires and other rubbish from his property, and replacing what he had removed with clean sand. EPA inspectors decided that Posgay's land was not his land at all but was a "wetland," which could not be developed because of overriding and uncompensated state interests. Posgay, an immigrant who came to this country to escape communism, ran afoul of our own version of the secret police.

- Bill Ellen was also charged with an alleged wetland crime. He had secured some 37 different permits to fill land in order to build a series of duck ponds. He was *creating* wetlands, but an EPA bureaucrat ordered him to halt the dump trucks he had hired. Ellen redirected the trucks to a different place on the site. This was judged to be "insubordinate behavior." Ellen spent six months in jail. The greatest irony is that he did not even own the land; he was simply the environmental consultant on the project. Despite his expert knowledge, he was trapped.

- Florida residents Ocie Mills and his wife are appealing convictions resulting from their wetlands violations; the Mills had the audacity to speak out against the U.S. Army Corps of Engineers. As a consequence, they were singled out for prosecution.

It must be noted that at the time that Posgay, Ellen, and the Mills were tried, there were three different federal definitions of a "wetland," and many states had created their own definitions. Usually, neither water nor wet soil need be present.

- Wayne Hage, a Nevada rancher, was told by the U.S. Forest Service that he could not clear brush from his irrigation ditch, a practice relied upon by

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generations of ranchers. When Hage sought a determination of his rights in the U.S. court in Reno, the government retaliated by filing criminal charges against him in another U.S. court in Las Vegas. A federal conviction was the price Hage paid because he dared to speak out.

- When a small California manufacturing company was accused of air quality violations, its president felt the violations were unjustified. He complained to his elected representatives and to the environmental agency which had made the charges. Without warning, agency inspectors swept down on the company, searched the physical facilities, combed the records, and, lo and behold, discovered additional alleged violations. They went on to file a legal suit against the company, but not before they issued damaging press releases and gave interviews with the media describing the violations as the most serious they had ever seen and alleging that the company was releasing tons of toxic contaminants into the air.

What contaminants were being released into the air? Paint and paint thinner. The company stood accused of using two to ten gallons of paint and paint thinner per day above the prescribed limit. Even though this did not result in a threat to human health or the environment, the agency demanded twice the company's annual net profit to "settle" the case.

- In Los Angeles, the owner of a trophy shop could not make his payroll because an environmental agency

slapped a lien on his bank account. The agency claimed that the ozone filter on his desktop laser printer was faulty and that a lien was required to secure payment of a hefty fine. The trophy shop owner, like hundreds of other former California businessmen, moved out-of-state.

These cases illustrate how environmental laws are used to prosecute individual citizens and small businesses, but, for the sake of comparison, I would like to share some other cases revealing how the same laws apply to big businesses:

- The Chevron Corporation settled a case brought by the state of California when the anchor from a ship unloading at a dock snagged an underwater pipeline. It was undeniably an accident. Chevron cleaned up the diesel fuel spill at its own expense. Yet the state filed criminal charges, and Chevron paid more than \$300,000 in fines.

- In California, attorneys for some of the more effective environmental special interests crafted a law called "Proposition 65," which requires special labeling for all products that are "known to the state...to cause cancer or reproductive harm." According to Bruce Ames, a professor at the University of California-Berkeley who is also one of the world's leading scientists, roughly half of all substances in the world are carcinogens. It is not too hard for the state of California to find carcinogens in most products.



**"If we are to find positive solutions to genuine environmental problems, we must begin by holding individuals accountable—fairly and justly, according to the rule of law."**

Like many others, this law also has a "snitch" or "bounty hunter" provision that allows private individuals to recover for violations. So the same attorneys who wrote the law are now policing it and getting rich in the process. Here is a case in point: The Gillette Company makes a typing correction fluid that comes in a very small bottle. It could not fit the state warning on the label. Attorneys filed suit on behalf of the people of California; Gillette was forced to pay a king's ransom and reformulate its product.

### Who Are the Big Polluters?

Radical environmentalists argue that environmental laws should mainly be aimed at the big "corporate dinosaurs" and that violations should carry huge financial penalties. A \$100, \$1,000, or even a \$10,000 fine does not trouble a major corporation. They add that huge financial penalties reflect the true value of what is lost to society by pollution.

Both arguments are insupportable. The overwhelming amount of pollution in this country is caused by individuals—by you and

me—not by the Fortune 500. Big businesses are easier targets. They can more easily pay huge penalties because they pass the cost on to consumers. Here are several related observations:

First, big businesses do not stand up and fight the system. They fear bad publicity, and they can always be outgunned by Uncle Sam.

Second, big businesses tend to buy their way out of violations by paying "settlements" and allowing themselves to become willing victims in an elaborate extortion racket.

Third, big businesses have latched onto the "green movement" because they have adopted a defeatist attitude or have been co-opted by radical environmentalists.

One way or another, big businesses will survive. But more and more small businesses are being prosecuted for alleged violations of environmental laws. These enterprises do not have the resources to comply, nor can they buy their way out. What happens to them? Many simply go out of business. A few attempt to fight and suffer retribution. The rest pay off government agencies with small "settlements," but are forever under the

watchful eye of their "protector" who is constantly seeking new opportunities to collect more "settlements."

### A Return to the Free Market and the Rule of Law

Environmental laws theoretically apply to individuals, too, but they are rarely enforced, except in the nightmarish cases described earlier. If we are to find positive solutions to genuine environmental problems, we must begin by holding individuals accountable—fairly and justly, according to the rule of law.

How do we set about doing this? In California, for example, as little as 10 percent of all automobiles emit more than 60 percent of the pollutants that cause smog. These cars should be repaired or taken off the road. They can be identified very easily with infrared roadside detectors, yet the state has failed to employ these devices. Once charged with individual responsibility for their incremental component of air pollution, individual citizens will resolve the pollution crises, first by eliminating pollution, then by eliminating the environmental agencies. Until individuals are allowed to rule, under law, there will be both pollution and a threat to liberty. ▲

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