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A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy

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A DEFENSE OF COMMON LAW ENVIRONMENTALISM: THE DISCOVERY OF BETTER ENVIRONMENTAL POLICY

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ABSTRACT

A major problem with the current environmental regulatory regime is that it does not provide a reliable process for determining or discovering either the optimal amount of pollution or the most efficient means for achieving the selected level of pollution. This Article explains how the common law process, when coupled with competitive federalism, spontaneously leads to the discovery of better environmental policy. This analysis suggests that common law rules should be the presumptively optimal method of controlling local environmental harms. Common law processes allow for greater experimentation and innovation than do set and rigid statutory rules. Unlike rigid rules, the common law provides opportunities to adjust to changes in technology and societal preferences and to learn from experience. Part of the adjustment process is through private contracting. The common law evolves by self-correcting policy mistakes, whereas there are no such self-correcting mechanisms in centralized command-and-control regulations. Command-and-control bureaucrats and legislators are often oblivious to changes inherent in a dynamic world, but common law environmentalism and

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jurisdictional competition provide a dynamic process through which policy options are discovered and discarded in response to the reality of perpetual changes in technology and political preferences. The current regulatory regime is strengthened and reinforced by the common law—but making bad policy stronger is not a logical reason for championing the common law. The current regulatory regime constrains the evolution of the common law and thus limits the ability of the common law to evolve and discover better environmental policy. The benefits of common law environmentalism are likely to be even greater when coupled with devolution of authority to the states, thereby allowing greater opportunities for experimentation and learning from other jurisdictions. Many of the standard criticisms of common law environmentalism are overstated. In particular, the common law failure that motivated federal intervention is largely irrelevant to current debates about the virtue of the common law.

INTRODUCTION

Widespread dissatisfaction with centralized command-and-control environmental regulation has lead to numerous reform proposals and some policy changes.[1] Policy changes include devolution, greater reliance on cost-benefit analysis, marketable pollution permits, brownfields legislation and many more.[2] Perhaps the most sweeping reform proposal is to abandon most federal environmental regulation in favor of a return to the common law.[3]

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[1] *See* HENRY N. BUTLER AND JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY (1996); Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153 (1988); Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 847 (1999) ("With the fall of the Soviet Union, the current environmental regulatory structure in America has been characterized as one of the largest centralized, command-and-control planning structures still in existence."); K.A. Taipale, *Information Technology as Agent of Change in Environmental Policy*, CAS Working Paper No. 05-2003 (2003), *available at* http://information-retrieval.info/papers/agentofchange.pdf.

[2] For a summary of reform proposals, *see* JESSE DUKEMINIER ET AL., PROPERTY, 48–49, 665–66 (6th ed., 2006).

[3] For a description of common law environmentalism, *see* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW (Roger Meiners & Andrew Morriss eds., 2000); BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT 161 (1977) *quoting* MICHAEL GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICA 115 (1996), ("By common law I do not mean the historical common law[.] I have in mind the basic logic of a legal system whose principal purpose lies in protecting private orderings. Such a system guarantees robust individual rights to exclude others (property); provides avenues for voluntary exchange (contracts); and protects against aggression by outsiders (torts)."); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 959-960 (1999); Free market environmentalism provides the intellectual foundation for common law environmentalism. *See* TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (Rev. ed.

Common law environmentalism has been harshly criticized.[4] To most environmental groups, law professors, policy makers, and environmental law practitioners, the proposition that devolution to the states and a greater reliance on the common law could increase environmental quality is preposterous. Many commentators do not take this proposal seriously because of their belief that it was the failure of state common law that necessitated federal legislation. Moreover, common law actions are thought to be inadequate for the large numbers of plaintiffs involved in many environmental actions. These criticisms and concerns about common law environmentalism are not surprising because such a return to historical principles seems out of step with a modern industrial world.[5] Nevertheless, given the longstanding and widespread dissatisfaction with the current centralized regulatory regime, it is time to seriously consider the common law as an alternative institutional arrangement for protecting environmental assets.[6]

A major problem with the current regulatory regime is that it does not provide a reliable process for determining or discovering either the optimal amount of pollution or the most efficient means for achieving the selected level of pollution. This Article explains how the common law process, when coupled with competitive federalism, spontaneously leads to the discovery of better environmental policy. This analysis suggests that the common law should be the presumptively optimal method of controlling environmental harms. Common law processes allow for greater experimentation and innovation than do set and rigid statutory rules. Unlike rigid rules, the common law provides opportunities to adjust to changes in technology and societal preferences and to learn from experience.[7]

2001). For additional resources on free market environmentalism and common law environmentalism, visit the website for PERC—the Property and Environment Research Center—http://www.perc.org.

[4] *See, e.g.*, Frank B. Cross, *Common Law Conceits: A Comment on Meiners & Yandle*, 7 GEO.MASON L. REV. 965 (1999).

[5] *See* YANDLE, COMMON SENSE, *supra* note 3, at 161.

[6] Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 Iowa L. Rev. 545, 548 (2007) (describing "recent efforts by plaintiffs, particularly state and local government plaintiffs, to push state common law to address modern concerns and compensate for perceived failures by the federal executive and legislative branches in environmental protection.").

[7] As Holmes states, the common law's systematic function serves these functions:

> It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the

Indeed, the common law allows for private ordering to avoid rules that impose greater costs than benefits to some parties. The common law evolves by self-correcting policy mistakes, whereas there are no such self-correcting mechanisms in centralized command-and-control regulations. Moreover, the benefits of common law environmentalism are likely to be even greater when coupled with devolution of authority to the states thereby allowing greater opportunities for experimentation and learning from other jurisdictions.

Part I presents a brief summary of the importance to economic policy analysts of knowing the optimal level of pollution and then explains why it is impossible to determine the optimal level of pollution. Of course, politics can determine the target level of pollution, but that is not necessarily related to the optimal amount of pollution and it is subject to political shenanigans, such as rent-seeking and bureaucratic empire building. Moreover, different institutions—the judiciary or legislatures—can result in different answers to the question of the permitted amount of pollution. The common law does not set out to determine the optimal level of pollution, but spontaneously evolves toward it through market-like interaction. In this sense, the common law process helps "discover" better environmental policies.

Part II addresses several arguments concerning the use of federalism and the common law to provide environmental protection. The impetus for federal intervention was the alleged failure of the common law to adequately protect the environment prior to 1970. Public awareness and preferences toward the protection of environmental resources has changed dramatically since that time, and current policy analysts should not be particularly concerned about the common law failing to adequately protect the environment in many areas. Moreover, the common law process offers numerous benefits as a dynamic system that can evolve in response to changes in preferences, technology, and so forth. Part II concludes that the current regulatory regime could be improved with a healthy dose of the common law. Indeed, the groups and individuals who should be most afraid of dismantling the current system are not necessarily those who truly value the environment but those whose personal self-

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> rules by which men should be governed. . . . In order to know what [the law] is, we must know what it has been, and what it tends to become.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW & OTHER WRITINGS 1 (Legal Classics Library ed. 1982); *see also* Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 7 (2007) ("[T]he advantages of the common law, at least in some circumstances, are substantial.").

interest is tied to the current system. Citizens would be the beneficiaries of this model for environmental policymaking, not their bureaucratic agents who benefit from the perpetuation of governmental controls.

Part III presents an argument for the presumption that common law environmentalism does an effective job of controlling many potential environmental problems. The starting point is a simple evolutionary model of jurisdictional choice with unconstrained choice of regulatory approaches. This model suggests that allowing jurisdictions to opt for common law environmental protections would not be the environmental disaster that is often presumed. The logic of policy arguments in favor of substituting common law processes for bureaucratic regulatory processes is straightforward: the current regulatory system is incredibly wasteful and inefficient with top-down policies and bureaucratic command-and-control; the common law, contrary to myth, actually did a fairly good job of protecting the environment; thus, environmental protection could be improved by dismantling parts of the current regulatory structure and replacing it with common law processes.[8] Implicit in these proposals is the devolution of the determination of substantive environmental standards to states and state courts where most common law doctrine has traditionally been created. The framework developed in Part III prescribes an allocation of regulatory authority that matches jurisdictions with the geographic scope of the pollution externality.[9] Local jurisdictions would then be unconstrained in selecting the regulatory response that best suits the preferences of their constituents. The goal of such competitive federalism is to create a dynamic discovery process through which multiple jurisdictions experiment with alternative responses to environmental problems.

Part IV considers the practical implications of the analysis, and proposes specific procedural and substantive changes that should be adopted in order to capture the benefits of common law environmentalism. Specific policy recommendations include limiting the scope of federal environmental regulation, prohibiting federal regulatory preemption of local law (regulations or common law), providing for a state common law defense to actions under federal

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[8] Meiners & Yandle, *Common Law and the Conceit of Modern Environmental Policy*, *supra* note 3, at 959–960.

[9] *See* Henry N. Butler & Jonathon R. Macey, *Pollution, Externalities and The Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, YALE L. & POL'Y REV. 23, 25 (1996) (suggesting that the regulating jurisdiction should be no larger than the geographic scope of the activity).

regulations, unfettered local choice of environmental policy instruments, and civil justice reforms.

The article concludes by explaining that discovering better environmental policy requires a rediscovery of the benefits of the common law.

I. COMMON LAW ENVIRONMENTALISM AS A DISCOVERY PROCESS

The economic analysis of environmental policy often begins with a consideration of externalities[10]—spillovers or third-party effects that may prevent markets from achieving the socially optimal level of an activity. If polluters are able to disregard the costs they impose on third parties, then polluters' decisions do not reflect the full costs of production. This externalization of costs of production is often due to poorly defined property rights (*e.g.*, the neighbor does not have legal recourse against the polluter) or high transactions costs (*e.g.*, the neighbors face a collective action problem in collecting funds to pay the polluter to stop polluting). Many socially beneficial activities produce negative externalities. If environmental policy—either common law or statutes—prohibited all negative externalities, then many socially beneficial activities would be banned and almost all activities would be curtailed. However, both the common law and statutory law attempt to balance the costs and benefits of socially productive activities that produce externalities, and thus recognize that the optimal amount of pollution is not zero. A challenging practical problem then is the determination of the optimal amount of pollution. This Part offers a brief overview of the problems that policy analysts face in determining—or discovering—the optimal amount of pollution.

A. Welfare Economics and the Need to Know

The economic goal of environmental policy is to force producers of externalities to internalize those costs into their decisionmaking.

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[10] As Dukeminier and Krier explain:

> Externalities exist whenever some person, say *X*, makes a decision about how to use resources without taking full account of the effects of the decision. *X* ignores some of the effects—some of the costs or benefits that would result from a particular activity, for example—because they fall on others. They are "external" to *X*, hence the label *externalities*. As a consequence of externalities, resources tend to be misused or "misallocated" which is to say used in one way when another would make society as a whole better off.

DUKEMINIER, ET AL., *supra* note 2, at 42 (emphasis in original).

Ideally, producers' private decisions regarding how much to produce (and thus how much to pollute) will be based on costs that reflect all social costs of their actions. Such internalization results in an optimal trade-off of the benefits of productive, externality-creating activities and external costs imposed on third parties.

In broadest terms, environmental policy needs to determine the acceptable amount of pollution. In economic theory, the optimal amount of pollution is simply the level where the marginal social benefit of the productive activity is equal to the marginal social cost (including externalities) of the activity. Inconveniently, determining the optimal amount of pollution is fraught with difficulties. For example, the external costs of the incremental amount of pollution can vary dramatically from area to area because of different population density, different preferences, different preexisting levels of pollution, different geological and atmospheric conditions, and so forth. Thus, there is no clear, practical methodology for determining the optimal amount of pollution in the real world. In practice, politics determines the permissible amount of pollution. Yet it would be a misleading tautology to conclude that the politically determined result is optimal simply because it has been politically determined.

