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*Time for the Federal  
Environmental Aristocracy  
to Give Up Power*

by David Schoenbrod

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# **Time for the Federal Environmental Aristocracy to Give Up Power**

by David Schoenbrod

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## Introduction

Beginning in 1970, the federal government seized the environmental issue from the states, set an obligatory regulatory agenda down to the farm and septic tank level, and harnessed the states to do the federal bidding. In the process, governors, mayors, state legislators, and town council members lost the power to resolve even the most local of environmental issues. These state and local officials must follow instructions that come down from on high in Washington instead of responding to the wishes of the voters who elected them, the people most directly concerned.

Local pollution sources are, by and large, the ones having the greatest effect on our home environments. Responding to these local pollution problems accounts for most of the money we spend on pollution control — either directly by paying higher taxes and higher prices or indirectly by receiving smaller incomes as regulation dampens economic growth. With our home environments and our home economies at stake, it is terribly important that these local environmental problems be solved adequately and sensibly.

The federal instructions evolve through the complex interplay between members of Congress, their staffs, the president, the vice president, the staffs of the White House and the surrounding presidential and vice presidential complexes, the political appointees at the top of the Environmental Protection Agency (EPA), the agency's 18,000 permanent employees, and the other centers of power in Washington. Those most concerned with federal environmental regulations include businesses that must control emissions or whose products may have environmental impacts, businesses that sell pollution control services, "public interest groups," and even the bypassed state and local officials. It would be naive to suppose that any of this cast of characters is immune to the temptation of putting self-interest above principle. If we are to have any faith in the federal instructions, it is not because only the virtuous have a hand in their writing.

No elected official is directly responsible to local voters for federal regulations. Congress and the president enact idealistic but detailed statutes that deflect the hard choices. Regulations are handed down later on the EPA's letterhead. Only after the EPA applies them in local cases does anyone know what pollution control strategies must be implemented, what forms must be filled out,

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and what permissions must be secured. By that time, members of Congress and the president are so far up the chain of command that they escape political responsibility. Thus, an unaccountable elite — a federal environmental aristocracy — holds the reins of power in resolving local environmental issues. The upshot is that voters have no meaningful control over how the federal government dictates the solution to the environmental problems in their own back yards. Perhaps that is why the public, in opinion polls, supports shifting power over environmental protection from Washington to the states and cities.<sup>2</sup>

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*An unaccountable elite — a federal environmental aristocracy — holds the reins of power in resolving local environmental issues.*

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Even if, by some miracle, all members of that aristocracy were driven by only the most altruistic of motives, they would fail to provide sensible solutions to local environmental issues. The federal instructions are meant to apply all across the country. Yet, the country is amazingly diverse. There are huge differences between the large numbers of local environments, industries, facilities within any one industry, and sources emitting pollution at any one large facility. The EPA's instructions must apply not just to air pollution but also to a dizzying array of other environmental issues. The numbers of complex matters that the EPA regulates surpasses that taken on by any other governmental organization since the Office of Price Administration controlled the prices of all goods during World War II. But, EPA control has become far more permanent and deals with matters that are far more complicated. According to Professor Richard Stewart of New York University School of Law, "the system has grown to the point where it amounts to nothing less than a massive effort at Soviet-style planning of the economy to achieve environmental goals."<sup>3</sup> No organization could hope to deal sensibly with such complexity. As a result, the federal take-over of environmental law imposes vast waste and needless regulatory complication, yet sometimes fails to clean up local environmental problems expeditiously.

This study argues that the popular desire for a clean environment can be realized with far more common sense by returning control of local environmental issues to state and local government.

The EPA would still have a job to do, but it would be limited to federal business.

## Why Washington Has Control

The late sixties and early seventies were a time of panic, not just about the environment, but also Vietnam, urban riots, and the ability of government at any level to respond to human needs. The desperate times produced martial measures. The response to Vietnam was war, the response to poverty was called a “war,” and the response to pollution was sufficiently warlike that national politicians could boast that they had assured victory as soon as Congress enacted statutes.

