BOOK REVIEW

WILLFUL BLINDNESS: THE DOWNFALL OF THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW

THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW. Michael S. Greve.* Washington D.C.: AEI Press June 1996, 137 pages, $29.95 Cloth.

> *The resurrection of meaningful, harm-based standing barriers in environmental litigation may well be the single most useful result of the demise of ecological, public-law conceptions.*[1]
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> *The principal theme of this book has been to show that the demise of environmentalism amounts to an equally broad judicial reform project . . . from collective values to private harms as the lodestar of constitutional and administrative law.*[2]

What is the appropriate role of government? The latest answer to this ancient question comes from Dr. Michael S. Greve in his new book, *The Demise of Environmentalism in American Law*. Greve is a libertarian, and he uses his book to promote a libertarian view of proper American constitutional government having a limited role in the lives of its citizens. More specifically, he views America's environmental laws

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* *See* The Center for Individual Rights, *Annual Report 1994-95* (visited Oct. 19, 1996) <http://www.wdn.com/cir/ar95.htm> [hereinafter *CIR Report*].

> Dr. Michael S. Greve is the co-founder and Executive Director of the Center for Individual Rights. He previously served as a Resident Scholar at the Washington Legal Foundation and as Program Officer at the Smith Richardson Foundation. Dr. Greve is an expert on environmental policy, administrative and constitutional law, and civil rights law, and he has published widely in these areas. Dr. Greve received his Ph.D. in Government from Cornell University in 1985.

Id. For more on Greve and the Center for Individual Rights, see Davidson Goldin, *Law Center Wages a Fight Against Political Correctness*, N.Y. TIMES, Aug. 13, 1995, § 1, at 28, and Richard C. Reuben, *The Case of a Lifetime*, A.B.A. J., Apr. 1994, at 70.

1. MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 99-100 (1996).

2. *Id.* at 108.

as a paradigm of its current government—too far-reaching, but about to retract.

This retraction is presaged by several important judicial decisions, chief among them *Lucas v. South Carolina Coastal Council*,[3] *Lujan v. National Wildlife Federation*,[4] and *Lujan v. Defenders of Wildlife*.[5] Greve examines these and other cases, but spends much of his time discussing the New Deal, administrative agencies, and politics. His regressive view of law and government puts Greve among those who believe not only that government must be democratic and effective, but that it must maintain a hands-off posture in all situations possible.

Before saying what he is for, Greve defines what he is against:

> At bottom environmentalism is an ideology or worldview . . . [viewing] common-law rights—such as private property and freedom of contract—as a menace to an imperiled planet. It therefore aims to eviscerate common-law rights and to replace them with a legal regime that would organize transactions among individual citizens for a single public purpose, environmental protection.[6]

Greve thus begins his first chapter, "The Ecological Paradigm," by defining his opponents in a most extreme way. From here on, the book hammers at this strawman, equating environmentalism only with its most rigid wing. To Greve, anything based on the traditional common-law (by which he means nuisance and trespass) would by definition not be "environmentalism," even if it promoted, for instance, less pollution or stronger protection of natural resources.

"The Ecological Paradigm" continues in this vein, showing environmentalism as an extension and expansion of the New Deal and the administrative state in that both refused to be limited to the common law.[7] But environmentalism is fundamentally differentiated from the New Deal in that it is "not a political equilibrium among interests but the permanent pursuit of values that transcend interest-group concepts. In short, environmental regulation has no principled stopping point."[8] "Values" is Greve's code word for laws that put ideas of right and wrong

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3. 505 U.S. 1003 (1992).
4. 497 U.S. 871 (1990).
5. 504 U.S. 555 (1992).
6. GREVE, *supra* note 1, at 1.
7. *Id.* at 8-12.
8. *Id.* at 11 (citations omitted).

beyond public debate. It is Greve's belief that environmental law's "values" will expand and envelop all public law that drives his fear of environmentalism.

