

Bronin, Sara C.

The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States
93 Minn. L. Rev. 231

Reviewed by: Sarah Payne-Jarboe

ABSTRACT

In 1971, *The Quiet Revolution in Land Use Control*, by Fred Bosselman and David Callies, argued that certain land use issues transcended local government boundaries and competencies. The authors asserted that states should take back their police power to regulate extralocal issues in a manner that maintained two core values: the preservation of the existing land use system and the respect for local autonomy. With the rise of sustainable design, it is time to revive some predictions about the quiet revolution. This Article uses the green-building example to rebut the scholarly presumption that land use is, or should be, an inherently local function. Green building is transforming real estate development across the U.S. and could soon expand greatly. If this occurs, practical and ideological challenges to our current system of regulating land use will continue to mount. Currently, much of what can be called traditional land use regulation occurs at the local level. As written and enforced, local zoning and design control laws create unnecessary conflict between the desire for safe and attractive communities and environmentally responsible communities. This tension raises the question: how should our traditional land use laws change in light of the negative externalities of conventional construction?

Part I of this Article restates the first component of Bosselman and Callies' argument: although states' police power includes land use regulation, such regulation typically takes place locally. Part II examines the significant negative externalities of conventional construction, defines green building and analyzes the significance of the green-building movement. It concludes that the construction industry is poised to shift dramatically, and that this shift will increase the tension with existing land use regimes.

Part III takes up the third component of the quiet revolution: local governments are ill-equipped to handle certain extralocal land use problems. Some localities bar green-building technologies. Many more simply ignore green building and fail to address the unintended barriers raised by local ordinances. Localities that allow green building often permit it piecemeal without developing comprehensive rules. Finally, localities are so autonomous, and local laws so varied, that it is difficult to transport best practices across jurisdictional lines.

Given the failures of local governments to facilitate green building, Part IV applies the fourth part of Bosselman and Callies' argument: when the consequences of land use laws extend beyond local boundaries, extralocal regulation is needed. Creating new regional governmental institutions is politically infeasible almost everywhere. Similarly, federalizing traditional land use regulation would likely be far too radical and would meet with resistance from both localities and states. Part V adopts the final piece

of the argument for the quiet revolution: states must take back at least some of their powers to regulate land use and facilitate green building.

ANALYSIS

This article effectively uses the example of green-building to confront the national issue of poor land use regulation by localities. Although restricting local power may not seem feasible, Bronin explains why the approach is actually more feasible than the alternatives. She also offers specific examples of legislation that keeps intact existing government entities and respects local autonomy. The article addresses the big picture of land use regulation and cleverly advocates for a feasible shift in policy.

Lazarus, Richard J.

Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future

94 CNLLR 1153

Reviewed by: Benjamin Seeger

ABSTRACT

Climate change may soon have its “lawmaking moment” in the United States. The inherent problem with such lawmaking moments, however, is just that: they are moments. What Congress and the President do with much fanfare can quickly and quietly slip away in the ensuing years. This is famously so for environmental law. Subsequent legislative amendments, limited budgets, appropriations riders, interpretive agency rulings, massive delays in rulemaking, and simple nonenforcement are more than capable of converting a seemingly uncompromising legal mandate into nothing more than a symbolic aspirational statement. Climate change legislation is especially vulnerable to being unraveled over time for a variety of reasons, but especially because of the extent to which it imposes costs on the short term for the realization of benefits many decades and sometimes centuries later. To be successful over the long term, climate change legislation will need to include institutional design features that insulate programmatic implementation to a significant extent from powerful political and economic interests propelled by short-term concerns.

Such design features should include a variety of asymmetric precommitment strategies, which deliberately make it hard (never impossible) to change the law in response to some kinds of concerns while simultaneously providing avenues for change in response to other longer term concerns that are in harmony with the law's central purpose--to achieve and maintain greenhouse gas emissions reductions over time. Lazarus proposes a number of pre-commitment strategies to protect current congressional legislation from significant changes while also enhancing the implementation of pro-environmental executive branch lawmaking. One potentially powerful technique would be to couple domestic climate change legislation with the United States' agreement to international treaty obligations by making clear that the former was intended to comply with obligations under the latter. Another technique would be to encourage executive branch implementation through a lawmaking shortcut that allows lawmaking to be made in the absence of Executive Branch action within a specified time period. The traditional objection to lawmaking precommitment strategies--that the present should not be allowed to bind future lawmakers--also has little force in the climate-change context, where the purpose of such strategies is not to protect the present at the expense of the future, but the precise opposite: to protect the future at the expense of the present.