The simplest regulatory approach to pollution is to tax polluters an amount equal to the marginal negative externality imposed by the pollution and then allow the market to clear. The goal of such a Pigovian excise tax is to force polluters to internalize the external costs of their pollution. By paying the tax to pollute, producers make profit-maximizing decisions that reflect the external costs. In theory, Pigovian taxes are clear and straightforward. They solve the market failure by giving producers incentives to act as if they were paying for all the resources used. However, in practice, it is virtually impossible for policy makers to accurately determine the appropriate amount of the tax for every producer—which by its nature will vary from industry to industry, producer to producer and location to location.

A logical extension of the Pigovian welfare analysis is for government regulation to declare the optimal level of pollution and the means by which to control it. This command-and-control approach relies on an expert centralized bureaucracy to prescribe acceptable levels of pollution and mandate the use of specified technologies to limit pollution. U.S. environmental regulation has traditionally relied on this approach—one which has been subject to harsh criticism for many years. In general, bureaucrats do not and cannot have the information necessary to make informed decisions about the optimal amount of pollution nor the most efficient means

for achieving the optimal amount.[11] This observation is accurate even when bureaucrats are assumed to be loyal agents of the public interest—an assumption that strays far from reality. In the end, command-and-control decisions seem arbitrary and subject to political shenanigans. Indeed, in many contexts, the command-and-control approach often does not even define acceptable levels of ambient pollution to which people are exposed, and instead focuseson the level of emissions that given facilities can emit. This means that enforcement and compliance often focus on emissions rules instead of actual exposures and harms.

A major improvement in the operation of the command-and-control regime has been the use of market-based regulations. Market-based regulations are designed to improve regulatory performance by giving regulated firms the incentives to find innovative and lower-cost means of achieving a given level of environmental quality than can be attained under command-and-control regulation. The best example of market-based regulations in action is tradable pollution permits. Other examples include conservation easements, tax incentives, and compensatory mitigation. Although market-based regulations provide incentives to discover creative ways to lower the cost of compliance with specified permissible levels of pollution, they do not help answer the vexing policy question of the optimal level of pollution.

B. Coase, Common Law, and Private Ordering

Ronald Coase turned the Pigovian welfare economics analysis of externalities on its head with his seminal article in 1960.[12] Coase explained the reciprocal nature of many so-called externalities and argued that private contracting often solved many conflicting use issues without need for governmental intervention. In this view, the primary role of government is to clearly define property rights and provide a mechanism for enforcing property rights and related contracts. The more complete the specification of property rights and the lower the costs of transactions, the more closely the market outcome will be to the socially optimal outcome. That is, the optimal amount of pollution is discovered through the enforcement of property rights and market interaction.

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[11] Bruce Yandle, "Coase, Pigou, and Enviornmental Rights," in *Who Owns the Environment*, Peter J. Hill and Roger E. Meiners, eds. (Rowman and Littlefield, 1998), 119. 128–132, 152.

[12] Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

Building on the Coasian perspective, free market environmentalism stresses the role of property rights, markets and contracts in solving environmental problems.[13] Common law environmentalism is a logical extension of free market environmentalism. In order to be effective, property rights must be enforceable thorough a court system that recognizes traditional common law actions of contracts, property and torts.[14]

Unlike regulatory approaches to the environment, which must confront the question of the optimal amount of pollution, the common law process that underlies common law environmentalism is not explicitly concerned with determining the optimal amount of pollution. Common law rules are developed over time by interaction of numerous self-interested litigants in an adversarial process. Judicial decisions by literally thousands of judges from hundreds of jurisdictions are synthesized into common law rules. Common law environmentalism rests on the assumption that the incentives of litigants to bring forth relevant information will force common law rules to reflect the trade-off of relevant costs and benefits.[15] The

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[13] *See generally* ANDERSON & LEAL, *supra* note 3.

[14] *See generally* YANDLE, COMMON SENSE, *supra* note 3.

[15] Professor Keith Hylton has explained the role of private information in the common law process:

> As Holmes suggested and Posner later argued explicitly, the negligence system is a large regulatory scheme that has worked with some success. Negligence liability works as a deterrent and it has not driven legitimate activity out of the country. The crucial feature that I want to highlight is its reliance on private information. The plaintiff knows more about his injury than any other party. The defendant knows more about his burden of precaution than anyone else. The negligence system gives both parties an incentive to persuade the court that their version of the appropriate regulatory rule is appropriate. Courts use their common knowledge, as well as information provided by the parties, to decide which parties' version is more persuasive, and to determine general conduct norms that will apply to future cases. In some cases, such as custom, a bright line rule favoring some defendants has emerged. In others, *e.g.*, res ipsa doctrine, a rule favoring plaintiffs has emerged.
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> What emerges from negligence litigation is a set of conduct norms that are shaped by the private information of parties. Although courts decide only the individual cases in front of them, the decisions create precedents that shape specific conduct norms that apply to future cases. A decision that a firm, or a professional, is not negligent in conforming to industry custom is both a regulatory rule and a judgment based on an assessment of private information in one case. The court's decision to uphold the custom is inseparable from its examination of the information brought in by the parties.
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> A public regulatory scheme could not hope to match the negligence system in terms of its scope, detail, and encapsulation of private information. To do so would require public agents to discover ex ante how much a potential victim would be hurt by a specific injury, and how much it would cost a potential injurer to avoid the injury. Even if the parties were able to provide this information ex ante, their incentives to do so honestly would be weak.

common law makes facts matter, and allows for flexibility between them. Blanket regulation cannot do so.

Because property rights are often difficult to define and transaction costs are high, the ability of the common law to force the internalization of all externalities is less than perfect. However, as Harold Demsetz has explained, reality-based policy analysis should not be concerned with the pursuit of perfection but instead should focus on the relative benefits of alternative institutional arrangements.[16] The comparative institutional approach employed in this article considers the merits of common law environmentalism in a decentralized system relative to the predominant alternative of centralized command and control.

It is also important to recognize the role of private ordering in the discovery and evolution of the common law. Although most common law doctrine is created in state courts, it is likely that the underlying rules are often created as much, if not more, in the myriad voluntary transactions that occur privately to help define and create the rights and expectations that common law courts are called upon to further define and enforce. Thus, a great deal of common law discovery results from the private ordering that common law rules facilitate.

The common law approach to environmental regulation, in large part embodied in nuisance law, reflects considerable sensitivity to private, local information.

Keith N. Hylton, *When Should We Prefer Tort Law to Environmental Regulation?*, 41 Washburn L.J. 515, 524–25 (2002). One major criticism by Professor Frank Cross is that evidentiary rules (presumably primarily those regarding relevancy, FED. R. EVID. 401–403) allow parties to exclude information about the broader social consequences of a particular rule, thereby limiting the ability of the court to make efficient policy judgments. Frank B. Cross, *Identifying the Virtues of the Common Law*, U of Texas Law, Law and Econ Research Paper No. 063 (2005) *available at* http://ssrn.com/abstract=812464 ("The economic value of the law rests largely in externalities, setting rules for future events. Yet the common law judicial process strictly excludes relevant evidence of such externalities. Rules of evidence may exclude judges from even considering information about the broader societal implications of the doctrines that they establish.").

[16] Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) ("The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing 'mperfect' institutional arrangement. This *nirvana* approach differs considerably from a *comparative institution* approach in which the relevant choice is between alternative real institutional arrangements. In practice, those who adopt the nirvana viewpoint seek to discover discrepancies between the ideal and the real and if discrepancies are found, they deduce that the real is inefficient. Users of the comparative institution approach attempt to assess which alternative real institutional arrangement seems best able to cope with the economic problem; practitioners of this approach may use an ideal norm to provide standards from which divergences are assessed . . . and select as efficient that alternative which seems most likely to minimize the divergence.").

C. Mistakes and Self-Correcting Mechanisms

Environmental policymakers—whether common law judges, legislators or bureaucrats—occasionally make mistakes. They may overregulate, underregulate, overcompensate, undercompensate, ignore sound science, admit junk science and so forth. In a centralized regulatory system, there are very few institutional forces to correct mistakes in environmental policy. And, experience has shown that it is particularly difficult to undo clear cases of overregulation. In a decentralized regulatory system, jurisdictional competition can improve environmental regulation by giving policy makers the political incentives to improve polices through experimentation, observation and learning across jurisdictions—the jurisdictional comparison makes costs and benefits more transparent. However, even under jurisdictional competition, the ability of state and local regulations to determine the optimal level of pollution would continue to be hampered by their inability to capture and assimilate relevant information. The common law, however, with its information rich process is more likely to identify and correct mistakes.

The common law develops through Darwinian forces.[17] Bad or inefficient decisions are eventually weeded out of the system. This can happen through continuous challenge in the originating jurisdiction or simply by the refusal of other jurisdictions to follow the rule.[18] The common law process tends to self-correct if a rule is out of line. Similarly, if conditions have changed so that a rule is no longer appropriate, the same forces will push the law to change.[19] In this way, the common law process spontaneously discovers better environmental law.

Appreciation of the discovery process inherent in the common law should make policy analysts more tolerant of deviations from (what they deem to be) the ideal or optimal environmental policy. Indeed, it is unlikely that any process will ever reach the theoretical optimal

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[17] For discussion of the various scholarly views of the common law process, see Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U.L. REV. 1551 (2003) and Cross, *Identifying Virtues of the Common Law, supra* note 14.

[18] See discussion of Peeveyhouse v. Garland Coal Company in Andrew P. Morriss, *Lessons for Environmental Law from the American Codification Debate*, in THE COMMON LAW AND THE ENVIRONMENT, *supra* note 3, at 144.

[19] *See* Hylton, *supra* note 14, at 527 ("Although nuisance law does not aim to generate global emission standards, nothing in this framework suggests that this could not be the result. As a population grows richer, it will demand more in terms of environmental quality. The comparison of expected externalized costs and externalized benefits will change over time in favor of stricter regulations. . . . In this sense nuisance law can be viewed as a regulatory framework that encourages development in early phases, and then places greater restrictions as the demand for environmental quality increases.").

policy in a dynamic world. The process may move toward the optimum—yet may never obtain it. There may be extended periods during which the law appears to be wrong.

D. Common Law Processes versus Statutory Regulation

U.S. environmental regulation has traditionally relied on a centralized bureaucracy to prescribe acceptable levels of pollution and mandate the use of specified technologies to limit pollution. Polluters are required to comply with regulations, often without regard to the relative costs and benefits of compliance. The current command-and-control regime has been subject to harsh criticism for many years.

Historically, environmental legislation is still in its infancy—but the common law applications of property, tort, and contract law that can serve environmental concerns are mature. "Environmental protection was not a distinct field of law before 1970. Since that time it has become a growth industry and has enjoyed widespread political support[.]"[20] Yet this "growth industry" has evolved with a general abandonment of the efficiencies of the common law.[21]

Some of the shortcomings of the current environmental regulatory regime are particularly glaring when compared with the common law. Where the federal rules are rigid and applied to all parties regardless of the specific circumstances, the application of the common law begins with an analysis of the facts of the specific alleged harm. Where the federal rules are imposed even if no party has been demonstrated harm, the common law requires an injured party to be harmed by the violation of a duty. These observations provide a starting point for a brief consideration of the benefits of common law processes relative to statutory regulation.[22]

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[20] RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 275 (1995).

[21] Meiners & Yandle, *Common Law and the Conceit of Modern Environmental Policy*, *supra* note 3, at 925 ("The common law, combined with various state-level controls, was doing a better job addressing most environmental problems than the federal monopoly, which directed most environmental policy for the last part of this century.").

[22] Hylton, *supra* note 14, at 515 ("There are two broad models of regulation: statutory schemes carried out by administrative agencies with the help of public enforcement agents, and highly discretionary common law rules developed over time through litigation. Environmental regulation is dominated by the first model, with relatively little of it done through litigation of tort claims. The reason may be largely historical: tort law has always been viewed as local in design and impact, while environmental law has always had a global aim. But it need not be this way. More than anything, tort law has been flexible, and thus capable of responding to new problems. . . . [T]ort law has some important properties that make it superior to statute-based regulatory schemes as a system of environmental protection.").

