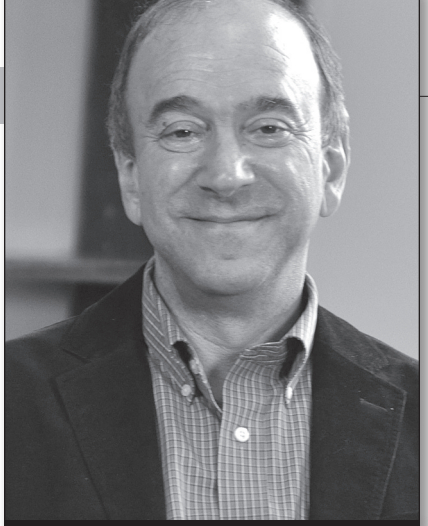
The Dignity of the States Is Being Lost in Environmental Litigation



Richard Lazarus is the Howard J. and Katherine W. Aibel Professor of Law at Harvard University. He can be reached at lazarus@law.harvard.edu.

States are not just another party. Their sovereign status sets them apart from private entities, nonprofit organizations, etc. That is why the Supreme Court in *Massachusetts v. EPA* referred to the "special solicitude" to which a state is entitled in determining whether it has met standing requirements. It is also why federal judges give more weight to state claims of the adverse health and welfare implications of a court ruling than they do to similar claims made by other stakeholders.

The uncomfortable question in environmental litigation is whether states should still be entitled to such respect. Or whether, by allowing themselves to become mouthpieces of partisans and interest groups, they have squandered their entitlement to special solicitude.

If one looks back to the 1970s and 1980s, the legal arguments of states in environmental litigation largely reflected their shared concern about federal government intrusions on sovereign prerogatives and by their distinct geography. Upwind and upstream states and downwind and downstream states naturally had differing views. The latter states understandably favored more stringent controls on the former. Partisan politics, as expressed in the political party of the elected governor at any one moment, played at most a secondary role in determining the legal argument of the state in environmental litigation.

The voices of sovereigns on public welfare issues are now opposing political choruses

But just as the overwhelmingly bipartisan majorities that supported congressional passage of federal environmental laws disappeared during the 1990s, so too has the distinct role of states in environmental litigation. Filings from the National Association of Attorneys General have effectively been replaced by filings coordinated instead by the Republican Attorneys General Association and the Democratic Attorneys General Association. A few examples from Supreme Court regulatory takings and Clean Air Act litigation underscore the extent of the shift.

On the question whether a state land use regulation amounts to a regulatory taking requiring the payment of "just compensation" under the Fifth Amendment, states are institutionally predisposed to favor the government regulator. That is why it is no great surprise that in the three Supreme Court regulatory takings cases decided in 1978 (*Penn Central Transportation Co. v. City of New York*), in 1987 (*Keystone Bituminous Coal Assn. v. De Benedictis*), and in 1992 (*Lucas v. South Carolina Coastal Council*), the states uniformly filed amicus briefs in favor of the state government regulators in those cases, regardless of party affiliation of the governor. By contrast, in the Court's most recently decided regulatory takings case, *Murr v. Wisconsin*, 19 states filed amicus briefs, roughly divided by half in terms of the party they supported. And all those with Democratic governors supported the government regulator and all those with Republican governors supported the landowner against the state.

The same phenomenon is evident in Clean Air Act litigation. For example, in 1984's *Chevron v. Natural Resources Defense Council,* eight states filed amicus briefs, four with Democratic governors and four with Republican governors. All eight supported NRDC. In a more recent Clean Air Act case, *Michigan v. EPA*, decided in 2015, 37 states participated as amicus curiae, and they divided almost evenly in terms of which side they supported, and, as in *Murr*, the decision was largely dictated by which party held power in the state. Republicans favored less environmental regulation and Democrats more.

The recent activities of the Republican AG association are emblematic of the transformation. In spearheading challenges to Obama administration environmental protection initiatives, the *New York Times* reports, the Republican AGs effectively allowed their letterhead and briefs to be used for legal arguments fashioned by industry lawyers. Industry funders essentially supplied resources to those AGs in exchange for their embrace of industry-favored legal arguments.

Environmental philanthropists now seem interested in replicating that litigation model, albeit to very different policy ends. Chafing at the success of the Republican AGs' collaboration with industry, Michael Bloomberg launched in August a new nonprofit dubbed the State Energy and Environmental Impact Center, designed instead to use the credibility of the states to attack the environmental rollbacks of the Trump administration. The center will provide state AGs with legal assistance, coordinate efforts across multiple AG offices, and coordinate pro bono representation in environmental litigation challenging the Trump administration.

Perhaps this counter move is a necessary response to restore equilibrium in environmental litigation. But the cost of both moves seems considerable: the potential loss of the voice of states as truly independent sovereign actors in litigation, the erosion of their integrity, and, accordingly, the demise of their entitlement to heightened judicial respect.

Copyright © 2017 Environmental Law Institute®, Washington, D.C. www.eli.org.
Reprinted by permission from The Environmental Forum®, Nov./Dec. 2017