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FOREWORD

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November 15, 2000, marked the tenth anniversary of the Clean Air Act Amendments of 1990 (CAA). The Public Law Review and Saint Louis University School of Law were fortunate to have some of the nation's most knowledgeable observers of the CAA participate in a symposium marking the decade-long implementation of this landmark environmental legislation. Speakers included Robert Brenner, Don Elliott, Lisa Heinzerling, Stephen Mahfood, Patricia Ross McCubbin, Bill Pedersen, Bill Rosenberg, Chris Schroeder, and Don Toensing. Their contributions were significant and, on behalf of the School of Law, I extend my thanks to all of them. I am also grateful to Robert Wilkinson, Maxine Lipeles, and John Griesbach for moderating panels. I would also like to extend my appreciation to our keynote speaker for the day, Timothy J. Dee, Ph.D., Commissioner of the Division of Air Pollution Control for the City of St. Louis. The staff of the Public Law Review, particularly Ryan Manger and Amy Hoch, also deserve much praise for the professional manner in which they organized and planned for this symposium. The generous and enthusiastic support of Dean Jeffrey Lewis was instrumental in the success of the symposium.

The essays presented in this symposium are organized around three basic themes concerning the implementation of the CAA: Progress and Challenges; Problems That Cross State Lines; and the *American Trucking* case, which at the time of the symposium, was pending before the Supreme Court. These themes certainly do not exhaust the broad scope of the CAA, but they do represent some of the more salient issues that have arisen in the course of the legislation's implementation.

In passing the 1990 amendments, the 101st Congress took some rather bold steps, including stringent new requirements to combat urban smog and control toxic air pollutants, an innovative "cap and trade" program for controlling pollutants that cause acid rain, an ambitious new permitting program, and a

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phase-out of stratospheric ozone depleting substances. President Bush declared the amendments to be "simply the most significant air pollution legislation in our nation's history."[1] Many were alarmed by the ambitious regulatory requirements of the legislation, some even suggesting that its "unduly stringent and extremely costly provisions could seriously threaten this nation's economic expansion."[2] The Wall Street Journal declared that the legislation would "deliver[] only trace benefits in return for enormous costs."[3]

In the ten years since the passage of the CAA amendments, it is safe to conclude that the dire predictions of the naysayers of 1990 have proven to be false. As Robert Brenner reports, the benefits of the legislation have been conservatively estimated to exceed its costs by a margin of 4 to 1.[4] Particularly noteworthy in this regard is the vast differences between the expected and actual costs of implementing stationary source controls on emissions of ozone precursors and sulfur dioxide, as well as the rapid development of substitutes for substances that deplete the stratospheric ozone layer. We now have cleaner air in urban areas, clean cars and fuels, and far less toxic air pollution than would be present absent the 1990 amendments. Additionally, as Stephen Mahfood notes, the 1990 amendments have moved air quality regulation in the direction of greater clarity as to applicable requirements for business through its mandate that many stationary sources secure operating permits.[5] Moreover, it is common knowledge that in the decade following passage of the CAA amendments, the nation experienced a significant economic expansion.

Nevertheless, in many respects, the promise of the 1990 amendments remains unfulfilled. Urban smog remains a significant health threat; implementing potentially new ozone and particulates standards and controlling regional haze will "create some real challenges" for the states and the federal government.[6] Moreover, in today's fractured political climate, legislative and

1. Michael Weisskopf, *Bush Signs Sweeping Air Pollution Controls Into Law*, WASHINGTON POST, Nov. 16, 1990, at A6.

2. Statement attributed to Nobel laureates James Buchanan, Milton Friedman, and George Stigler, in I COMM. ON ENVIRONMENT AND PUBLIC WORKS, U.S. SENATE, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 759 (Comm. Print 1993).

3. *Id.* at 758 (statement of Sen. Symms) (quoting *Clean Air Politics*, WALL STREET JOURNAL, Oct. 19, at A14).

4. Robert D. Brenner, *Clean Air Act: Progress and Challenges Ahead*, 20 ST. LOUIS U. PUB. L. REV. 5, 6 (2001). For a less rosy estimate of the costs and benefits of the Clean Air Act, see Robert W. Hahn, *Regulatory Reform: Assessing the Government's Numbers*, AEI-Brookings Joint Center for Regulatory Studies Working Paper 99-6 (July 1999), *available at* http://www.aei.brookings.org/publications/publications.asp.

5. Stephen Mahfood, *Implementing the 1990 Clean Air Act Amendments: A State Perspective*, 20 ST. LOUIS U. PUB. L. REV. 13, 17 (2001).