1. The Common Law Reflects Norms

The common law tends to reflect societal norms.[23] The common law filters regulation according to these norms while top-down regulation lacks such flexibility. Moreover, if norms vary from one jurisdiction to another, the common law can reflect those differences much more accurately than centralized statutory regulation.[24]

2. The Common Law Facilitates Private Ordering

One of the biggest differences between the common law and regulatory systems is the ability of individuals and groups to engage in voluntary transactions to address environmental concerns and thereby avoid litigation or other disputes. This occurs in the common law context because common law actions are based upon discrete rights that can be traded. In the regulatory system, by contrast, there are no rights that can be traded, either because the system does not recognize rights, or because it creates nearly infinite rights through citizen suit programs. The common law creates default rules that can be bargained around, whereas regulatory systems typically preempt alternative arrangements. Moreover, the common law process itself furthers greater definition of these rights, whereas the regulatory system does the opposite.[25]

3. Common Law Evolution versus Statutory Revolution

The common law also evolves slowly as it adapts to exogenous changes by overturning precedents that no longer fit economic

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[23] Professor Frank Cross also cites this feature as a strong attribute of the "bottom-up" approach of the common law. Cross, *Identifying the Virtues of the Common Law*, *supra* note 14, at 5 ("The 'bottom up' approach may also be more likely to draw upon existing social understandings and norms in the development of law, which may in turn be more effective.") (citation omitted). In considering the relative merits of the common law and statutory regulatory law, David Schoenbrod states: "[T]he common law enforces the norms of society, whereas the administrative state tries to impose intellectually generated norms on society. Common law rules tend to limit liability to conduct that society deems unjust, whereas the administrative state imposes liability where the state deems it useful to achieve its objectives." David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, in THE COMMON LAW AND THE ENVIRONMENT, *supra* note 3, at 17–18.

[24] *See* Schoenbrod, *Protecting the Environment*, *supra* note 22, at 6–19; YANDLE, COMMON SENSE AND COMMON LAW, *supra* note 3, at 164–5. ("Localized information and localized control are part of the efficiencies that a reliance on common law brings to the table for environmental protection. Common law allows the system to get closer to the source, and it allows more targeted attention than a top-down federal regulatory regime. Although it is debated, the common law can be argued to bring environmental protection closer to the source—a means of avoiding the inefficiencies of centralization.")

[25] *See* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 73–78 (2001).

conditions or societal norms. The common law process is dynamic and spontaneous, yet orderly.[26] As Keith Hylton notes, "[m]ore than anything, tort law has been flexible, and thus capable of responding to new problems."[27] As discussed above, the common law spontaneously evolves in response to changing circumstances.

In contrast, environmental statutes have been hastily enacted in response to crises and environmental disasters. Such statutory revolutions tend to become rigid and irreversible once interest groups capture the regulatory process.[28] Even statutory regulations that were initially "optimal" are unlikely to remain so as tastes, preferences, wealth and technology change. There are no self-correcting or self-

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[26] Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 1002–1003 (1996) ("[B]ecause common law rules develop concurrently with the evolution of society, the direction and timing of change are fairly predictable. The law responds to the demands of those subject to it."). For a theoretical explanation of spontaneous order, see 3 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY 93–97 (1979); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 22–70 (1960). *See also* Nicola Gennaioli & Andrei Shleifer, *The Evolution of the Common Law*, 115 J. POL. ECON'Y 43, 43 (2007) ("We present a model of lawmaking by appellate courts in which judges influenced by policy preferences can distinguish precedents at some cost. We find a cost and a benefit of diversity in judicial views. Policy-motivated judges distort the law away from efficiency, but diversity of judicial views also fosters legal evolution and increases the law's precision. We call our central finding the Cardozo theorem: even when judges are motivated by personal agendas, legal evolution is, on average, beneficial because it washes out judicial biases and renders the law more precise. Our paper provides a theoretical foundation for the evolutionary adaptability of the common law.").

[27] Hylton, *supra* note 14, at 515. *See generally* Ray Kirsch, Note, *What's the Buzz? Common Law for the Commons in* Anderson v. State Department of Natural Resources, 29 HAMLINE L. REV. 338 (2006).

[28] Michael Greve has noted:

> The tendency for environmental statutes to become playing fields for interest groups and politicians has disturbing implications. As a practical matter, it means that environmental regulation becomes even more rigid and immune to reform. Even as we learn from the failures of the past, and even as the need for reform becomes more urgent, we will be stuck with statutes and regulations that are no longer sustained by any plausible environmental rationale.

Michael S. Greve, *Environmental Politics Without Romance*, *in* ENVIRONMENTAL POLITICS: PUBLIC GOODS, PRIVATE REWARDS 1, 12 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992), *cited in* Zywicki, *supra* note 1, at 913. Anderson and Leal also explain the potential pitfalls of a governmental regulatory solution due to interest group influence:

> Because the costs of bringing together those who use a marine environment are often high enough to prevent joint action against polluters, a case can be made for some regulatory authority . . . to control the level of pollution. Of course, one of the problems with government control is that special interests that engage in waste disposal are just as likely—or perhaps even more likely, if they are well organized—to influence the agency as are those who suffer damages. The capture of regulatory policies by polluters is not surprising when we realize that the costs of control are concentrated on the polluter but the benefits are diffused across the population.

ANDERSON & LEAL, *supra* note 3, at 139–40.

adjusting mechanisms built into regulations to evolve in response to such changes, but the common law is inherently self-correcting.

The history of environmental regulation reveals numerous instances where legislatures have preempted the common law.[29] Although federalism and jurisdictional competition provide some constraint on state governments over time by making transparent the costs of such legislation, politicians are notoriously myopic. And, of course, state governments are in the rent-seeking business. Professor Frank Cross noted the rent-seeking tendencies in the context of the relationship between state laws and common law actions:

> The best illustration of the public choice shortcomings of state regulation is the preemption issue. The nearly universal presence of saving clauses in federal environmental legislation is testimony to the fact that they are not the products of special interest bargains. If special interests provoked passage of federal environmental statutes in order to escape the strict common law, the first characteristic that one would expect to find in the statute is an explicit common law preemption provision. Yet such provisions are absent in federal law. . . . State legislation may not only lack the savings clauses characteristics of federal legislation, but may even expressly preempt state common law protections.[30]

Federalism relegates such rent-seeking concerns to a lower level of policy concerns for a straightforward reason. At the state level, citizens have to live in the stench of the stockyards and can move. The question of whether interest-group restrictions on the common law are in the public interest is not as important at the state level as at the federal level because jurisdictional competition constrains states. And, as discussed above, increased public concern about the

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[29] *See* Roger E. Meiners, et al., *Burning Rivers, Common Law and Institutional Choice for Water Quality*, *in* THE COMMON LAW AND THE ENVIRONMENT, *supra* note 3, at 54, 71.

[30] Cross, *Common Law Conceits*, *supra* note 4 at 980. Cross argues for federal regulation, on the basis that state legislatures were often influenced by special interests to discriminate against out-of-state businesses through legislation that raised costs and barriers to entry. Federal preemption of state laws was in turn the product of special interest lobbying to overcome the challenges businesses faced with jurisdictional variety in environmental laws and regulations. *Id.* at 976 ("While regulated interests played a role in the passage of the early environmental legislation, they did not do so in order to preempt common law. The more plausible special interest explanation for this legislation is that of Elliott, Ackerman, and Millian. They argue that industry pushed the laws to supplant state legislative action, which was discriminating against out-of-state business and creating fifty inconsistent rules that made compliance more difficult and expensive. This would explain how even a stricter federal requirement, if uniform, would reduce compliance costs by enabling economies of scale.") (citations omitted).

environment since the early 1970s has generally enhanced the ability of jurisdictional competition to constrain state decisionmakers.

The relative slowness of the evolutionary common law process also means that the common law does not quickly respond to crises and environmental disasters. Such "fiddling while rivers burn" is often politically unacceptable. It is perhaps too much to ask of politicians to say, in effect, "don't worry, the courts will take care of it in due time." Unfortunately, statutory remedies—often passed in response to some crisis—often end up frozen in time and lagging behind changes in technology and preferences.[31]

4. Balancing of Costs and Benefits

Richard Posner's famous assertion that the common law tended to be efficient triggered a tremendous amount of research (and debate) on legal processes and substantive legal rules.[32] Efficiency of the common law process means that the common law rules tend to reflect a balancing of benefits and costs of parties engaging in an activity. The classic example of such balancing is the negligence standard articulated by Judge Learned Hand in *Carroll Towing*. Under the famous Hand Formula, a defendant will be held negligent if the burden of precaution is less than the expected harm avoided. In this sense, the common law guides behavior by providing incentives to engage in productive activity as long as the expected benefit is greater than the expected cost. Activities that are expected to generate more costs than benefits are deterred by the threat of liability.

As mentioned above, a large part of the common law approach to environmental law is embodied in nuisance law. The liability standard for nuisance law—a defendant will be held liable when he has unreasonably interfered with the use and enjoyment of someone's land—reflects a balancing of costs and benefits.[33]

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[31] In the absence of some type of built-in corrective mechanism, perhaps all statutory revolutions should include sunset provisions.

[32] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 27–29 (5th ed. 1998). Under Posner's models, the common law evolved toward efficiency without conscious economic analysis or even without any such intent by judges. Efficient rules survive and inefficient ones die. The legal processes research focused on what characteristics of the common law processes yielded efficient legal rules. Numerous theories were developed, and most tended to include an evolutionary process where inefficient decisions are more likely to be overturned than efficient decisions because inefficient decisions result in greater litigation and thus greater opportunity to be overturned. The research on substantive legal rules—where law and economics scholars examined rules to determine if they were efficient in the sense that they provided incentives to engage in productive activity—generally verified Posner's assertion about the efficiency of the common law. For a thorough review and critique of the literature on the efficiency of the common law, see Zywicki, *The Rise and Fall of Efficiency in the Common Law*, *supra* note 16.

[33] *See* Hylton, *supra* note 14, at 525–26 ("The unreasonable interference test appears to

The weighing of costs and benefits under the common law nuisance standard should be compared to the absence of any weighing of costs and benefits in the application of federal environmental standards to specific situations. Common law adjudication is fact intensive, whereas application of regulatory rules is only interested in whether the rule was violated, not whether there was harm or whether the harm was somehow outweighed by the benefits from the activity.[34]

5. Reduced Rent-Seeking and Malfeasance

Judicial decisionmaking is generally much less susceptible to rent-seeking, malfeasance and other distortions of a rational balancing of costs and benefits. Legislators and regulators are agents of their constituents. In addition to the usual agency concerns with laziness and risk aversion, legislators and regulators are particularly susceptible to making decisions that are not in their constituents' best interests because of rent-seeking, rent-extraction, and good old fashioned bribery.[35] The legislative history of the Clean Air Act vividly illustrates this problem, as special interests crafted legislation that helped their narrow interest at the cost of not achieving the putative goals of the legislation.[36] Moreover, pressure from legislators (motivated by interest group pressures) can lead to differential enforcement of regulations by administrative agencies.

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balance externalized benefits and externalized costs of the nuisance-generating activity. Where there is reciprocal exchange, because the externalized benefits equal or exceed the externalized costs, courts do not find interference unreasonable. Courts find unreasonable interference only when reciprocity is violated because the externalized costs far exceed the externalized benefits. Nuisance doctrine looks into the utility to the locale of the underlying activity in comparison to its costs, the capacity of the plaintiff to bear the loss, whether the defendant's activity is common to the locale, the priority in time among competing activities, and the nature of the rights invaded."). *See also* Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 997 (1996).

[34] Hylton, *supra* note 14, at 534 ("Like negligence law, nuisance law is a sophisticated, information-rich regulatory scheme that has evolved over many years of trial and error. By balancing external costs and external benefits, it has protected rights to develop and to enjoy property, without presenting serious obstacles to economic growth. Environmental law has taken a different track, relying on statutes and minimizing the common law's input. Nuisance law has advantages over the statutory framework in terms of its treatment of local information and enforcement incentives. [E]nvironmental law enforcement could be improved by returning to some of the principles embodied in nuisance law.").

[35] *See, e.g.*, *id.* at 523–24.

[36] As Bruce Ackerman and William Hassler demonstrate, environmentalists allied themselves with eastern dirty coal producers and miners to impose regulations that were both economically and environmentally inferior to obvious alternatives. BRUCE ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 117–18 (1981).