A federal chain of command was established in which Congress gives instructions to the EPA about how it should give instructions to the states about how they should deal with all environmental problems. The statutes and regulations purport to take account of every conceivable contingency. They also order the states to submit back up the chain of command plans and reports, in minute detail, on what they will do and have done to carry out the national battle plan. Not for nothing is this called “command and control” regulation.

After Congress enacted a host of federal statutes in the 1970s, environmental quality improved and the panic ebbed. From this, many people concluded that the federal government must continue to control environment issues. But, why should this be so? Three reasons are usually given: (1) only the federal government can deal with interstate pollution; (2) the states can’t deal with pollution because they are competing to attract employers; and (3) the states’ record before 1970 showed that they are ineffective at controlling pollution. None of these reasons survives careful scrutiny.

### Interstate Pollution

One rationale for nationalizing pollution control is that pollution crosses state boundaries. It is true that states *may* fail to set reasonable standards for interstate pollution because state officials feel no political pressure to take account of the harm that their own constituents do to people living in other states. But, a pollution source that hurts those in other states usually causes even more hurt locally. So, states have adequate incentive to regulate most pollution sources. Concerns about interstate pollution justify a federal role only in regulating the exceptions.

Moreover, the federal government itself has systematically

failed to address interstate pollution adequately. Consider the first and largest single step in the national environmental takeover, the Clean Air Act amendments of 1970. The heart of the Clean Air Act is this: states must adopt and agree to implement plans to achieve the mandatory national ambient air-quality standards. The statute requires the EPA to disapprove a state's implementation plan if it would fail to achieve the national goals within the state or allow pollution that significantly interferes with a downwind state's ability to achieve those goals. The EPA routinely enforces the *in state* requirement, but, thus far, has not enforced the *interstate* requirement.

This weird spectacle of the federal government concerning itself with intrastate but not interstate pollution actually increased interstate pollution. Electric utilities met the requirement to reduce in-state pollution by building tall stacks to carry the pollution out of state. The number of smoke stacks taller than 500 feet grew from 2 in 1970 to 180 in 1985, with 23 of these stacks over 1,000 feet tall, all paid for by consumers. Congress later decreed that tall stacks should not count as a means to control local pollution. That eliminated the federally created incentive to send pollution out of state but did nothing to curb the interstate pollution that justified federal involvement in the first place. The EPA has still never ruled against interstate pollution, despite many complaints from downwind states over the past quarter century.

It was only in 1990 that Congress included a provision in the Clean Air Act that deals selectively with one important kind of interstate pollution. Interstate pollution was an afterthought, not the reason for the federal takeover of air pollution regulation.

Other federal environmental statutes also focus primarily on intrastate pollution. The acts dealing with disposal of toxic wastes and cleanup of abandoned toxic waste sites (the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation, and Liability Act) seek primarily to protect groundwater and soil. These are almost entirely local issues. Similarly, the Surface Mining Control and Reclamation Act aims primarily at restoring landscape contours, a quintessential local issue. Controlling the runoff from mines into streams and rivers is a secondary consideration. Likewise, the Safe Drinking Water Act deals with the local distribution of water.

In sum, the federal government deals largely with intrastate and not interstate pollution. Thus, the national takeover of environmental law is founded on the premise that Washington should regulate *local* pollution.

## Race-to-the-Bottom

The federal environmental aristocracy claims that the states are inherently incapable of making good decisions even on local pollution because they compete to attract employers. As the argument goes, each state would set ever lower environmental standards, producing a “race to the bottom.”

It is true that states do consider competition for jobs when they attempt to address environmental problems. But sellers of goods also take account of the competition for customers in setting prices. The question is, why isn't such competition between states, as with sellers, a good thing?

The New Dealers, in their early years in office, believed that competition among sellers was inherently disastrous because they would engage in a race to the bottom price and end up bankrupt. The New Deal tried to control all prices through the National Recovery Act, which allowed businesses to collude on prices. Soon, however, the Supreme Court ruled the government-sanctioned cartels unconstitutional, and economists showed that price competition produces a race to the bottom only in rare circumstances. The New Dealers then decided that the problem was a lack of competition, not too much.

