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David Schoenbrod
New York Law School

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Protect the environment instead of the bureaucracy

Putting the "Law" Back into Environment Law

BY DAVID SCHOENBROD

AMERICA'S MODERN ADMINISTRATIVE STATE HAS done a terrible job with pollution control. True, the environment is much cleaner, but pollution was being reduced as quickly before the administrative state took over in the early 1970s as afterwards, as Indur Goklany has shown. The earlier progress was made through a combination of private action, common law, and ad hoc regulation, mostly at the state and local level. What the administrative state added was comprehensive, command-and-control management from on high. The result is an intrusive, inflexible system that bureaucratizes all life that it touches, yet has left the public more anxious about pollution than ever. Such anxiety fuels the growing power of the administrative state.

The state's perversities have prompted some to argue for a return to the common law as the way to control pollution. Statists respond with a litany of reasons the common law would fail to adequately control pollution in the modern world. Some are telling. Proponents of a return to common law reply that the state too has its flaws. That it does. But each side refuses to face up to its own failings. Each side insists that its own creed be followed literally.

Departing from such fundamentalism, I suggest a realistic way to control modern pollution according to the spirit but not the letter of the common law. I first explain why the common law alone cannot adequately control pollution today. I then show why the modern administrative state is such an ugly thing despite the well intentioned dreams and sense of superiority of those of us who spawned it. Finally, I argue that we can preserve much of what is beautiful about the common law in a system of pollution control that can work, and has worked, in the modern world.

David Schoenbrod is professor of law at New York Law School. A longer version of this article appears in a book containing the papers delivered at a conference held by the Political Economy Research Council, *The Common Law and the Environment: Rethinking the Statutory Basis for Modern Environmental Law.* The author acknowledges many helpful suggestions from the conference participants as well as Richard Revesz, Ross Sandler, and Jerry Taylor.

The Common Law Cannot Do the Whole Job

WHEN IT COMES TO THE COMMON LAW OF THE ENVIRONment, there are believers, nonbelievers, and wanna-be-believers. I am a wanna-be-believer. I want to believe that the common law could replace the administrative state. But it cannot because it would encounter overwhelming problems both in judging liability and in providing remedies.

Liability for air pollution cannot be based upon the kind of absolute rule that defines liability in the common law of trespass: no trespassing. If it were illegal to emit particles of air pollution that trespass on another's land, not only industrial society but all human activity would be illegal. We cannot grow beans, even the organic way, without kicking up dust, or cook them, for that matter, without emitting fumes.

The common law in fact judges air pollution through the lens of the law of nuisance, not trespass. In 1611, the

court in *William Aldred's Case* held that the defendant committed a nuisance by maintaining a pigsty near the plaintiff's parlor. The court reasoned that it is a nuisance to use one's property in a way that injures that of another. But that reason, standing alone, begs the question. There has to be a place for pigsties as well as parlors. Just how is a judge to know which is in the wrong place? In the early English cases, that understanding was based on custom. But custom provides no such understanding today. Living in a world where change has become customary, where land use patterns shift, new technologies emerge, and medical discoveries show accustomed levels of pollution to be unhealthy, we do not want law to hold that what should be is what has been.

Modern courts have tried to supplement custom by looking also at the benefit of defendants' activity in comparison to the harm to the plaintiff. But then the judge is making a policy judgment and not mirroring the customs of the people. This is not common law but ad hominem regulation, and without democratic accountability.

Even if common law courts could deal with liability, they still cannot provide adequate remedies in many cases. Courts award damages only for harms proved to be caused by the defendant and injunctions only to ward off harms proved to be imminent and substantial. Overcoming such barriers to relief would be easy in a case of a pigsty and a parlor, but impossible in the more typical modern case where a pollutant presents nontrivial risks of great harm. Plaintiffs in such cases usually cannot prove harm by a preponderance of the evidence, or anything like it.