In general, common law judges are not subjected to the same pressures as legislators and regulators. The common law system runs on its own with "minimal interference from politicians, lawyers, industry special interests, or environmentalists."[37] Of course, almost all judges are products of some political process, and thus bring some political baggage and some ideological beliefs to the bench. Moreover, in states where judges are elected, out-of-state defendants do not fare as well.[38] This analysis is ultimately a comparison of alternative imperfect institutions where it seems likely that legislators are more susceptible than judges to rent-seeking.[39]

6. Priority Setting

The incentives to bring common law nuisance actions is driven by the injured parties' (and their attorneys') calculations of the expected costs and benefits of pursuing the actions. Actions involving trivial damages will not be brought, in general. On the other hand, private actions under federal and state environmental actions allow parties to file actions and recover attorneys' fees for technical violations that cause little if any harm. The common law redresses actual, provable harms.

The ease of private actions under federal environmental statutes and regulations can result in distorted enforcement.[40] Statutes—especially when crafted with citizen suit clauses and provisions for

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[37] Zywicki, *Environmental Externalities*, *supra* note 1, at 913.

[38] ERIC HELLAND & ALEXANDER TABARROK, JUDGE AND JURY: AMERICAN TORT LAW ON TRIAL 67–93 (2006).

[39] Interestingly, Frank Cross speculates as to the influences of special interests on judges, particularly at the state level, as well as the ability of special interests to strategically settle cases in order to avoid creation of unfavorable precedent. Cross, *Common Law Conceits*, *supra* note 4, at 972–3 (1999). However, in his later empirical study, he finds that the independence of the judiciary in common law countries tends to prevent corruption in the legal system (compared with civil law systems). Cross, *Identifying the Virtues of the Common Law*, *supra* note 14, at 29 ("[C]ommon law's identifiable positive effect on judicial operations comes primarily through its association with greater judicial independence. The results demonstrate that the apparent virtues of English origin are attributable not to the conventionally recognized features of the common law, such as its reliance on precedent, but to the derivative effect of the common law on judicial power. A more powerful, independent judiciary has the ability to be less corrupt and more predictable (as it need less defer to other institutions).").

[40] YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT, *supra* note 3, at 151–52 ("Some environmental public interest firms earn good revenues by filing citizen suits for CWA violation. Even trivial violations can pay well. Even the most trivial environmental problem will deserve regulatory attention. By contrast, common law procedures impose costs and force litigants to ration their efforts. Rationing brings focus. For example, instead of considering all hazardous waste sites to be equal, since they contain some amount of hazardous waste, the sites will tend to be ranked on the basis of potential damage to people and the environment. Those that pose the greatest risk will be addressed first. Those that pose trivial threats will not be addressed at all.").

lawyers' fees—skew the incentives for negotiation, suit, and settlement. As Bruce Yandle explains:

> Whether by common law or statute law, actions taken to protect environmental assets and rights should be filtered on some logical basis. The common law process asks for scientific evidence of actual or potential harm. Access to court is provided only to those who are actual parties to a controversy—those who demonstrate that they or their property have been damaged—and the remedies can provide payment for damages and injunctions that stop the harmful activity.
>
> By comparison, statute law and regulation require demonstration that rules have been violated; they do not require evidence of damages. Any person can file a complaint, whether damages can be shown or not. The remedies that result provide no payment to those whose land values have suffered or whose enjoyment of life has been compromised. Instead the remedies give payment to those who brought the action (the lawyer) and impose penalties on those who violated the rules that may not be remotely related to the value of the damage done. In short, the two approaches contain different rationing systems and different reward outcomes.[41]

Priority setting is extremely important in environmental policy for the simple reason that the number of pollution discharge points is unmanageably large. The centralized regulatory system, even with great reliance on state enforcement, has been unable to effectively monitor water pollution. However, the fact that many of these sites are not generating private litigation suggests the possibility that the discharge is not a major problem. It does not, however, demonstrate that the regulators are engaged in a reasonable balancing of costs and benefits where they do bring enforcement actions.

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[41] YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIORNMENT, *supra* note 3, at 151–52. *See also* Hylton, *supra* note 3, at 521–22 ("Moreover, the private litigation system has the desirable property that overzealous (and potentially arbitrary) enforcement is unlikely to occur. By overzealous enforcement, I refer to the case in which enforcement agents spend $1 million to stop a harm that costs $10,000. The risk regulation literature has already shown that such cases exist.").

7. Interaction of Common Law and Legislative Processes

This section has considered several advantages of the common law process over the legislative process.[42] Of course, these processes overlap and influence each other. In the environmental area, the most poignant episode of interaction of common law and legislative processes is the enactment of federal environmental legislation after the alleged failure of the state common law system to adequately protect the environment. This episode, which is discussed in greater detail below, warrants two observations that provide a fitting end to our discussion of the common law and statutory processes. First, the common law evolves very slowly and may lag behind rapid changes in social norms such as the changes in environmental preferences that occurred in the late 1960s. This vacuum creates opportunities for entrepreneurial politicians to fill the gap. Second, legislative intervention—through prohibition of common law actions[43]—can stifle the development of the common law and result in lower levels of environmental protection that would have ultimately have been provided by the common law.

II. THE RELEVANCE OF COMMON LAW ENVIRONMENTALISM

Common law environmentalism offers an alternative to the current regime of centralized, bureaucratic regulation. Not surprisingly, mainstream commentators are not exactly enamored with the idea of ceding protection of the environment to the unordered world of litigation. Others view the common law as a potential source for strengthening the current regulatory regime. This Part responds to a few of the attacks on common law environmentalism.

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[42] For a concise summary of alternative views of the relationship between statutes and the common law, see Klass, *supra* note 6, at 547–54.

[43] Professor Bruce Yandle, a leader in the development of common law environmentalism, notes:

> [A] large number of states by statute shield certain interest groups from nuisance and other common-law actions. Protection of farmers from nuisance suits involving odors and other potentially damaging environmental actions are most common. In a 1983 survey of these shield statutes, Margaret Grossman and Thomas Fischer found that thirty-five states had enacted "right to farm" statutes that generally provided some kind of protection from nuisance suits. Others states including Iowa, Kansas, Nebraska, Oklahoma, and Wisconsin have feedlot statutes that specifically shield the livestock industry in those states. The protection of such operations by common law is practically eliminated by such statutes.

YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT, *supra* note 3, at 158.

A. Common Law Environmentalism

Common law environmentalism has been described by Bruce Yandle in pragmatic terms, based on its flexibility and evolutionary characteristics:

> [A] system of law that focuses on real environmental problems when they are actually confronted by real people. But while common-law logic may be coming to the fore, we should recognize that its progress will be constrained, if not accommodated, by statute law. . . . State law emerges from a political struggle and tends to deal with expediencies—specialized situations—in highly technical ways. By constitutional rule, statutes dominate common law. By contrast, common law emerges from a social process that produces general rules that condition human behavior. Few people know the details of statute law and the associated regulation. Many people understand the common sense of common law.[44]

Yandle continues, explaining the rigidity of statutory law and the concomitant constraint it places on mutually beneficial negotiations between receptors and generators of pollution:

> [S]tatute law embodies command-and-control regulation and specifies a host of technical violations that can trigger law enforcement actions. Any citizen can initiate an action, provided appropriate evidence of a violation is presented. There are no requirements for proof of damages or demonstration of being a party to a controversy. Statute-based penalties involve penalties imposed on law violators. There are no provisions for damages to affected property owners. Polluters and holders of environmental rights cannot engage in transactions that transfer rights to a polluter. Citizens cannot contract around the rule. All matters involving federal statutes and regulation are resolved in the federal court system. As the antithesis, the common-law remedies for environmental problems are based on the law of torts. . . . Holders of common law rights can transfer the rights to polluters. That is, individuals can contract around the rule. [45]

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[44] YANDLE, COMMON SENSE AND COMMON LAW, *supra* note 3, at 162.

[45] *Id.* at 162–63.

The link between the free market environmentalism and common law environmentalism involves more than the definition and enforcement of property rights. Indeed, as discussed below, the common law process encompasses market-like characteristics that make common law environmentalism a logical extension of free market environmentalism.

The common law approach to environmental regulation, in large part embodied in nuisance law, reflects considerable sensitivity to private local information.[46] It makes facts matter and allows for flexibility between them.[47] Blanket regulation cannot do so.[48] Common law rules are developed over time by interaction of numerous self-interested litigants in an adversarial process. The common law facilitates environmental markets, in contrast to command-and-control regulation. Markets exhibit a form of economic Darwinism in which economic actors who make successful decisions garner control of more resources and those who make bad decisions lose control of resources.[49]

Most proponents of greater reliance on common law protections are not advocating complete dismantling of the current regulatory regime. Rather they are simply advocating taking advantage of the available tools.[50] Market failures might sometimes justify regulation, but it should not be presumed that resorting to coercive regulation is the optimal solution.[51] Policy analysts should not immediately jump

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[46] Hylton, *supra* note 14, at 524–25.

[47] Zywicki, *A Unanimity-Reinforcing Model of Efficienby in the Common Law:*, *supra* note 25, at 1002-03 ("[T]he relative institutional superiority of the common law to legislation lies in the common law's ability to preserve individual expectations. Reliance on precedent maintains the stability of the common law through time.").

[48] *See* Stewart, *supra* note 1, at 154 (arguing that long term pollution controls cannot be dependent on command-and-control systems of governmental regulation).

[49] Economic Darwinism—a variation on the biological theory of natural selection—has been applied to numerous economic and legal contexts. In industrial organization economics, Nobel Laureate George Stigler used Economic Darwinism to study economies of scale. George J. Stigler, *The Division of Labor is Limited by the Extent of the Market*, 59 J. OF POL. & ECON'Y. 185, 191–94 (1951). In the economic analysis of organizations, Eugene Fama and Michael Jensen used Economic Darwinism for their discussion of organizational forms. Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301 (1983) ("Absent fiat, the form of organization that survives in an activity is the one that delivers the product demanded by customers at the lowest price while covering costs.").

[50] YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT, *supra* note 3, at 89 ("The economic way of thinking suggests we should consider all the tools in our toolbox when addressing a problem, matching specific tools to specific features of the problem. I believe the common law offers a powerful set of incentives that encourage those who care most, property owners, to seek low-cost remedies for a large array of environmental problems.").

[51] *See, e.g.*, Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 474 (2005) ("[T]there is growing environmental literature suggesting that greater reliance on state tort law, or at least upon tort law principles, would improve environmental protection.").

to an assumption that governmental regulation is necessary or capable of solving the harms that may be caused from such pollution.

B. The Irrelevance of Common Law Failure

The major federal environmental protection statutes were passed in the early 1970s in response to growing public sentiment for greater protection of the environment. Rachel Carson's Silent Spring is often credited with launching the modern environmental movement, yet the ultimate catalyst for passage of federal environmental legislation was probably the infamous "burning river" incident when the Cuyahoga River in Ohio caught on fire on June 22, 1969.[52] Although there is considerable controversy over the facts and the interpretation of the facts, this episode is often viewed as strong evidence that the states and the common law were not doing an adequate job of protecting the environment. [53]

Indeed, it has often been argued that the common law was particularly ill-suited to deal with pollution:

> The obstacles to legal action in the pre-statutory common law system included: (1) significant standing requirements; (2) tough evidentiary burdens on the plaintiff to prove that the alleged polluter's conduct was unreasonable; (3) "overly solicitous" defenses available to the alleged polluter; (4) the burden on the plaintiff to prove that the defendant's pollution caused the plaintiff's injury; and (5) the real possibility that even if the plaintiff proved injury and causation, a court would refuse to enjoin the polluting activity because of a balancing of the equities. The failings of the pre-statutory common law system of environmental protection are also explained by certain limitations in the judicial process: (1) the fortuitous nature of court action that prevents it from serving as a reliable pollution control program; (2) the ex post character of litigation and the resultant inability of courts to take preventive action in anticipation of future problems; (3)

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[52] *See* Cuyahoga River Area of Concern, *available at* http://www.epa.gov/glnpo/aoc/cuyahoga.html ("Fires plagued the Cuyahoga beginning in 1936 when a spark from a blow torch ignited floating debris and oils. Fires erupted on the river several more times before June 22, 1969, when a river fire captured national attention when Time magazine described the Cuyahoga as the river that "oozes rather than flows" and in which a person "does not drown but decays." This event helped spur an avalanche of pollution control activities resulting in the Clean Water Act, Great Lakes Water Quality Agreement, and the creation of the federal and state Environmental Protection Agencies.").