Those who engineered the national takeover of environmental regulation presumed that there was such a race to the bottom because they wanted more stringent regulations and could get them most conveniently from Washington. Professor Richard Revesz of the New York University School of Law has shown that “race-to-the-bottom arguments in the environmental area have been made for the last two decades with essentially no theoretical foundation.”<sup>4</sup> Revesz has not proven that there never could be such a race, but he has shown that it was not the real reason for the national takeover. The clincher is that Washington has taken control of many environmental issues for which a race to the bottom is impossible because the problem is uniquely local — for example, abandoned waste sites.

The race-to-the-bottom argument does not justify the continued national control of local pollution. The argument focuses upon just one determinant of state environmental policy — the competition to attract employers — ignoring other determinants such as the public's wish to avoid pollution. Efforts to site pollution sources have been met with NIMBY responses — “not in my back yard.” NIMBY is a race-to-the-top. The federal environmental aristocrats deplore both race-to-the-bottom and NIMBY. In one thing only are they constant: they should shoulder the experts' burden of sup-

planting the decisions of the communities affected.

Moreover, states know that a good environment often helps to attract employers. Competition to attract employers sometimes encourages stronger, not weaker, environmental regulation. After all, more employees these days sit in front of keyboards rather than stand under dirty smoke stacks, especially in the industries with the most flexibility as to location. In deciding where to locate new facilities, owners and managers want an environment that is safe and attractive, whether for their own families or for those of the employees they hope to recruit in a nationally competitive job market.

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*The race-to-the-bottom argument neither  
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with experience.*

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The federal environmental regulators would not dare follow their race-to-the-bottom excuse to its logical conclusion. Then, they would have to support national control of property taxes, primary and secondary education, and all other actions of state and local government that would tend to affect industrial location. Indeed, they could not stop at national control, because the competition to attract employers is increasingly international.<sup>5</sup> To avoid an international race-to-the-bottom, they would have to favor subjecting all such decisions to international control.

Fortunately, the race-to-the-bottom argument neither makes sense nor corresponds with experience. If the phenomenon exists, it would have been evident before the Clean Air Act of 1970. But, that race took place only in the flawed memories of federal environmental aristocrats.

### **The Supposed Failure of the States**

The sponsors of the Clean Air Act amendments of 1970 reasoned that Washington must take over because the states had failed to protect local air quality. But, this case has been asserted, not proven. With the emergence of the environmental movement in the 1960s, many state and local governments responded to public pressure for a cleaner environment by enacting broader pollution-control laws. According to a Brookings Institution study, the pollu-

tion limits on stationary sources that the states enacted in the 1960s, when the states were still in control, reduced pollution three times as much as those enacted under the auspices of the federal government in the 1970s.<sup>6</sup>

The federal government, in fact, first involved itself in the substance of air pollution regulation to *thwart* aggressive state action.<sup>7</sup> In the early 1960s, automobile manufacturers, worried that many states might impose strict and differing emission limits on new cars, sought advice from Lloyd Cutler, an eminent Washington lawyer, former New Dealer, and later counsel to President Carter. Cutler suggested that the manufacturers get Congress to give the Department of Health, Education, and Welfare (this was before the creation of the EPA in 1970) the authority to regulate emissions from new cars. The thinking was that the companies could keep the department from imposing expensive pollution-reduction measures, but that the existence of this national authority would be a powerful argument against state regulation.

Congress obliged the auto manufacturers and in 1967 it prohibited most states from regulating new-car emissions. The 1967 statute also protected public utilities by requiring states to follow a complicated process that was likely to delay and weaken any controls applied to them. The federal government failed to act on interstate pollution and lead in gasoline, and it made auto manufacturers spend only a few dollars per car to control emissions.