The Modern Administrative State Is Ugly

THE ADMINISTRATIVE STATE BEGAN IN AMERICA WITH the Progressives at the dawn of the 20th century. Those early elitists thought they could supply better government than had common law courts and popularly elected legislatures, by empowering administrative agencies —staffed of course by people like themselves—to govern "in the public interest." The agencies were a big departure from the common law, but there still was an essential similarity. Both common law courts and agencies sought to vindicate society's values—the courts by enforcing society's binding customs, the agencies by governing in "the public interest," as the Progressives understood the term.

Starting somewhere around 1970, the administrative state ceased trying to vindicate society and started trying to improve it. It would be made to live according to ideals that were intellectually generated from on high rather than its own values. For example, the newly created Environmental Protection Agency (EPA) was told to try to force society to end all water pollution by 1985. The state had started to try to intrude itself on society far more aggressively than in the past because the elite itself had changed. In *Drawing Life: Surviving the Unabomber,* David Gelernter, a Yale computer professor whose splendid writing got more of the attention that it deserves after he was wounded by the Unabomber, remarks

> Today's elite is intellectualized, the old elite was not...
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> The old elite got on fairly well with the nation it set over. But the enmity between Intellectual and Bourgeois is sheepman against cattleman, farm against city, Army versus Navy: a cliché but real. Ever since there was a middle class, intellectuals have despised it. When intellectuals were outsiders, their loves and hates never mattered much. But, today they are running things, and their tastes matter greatly.
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> Members of the old social upper-crust elite were richer and better educated than the public at large, but they approached life on basically the same terms. The public went to church and so did they. The public went into the army and so did they... They agreed (this being America) that art was a waste, scientists were questionable, engineering and machines and progress and nature were good—some of the old-time attitudes made sense and some didn't, but the staff and the bosses were basically in accord...
>
> Today's elite loathes the public. Nothing personal, just a fundamental difference in world view, but the hatred is unmistakable.

The seed of the new elite was in the old elite's rationale that intellect justifies the exercise of power without accountability. Having taught that creed from the beginning of the 20th century, the top universities began to take it to heart in the late 1940s by changing their admissions and hiring policies to emphasize intellect. They had always had some intellectuals on board, but previously wealth was the main way into the student body and social connections were helpful in getting on the faculty. The Ivy League was known for producing gentlemen, not eggheads. As part of the new trend, Jews such as I were admitted in larger numbers. Gelernter concludes that intellectuals came to dominate the faculties by the early 1960s so that the first wave of students fully indoctrinated as intellectuals emerged from graduate school in the late 1960s.

As a graduate of Yale Law School in 1968, my contemporaries and I who were so instrumental in helping to launch the Environmental Protection Agency, the Natural Resources Defense Council, and other "public interest" environmental groups were charter members of the new wave. We felt fully entitled to remake society according to our ideals. We thought we knew everything because we had gotten good grades. But what passed for reasoning was often little more than "society should do as we think." Besides, there is more to wisdom than reasoning. Here again, Gelernter is helpful.

> There is a crucial distinction between propositions you arrive at by reason... and ones that are based on emotion or experience or horse sense. The Talmud calls this elusive stuff *derekh eretz,* literally "way of the world"—a phrase that also means "deference" or "humility."

One of the Talmud's deepest assertions is also one of its simplest: *yafeh talmud Torah im derekh eretz,* Torah study together with worldly experience is beautiful. Ideas against a background of humility and common sense. (Some of the greatest Talmud thinkers didn't earn their living as rabbis; they were shoemakers, merchants, or carpenters.)

Yet, according to the new elite, only those who earn their living by thinking are thinkers.

Having dismissed the great bulk of humanity as lacking in thoughtfulness, we considered ourselves entitled to far more power than comes from one vote at the polling place. We looked down on government as it then operated because society seemed to us to be moving too slowly toward the ideals we admired. As the chant went:

What do we want?
[insert the ideal of the day]
When do we want it?
Now!

We wanted new kinds of statutes that would force agencies to bend society to our ideals on a timetable. One of these statutes was the 1970 Clean Air Act. It mandated that EPA protect the health of all Americans from all harmful pollutants by the end of the 1970s without regard to cost. As a young attorney at the Natural Resources Defense Council, I saw my role as forcing EPA to live up to this ideal. A quarter century of experience has taught me that legislation by ideal is unkind to people and their society.