ANALYSIS

This article addresses both present and future obstacles that will be encountered with climate change legislation, and offers persuasive policy mechanisms for dealing with them. The article is both effective and thorough in its treatment of the issue. It addresses climate change from a unique perspective, and offers real and practical

solutions to the problem. The main drawback of the article is the author's treatment of the constitutional issues. That section of the article is not well fleshed out. However, it is a great article on a very important topic and deserves to be included in the publication.

Resnik, Judith et. al.

Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)

50 Ariz. L. Rev. 709

Reviewed by: Patrick J. Lynch

ABSTRACT

The relevant public-sector based participants in environmental policy debates extend beyond the three branches of the national government and the states, acting alone or coordinated through Congress. Translocal organizations like the National League of Cities, the U.S. Conference of Mayors, and the collectives of state attorneys general, governors, and state legislators are all exemplary of the multiplication of “national” players, rooted in states and localities yet reaching across them. This Article addresses the problem of how to conceptualize the federalism grid, often depicted on two dimensions, horizontal and vertical. Our interest is in the growth and significance of translocal organizations of government actors (TOGAs) and their role in the importation and exportation of law across national boundaries, and specifically, their activism regarding climate change. In addition to examining how TOGAs shape law and policy in ways that criss-cross a two-dimensional grid and undercut claims of the exclusivity of certain issues as either “national” or “local,” we consider the legitimacy, from federalist perspectives, of the particular form of aggregate political capital created by TOGAs. Our assessment is that TOGAs forward some, but not all, federalist virtues.

We urge that law take TOGAs into account, appreciate their potential, and develop models of different modes of legal recognition and regulation. Special forms of legal status should be accorded: TOGAs should have access to courts to enforce federal statutory rights, for example, which could be provided through case law or statute. We also suggest that the political safeguards of translocalism ought to affect courts' decisions about whether to find that federal law displaces local actions. Absent a clear statement from Congress directing preemption, the judiciary ought to be reluctant to ban local majoritarian activities. We would put the burden on Congress to provide a “clear statement” of its preemptive provision and its boundaries, and would not permit preemption based on general claims made by the executive branch officials of a need for exclusive authority to act. In terms of democratic theory and concerns about fairness, transparency, and accountability, more evaluation and likely regulation should help to frame the representative roles of TOGAs engaged in policymaking.

ANALYSIS

The identification of translocal organizations as TOGAs and the claim that they can serve an increasingly important role in controlling greenhouse gas emissions is novel, and one that would be well-suited for inclusion in ELPAR. The authors do an excellent

job describing the common characteristics of various TOGAs and their ability to bring together constituents across state and national borders in reducing emissions. The authors also make a paradigm-shifting proposal to legitimize these translocal organizations by according them new forms of legal status. Their call for the enactment of statutes and doctrines to assign special standing and preemption privileges to TOGAs seems particularly worthy of debate among legal practitioners and policymakers. This article could spark an interesting debate among local, state and federal governmental actors about the relative ability of subnational, national and translocal organizations to represent constituents in making GHG reductions.

Stewart, Richard

U.S. Nuclear Waste Law and Policy: Fixing a Bankrupt System

17 N.Y.U. Envtl. L.J. 783

Reviewed by: Carmela Renna

ABSTRACT

This article first provides a history of federal nuclear waste law and policy to date, then diagnoses the major failures in the current design, and proposes a suite of new measures to launch a comprehensive new approach. These measures include a reconsideration of the ethical principles underlying the drive for immediate waste burial; the creation of a high-level National Waste Management Commission; the creation of two new federal entities to manage nuclear wastes and to site waste storage facilities and repositories; the elimination of Environmental Protection Agency (EPA) regulatory authority over these activities; the adoption of a risk-based approach to waste regulation and management; and the adoption of new, more flexible and adaptable strategies for siting storage and disposal facilities.