Then, in 1970, the political winds shifted in Washington. Earth Day and a series of acute air pollution episodes on the East and West Coasts brought air quality to the top of the national political agenda. Ralph Nader published a study in which he accused Senator Edmund Muskie of selling out to polluters.<sup>8</sup> Muskie had hoped to ride to the presidency in 1972 as the environmental champion. A bidding war commenced in which President Nixon, Senator Muskie, and other legislators seeking the 1972 Democratic presidential nomination vied to be the environmental champion by proposing the toughest air-pollution bill.

The result was the 1970 amendments to the Clean Air Act. The amendments regulated new cars with vigor and also, as the first step in the national takeover, required the states to regulate stationary sources to achieve national air-pollution goals. As the Supreme Court later put it, "Congress reacted by taking a stick to the states."<sup>9</sup> The EPA claims that this radically reduced pollution from stationary sources. But, according to Brookings Institution scholar Robert Crandall, "Assertions about the tremendous strides the EPA has made . . . are mostly religious sentiment."<sup>10</sup>

Indur M. Goklany, manager of science and engineering in the Office of Policy Analysis at the Department of Interior, has compiled and analyzed data on air pollution in the United States from 1900 to the present in a systematic search for evidence of a race to the bottom or other evidence that states cannot cope with pollution problems.<sup>11</sup> His analysis shows that prosperity and technology brought the same sequence of events for each pollutant — increases in the pollutant's emissions triggered a recognition of its danger, which prompted discovery of means to control it and ultimately a reduction of its emissions.

Goklany found that different pollutants went through this cycle at different times. For particulates and sulfur dioxide, the reductions came *before* the federalization of pollution control. For carbon monoxide, reductions were just beginning as federalization began. In addition, Goklany found that local and state air programs grew significantly prior to the mid-1960s. He also pointed out that localities advertise their good environmental quality to attract employers. So, he concludes, "While the race-to-the-bottom rationale may well have seemed valid for a brief period in this nation's economic development, affluence and technology have largely invalidated that argument for Federal intervention."<sup>12</sup>

Crandall's and Goklany's data suggest that the national take-over took place as air quality was already getting better because of improving technology, increasing prosperity, and popular demand. The federal government took credit for the improvement that was already in the works much as a crafty rainmaker might boast during the rainy season that he made the clouds weep.

In sum, the rationales for federal control of local pollution are without substance. The federal environmental aristocrats are wearing no clothes.

## The Costs of Remote Control

Without remote control from Washington, we could dispense with the flood of regulations flowing down the federal chain of command. The source of this cascade of words is a thick volume of statutes in fine print. As the cascade flows by the EPA, it spreads to fill enough volumes of agency regulations, printed in double columns, to fill a 2 foot shelf.

The EPA regulations are so lengthy partly because those who write them respond more to pressures from within the agency to enlarge and protect its power than to the public's need for clear, concise rules. The problem is not that the agency is oversolicitous of the environment; it is that it is oversolicitous of itself. So, the

regulations construe the agency's power as broadly as possible and then respond to the obvious instances of overreacting by providing a slew of narrowly defined exceptions. Thus, under a statute regulating the handling of hazardous wastes, the agency takes 17 pages to define "hazardous waste." The definition reads as if written by Monty Python's John Cleese.

As the cascade of words goes by the lower reaches of the EPA, it spreads out still further in the form of EPA "guidance" documents. (You can see why guidance is necessary.) One subset of the guidance documents for one of the dozens of federal statutes, Superfund, fills thirteen loose-leaf notebooks. There are probably twice as many guidance documents for that particular statute, but no one knows for sure because the agency itself has been unable to assemble a complete collection.

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As the paper flood reaches the states, it spreads still further in the form of state legislation and then state regulations, all of which must take the form mandated by federal instructions. The cascade keeps spreading. The states must submit plans to the EPA to show that the federal instructions will be implemented. The plans are usually not documents in the ordinary sense of the word, but often are filing cabinets full of submissions from the state to EPA officials. Finally, state and local government and pollution sources must submit reports to show that the federal instructions were carried out.