The ideals become real only in the concrete. Protect-health-from-pollution-without-regard-to-cost is only an ideal until there are laws requiring real people to reduce pollution to the required extent. In enacting ideals instead of rules of private conduct (such as emission limits on specific kinds of plants), Congress does only half the job of making law; it creates rights without imposing corresponding duties. It does the popular and shuns the unpopular part of lawmaking.

It is mistaken to think that Congress could do a better job by legislating ideals instead of rules of conduct because, in legislating ideals, it disengages itself from the interests that must give way if the ideals are to be realized. Legislators and agency officials cannot know whether they really believe in achieving their loudly proclaimed ideals until they face up to the interests that must give way to achieve them. It turned out that achieving the ideal of the 1970 Clean Air Act would have required taking most of the cars off the roads in Los Angeles and halting construction of new factories in many areas with high unemployment. No one in public office was willing to defend such results.

Members of Congress of course also use legislation by ideal to evade democratic accountability in fields other than pollution control. They freely enact absolutist ideals in the form of mandates on lower levels of government (such as to remove asbestos from the schools), entitlements (such as old age pensions), or government insurance (such as for buildings in flood plains). But the ideals become real only when other legislators have to raise the money to make it so.

It is no good trying to excuse the idealism on the basis that there is time enough for Congress to face the hard choices after the ideal is enacted. Statutes that launch regulatory agencies, impose unfunded mandates, and create entitlements are not trial balloons. People come to depend upon the entitlements; they save less for retirement in reliance on Social Security or build a house in a flood plain in reliance on government flood insurance. Once we get something from government, it feels like a right that we will fight to keep, even if we would not have missed getting it in the first place. Besides, repealing an enacted ideal requires going through the Constitution's legislative process. The House, the Senate, and the president all were given a say in enacting statutes so that government would not act rashly. By legislating ideals, Congress evades the procedural checks on acting rashly, but those checks come fully into play in stopping new legislation to temper past rashness. Besides, once Congress legislates a new ideal, a subgovernment grows up around it and defends itself. A legislated ideal is almost as hard to take back as a slap in the face.

Legislation by Ideal Empowers the Unaccountable

MY GENERATION OF PETULANT YOUNG ELITISTS CAME to understand how the magic wand of idealism could be used to get power. The trick was to promise to achieve some ideal, but to postpone the hard choices about how to achieve it until later. The 1970 Clean Air Act could be enacted because the laws needed to produce clean air would not have to be put in place until 1977. Ideals were postponed for present power—a far cry from the chant "When do we want it? Now!" When 1977 arrived with the ideal unachieved, EPA held the whip hand over society because it theoretically had the power to stop the building of new factories and to close gas stations on the massive scale required to achieve the ideal. But EPA was not about to exercise its power because then it would lose it. Instead, the agency deigned to allow society more time in exchange for more power. In the jockeying, EPA had two critical advantages—any softening of the regulatory timetable would have to get through the legislative process, and EPA was now itself the center of a subgovernment with clout. In the 1977 Clean Air Act, EPA and its allies allowed the 1977 deadline to be eased to 1982 for some pollutants and 1987 for others in exchange for vastly increased power to impose procedural and substantive requirements on society. After the 1977 and 1982 deadlines also proved impossible, the 1990 Clean Air Act allowed the deadlines to be eased out as far as 2010 in exchange for still greater increases in power.

But as things stood after the 1990 legislation, EPA's

power was a depleting asset. Enough time was passing that the agency's health standards would be largely met by 2010. In 1996, EPA promulgated new, tougher standards that project its power far beyond 2010. Many mayors and governors, including many Democrats, think the standards are wasteful, unnecessary to protect health, and impossible to achieve. The agency replies that it will decide later on, case by case, whether to give them more time to meet the goal. With governors and mayors having to seek the agency's grace, it will have still more power.