[53] *See, e.g.*, Meiners, et al., *supra* note 29; Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89 (2003).

> the traditional reluctance of courts to issue affirmative orders requiring specific actions by polluters; and (4) the reality that the adversarial process does not ensure representation of the public's interest in pollution control. These limitations, when combined with the degraded state of the environment and courts' reluctance to enjoin polluting activity, demonstrate why Congress enacted comprehensive environmental statutes to remedy some of the failings in the pre-statutory common law system of environmental protection.[54]

In this public interest view, national politicians seized on public concerns about the environment and proceeded to pass several major acts and created a massive federal bureaucracy.

The enduring legacy of the burning river is that the common law failed to adequately protect the environment. Proponents of increased reliance on the common law argue that the common law was, in fact, doing a fairly good job of protecting the environment in the 1960s[55]—which was the beginning of a trend toward increased environmental quality that would have occurred without federal intervention.[56] The public's demand for increased environmental quality was driven by increasing wealth during the long economic expansion following World War II. Regardless, for present purposes, it is not necessary to resolve the historical debate about the role of the common law. Suffice it to say that a less than perfect common law was replaced by a less than perfect regulatory regime.

The assertion that pollution was at higher levels under the common law simply means that parties who could have filed common law actions to stop or reduce pollution either

(a) were not harmed enough to care;

(b) were compensated for not bringing the action;

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[54] Andrew M. Thompson, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L.J. 1329, 1355 (1996).

[55] For example, a review of the facts reveals that the common law was not the problem, rather the massive pollution of the Cuyahoga occurred because state laws forbade common law nuisance actions against the polluters. *See* Meiners, et al., *supra* note 29.

[56] Paul Portney of Resources for the Future reasoned that "[t]he fact that at least some measures of air quality were improving at an impressive rate before 1970 suggests that other factors in addition to the Clean Air Act are behind recent improvements." Paul Portney, *Air Pollution Policy*, *in* PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 51 (Paul Portney ed. 1990).

(c) could not file suit because of problems with civil procedure; or

(d) could not file suit because state law preempted common law actions.

Arguably, these "problems" with the common law have been solved through changes in our legal system:

(a) The "not harmed enough" problem has been solved as classes are routinely certified without class members knowing of the harm.

(b) Historical evidence reveals numerous instances where polluters contracted with local property owners to allow their property to be harmed.

(c) In the post-statutory era, common law actions are much easier to bring than earlier. Meiners and Yandle assert that the common law of public nuisance has improved.[57] The law has evolved, and the technology of lawsuits has made it easier to bring actions.[58] Moreover, plaintiffs' lawyers have perfected mass tort and class action claims. They have no real resource constraints.[59]

(d) Most states have saving clauses that maintains a role for their common law.

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[57] Meiners & Yandle, *Common Law and the Conceit of Modern Environmental Policy*, supra note 3, at 928. ("Now that claims for public nuisance actions no longer require a 'different injury' requirement or the 'criminal interference' requirement, the common law theory can more easily address a wide range of environmental ills. Any person who is injured can sue for equitable relief and monetary damages; courts will merely refer to the nuisance resulting in money damages as a 'private nuisance' to the individual seeking money.").

[58] YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT, *supra* note 3, at 160. But how has the common law suddenly overcome the alleged handicaps that made it so unworkable that statute law had to come to the rescue? After all, critics said that common law was ineffective in dealing with environmental harms involving multiple culprits. Clear evidence of harm is required by common-law rule. And what about the problem of many receivers of harm, not all of whom are damaged sufficiently to have an incentive to bring an action?

Advances in science address the first problem. Computer modeling and the development of schemes for matching waste with its source make it feasible to identify pollution sources. And greater expectations that public prosecutors will pursue public nuisance cases bring a more effective response from attorneys general when a few citizens complain.

[59] For documentation of the organized plaintiffs' bar, see http://www.manhattan-institute.org/html/clp.htm#tli.

Debate over the common law of the 1960s should be largely irrelevant to the current policy debate over whether to scale back the federal environmental regulatory structure in favor of a return to state authority and common law adjudication. Political, economic and legal changes have fundamentally reshaped the environment in which the common law is applied. One of the benefits of the common law is that it tends, over time, to reflect and enforce the norms of a society.[60] But, because the common law evolves slowly, it sometimes lags behind more rapid changes in public preferences. Arguably, this timing problem is what allowed national politicians to exploit the perceived need for federal intervention in the early 1970s. Even if it is true that the common law could not keep up with rapid changes in public preferences in the 1960s, it does not follow that the common law could not have caught up over time. The counterfactual question of what the common law would look like today if the federal statutes had not been passed is an important component of comparative institutional analysis. It seems reasonable to presume that the lasting change in popular sentiment for greater protection of the environment that began in the 1960s would have eventually worked its way into enhanced common law protections for the environment. Although it is impossible to know with precision what the common law would look like today, one can only speculate that it would include an increased reliance on property rules to deter pollution, and perhaps routine awards of punitive damages when property rules are ignored. Regardless of the precise rules that could have evolved, it should be clear that the common law of the 1960s—and the accompanying disputed evidence—are largely irrelevant to current policy debates.

C. The Economic Meaning of Doing a "Better Job" in Environmental Protection

The debate about the choice of environmental policy instrument—common law or statutory law—has inadvertently been cast as a question of which instrument is more likely to achieve greater environmental quality. Dogged pursuit of increased environmental quality—cleaner air, cleaner water, cleaner dirt—is generally not the goal of rational environmental policy. Rational environmental policy seeks a balancing of benefits and costs in determining the optimal level of environmental quality. In this framework, there can be "too much" environmental quality. Thus, even if greater reliance on the common law could result in *less* environmental quality in some

[60] *See generally* HOLMES, *supra* note 7.

localities or states, it could nonetheless result in *better*—that is, closer to optimal—environmental quality. The counterintuitive notion—which surely strikes many environmentalists as wrongheaded—is that a better environmental policy could involve more (not less) pollution.

When the leading proponents of common law environmentalism—both of whom are economists—asserted that the common law would do a "better job"[61] than federal environmental regulation, they were implicitly assuming that the common law would provide a better process for trading off costs and benefits to find the optimal level of pollution. Unfortunately, critics of common law environmentalism have missed this fundamental economic point.

Meiners and Yandle's strong statement about the common law doing a "better job" may have had the unintended consequence of diverting attention from the important potentially beneficial effects of increased reliance on the common law.[62] It probably would have been a political mistake for Meiners and Yandle to argue that greater reliance on the common law could result in more pollution—which in some instances would be a better reflection of societal norms and values. The analysis in this Article suggests that perhaps a better way for Meiners and Yandle to state their position would have been that the common law could do a better job of discovering the optimal amount of pollution—in some areas, it might mean more pollution and in other areas it might mean less pollution. In this regard, the common law process is superior to a rigid, outdated federal environmental regulatory standard.

D. State Common Law Was Not Preempted and It Plays An Important Role in the Current Regulatory Regime

A great deal of Meiners and Yandle's argument that the common law would do a "better job" protecting the environment than the federal environmental statutes appears to be based on their implicit assumption that state common law is preempted by the national environmental laws. This implicit assumption appears inconsistent with Bruce Yandle's earlier discussion of a resurgence of the common law.[63] Nonetheless, Professor Frank Cross used this opening

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[61] Meiners & Yandle, *Common Law and the Conceit of Modern Environmental Policy*, *supra* note 3, at 925. ("The common law, combined with various state-level controls, was doing a better job addressing most environmental problems than the federal monopoly, which directed most environmental policy for the last part of this century.").

[62] Indeed, Frank Cross states that "claims that the common law will provide stricter or better environmental protection are merely an unnecessary distraction." Cross, *Common Law Conceits*, *supra* note 4, at 10.

[63] YANDLE, *supra* note 4.

to pounce on Meiners and Yandle. Cross clearly demonstrated that state common law was not preempted by the federal environmental statutes.[64]

The fact that state common law was not preempted, however, does not in anyway demonstrate that common law environmental protections would be inadequate in the absence of federal regulation. All that Cross has demonstrated is that Meiners and Yandle appear to have made a mistake in implying that the common law was preempted. Cross's evidence of the continuing use of the common law after the passage of the federal legislation suggests that the common law is indeed—at least in some circumstances—providing greater environmental protections than the federal legislation.

Far from being preempted by the federal environmental statutes, the common law fulfills significant roles in the current regulatory regime. Perhaps the most important role is to reinforce the federal statutes and regulations through common law actions for compensation.[65] Some commentators who are unhappy with the performance of the current regulatory regime argue that common law actions should be used to supplement and improve—not replace—the current system. These commentators are dissatisfied with the federal laws because they do not provide enough protection for the environment.[66] They would like to see the common law used to provide superior environmental protection in terms of further reductions of pollution.[67] For example, the common law fills numerous gaps in the federal regulatory scheme.[68] As Czarnezki and Thomsen explain:

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[64] Cross, *supra* note 4, at 969 ("Virtually every major piece of federal environmental legislation contains a savings clause stating that the statute would 'restrict' any right that any person (or claims of persons) may have under any statute or common law."). He further demonstrates that common law nuisance claims have dramatically *increased* since the passage of federal environmental legislation. *Id.* at 970 table 1. He argues that "the common law is still with us and even thriving[.]" *Id.* at 966.

[65] Indeed, one of Meiners and Yandle's primary concerns was that the federal preemption had reduced the financial responsibility of polluters. Meiners & Yandle, *Common Law and Conceit of Modern Environmental Policy*, *supra* note 3.

[66] Czarnezki & Thomsen, *supra* note 7 ("Stated simply, the common law strives for immediate cleanup of pollution and condemns the destruction of the natural environment.").

[67] Another commentator, Alexandra Klass, advocates "strengthening the common law as a means of environmental protection. . . . [I]t is both allowable and desirable to develop a new state common law that incorporates data, standards and policy principles obtained in the statutory era to provide increased protection for human health and the environment." Aleandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 2 (forthcoming 2008).

[68] *See, e.g.*, Klass, *supra* note 6, at 21 ("state common law can be revived to fill its historic role as a 'gap-filler' to address environmental protection needs based in part on the policies and data generated by environmental statutes and regulations.").

> Statutory omissions, administrative problems and enforcement inefficiencies should not limit common law causes of action that might provide additional remedies to landowners. In light of the inadequacies of the federal regime, common law principles have a role to play. The common law, first, should *not* be adversely affected by the federal role (*e.g.*, CERCLA compliance orders administered by the EPA), and, second, should force polluters to be seen as violators of *state* law that serves as a deterrent of environmental pollution.[69]

This gap-filling role of the common law implicitly concedes that the common law can provide greater environmental protection that, at least to some commentators, is superior.

Finally, the common law has been viewed as a safety net that provides a backup protection of the environment when a change in administration and the influence of interest groups results in less administrative enforcement of federal regulations.[70]

E. The One-Way Ratchet: The Mirage of Common-Law Vitality in the Post-Statutory Era

Professor Cross presents evidence of the increased number of reported environmental nuisance actions after the passage of the federal environmental statutes. Cross believes that this evidence supports the conclusion that the common law was, in fact, "reinvigorated" by the passage of federal environmental statutes:

> There is reason to believe that it is statutory law itself that reinvigorated the use of the common law for environmental protection. The combination of citizen suits authorized by statutes and traditional, common law actions is synergistic. The statutory citizens suit enables plaintiffs to get into federal court, which is generally a more favorable forum for their claims. The ability to combine statutory and common law claims also may better enable plaintiffs to recover their attorneys' fees upon victory and facilitate their ability to obtain equitable relief. Rather than inhibiting common law, environmental statutes may empower the traditional remedies. This claim is consistent with the finding that the

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[69] Czarnezki & Thomsen, *supra* note 7.

