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Two Social Movements

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Foreword: Two Social Movements

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Two social movements in the last fifty years have had a profound impact on our understanding of law and the role of the courts in our system of government. One is the civil rights movement. The demand for greater racial and gender equality and other civil rights has changed the face of the law in countless ways. For example, it has called into question—or at least required a fundamental revision in—the traditional understanding that the courts should interpret the Constitution and laws in accordance with their original meaning. Decisions such as *Brown v. Board of Education*[1] and the voting rights cases[2] appear to presuppose that the meaning of the law can change over time as courts' perceptions of social exigencies change. The civil rights revolution has also thrust courts deeply into the governance of traditionally autonomous institutions such as local schools, election boards, prisons, and mental hospitals.

There is a second social movement, however, that can also lay claim to have transformed our conception of law and the role of courts—the environmental movement. Environmentalism burst onto the scene on Earth Day in 1970 and, despite some challenges to its position, has not departed since. Although the influence of environmentalism on the legal system has not been as pervasive as that of the civil rights movement, it too has left its mark in many ways. For example, environmentalism can take credit for the vast expansion in the law of standing that took place in the early 1970's.[3] Similarly, environmental groups pioneered the use of "public interest law firms" as private enforcers of public laws. As a consequence of these and related developments, the environmental movement gave rise to a new and much more aggressive style of judicial review of agency action, known as the "hard look" doctrine.[4] Environmentalism has also had an impact on substantive legal norms, most prominently perhaps with respect to causation, where courts have gone so far as to hold that

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1. 347 U.S. 483 (1954).

2. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

3. *See* Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regulatory Agency Proceedings, 412 U.S. 669 (1973).

4. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

liability may be imposed under the "Superfund" statute without regard to any showing of causation of injury at all.[5] Each of these innovations has spilled over from environmental controversies to other areas of the law.

The civil rights and environmental movements are linked in many ways. But one theme that clearly unites these two movements is the fundamental transformation they have brought about in the role of courts in our society. Before the advent of these two movements, courts played an essentially conservative role in the scheme of government, acting as a brake on social changes emanating from politically accountable legislative bodies. To be sure, courts often behaved in an "activist" fashion in this period. By and large, however, it was an activism in support of established social and economic interests. This was true, for example, of the Marshall Court's expansive reading of the Contracts Clause,[6] the Taney Court's effort to make the world safe for slavery,[7] and the Fuller and White Court's attempts to invalidate redistributive social legislation in the name of substantive due process.[8]

With the coming of the civil rights and environmental movements, courts ceased acting as a brake on changes sought by democratic institutions and became themselves the agents of social change. Rather than striking down or narrowly construing legislative innovations in order to protect "vested" rights, courts became open fora for groups seeking recognition of new rights going beyond what legislatures were prepared to grant. True, this new progressive version of judicial activism required at least the tacit support of the electorally accountable branches. Many of the innovations spawned by the courts were actively endorsed by the executive branch, and often they were later codified by the legislature. But whatever public support this program of social change through litigation may have garnered after the fact, it clearly presents a new challenge to our understanding of the role of the courts under the rule of law.

The part that environmentalism has played in producing this judicial role-reversal poses a particularly daunting challenge for those who would justify the new role of the courts. Although support for the civil rights movement thrust the courts into an unfamiliar role as catalysts of social change, that role could at least lay a claim to legitimacy

5. *See* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

6. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

7. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

8. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); Coppage v. Kansas, 236 U.S. 1 (1915).

in the great purposes of the Civil War Amendments, and in the tradition of judicial solicitude for "discrete and insular minorities" thought to be poorly protected by the democratic political process.[9] Environmentalism can make no such claim. Modern environmental values cannot plausibly be linked to the Constitution, no matter how broadly construed. And environmentalists do not purport to represent a minority interest; rather, they claim to represent a diffuse majority. Thus, the judicial assumption of the role of catalyst for social change is especially difficult to justify in the environmental area. Indeed, the fact that Congress soon responded to the environmental movement with massive and detailed federal legislation makes many of the environmentally inspired judicial innovations, such as expanded rules of standing and hard look review, even more suspect.

The Federalist Society has long been at the forefront of those questioning modern judicial activism and whether it is compatible with the rule of law. As I have suggested, the environmental movement has played an important role in the emergence of the modern version of the activist judiciary, and presents an especially difficult challenge for those who would justify such a judicial role. It is therefore fitting and proper that the Society should sponsor this symposium on *The Environment and the Law*.

The pages that follow explore the broader jurisprudential implications of environmentalism from a variety of perspectives: conservative and liberal, normative and positive, academic, judicial, and practical. The debate leads not only to some predictable points of disagreement, but also to some surprising points of consensus. The reader will find here wit and wisdom, truth and error, and more than an occasional startling insight. Throughout—another hallmark of Federalist Society gatherings—the discussion is always lively. Whether one agrees or disagrees with the premises of the environmental movement, or agrees or disagrees with the role of the modern judiciary as an agent for environmental change, one cannot help but attain a richer understanding of these fundamental issues by reading the exchanges in this Symposium.

9. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).