Less Pollution but More Anxiety

THE GREAT CONCENTRATION OF POWER WORKED through legislation by ideal cannot be justified by good results. The air people breathe is much cleaner today not because of the ideal handed down from Washington but because society wanted it so. As Indur Goklany shows in his essay in *The Common Law and the Environment: Rethinking the Statutory Basis for Modern Environmental Law,* state and local governments responded to the demands of voters for cleaner air long before the national government got involved—and progress was as quick before Washington took over as it was afterwards. The national government's most important contribution to clean air was not some abstract ideal but the enactment by Congress in 1970 of a concrete rule of conduct requiring a 90 percent cut in emissions from new vehicles. Public support for cleaner air would have prompted legislatures at all levels of government to enact further concrete steps to reduce pollution. But, instead of enacting other concrete laws in response to popular demand, Congress evaded the hard choices by enacting its grand ideal.

One might hope that legislation by ideal would make people worry less about pollution because a national EPA is standing guard. After all, we want to *feel* safe as well as *be* safe. But the idealistic approach has left us feeling unsafe. According to opinion polls, the public is more worried about the environment now than it was in the 1970s. The public worries more despite dramatic decreases in pollution because the idealistic approach puts EPA in the business of getting the public to worry about our "failure" to attain unattainable ideals. The agency and others who get power and money from pollution control are far more ready to identify problems and propose increases in its power than to say things are reasonably safe. With the drumbeat of missed deadlines—and all the money EPA spends, and gives to its supporters to spend, to arouse anxiety—no wonder the public worries more.

Perhaps the most telling evidence of EPA's success at worry-mongering is the irony that a majority of people worry that the majority of people do not worry enough about pollution. (Sixty-eight percent of the public have this worry, according to one poll.) Thus the same public that got government to do something substantial about pollution have been convinced by the same government that people like themselves are too dumb to get the government to protect them. Government by ideal creates a state—literally a state of mind—in which people feel power must be ceded to an unaccountable administrative state.

Government by Ideal Results in Excruciatingly Detailed Regulation

MY COMPLAINT IS NOT THAT EPA MOVED TOO FAST TO clean the air. Indeed, it was woefully slow in some instances, such as lead in gasoline and interstate pollution. My complaint is that without legislation by ideal we would have achieved comparable improvements in public health with much less harm to society.

The Clean Air Act, and the many other statutes modeled on it, allow a federal agency to run major segments of civil society on quasi-military lines through a chain of command that runs from Congress down through EPA to states and ultimately the regulated entities. The battle plan begins with statutes proclaiming ideals, EPA regulations and guidance documents giving instructions to subordinate regulators, state statutes, regulations, and plans showing compliance with the national orders, and then the permits to, and reports from, the regulated entities. Before 1970, progress was being made on pollution with far less paperwork. Although the paperwork is itself a vast waste of human time and talent, its greatest importance is as a marker of something more subtle, the loss of flexibility that comes from trying to run society on military lines. Not only is everything controlled directly or indirectly from Washington, but it is controlled in great detail.

It is worth recalling how our legal system used to discourage antisocial activity. As a rough generality, if you acted wrongly but caused no harm, you paid token damages or nothing at all. No harm, no foul. If you did wrongly cause damage, you paid for it, but were not punished unless you did something society judged awful. It was because only awful conduct was made a crime that ignorance of the law was no defense—you should have known better.

Such an approach would not work for many modern environmental concerns because it is hard for judges to place a dollar value on the harm done by many pollutants. But, for those pollutants, legislatures have many fairly nonintrusive ways to limit total emissions from all sources or total emissions from any one plant.

Our modern environmental statutes control conduct in far more detail than that. Instead of limiting total emissions from each plant, the regulatory system frequently slaps a separate emission limit on every one of the many smokestacks, pipes, and vents coming out of the typical plant. The agency regulates not only emissions but sometimes also the techniques used to control them, monitor them, and report them. All this must be pinned down in a permit to be secured before going into operation. And to get the permit you must pay a tax sufficient to keep the regulators in business. Also, if the source needs to change what it is producing or how it operates, which can hap-

pen every few weeks in this computer age, it will need an amended permit.