6. *Id.* at 18.

administrative refinements to improve the workings of the CAA may be extraordinarily difficult.[7]

Exploring one of the more persistently difficult regulatory problems—emissions from motor vehicles—Professor Chris Schroeder reminds us that assessments of environmental policy cannot usefully be approached by positing a "relationship between policy and politics" as one of "goal and obstacle."[8] Professor Schroeder notes that regulation has "achieved genuine and significant reductions" in pollutants from motor vehicles but has also missed opportunities for more substantial gains because we have shied away from strategies that are unpopular with the American public. Under a "recipe view of the relationship between policy and politics," however, "falling short of policy perfection is not a sufficient ground for condemning the policies that democratic institutions have promulgated."[9]

Innovations may also come in somewhat unexpected areas, as Professor McCubbin points out in her discussion of EPA's innovative—and highly controversial—efforts to deal with ozone transport.[10] EPA has high hopes that this unprecedented regulatory action—which will affect "nearly half the nation"[11]—will move the nation as a whole within striking distance of solving the seemingly intractable problem of urban smog. Professor McCubbin, who argued the case on behalf of the government, concludes that, by employing an approach that seeks to reconcile cost-effectiveness with good neighborliness among the states, EPA's action, "while appearing to restrict the states' choices . . . preserv[es] the careful balance of authority mandated by the cooperative federalism of the Clean Air Act."[12]

In my own contribution to the symposium, I take up the issue of cooperative federalism and defend the Clean Air Act's strategy of using national ambient air quality standards. Contrary to longstanding criticism, the national ambient standards, as the center of the CAA, represent a responsible strategy for dealing with the inevitable "slippage" between theory and practice, as well as promising effective and politically pragmatic incentives for improving the performance of our regulatory system and the manner in which we view shared national commitments.[13]

7. Brenner, *supra* note 4, at 6-7; Mahfood, *supra* note 5, at 16.

8. Christopher H. Schroeder, *Regulating Automobile Pollution: An Environmental Success Story for Democracy?*, 20 ST. LOUIS U. PUB. L. REV. 19, 25 (2001).

9. *Id.* at 44.

10. Patricia Ross McCubbin, Michigan v. EPA: *Interstate Ozone Pollution and EPA's "Nox SIP Call,"* 20 ST. LOUIS U. PUB. L. REV. 45 (2001).

11. *Id.* at 46.

12. *Id*. at 64.

13. Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 ST. LOUIS PUB. L. REV. 65 (2001).

The CAA's adoption of national ambient air quality standards also provides the backdrop for one of the most important environmental decisions rendered by the Supreme Court. In *Whitman v. American Trucking Assns*,[14] the Court turned back a constitutional challenge to the Clean Air Act, reversing a shocking opinion by the D.C. Circuit. The lower court had concluded that EPA's approach to setting ambient standards "lacked any determinate criteria for drawing lines" and, therefore, violated the virtually moribund "nondelegation doctrine."[15] At the same time, the D.C. Circuit affirmed the long-standing understanding that the CAA prohibited EPA from considering costs in setting ambient standards—a decision that the Supreme Court unanimously upheld.[16]

The symposium, while lacking the benefit of the Court's decision at the time the symposium was held, was fortunate to have two of nation's leading scholars on the CAA address the issues raised by the D.C. Circuit's decision—Professor Lisa Heinzerling and Bill Pederson, both of whom participated in the *American Trucking* litigation. Professor Heinzerling provides an exhaustive history of standard-setting under the CAA and mounts a devastating critique of the D.C. Circuit's decision. Bill Pedersen advances the case for requiring EPA to consider costs in setting standards, concluding that "precisely because considering costs in evaluating the meaning of uncertain data corresponds so precisely to how such decisions are ordinarily made in the absence of legal constraint, it is hard to see what justification EPA could offer for departing from that course if it could not rely on the trump card of legislative command."[17] While the Court concluded that EPA could properly rely on the "trump card of legislative command," the CAA's "cost-blind" approach to setting standards will no doubt continue to generate controversy and proposals for legislative reform, particularly as the Bush administration faces the prospect of implementing more stringent standards for ozone and particulate matter.

As we move into the new millennium and the second decade of the 1990 amendments, we should all be thankful for the aggressive measures we have been able to implement in support of protecting the public health, particularly our most vulnerable populations. We can no doubt make improvements—and some are sorely needed—but one can only marvel at the manner in which the CAA tackles the complex and politically sensitive task of clearing the air. We have much to learn, but there is a great deal of wisdom and understanding that can be gleaned from our experience with the 1990 amendments. I feel

14. 531 U.S. 457, 121 S. Ct. 903 (2001).

15. *American Trucking Assns., Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

16. *Whitman*, 121 S. Ct. at 911.

17. William F. Pedersen, *Costs Matter: Effective Air Quality Regulation in a Risky World*, 20 ST. LOUIS U. PUB. L. REV. 151, 158 (2001).

confident that the symposium makes a substantial contribution both to that understanding and the prospects for creative and effective reform in the years ahead.