Greve's primary example of this is the subject of his second chapter, "Takings." He uses the *Lucas* case as his example of environmental values run amuck—a state's preference for building-free beaches that defeats common-law freedom of property.[9] Greve celebrates the Supreme Court's vindication of David Lucas as the beginning of the end for environmentalism. "Specifically, the case rejects the idea that environmental concerns warrant special judicial recognition or a drastic revision of traditional, common-law notions of property."[10] This makes *Lucas* a watershed case in its bright line reliance on state common-law harms as a standard that prevents uncompensated takings.[11]

Greve interprets *Lucas* correctly, but does not understand that the case is problematic—that under *Lucas* there is no deference to the legislature's ability to define new harms which the state has the right to regulate, for instance beach erosion. The *Lucas* standard privileges judges over legislatures, upsetting the constitutional balance of power, and freezes citizens' rights at a centuries-old common-law level. Greve rejects these arguments in his discussion of Justice Blackmun's dissent and Justice Kennedy's concurrence in *Lucas*.[12] These opinions recognize that the common law is not the limit of the law, that some public ordering is integral to a complex and interdependent society, but they do not derogate the importance of the common law.[13] The *Lucas* majority and Greve not only prefer the common law's private ordering, but recognize

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9. *Id.* at 23.

10. GREVE, *supra* note 1, at 30.

11. *Id.* at 32-34.

12. *Id.* at 35-39.

13. Even the most environmentally minded of Justices, William O. Douglas, believed in the primacy of the common law. However, like almost all legal and environmental theorists except Greve, he did not stop at the common law:

> Congress of course acts in the context of existing common-law rules, and in construing a statute a court considers the "common law before the making of the Act." But Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law. It cannot be presumed that the common law is the perfection of reason, is superior to statutory law, and that the legislature always changes the law for the worse. Nor should the canon of construction "statutes in derogation of the common law are to be strictly construed" be applied so as to weaken a remedial statute whose purpose is to remedy the defects of the pre-existing law.

Pierson v. Ray, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting) (citations omitted).

only private ordering as legitimate. For them, the public cannot be recognized by the law.

The book shifts to another problem in its third chapter, "Standing to Sue." Here Greve applauds *Lujan v. National Wildlife Federation* and *Lujan v. Defenders of Wildlife* for restricting standing to those with close connections and tangible harms.[14] *Lujan v. National Wildlife Federation* "treats environmental protection not as a public value but as a private interest" which cannot be protected by interest-group politics in either the legislature or the judiciary.[15] *Lujan v. Defenders of Wildlife* restates the requirement of injury-in-fact as necessary for standing, rejecting the view that "Congress could create any right it wished, the violation of which would then constitute an injury—regardless of whether such rights had common-law analogs and regardless of separation of powers concerns."[16]

The rejection of that power is part of Greve's long-standing opposition to citizen suits.[17] Greve's only complaint with *Lujan v. Defenders of Wildlife* is that it does not go far enough to eliminate statutory authorization of citizen-enforcement suits.[18]

At no point in his discussion of the congressional recognition of rights and standing does Greve discuss the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[19] Greve might disagree, but the Bill of Rights is not a closed set. The Constitution is a social contract, and there are, by design, methods of Constitutional change, including both Article V's amendment power and the Ninth Amendment's inclusion doctrine.[20]

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14. The majority opinions in *Lujan v. National Wildlife Federation*, *Lujan v. Defenders of Wildlife*, and *Lucas v. South Carolina Coastal Council* were all authored by Justice Scalia. Of the 149 direct quotations contained in *Demise of Environmentalism in American Law*, twenty-six come from Scalia.

15. GREVE, *supra* note 1, at 50.

16. *Id.* at 55. *See id.* at 53, note 32, in which Greve correctly recognizes *Lujan v. Defenders of Wildlife* as the judicial formulation of Scalia's article *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). *See also* GREVE, *supra* note 1, at 99-100.

17. Michael Greve is the author of *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990), and is co-editor with Fred L. Smith of ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (1992), which argue that many of the environmental citizen-suit provisions operate as de facto subsidies of the public-interest environmental law firms. *See* GREVE, *supra* note 1, at 100-01.

18. GREVE, *supra* note 1, at 55-61.

19. U.S. CONST. amend. IX.

20. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-3, at 774-77 (2d ed. 1988).

The articulated rights in the Constitution are Positivist, but the Ninth Amendment is a Positivist listing of Natural Rights theory. This is a textual peg for extra-textual review. The purpose of the Ninth Amendment is to allow the recognition of rights which are not expressly listed.

Preferring to restrict judicial review to common-law rights, Greve turns to the specifics of such review in chapter four, "Judicial Review of Environmental Regulation." After briefly reviewing jurisprudence under *Chevron U.S.A. v. Natural Resources Defense Council*,[21] Greve dismisses it in favor of a form of substantive due process which he calls "substantive review."[22] This approach attempts to review statutes not on their procedures but on whether they do more good than harm, a subjective method that equates "good" with "profitable" and in the end elevates cost-benefit criteria to the importance of a constitutional requirement. In support of substantive review, Greve discusses three appellate cases that use such reasoning to defeat environmental regulations.[23] Furthermore, Greve attacks other courts for not reading cost-benefit analyses into statutes that do not contain them,[24] and wants courts to ignore the plain meaning of statutes with which he disagrees.[25] If adopted, this method would distort the traditional function of common-law courts and upset the separation of powers. Greve thus elevates cost-benefit ratios into the realm of values, beyond the reach of the legislative or executive branches and enforced by subjective courts in the face of public or private opposition.