No major facility can hope to avoid violating such a compulsive system of legally binding requirements. As a recently published environmental law treatise acknowledges, "it is virtually impossible for a major company (or government facility) to be in complete compliance with all regulatory requirements. [And yet] virtually every instance of noncompliance can be readily translated into a [criminal] violation." (Celia Campbell-Mohn, Barry Been, and William J. Futtrell, *Sustainable Environmental Law.*) Government now uses the criminal law, "civil" penalties, and other sanctions to punish much conduct that is neither harmful nor intentional and that ordinary people would not think reprehensible.

Government by Ideal Costs Little People

BIG CORPORATIONS CAN LIVE WITH GOVERNMENT BY ideal. In truth, they often come to like it. They can cope with its complications because they have in-house staffs and outside lawyers, often hired away from "public interest groups" and EPA. The specialists know that their livelihoods come from the administrative state. The corporations must, of course, pay for the staffs and pollution control itself. But because their large competitors bear a similar burden, the costs can be passed along to consumers.

The compulsive system of crime and punishment is more of a problem for state and local governments, farmers, and small businesses. Also harmed are homeowners or other property owners with wetlands, asbestos, lead paint, or radon problems, for example. Unlike large corporations, those people are not well equipped to deal with highly complex regulatory requirements.

Smaller businesses face additional problems. Quickly growing small firms are kept from building new plants to compete with established firms because the regulations give a large preference to existing plants. Big businesses love the protection from competition. Because big businesses have many ways to use federal regulation to protect themselves from competition, major new EPA regulations sometimes even increase the price of their stock, as Bruce Yandle shows in *Common Sense and Common Law for the Environment.*

Households bear an average annual cost for pollution control of $1,850 per year, according to Allan Carlin in *Environmental Investments: The Cost of a Clean Environment.* That counts only the direct costs of control, such as capital equipment and operating costs. The indirect costs due to paperwork requirements and stifling innovations are larger still. Michael Hazilla and Raymond Kopp's study "Social Cost of Environmental Quality: A General Equilibrium" estimats that the Clean Air and the Clean Water acts alone reduced national income 2 percent by 1981 and 6 percent by 1990. That loss in income grows cumulatively and, moreover, takes account of only two of the many environmental statutes.

Such numbers, by themselves, do not prove that pollution control is too expensive. We gladly would pay more to avoid unmitigated pollution. The question is whether we could get equivalent protection for less. We can. The best estimates are that a more flexible system could have achieved the present level of environmental quality at one-fourth the cost.

Government by Ideal Stifles Initiative and Creativity

WE ARE HURT NOT JUST IN OUR POCKETBOOKS BUT IN our ability to live our lives in ways that are most fulfilling to us. When I talk with friends and neighbors about what they would really like to do, they often mention developing some talent into a little business that they could operate on their own or in conjunction with a few friends. What usually stops their hopes before they stir far is feeling daunted by the various regulatory and record-keeping requirements, of which the environmental laws are but one of many examples. Some people decide to proceed anyway, but illegally. They become new recruits to the underground economy. Others do not go underground, but cut corners and are left worrying about getting caught. Most, however, stay where they are, cogs in large organizations. The large organizations provide the capacity to deal with the government-imposed complication, but at the price of doing things the organization's way. Small businesses are right to see the state as their enemy.

I do not want to exaggerate. Plainly, small businesses continue to flourish. But the drag on individual initiative and creativity is real. When innovators from the private or public sectors explain their success in finding new or better ways to provide people with what they want, the stories they tell often show that it was tougher jumping through the regulatory hoops than coming up with the idea or implementing it. The stories that we do not hear are of the innovations that died because getting the permits was just too expensive, too time consuming, or too discouraging. It is a sign of the times that the artists Christo and Jeanne-Claude, whose projects include wrapping public monuments in gossamer fabrics, make their years-long efforts to get the necessary permits part of the work of art. In art, as it imitates life, government is a drag on individual creativity.

When the state throttles individual initiative, we lose something even more precious than money and what it can buy. We lose society. Marvin Devino, our nearest neighbor in upstate New York, fixes the tractors and trucks of local farmers and loggers not just for money, but also for company. When he complained of being too busy, I told him, as I had learned as a good intellectual, that he might be able to work less and earn more by raising his prices. His reply: "But, then I wouldn't get to see my friends."