[70] *See, e.g.*, Thomas O. McGarity, *Regulation and Litigation: Contemporary Tools for Environmental Protection*, COLUM. J. ENVTL. L. 371 (2005).

> common law has been more frequently employed in recent years. Hence, the claim that abandoning statutes for the common law would offer better environmental protection is difficult to sustain—the common law is still with us.[71]

The common law plays an important role in improving the functioning of the current centralized regulatory system; however, it does not necessary follow that the common law was "reinvigorated" in the sense of enhanced realization of the traditional benefits of the common law. It is one thing to state "the common law is still with us"; it is quite another thing to assert that our current system is taking full advantage of the benefits of the common law process.[72] In this regard, Cross does not adequately address the impact of the federal statutes on the evolution of the common law.

Perhaps the most telling part of Cross's critique of Meiners and Yandle is his implicit assumption that current federal regulatory law is superior to the common law. This bias is revealed in his analysis of the evidentiary value of regulatory compliance with federal regulations in state common law actions:

> While regulatory compliance is not an effective defense to common law liability, regulatory noncompliance is a powerful tool for common law plaintiffs. Meiners and Yandle overlook this key point. A violation of environmental regulations is commonly regarded as proof of negligence or nuisance per se, thus easing considerably a plaintiff's burden of proof in a tort action. Therefore, rather than weakening the common law, statutory requirements may actually strengthen its application. Any vitality the common law ever had is still present.[73]

If the statutory requirements are "too strict" and thus would not result in liability under traditional common law nuisance standards, Cross would nonetheless conclude that the statutory requirements had "strengthened" the application of the common law and confirmed its "vitality."

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[71] Cross, *Common Law Conceits, supra* note 4, at 970.

[72] For the view that the common law has suffered as a result of federal legislation and that it is receiving less attention in court than it would in the absence of federal law, *see* H. Marlow Green, *Can the Common Law Survive in the Modern Statutory Environment?*, 8 CORNELL J. L. AND PUB. POL'Y 89 (1998).

[73] Cross, *Common Law Conceit, supra* note 4, at 969. For a suggestion that regulatory compliance can be helpful to the defense, see YANDLE, COMMON SENSE AND COMMON LAW, *supra* note 3, at 154 ("While being in compliance was not necessarily a shield, the permit and good data on discharge was often persuasive and hard to defeat.").

An alternative and superior view is that the common law strengthened and reinforced the statutory requirements, regardless of whether the statutory requirements reflected sound policy. Making bad policy stronger is not a logical reason for championing the common law. Moreover, the federal statutes limited the range of potential evolution of the common law.

Cross's effort to discredit Meiners and Yandle results in his support of a kind of one-way ratchet effect where the common law can only increase standards; common law standards below statutory standards are irrelevant. This exogenous constraint on the evolutionary process of the common law threatens the "vitality" of the common law. If the statutes are rigid and unchanging, as Cross has argued in other environmental regulation contexts,[74] the common law cannot evolve. Thus, the vitality of the common law must be compromised to some extent by federal statutes. In the words of Professor Alexandra Klass, "something has been lost."[75]

In addition to hampering the evolution of the common law by limiting the range of relevant decisions, federal statutory domination of environmental law short-circuits the benefits of competitive federalism in both statutory law and the common law. As discussed above and elsewhere, federalism can be structured to improve environmental regulation. Similarly, federalism can provide an improved institutional structure for the dynamic evolution of the common law as state courts follow and reject rulings from other states. Unlike monopolistic federal legislation, federalism and the common law provide an institutional framework for reversing policy mistakes.

F. Empirical Evidence on the Role of the Common Law in the Post-Statutory Era

To support his critique of Meiners and Yandle's strong claim that the common law would have provided better environmental protection, Frank Cross collected data documenting an increase in the number of state common law claims filed after passage of the federal

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[74] *See* Frank B. Cross, *The Consequences of Compromise*, 75 WASH. U. L.Q. 1155 (1997) (criticizing the Food Quality Protection Act as too restrictive in pesticide regulation); Frank B. Cross, *Paradoxical Perils of the Precautionary Principle,* 53 WASH. & LEE L. REV. 851, 879–86 (1996) (arguing that strict environmental regulation causes more health harm than it cures); Frank B. Cross, *When Environmental Regulations Kill: The Role of Health/Health Analysis*, 22 ECOL. L.Q. 729, 732–33 (1995) (contending that high cost of compliance with environmental regulations produces additional morbidity and mortality); Frank B. Cross, *The Public Role in Risk Control*, 24 ENV. LAW 887, 941–43 (1994) (claiming that tendencies to overregulate in response to environmental problems are counterproductive).

[75] Klass, *supra* note 68.

environmental statutes. Cross's empirical evidence has some serious flaws.

First, he equates the filing of nuisance actions with better environmental protection. In a well-functioning civil justice system, well-developed nuisance rules can result in fewer lawsuits and less pollution. Cross does produce some evidence of a correlation between increased nuisance actions and increased environmental quality. But it is difficult to cull out not only the contemporaneous effects of new federal statutes and regulations, but also the relationship with overall trends toward improved environmental quality.[76]

Second, the upward trend in filing of nuisance lawsuits is also consistent with an interpretation that supports the role of the common law in protecting the environment. Social norms toward pollution changed dramatically during the 1960's. To the extent the common law evolves to reflect social norms, subtle changes in the law (or in juries' willingness to hold polluters liable—a reflection of changed norms) may have made nuisance actions more attractive, even holding the amount of pollution constant. Cross does nothing to control for this. Also, Cross does not account for the fact that more common law suits will necessarily result from federal regulation that includes savings clauses. Plaintiffs would have the incentive to bring a common law claim in tandem with a federal claim, especially when violation of the latter is easier to prove and may be regarded as *per se* liability for the former. Plaintiffs will thus be able to "double their money," but this has no bearing on whether either claim is effective at bringing about optimal levels of pollution. Rather, the incidence of common law claims would simply track the preexisting policy decisions made by federal legislators. Cross might do better in proving that the common law is "thriving" under the present regime by analyzing how common law claims were brought *independently* of federal actions, and also which joint claims yielded liability under common law nuisance *but not* under the federal regulation.

It is impossible to know how many common law nuisance actions would have been filed if the federal statutes had not become law. Cross's evidence does not rule out the possibility that even more common law actions would have been filed but for the federal statutes—that is, there could have been a type of crowding out of state common law actions. Regulatory suits are far easier to bring than common law suits, so it is at least conceivable that there was some substitution of regulatory suits.[77] Regardless, Cross has not supported

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[76] *See supra* note 56.

[77] YANDLE, COMMON SENSE AND COMMON LAW, *supra* note 3 at 156 ("The relative

his conclusion that "[t]he combination of citizen suits authorized by statutes and traditional, private common law actions is synergistic."[78]

The truly surprising thing about Cross's empirical evidence is that common law environmental actions appear to have not soared to the same degree as other areas of litigation. Yes, environmental actions have been a large part of the litigation explosion, but they have not been at the level of actions one would expect in view of the protestations of many environmental groups about the dire state of the environment. If people were suffering large harms from the nastiness of environmental harm, we should expect to observe far more tort litigation. One explanation for this admittedly casual observation is that more suits are not being filed because the environment is reasonably clean.

III. A DYNAMIC FRAMEWORK FOR EVOLUTION OF ENVIRONMENTAL POLICY

This Part develops an institutional framework for promoting experimentation and evolution in environmental policy. It begins with a simple model of jurisdictional choice in which jurisdictions are free to select the common law as the primary instrument for environmental protection. It ends with a pair of simple default rules for promoting experimentation, evolution, and reversibility of policy mistakes. Common law environmentalism and jurisdictional competition provide a dynamic process through which policy options are discovered and discarded in response to the reality of perpetual changes in technology and political preferences.

A. Simple Evolutionary Model

Two neighboring states in a federal system differ in many ways important to their relative desires for a cleaner environment. Their citizens have different income levels, education levels, and pollution tolerances. Moreover, one state is densely populated and the other sparely populated. The citizens of one state have different attitudes toward pollution than the citizens of the other. There are sources of

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simplicity of statute-based action helps to explain why statute-law actions tend to drive out common-law actions. But in driving out common law, it is possible that the realism of the common law is lost. Under statute law, the anchors of property rights are no longer secure. Proof of harm is not necessary. Risk is not a necessary consideration. Statutory violation is. It is possible that low-risk polluters will be pursued at great cost, while higher risk polluters are overlooked.").

[78] Cross, *Common Law Conceit, supra* note 4, at 970.

localized pollution in both states. There is zero trans-boundary pollution, and citizens and/or their assets can move between jurisdictions at low cost.

One possible response to the local pollution is centralized command-and-control regulation over both states. Given the differences between the states, it is impossible for a centralized command-and-control system of environmental protection to be optimal for citizens of both states at the same time. Although it is possible to be optimal for the citizens of one state, it is likely that that happy coincidence will not occur and consequently citizens of both states will live in sub-optimal regulatory environments.

For purposes of analysis, assume the central government totally abandons the field of environmental regulation, but each state imposes its own command-and-control regulatory structure. States would be able to compete in ways that had previously been unavailable. Initially, jurisdictional competition between state statute-based regulations might lead to experimentation as states attempt to tailor their regulations to their citizens' preferences.[79] These benefits of jurisdictional competition have been discussed for years.[80] Within this framework, states and their political actors would be forced to engage in balancing of costs and benefits to the betterment of their citizens.

An additional step away from the original centralized regulatory regime would be for a state to exit the regulatory field altogether, leaving the protection of environmental assets entirely to private litigants and the common law courts. Many environmentalists would expect the common law state to quickly become an environmental wasteland with toxic sites, burning rivers and polluted skies; in stark contrast to the superior environment provided in the regulated state. However, our simple model of jurisdictional competition suggests that such a doomsday scenario for the deregulated state is highly unlikely.

Assume State A decides to repeal all statutory regulations, while State B maintains a statutory regulatory framework. It is plausible that the common law of State A will maintain environmental quality in State A because:

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[79] See HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY (1996).

[80] Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 592 (1996) (tailoring policies to local needs and desires reduces abilities to protect property rights and to limit transjurisdictional pollution to an efficient level); *see also* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

- Public awareness and perceptions of the value of environmental assets;

- Should State A's environmental quality fall below State B's, it would be obvious to citizens of State A;

- Media willingness to expose and sensationalize wrongdoing;

- Mobility of citizens, consumers, and capital;

- Environmental groups solve some free rider problems;

- Sophisticated and aggressive plaintiffs bar;

- If environmental assets are highly valued by citizens of State A, juries would likely reflect these values.

In this decentralized world, where only property rights and the common law protect environmental assets, it would be highly unlikely for environmental quality to spiral downward.

If State A does not suffer significant environmental degradation under the common law, then State B might wonder why it should bother with providing a regulatory structure to protect its environment. State B might recognize that it receives little, if any benefit at substantial cost, and decide to repeal its regulatory structure in favor of common law environmental protections.

This simple model establishes a simple point—dismantling the current regulatory regime, at least in terms of dealing with local pollution, is not likely to result in environmental catastrophe. Different institutional arrangements are likely to yield different environmental outcomes; and different environmental outcomes may better match the environmental preferences of communities with different preferences. This is not Nirvana; it is not perfect. Policy mistakes may occur. Indeed, as in evolutionary biology, a policy mistake (that is, a mutation) may lead to the discovery of superior means of environmental protection. Increased reliance on the common law could be a major improvement over the current regulatory regime.

B. Federalism and the Presumption of Decentralization

Much of the condemnation of the common law as a means for protecting the environment is based on a lack of confidence in the ability of states to develop adequate legal rules in the face of interest group pressure to compete in a "race to the bottom." Although state regulations are a major force in environmental regulation,[81] the perceived state government failure has provided the basis for many calls for continued federal domination of environmental policy.