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21. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1985).

22. GREVE, *supra* note 1, at 68.

23. *Id.* at 68-83. The three cases are *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 956 F.2d 321 (D.C. Cir. 1992), *Corrosion Proof Fittings v. Environmental Protection Agency*, 947 F.2d 1201 (5th Cir. 1991), and *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (UAW) v. Occupational Safety and Health Administration*, 938 F.2d 1310 (D.C. Cir. 1991). The two D.C. cases were both authored by Judge Steven Williams, whom Greve later lauds along with Scalia as "heroes." GREVE, *supra* note 1, at 108. Williams also concurs separately in *UAW*, 938 F.2d at 1326.

Williams and Scalia were both placed on the federal bench by Ronald Reagan, perhaps the most anti-environmental president of the twentieth century. Greve, however, dismisses the importance of conservative appointments to the bench, seeing the case law of which he approves as good judging, not bias. GREVE, *supra* note 1, at 19-21. But if Greve is correct and these decisions are not isolated but the beginning of a trend, can this trend be unrelated to the fact that "Reagan and Bush appointees now account for nearly two-thirds of all federal judges as well as five of the nine Supreme Court justices[?]"

"'Without the new judges,' says Michael McDonald, president of the Center for Individual Rights, 'our views would have fallen on deaf ears.'" Roger K. Newman, *Public-Interest Law Firms Crop Up On the Right; Suits With Agendas*, NAT'L L.J., Aug. 26, 1996, at A1.

24. GREVE, *supra* note 1, at 64.

25. *Id.* at 72.

Having given his version of what happened in federal courts in the early 1990s, Greve gives his version of why in his fifth chapter, "Functional Rules for a Dysfunctional System." He sees *Lucas* and his other favorite cases as attacks on the regulatory failures of the administrative state, which rein it in by insisting on common-law structures.[26] Greve runs through a laundry list of administrative excesses, but will accept no solution short of libertarian small government.[27] There are plenty of solutions he does not consider. Would not "sunset" provisions, requiring periodic reauthorizations of government programs, prevent all regulations from becoming out-moded? Is not agency capture a real problem? Would not more consent agreements mean fewer lawsuits and less command-and-control regulation? Would not a Secretary of the Environment coordinate conflicting policies?

In this chapter, Greve's scorn for the environment begins to show through: "[T]he absurd idea that we are required by law to spend the entire national wealth on the preservation of every rat is not particularly conducive to the sensible allocation of scare resources. . . ."[28] From this point on, the tone of the rhetoric becomes increasingly impolite. This is the only problem with the book's style, which is otherwise enjoyable.

In his sixth and final chapter, "Environmental Ideology and Real-World Politics," Greve "argues that the ideological premises embodied in the case law have had a major influence on the terms of the political debate. . . ."[29] Here he is correct, as *Lucas*, *Lujan v. National Wildlife Federation*, and *Lujan v. Defenders of Wildlife* have become rallying points for both pro- and anti-environmental forces. During the early 1990s, anti-environmental forces provided significant impediments to the momentum of the environmental movement. Greve celebrates this change, including the fact that "think tanks that advocate environmental policies based on property rights and private markets [now] enjoy increased influence, credibility, and funding."[30]

At no point in the body of the book does Greve acknowledge that his own organization, The Center for Individual Rights (CIR), is one of these beneficiaries. A nonprofit public-interest law firm, CIR receives the bulk of its financing from right-wing foundations, corporate giants,

26. *Id.* at 85-90.
27. *Id.* at 91-106.
28. GREVE, *supra* note 1, at 90.
29. *Id.* at 107.
30. *Id.* at 109.

and defense firms.[31] The CIR is one of the right-wing think tanks currently so influential in Washington's Beltway culture and the federal courts.[32] Greve's ties to these interwoven organizations make him the epitome of an interest-group advocate, yet he does not see himself in partisan terms.