Legislation by ideal is puritanical. It upholds virtue in the sense of pious adherence to notions of purity, but destroys virtue in the sense of using our personal powers to express ourselves to the fullest. And it does so relent-

lessly. As the philosopher C.S. Lewis wrote in "The Humanitarian Theory of Punishment,"

> Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometime sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth. Their very kindness stings with intolerable insult. To be "cured" against one's will and cured of a state we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals.

The idealist intellectuals who began pouring out of the top graduate schools in the late 1960s thought of ourselves as committed to peace, freedom, and the love of humanity. Despite our talk of peace and freedom, we launched regulatory systems that work on quasi-military lines and that unnecessarily curb freedom. Despite our talk of love, our idealism has taken a form that is the contrary of love. To love another human is to see that being as a whole and hope for the full realization of that wholeness. To impose idealism on society is to focus on one aspect of other people—their desire for clean air, for instance—and insist that that aspect should trump all others. Such conduct would in the days of the counterculture have been called "laying a guilt trip." The state runs on guilt and anxiety.

The Beauty of the Common Law

BY COMPARISON TO THE ADMINISTRATIVE STATE, THE common law has many beautiful features. First, its rules of liability proscribe conduct that society deems unjust. In contrast, the administrative state's rules of liability are expedients to its ends.

Second, common law decisionmakers (judges)—unlike those of the administrative state (Congress and EPA) —do not gain in power or prestige by changing the rules. Common law rules are, metaphorically speaking, boundaries between holders of rights. Cases arise because of uncertainty about how the boundaries apply in particular instances and so will arise no matter where the boundaries are. Congress, however, gains in power by granting EPA broader jurisdiction, and EPA gains in power by using that jurisdiction aggressively, as when it ratchets up the stringency of its ambient standards. It is an empire builder. That is not what the court had in mind when it stated in the first modern environmental law case that an agency charged with protecting the environment should not be an "umpire blandly calling balls and strikes." (*Scenic Hudson Preservation Conference v. FPC*, 454 F.2d 608, 620 (2d Cir., 1965).)

Third, the common law takes an evolutionary approach to lawmaking, while the administrative state works through great spasms of legislative authorization. As Andrew Morriss points out in his essay in *The Common Law and the Environment: Rethinking the Statutory Basis for Modern Environmental Law,* the common law works in light of the very real facts of real cases while the cataclysmic statutory authorizations of the administrative state are premised perforce on imagined facts. It was imagined facts that gave rise to such goofy notions as "technology forcing," which was supposedly to let us achieve the Clean Air Act's absolute health goals in the 1970s. The common law was tied to real facts because it could issue orders only to those who had been given personal notice and a right to a hearing. In contrast, the administrative state stakes out its turf through abstractly framed authorizing statutes that leave most people uninformed of what is likely to happen to them and give them no personal notice until it is too late.

Fourth, common law rules tend to be cost sensitive, while those of the administrative state are often not even supposed to take cost into account.

Fifth and finally, the common law relies principally on private ordering, while the administrative state, with its command-and-control mindset seeks to order vast swaths of human activity through top-down power. The common law provides rules for dealing with externalities, but otherwise leaves decisions about whether to control pollution—and how—up to private persons. So, for example, the common law prefers compensating or preventing harm rather than requiring adherence to the law as an abstract duty. Also, those with duties and rights under the common law are usually free to trade them. In contrast with the administrative state, all rights are inalienable, and duties may be swapped, as with emissions trading, only if the jealous administrative state approves.

How to Protect the Environment in the Spirit of the Common Law

WE CAN HAVE A WORKABLE POLLUTION CONTROL LAW that is more like the common law and less like the fiats of the administrative state. The place to start is the common law. It is still the chief regulator of pollution, at least between rural neighbors. But it cannot do the whole job.