The current U.S. system of nuclear waste law and policy is bankrupt. The 1982 Nuclear Waste Management Acts (NWPA) set a 1998 deadline for opening a deep geologic repository to receive spent nuclear fuel (SNF) and high level waste (HLW) from reprocessing. In 1987, Congress amended the act to designate Yucca Mountain as the only potential site, and twenty years later the proposed repository remains mired in controversy and unremitting opposition by Nevada. There is no prospect for an alternative repository, or for the development of a federal consolidated storage facility. The wastes destined for Yucca continue to be held at several Department of Energy (DOE) nuclear facilities and over a hundred nuclear power plants across the country.

From the viewpoint of environment, health, and safety protection, the current situation is not necessarily a bad one, but in the larger political context, it is a disaster. The waste status quo is a serious obstacle to expanding nuclear power, which is a proven, reliable technology that can make important contributions as part of a portfolio of energy strategies to reduce fossil fuel use. Nonetheless, permanent burial is widely regarded, in part because of the expectations generated by the NWPA, as an indispensable "solution" to the nuclear waste "problem." The failures of the NWPA to "solve" the "problem" so defined have fueled public distrust of the government and opposition to using nuclear power. Opposition has, however, tempered somewhat in the face of concerns over global warming.

We should not be too quick to bury spent nuclear fuel, for it contains a significant amount of useful energy that could potentially be tapped through reprocessing. Reprocessing might also reduce both the amount and the near term radioactivity and heat of the radioactive wastes that must ultimately be disposed of. Finally, it could generate an additional source of uranium for use by developing countries who wish to use nuclear power without building uranium enrichment or SNF reprocessing plants that risk proliferation of nuclear weapons.

ANALYSIS

This article is a strong candidate for inclusion in ELPAR because nuclear waste disposal is a pressing on-going environmental issue of national concern that has no foreseeable resolution. The author presents a persuasive and well-developed proposal, and although it would require fundamental change, this appears necessary in order to move forward, so it may be feasible as a whole or in part and would be influential in sparking policy debate.

Wyman, Katrina Miriam
Rethinking the ESA to Reflect Human Dominion over Nature
17 N.Y.U. Env'tl. L.J. 490

Reviewed by: Ping An

ABSTRACT

This article starts with the assumption that humans by now have profoundly reshaped the earth to suit our purposes. It analyzes the implications of humans' dominion for the ESA (Endangered Species Act), which was passed under a more modest assumption of human impact than we now know to be the case. The ESA is set up to protect imperiled biodiversity in a blunt way that requires listings of endangered species which automatically trigger a full range of protection mechanisms. The author explains that the objective of recovering all imperiled species is too ambitious to be practicable. And it is unlikely that many of the currently unlisted imperiled species (which is much greater than the listed imperiled species) could be protected without significantly greater resources. The poor allocation of public funds and the high cost imposed by the ESA make it impossible to achieve the statute's stated goals. The problems associated with the ESA can be attributed to the denial of the extent of human domination over nature.

To address such problems, the author critiques two leading approaches before offering a new proposal for ESA reform. She proposes to decouple the decision to list a species under the ESA from decisions about how to protect the species. Decoupling will allow protections that are tailored to each species. Federal agencies should be required to identify the most cost-effective ways of protecting a species after it is listed. Direct funding should be provided to protect a smaller number of umbrella species, which in turn might safeguard many others from extinction. While we should rethink the ESA to better address the threats to species today, we should also take preventive actions to avoid bringing species to the brink of extinction by acting under a myriad of other legislative and policy frameworks to protect biodiversity.

ANALYSIS

This article takes a truly novel approach to the protection of endangered species. The author addresses the increasing ineffectiveness of the ESA, and argues convincingly that the outdated assumption underlying the ESA is at fault. The article takes tentative steps in figuring out how to do something to protect biodiversity in a world that has changed profoundly since the early 1970s. Overall, the article presents exactly the kind of big picture policy debate on important environmental issues suitable for publication in ELPAR.