Instead, Greve sees himself as merely the expositor of the only correct interpretation of the Constitution. He campaigns for "a legal system whose principal purpose lies in protecting private orderings. . . . Its fundamental maxim is 'keep off.'"[33] He pays lip service to transaction costs[34] and public-law theory,[35] but in the end will only see a libertarian vision. He even advocates a resurrection of the *Lochner* doctrine.[36]

Greve spends much of his last chapter, as he did in his first, decrying the New Deal.[37] Here it becomes obvious that his real purpose is not to trace the rise and fall of excesses in environmental law, but to advocate the dismantling of twentieth-century government. "Environmentalism," the monster of chapter one, is only the strawman he sets up to knock down in its place.

Even as he decries politics, Greve plays politics, quoting the Contract with America,[38] promoting the Republican-controlled 104th Congress,[39] and assuming that *Lucas* is a "breakthrough" instead of acknowledging that it is too soon to tell whether *Lucas* is a beginning or just an aberration.[40] This double-dealing is his pattern throughout the

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31. These include the American Petroleum Institute, Archer Daniels Midland, Chevron U.S.A., the Adolph Coors Foundation, Kirkland & Ellis, the John M. Olin Foundation, both the Philip Morris Companies and Philip Morris U.S.A., UNOCAL, and Winston & Strawn. *See* CIR Report, *supra* note 3. "The Smith Richardson Foundation has given $570,000 since 1989, and the Carthage and Bradley foundations $450,000 each in the same period." Davidson Goldin, *Law Center Wages a Fight Against Political Correctness*, N.Y. TIMES, Aug. 13, 1995, § 1, at 28.

32. For the history of this movement, see Newman, *supra* note 23, Barry J. Nace, *Exposed: The Campaign to Destroy Justice*, TRIAL, Jan. 1994, at 7, and Jim R. Carrigan, *Junk Science and Junk Research*, 39 TRIAL LAW. GUIDE 230 (1995). Also note that *The Demise of Environmentalism in American Law* is published by the AEI Press, publisher for the American Enterprise Institute.

33. GREVE, *supra* note 1, at 115.

34. *Id.* at 117.

35. *Id.* at 12-15.

36. *Id.* at 118. *See* Lochner v. New York, 198 U.S. 45 (1905); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See also* TRIBE, *supra* note 20, at 566-81.

37. GREVE, *supra* note 1, at 8-12 and 118-20.

38. *Id.* at 131, note 32.

39. *Id.* at 130.

40. *Id.* at 129. He is willing to dismiss the pro-environmental holding in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407 (1995), as "a surprise and . . . an exception." GREVE, *supra* note 1, at 67.

book. For instance, Greve only mentions in passing President Reagan's Executive Order 12,291, section 2 of which mandates that executive agencies perform cost-benefit analyses for major projects.[41] Greve gets no deeper into this, perhaps because if he did then the subject of Executive Order 12,866 would be the next step.[42] This order replaces 12,291, puts cost-benefit analysis at the center of all federal regulation, and treats environmentalism as just another interest-group desire. This eliminates the need for the "substantive review" cases Greve praises in his fourth chapter. President Clinton issued Executive Order 12,866, and a partisan such as Greve is unable to give any credit to his political opponents, even when they take actions with which he logically should agree.

The last subchapter of the book is called "Politics as Second-Best," and here Greve publicly wishes for "a wholesale attack on the administrative state . . . a public consensus to repeal the New Deal."[43] His libertarian values see the issue of state power as beyond political debate. Thus he commits the exact fallacy of which he accuses environmentalists—he places his own interest-group politics into the realm of "values" and attempts to force them on everyone without going through the political process.[44]

The Demise of Environmentalism in American Law is not all bad. Greve has a good writing style, largely free of both legalese and ivory-tower jargon. Many of his points taken in isolation are correct, especially in the "Takings" chapter. Those who subscribe to Greve's political viewpoint will find this book a valuable support for their own theories. However, there are two basic problems: First, Greve does not accept that our government is just that, a social contract which we can change; second, he does not see that his values are just another set to be debated in the marketplace of ideas. In doing so, he commits the sin of which he accuses environmentalists. Michael Greve is more than eager to remove the speck from his neighbor's eye, but he ignores the plank in his own.[45]

Boyd Thompson

41. Exec. Order No. 12,291, 3 C.F.R. 127 (1981); GREVE, *supra* note 1, at 75.
42. Exec. Order No. 12,866, 3 C.F.R. 638 (1993).
43. GREVE, *supra* note 1, at 134-35.
44. *Id.* at 136-37.
45. *See Luke* 6:41.