Supplementing it with legislation *can* be perfectly consistent with the rule of law. Indeed, the common law needs legislation to rescue it when lines of cases go down blind alleys, as Friederich Hayek argued. We also sometimes need legislation to paint bright lines, take account of changes in society, and construct remedies for pollution that is not certain to cause harm but does present significant risk. For Hayek, the key difference between the rule of law and the fiats of the administrative state was not that one was made by judges and the other made by politicians, but that law proscribes only unjust conduct.

There is, of course, no way to guarantee that legislat-

ed law will proscribe only unjust conduct or, indeed, reflect any of the other beautiful attributes of the common law. But we can shift the odds in our favor by changing legislative lawmaking in two fundamental ways.

First, the national government should deal only with those environmental issues that the states are institutionally incompetent to handle. As I have previously argued in REGULATION, that would leave most regulation at the state and local level. There is no intellectually respectable case for the continued national dominance over pollution control. The old case has been decimated by the theoretical work of Richard Revesz, the statistical work of Indur Goklany, and my own work that documents the gap between the promise and performance of the administrative state.

Second, legislation, whether at the federal, state, or local level, should be restricted to enacting rules of conduct rather than such abstract ideals as "protect health." In other words, legislatures should not delegate the power to make law to administrative agencies. I have published a book that shows this is feasible.

These two changes would increase the likelihood that legislated rules of conduct would have the virtues of the common law. The rules would tend to be in accord with the values of society because they would be made by legislators operating locally and accountable to the electorate on a local basis rather than by the functionaries of a national agency largely insulated from popular control. No longer could legislators escape responsibility by enacting pious ideals instead of rules of conduct. Having to take responsibility for the hard choices, they would lose their stake in expanding the power of the state. To the contrary, they would be inclined to intervene only where existing law is deficient. Their intervention would be likely to take the form of limited fixes rather than authorizing the imposition of whole new systems. For example, when Congress found itself forced to enact a rule of conduct to limit emissions of new cars in 1970, it enacted an emission limit only for new cars. The rest of the 1970 Clean Air Act delegated broad-ranging lawmaking power to EPA. But, were delegation foreclosed, further congressional interventions would likely be limited to specific categories of plants, or even specific categories of plants in a specific region. Or Congress would enact common law-like rules of the sort that Professor Thomas Merrill suggests for controlling interstate pollution.

Such lawmaking would tend to replicate additional virtues of the common law. It would be evolutionary rather than cataclysmic, based on real rather than imagined facts, and cost-sensitive rather than pretending to be cost-ignorant. Because particular industries would be targeted, they will press to defend themselves. As a result, the proponents of legislation would bear the burden of showing why the legislation is really needed to prevent harm and is a proportionate response to it. Moreover, because the elected legislators would be responsible for the consequences, they would find it to their advantage to allow scope for private ordering. We see evidence of that in the acid rain program under the 1990 Clean Air Act. With Congress on the hook for the costs, the statute allowed emissions trading.

I do not want to claim too much for the legislative process at the state and local level. It is subject to manipulation by concentrated interests and logrolling. But Congress and the executive branch are fully amenable to the same evils. (In the executive, the pejorative "logrolling" gets the positive spin of "coalition building.") But when the regulations come from state and local legislatures rather than EPA functionaries, we know just whom to blame if we do not like the results. The state and local legislators will be up for reelection soon, and it will not cost a king's ransom to unseat them, or at least make them sweat enough so that they will pay more heed to us.

The results will reflect human foibles, but to reject that is to reject the roots of modern environmentalism. Aldo Leopold, its spiritual father, set out to teach ordinary people about the environment because he believed that those who do not understand nature will make bad decisions about it. No understanding is needed for Congress to promise rosy ideals or for people to put blind faith in their administration by a remote EPA. But its environmental fiats come down from on high, whereas Leopold wanted to save the environment from the bottom up. His vision was not unlike that of the Framers of the Constitution, many of whom were thoughtful naturalists. They sought to root the laws in popular support by requiring that they be made by elected legislators. Such laws will reflect human nature and so therefore will not be perfect. But the quarter century since Earth Day has demonstrated a corollary to Leopold's teaching: those who cannot accept human nature will make bad decisions about how government should protect nature. Democratic accountability should be among the natural resources that environmental law defends.

Readings

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