In recent years, there has been a growing appreciation of the potential to use federalism and jurisdictional competition as tools in improving environmental regulation.[82] Professor Richard Revesz has argued that most pollution is local, and thus there should be a presumption of decentralized regulation.[83] Similarly, Professors Henry Butler and Jonathan Macey have argued that jurisdictional competition is likely to generate optimal laws if four conditions are fulfilled:

> (1) the economic entities affected by the law must be able to move to alternative jurisdictions at a relatively low cost; (2) all of the consequences of one jurisdiction's laws must be felt within that jurisdiction; (3) lawmakers must be forced to respond to adverse events such as falling population, real estate prices, market share or revenue, and other manifestations of voter discontent that result from inefficient regulations; and (4) jurisdictions must be able to select any set of laws they desire.[84]

Analyzing a particular pollution control problem using these conditions can clarify the optimal level of government to address the problem.[85]

Butler and Macey developed a matching principle that suggests that optimal regulation should match the size of the externality. If an

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[81] *See, e.g.*, Klass, supra note 6, at 569 ("While it is generally recognized that state *regulatory* efforts continue to play a major role in environmental protection (where state agencies can develop expertise), the same recognition often does not extend to state *common law*—beyond, perhaps, the ability to collect damages where federal law does not provide for such a remedy.").

[82] *See* ENVIRONMENTAL FEDERALISM (Terry L. Anderson and P.J. Hill, eds. 1997); BUTLER AND MACEY, *supra* note 80; Revesz, *supra* note 81; Adler, *supra* note 51.

[83] Revesz, , *supra* note 81.

[84] Butler & Macey, *Pollution, Externalities and The Matching Principle*, *supra* note 9.

[85] Butler and Macey critique the major rationales for national level regulation: limiting interstate externalities; halting a "race to the bottom;" controlling political cost externalization; capturing national economies of scale in administration, technical expertise, and funding; and maintaining national moral ideals.

externality is local, the regulatory response should be local. If an externality is statewide, then the regulatory response should be statewide. If an externality imposes significant costs across state lines, then a multi-state response—with possible national coordination is appropriate. As with Revesz, Butler and Macey conclude that regulatory responses should begin with a presumption of decentralization.

More recently, Professor Todd Zywicki has provided a political externalities argument in favor of the presumption of decentralization. Pollution externalities are the result of private decision makers not bearing the full costs of their decisions.[86] Statutes and regulations ostensibly intended to correct pollution externalities often result in political externalities as public policy makers bear little of the costs imposed by the regulations. Political externalities can result from interest group bargains designed to help one group at the expense of another. As Todd Zywicki has stated:

> [L]egal scholars must stop railing about environmental externalities without also considering the political externalities inherent in the regulatory process. Buchanan and Tullock noted thirty years ago that majoritarian democracy creates political externalities the same way as polluters create pollution externalities. In both cases, those favoring a particular use for property are entitled to use it without having to pay the full opportunity cost for it.[87]

As Zywicki continues, he notes that federal regulation of localized problems is simply inefficient:

> Once it is realized that political externalities are at least as prevalent as environmental externalities, numerous implications arise. For instance, the idea that most environmental regulation should emanate from the national level simply vaporizes. Most pollution is local in its source and impact; thus, most environmental externalities are also best dealt with by local action. Elevating the locus of regulation to the federal level does little to deal with these environmental externalities, except for the rare circumstances of large interstate or international forms of pollution. But federal action creates massive political externalities. In particular, national regulation creates the opportunity for

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[86] Zywicki, *Political Externalities*, *supra* note 1.

[87] *Id.* at 912.

> some regions to use regulation as a method to transfer wealth to themselves at the expense of other regions. By disintegrating the protections created by federalism, national regulation also eliminates many of federalism's constraints on the ability of special interests to seek rents and the ability of politicians to extract them. Thus, as Professor Revesz has suggested, there should be a presumption of decentralization in regulation, but not necessarily for the reasons he articulated.[88]

A presumption in favor of decentralized responses to externalities is an important first step in revitalizing common law environmentalism.

Of course, as suggested above, one concern with decentralization is that state governments are particularly susceptible to interest group legislation in environmental regulation.[89] It is undeniable that the federal government as well as state governments are in the rent-seeking business. The key challenge is to develop institutional structures that channel interest group pressures in a manner that increases the quality of laws and regulations. Competitive federalism in environmental regulation provides such an institutional structure.

C. Conceit v. Conceit: Closed versus Open Systems in the Evolution of the Common Law

Professor Frank Cross has criticized Meiners and Yandle for naively believing that a perfect common law process would replace a federal regulatory structure dominated by special interests. Cross calls this the "Common Law Conceit":

> Even if one accepts the claims that public law displaced common law, there remains the crucial problem with the authors' position in their unrealistic contrast of a tawdry public-choice infected legislature and executive with an idealized, Rhadamanthine judiciary neutrally and scrupulously applying a transparent common law. It is as if judges were Olympian gods handing down principled legal decision, which Meiners and Yandle would contrast with biased political decisions rendered by the accountable branches of government. But the judiciary is a political system just as is the legislature. While the political system of litigation differs from the political system of legislation, those

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[88] *Id.* at 912–13.

[89] See Cross, *Common Law Conceit*, *supra* note 4, at 980.

> differences may make the courts more vulnerable to special interest manipulation.[90]

In effect, Cross is accusing Meiners and Yandle of committing what economists often call the "Nirvana Fallacy"—the tendency for policy entrepreneurs to criticize imperfect markets and assume that their solutions are perfect.[91] Yes, Meiners and Yandle are very critical of the current federal regulatory regime—as are the vast majority of legal commentators, including Cross.[92] But, Meiners and Yandle are well aware that the common law process is not perfect. Comparative institutional analysis does not reject one option because it is imperfect, but instead asks which option is superior.

Obviously, Professor Cross is much more skeptical of the common law process than are Meiners and Yandle. Professor Cross claims that "the litigation process itself favors the moneyed and disadvantages the general public."[93] By this, Cross clearly means that big companies (polluters) benefit at the expense of the environment and the general public. This seems inconsistent with his earlier documentation of how effective the common law had been in bringing polluters to justice. Ironically, Cross's statement makes

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[90] *Id.* at 970–71.

[91] See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1.

[92] Cross, along with Meiners and Yandle, agrees that federal environmental regulation has gone too far. Cross, *Common Law Conceits*, *supra* note 4, at 981–82 ("Far better, I think, is a frank position that environmental regulation has gone too far and should be pruned back. I believe that we can get closest to the optimal environmental policy by retaining but rewriting federal laws and regulations to require consideration of costs and benefits, scientifically accurate risk estimates, and other factors before regulating."). The great divide between Cross and Meiners-Yandle is that Cross appears to believe that the federal regulatory system can be fixed if enough smart people are brought to bear on the problem while Meiners-Yandle believe that a fundamental change in the institutions of environmental policy is necessary to find the solution. As explained by Meiners and Yandle:

> Those plagued with the fatal conceit believe that national governments are always better equipped to gather more and better information than the unfettered forces of markets constrained by rules of law. Yet, even if central authorities solve the information problem, statute writing is a batch process where information is assembled periodically and durable statutes are written and implemented. As the world evolves and changes, the information underpinnings of statutes still in force become obsolete. On the other hand, the common law process is continuous; it draws together information on controversies as they occur; and evolves as the world changes. While errors may be made in either case, in statute writing the cost of error is logically higher, because statutes are all-encompassing and more costly to change.

Meiners & Yandle, *Common Law and the Conceit of Modern Environmental Policy*, *supra* note 3, at 959. Cross responds that, "Meiners and Yandle, who are so cynical about the public choice reasons for federal environmental legislation, should be more cynical about reliance on state legislation." Cross, *Common Law Conceits*, *supra* note 4, at 980.

[93] Cross, *Common Law Conceits*, *supra* note 4, at 972.

sense if some of the moneyed are sophisticated plaintiffs' attorneys who stand to gain enormous sums for successfully suing large corporations who will then pass on the increased costs in the form of higher prices.

Cross cites three factors in support of his argument that the litigation process favors polluters. First, there are the general litigation maneuvers that corporations, with expensive counsel, have greater ability to manipulate in their favor. This claim is surely offset by the role of the sophisticated plaintiffs' bar and its proven track record against large corporations.[94] Second, he also argues that state judges, because they must seek re-election, are equally susceptible to being influenced by moneyed corporations via campaign contributions. However, his own 2005 article—where he found judicial independence to be one of the resounding virtues of the common law system—appears to rebut this argument. Judges cannot be completely independent of politics and increase group pressures, but—on any continuum from pure independence to rent-extracting entrepreneurs—the typical judge would appear to be relatively more independent than the typical legislator. Finally, Cross argues that polluters who are repeat-defendants have the ability to manipulate the development of precedent, by settling cases that may turn out unfavorably, and expending significant resources on appeal to overturn adverse verdicts.[95] Again, Cross fails to appreciate the sophistication of the mass torts plaintiffs' bar—the same players on both sides are repeat dealers.

Professor Cross cites a litany of studies questioning the efficiency and viability of the common law. Those criticisms of the common law have one flaw in common—they all view the common law as a closed system instead of the open competition system that shapes the common law in the United States. These criticisms of the common law process fail to appreciate the beneficial effects of jurisdictional competition in weeding out and correcting flaws in the common law process. Any meaningful move toward increased reliance on the common law would necessarily entail devolution of authority to state governments and courts. If a state chose to rely exclusively on the

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[94] *See* Center for Legal Policy, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003*, *available at* http://www.manhattan-institute.org/pdf/triallawyersinc.pdf.

[95] *See* Cross, *Common Law Conceits*, *supra* note 4, at 973 ("Litigation requires money, and those with more money are more likely to prevail in court. Marc Galanter explained how the "basic architecture" of the litigation process enables wealthier participants to prevail more frequently. Special interests are able to hire better counsel and devote more hours to winning. They are also more likely to be able to appeal and win on appeal when they lose at trial. Being experienced in litigation and having more experienced counsel may also provide a crucial informational advantage to repeat players, typically big businesses.") (citations omitted).

common law, any serious mistakes would become obvious and subject to reversal. And, in general, if a state court makes a particularly egregious decision, the decision will not be followed in other jurisdictions.

D. Simple Default Rules for Promoting Experimentation, Evolution and the Reversal of Policy Mistakes

The preceding discussion provides the foundation for two simple default rules for analyzing potential environmental problems. The goal of these rules is to develop institutions that discover and implement better environmental policy through experimentation, evolution and the reversal of mistakes.

1. Presumption of Local Pollution and Decentralized Responses

Most externalities are local. As discussed above, there is a great deal of support in the literature for the presumption of decentralized responses to predominantly local pollution.

2. Unfettered Local Choice of Environmental Policy Instruments

Local policymakers should have unfettered choice in selecting the environmental policy instruments to deal with potential environmental problems. Although this article strongly supports greater reliance on common law environmentalism, principles of federalism and jurisdictional competition suggest that local and state governments should be totally free to experiment with any mix of common law and statutory regulation.

Some practical implications of these simple rules are applied in Part IV below.

IV. FROM THEORY TO PRACTICE

Advocates of using the common law to improve environmental regulation presume the existence of a well-functioning civil justice system to adjudicate actions in an orderly, predictable, timely, just and cost-effective manner. With all due respect, those scholars are living in a fantasyland. Our current civil justice system is often criticized for frivolous lawsuits, class action abuse, junk science, oppressive discovery, runaway juries, overzealous state attorneys general, and so forth. Most American businesses have become very leery of the ability of courts to reach reasonable results in major areas of litigation. Indeed, for over two decades, business groups have

sought federal and state legislative solutions to alleged problems with the civil justice system.[96]

Industrial corporations have learned to operate within the current environmental regulatory structure, and they are likely to fight to keep from being thrown into the morass of class actions, discovery motions, and jury trials that could result from increased reliance on common law protections of the environment. The common law process, when viewed from a distance and over-time, appears to be orderly and relatively slow moving. Yet, to participants in the day-to-day rough-and-tumble of litigation, the common law process appears to be chaotic, unjust, unpredictable, uncontrollable, punitive, and even uninsurable (at a reasonable price).

In spite of these concerns, this Article has argued that tremendous benefits could be reaped from a greater reliance on federalism and common law environmentalism. This Part proposes several modest changes in the current regulatory regime that could help capture some of the benefits of competitive federalism, and demonstrate the viability of state and local responses to local environmental problems.

A. Limiting the Scope of Federal Environmental Law

The presumption that pollution is local should be the default rule for determining regulatory authority. Congress is unlikely to move in this direction because political institutions rarely voluntarily give up power and powerful interest groups prefer the current structure. Nonetheless, the willingness of the Supreme Court to consider challenges to federal authority over local activities provides an opportunity to devolve some regulatory authority to the states. Presumably, then, the states would have unfettered discretion in choose the mix of legislative and common law responses to use of environmental resources.

One ongoing battle over the scope of federal environmental law is the issue of preemption and the question of when federal regulation actually preempts state action.[97] Obviously, efforts to have federal legislation and federal regulation preempt state common law actions often run counter to federalism principles and common law environmentalism.

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[96] Most of the civil justice reform movement appears to have been a sustained push for broad-based, systematic changes—where free-riding and industry-specific rent-seeking is less important.

[97] See FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein and Michael S. Greve, eds.) (2007).

This Article provides insights into three issues involving the proper relationship between federal enforcement actions and state common law. First, should compliance with federal environmental regulations serve as a defense to common law actions? From the perspective of this Article, the answer is no. If the federal regulations do not provide for environmental standards that meet the local norms reflected in a state's common law, then common law actions can simultaneously improve environmental quality and environmental regulation. However, a reasonable compromise might be to allow a showing of compliance with federal regulations to bar a state court from imposing punitive damages on the complying party.

Second, should there be a state common law defense to federal environmental enforcement actions? From the perspective of this paper, the answer is yes. If federal regulators are trying to impose regulations on a primarily intrastate activity, the local polluters should be allowed to prevail with a showing that the local pollution is allowed by the state common law. In this instance, environmental policy is improved although there may be more pollution at the local level than would occur with federal domination.

Third, should non-compliance with federal regulations carry weight in state common law actions? Obviously, this issue is closely related to the second issue. However, the difference is that this issue is addressed in state court under state law (or at least by a federal court applying state law), while the second issue involves the application of state law in an action under federal law. In the spirit of federalism offered in this paper, state courts should be free to decide on this issue in any manner they wish.[98]

B. Local Means Local; State Means State

The model of federalism and common law environmentalism developed in this Article is crucially dependent upon adherence to the matching principle that all of the consequences of a jurisdiction's laws must be felt within that jurisdiction. Violation of this condition is a major threat to the efficient functioning of any decentralized system. The fact that most pollution is localized means that the response should be local. The challenge is to constrain the response to the size of the environmental harm.

Of course, many polluters are out-of-state corporations that own plants in the state where they pollute. A state's forcing of an out-of-state corporation to pay for in-state pollution does not violate the

[98] To some extent, this is an evidentiary issue of whether a jury is allowed to hear evidence of non-compliance with federal regulations.

matching principle so long as the damages awarded are in line with the actual in-state damages.

Of particular concern is the tendency of some jurisdictions to dispense justice for actions remotely related to their geographic venue. The redistributive tendencies of state courts—so famously described by former West Virginia Supreme Court Justice Richard Neely[99]—must be checked in order for federalism to function properly. So-called "magic jurisdictions" and "judicial hellholes"[100] can destroy the functioning of competitive federalism. [101]

A similar phenomenon is the expanded use of public nuisance doctrine in products liability and toxic torts cases. The lead paint litigation in Rhode Island has been singled out as an example of expansive and redistributive application of public nuisance law to extract payments from out-state-corporations who bear little relationship to the parties harmed.[102] Such abuses of the public nuisance doctrine[103] threaten a move towards common law environmentalism because it unjustifiably taints the primary legal doctrine of common law environmentalism.

State courts should be limited to awarding damages for actual in-state damages caused by the local pollution.[104] State courts should strictly adhere to the standards for awarding punitive damages.

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[99] See RICHARD NEELY, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 4 (1998) ("As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and there friends will reelect me.").

[100] Victor Schwartz, *Three Key Threats to Doing Business in Our Civil Justice System and What ATRA is Doing to Stop Them*, *available at* http://www.legalreforminthenews.com/Op-Ed/Op_Ed-Threats-to-Civil-Justice.html.

[101] Overreaching by state courts is similar to the "political externalities" discussed by Todd Zywecki. *See* Zywecki, *Political Externalities*, *supra* note 1.

[102] Richard O. Faulk and John S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation By Public Authorities and Private Counsel*, MICH. ST. L. REV. (forthcoming).

[103] See papers prepared for Searle Center Research Roundtable on "Expansion of Liability Under Public Nuisance," April 7th—8th, 2008, Northwestern University School of Law, http://www.law.northwestern.edu/searlecenter/conference/roundtable/index.html#public: Keith N. Hylton, Paul J. Liacos Scholar in Law, Boston University School of Law, *The Economics of Public Nuisance Law and the New Enforcement Actions*; George L. Priest, John M. Olin Professor of Law and Economics, Yale Law School, *Market Share Liability in Personal Injury and Public Nuisance Litigation: An Economic Analysis*; Martin H. Redish, Louis and Harriet Ancel Professor of Law & Public Policy, Northwestern University School of Law, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*; David A. Dana, Professor of Law and Associate Dean for Faculty Research, Northwestern University School of Law, *The Mismatch Between Public Nuisance Law and Global Warming*.

[104] Recent Supreme Court decisions are consistent with this view. *See, e.g.*, BMW v. Gore, 517 U.S. 559 (1996).

C. Class Actions

The common law can easily and efficiently handle pollution cases involving neighbors or small numbers of injured property owners. However, the nature of modern industrial pollution is that it frequently adversely impacts thousands of property owners. As mentioned above, the class action has been developed for efficient judicial administration, justice and deterrence.[105] A class action promotes better use of judicial resources by allowing plaintiffs and defendants to consolidate numerous claims into one trial. The class action also makes it feasible for plaintiffs who have suffered a relatively small harm that is generally not worth pursuing to consolidate their claims and hire a contingent fee attorney (who would not be willing to take on the individual cases). By providing a means to compensate plaintiffs who otherwise would not be compensated, the class action forces polluters to pay for their bad acts. As such, class actions serve as a deterrent to bad acts.

From the perspective of proponents of increased reliance on the common law, the class action is an answer to one of the biggest arguments in favor of state or federal regulation of pollution—regulation is no longer necessary because common law courts can handle even the largest claims. Class actions, however, create a whole new set of problems—which are well known by legal scholars and all major U.S. corporations.

Class action lawsuits have imposed significant costs on defendants, which is certainly appropriate if the case is established and the damages are appropriate. Professors Theodore Eisenberg and Geoffrey Miller reviewed class action awards from 1993 to 2002 and found that the average award was $139 million and that the average award in the top ten percent of awards was $1.08 billion.[106] In light of the large awards documented by Eisenberg & Miller,[107] it is not surprising that the mere certification of a lawsuit as a class action causes many companies to settle, rather than risk devastating financial losses. As Professor George Priest explains:

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[105] *See* FED. R. CIV. P. 23.

[106] Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004). There are several reasons to believe that the Eisenberg-Miller numbers underestimate the true magnitude of class action judgments and settlements. *See* GEORGE L. PRIEST, WHAT WE KNOW, AND DON'T KNOW ABOUT MODERN CLASS ACTIONS: A REVIEW OF THE EISENBURG-MILLER STUDY, MANHATTAN INSTITUTE CIVIL JUSTICE REPORT 9 (2005).

[107] Eisenberg & Miller, *supra* note 107.

> [A] principal concern regarding the operation of class actions is that the certification of a class itself, often based upon satisfaction of relatively undemanding procedural requirements, will bludgeon a defendant into a massive settlement. . . . Commentators unanimously concede that virtually every mass tort class action that have been successfully certified has settled out of court rather than been litigated to judgment. . . . We have recently observed settlements in class actions at enormous sums of money where there appears to be no substantive basis for defendant liability.[108]

This indictment of how the class action system operates should be enough to give pause to even the most fervent advocates of common law environmentalism. Companies often complain that they are compelled to settle, even when they believe they have a good chance of winning at trial. The benefits of the common law process are not captured under such a system.

Class action reforms—such as interlocutory appeals of class certification, limitation of discovery orders, and reasonable appeal bonds—would make class actions a better instrument of common law environmentalism. Moreover, such reforms would make a return to common law environmentalism much more attractive to large corporations.

D. "Junk Science"

Environmental policy should be based on sound science. Unfortunately, many leading toxic tort cases have been based on questionable scientific evidence. When the U.S. Supreme Court handed down *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[109] in 1993, it raised hopes and expectations that the quality of the scientific evidence that reaches juries would be improved. Following *Daubert,* the frequency with which testimony by experts was excluded rose, as did the percentage of summary judgments granted against plaintiffs.[110] In order for federalism and common law environmentalism to improve environmental policy, it is important for courts to faithfully fulfill their gatekeeping role by ensuring that

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[108] PRIEST, *supra* note 107.

[109] 509 U.S. 579 (1993).

[110] LLOYD DIXON & BRYAN GILL, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE DAUBERT DECISION (2002).

expert testimony is reliable and by keeping "junk science" from the courtroom.

CONCLUSION: WHO'S AFRAID OF COMMON LAW ENVIRONMENTALISM?

Common law environmentalism is a legitimate complement to our current regulatory regime. No matter how sound the arguments in favor of common law environmentalism, the political reality is that many interest groups have strong incentives to maintain the status quo. National environmental groups, bureaucrats at state and federal environmental agencies, lawyers specializing in environmental law, and environmental law professors, all have substantial organizational capital and human capital invested in the current system. Those specific investments would be substantially devalued if the current regulatory regime were dismantled.

In addition to these obvious opponents of regulatory restructuring, industrial companies that bear the direct costs of much environmental regulation and complain vehemently about burdensome regulation are likely to oppose a move to the common law for the simple reason that the return to the common law would create great uncertainty that is beyond their control of legislative processes.[111] Indeed, many companies may view themselves as beneficiaries of the current regulatory regime. Thus, both pro-environment and pro-business groups, as well as many lawyers and law professors, are opposed to structural reform of environmental regulation.

Even if leaders of environmental groups become convinced that the common law and federalism can provide better environmental protection, they must also be convinced that it is in their interests as organizations. It will be difficult to overcome the bureaucratic incentives in environmental organizations to protect their turf as dictators of environmental policy instead of actually focusing on protecting and improving the environment.

Although there are reasons to be skeptical about Congress ever devolving its regulatory authority to the states, it is possible that the Supreme Court could reduce the range of federal government control. As noted by Alexandra Klass,

> Based on the Court's current willingness to scrutinize federal regulation of seemingly local activities, there is more than a minimal threat to federal authority over environmental resources such as intrastate wetlands, endangered species that

[111] *See* Zywecki, *Political Externalities*, *supra* note 1.

> do not regularly cross state lines, or individual parcels of land that are subject to soil or groundwater contamination. While it is too soon to know just how far the Court will go in reigning in federal authority to regulate natural resources and pollution on Commerce Clause or other grounds, the current trends argue for a renewed emphasis on state law to address pollution and natural resources concerns in the coming years.[112]

Yet, Klass recognizes the interest group problems inherent in a return to the common law.[113]

This Article argues that common law environmentalism and federalism could help policy makers discover better environmental policy. Actual movement toward greater reliance on these institutions is a daunting task. As Professor Klass suggests, the Court may advance the change. This would appear to be a more likely prospect than the environmental establishment admitting that the current system is failing and calling for greater reliance on the common law.

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[112] Klass, *Common Law and Federalism*, *supra* note 6, at 579.

[113] *Id.* at 579, n. 198 ("This judicial trend toward devolving power from the federal government to the state governments contrasts with recent federal efforts by the executive branch and certain members of Congress to use federal law to preempt efforts by injured parties to recover damages associated with pesticides, prescription drugs and other products under state tort law").