This system is immensely wasteful. It wastes time, the legitimacy of the law, and money.

### **The Waste of Time**

Recall the two-foot shelf of EPA regulations. It is a codification of thousands of regulations which the agency has separately promulgated over the years. Any one of these can take years of ad-

ministrative and judicial proceedings to develop. Such proceedings often occupy the time of hundreds of employees of federal agencies and federal contractors and hundreds or thousands of employees of state and local government and businesses. Moreover, once promulgated, the regulation sets in motion requirements for paperwork that, in themselves, do nothing to clean the environment. This chain of command would be largely unnecessary in a system not run from Washington; so, too, would be most of the EPA's 18,000 employees.

States and cities, if left to their own devices, would not adopt such a compulsive style of environmental regulation. State and local officials would be more prone to assess particular problems as they arise and decide what should be done, just as sensible human beings handle issues that arise in their personal lives. Local officials, working with the operators and neighbors of a pollution source, could craft solutions that make sense in the context of the specific problem. That is impossible when all solutions must hew to federal rules. While the waste of people's time is vast, it is chiefly important as a marker of something more subtle, the loss of flexibility that comes from trying to run society along quasi-military lines.

### **The Waste of Law's Legitimacy**

A recently published environmental law treatise acknowledges that "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."<sup>13</sup> Former colleagues of mine at the Natural Resources Defense Council who now help corporations with environmental compliance tell me the same: their clients can't help but violate the law, no matter how hard they try, because the legal requirements are just too complex and too confusing. This confusion and complexity is a direct result of the needless federal chain of command. When the law, especially the criminal law, cannot be obeyed, it loses its legitimacy.

### **The Waste of Money**

Professors Henry N. Butler of the University of Kansas and Jonathan R. Macey of Cornell University speak for many liberal and conservative scholars in concluding that the "command and control regulatory strategy. . . has not set intelligent priorities, has squandered resources devoted to environmental quality, has discouraged environmentally superior technologies, and has imposed unnecessary penalties on innovation and investment."<sup>14</sup> No

wonder. People sitting in Washington are trying to choreograph all of the environmentally related activities in the United States in the face of wide disparities in local conditions and ceaseless changes in our understanding of environmental problems and pollution-control technology.

There is no reason to think that such centralized planning would work any better in running the American environment than in running the Soviet economy. Moreover, our centralized planners, unlike their Soviet counterparts, have to brook the interference of members of Congress doing casework for constituents and contributors and the intervention of federal judges. As Professor Richard Stewart puts it, the federal chain of command is a “self contradictory attempt at central planning through litigation.”<sup>15</sup>

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Scholars holding diverse political perspectives have suggested pollution taxes, emissions trading, greater reliance on the common law, and other radical alternatives to Washington’s command-and-control approach. Others, such as former EPA Administrator William Ruckelshaus, have criticized the federal approach under which there are separate regulatory schemes for air pollution, water pollution, and so on.<sup>16</sup> They suggest, instead, that plants be looked at holistically in order to produce better overall environmental quality at lower costs. Such innovation is impossible, however, without local control.

The potential savings from local flexibility are immense. For example, Amoco and the EPA jointly studied the operation of one refinery to determine the consequences of allowing more flexibility. The study found that the refinery could achieve “about 97 percent of the release reductions that regulatory and statutory programs require for about 25 percent of today’s costs for these programs.”<sup>17</sup> The study concluded that these huge savings came from the refinery operators being freed from regulatory restrictions on *how* they reduced pollution. Similarly, many studies suggest that more market-oriented approaches would have reduced pollution to present levels at only a quarter the cost of command and control regulation.<sup>18</sup>

Saving three-quarters of pollution control spending to get the same pollution control “bang” would make a huge difference. We are spending \$1,850 per household annually on pollution control.<sup>19</sup> This figure represents only the direct costs of pollution control in terms of capital equipment and operating costs. The current regime of pollution control also has immense indirect costs by imposing paperwork requirements and discouraging new plants and innovations. One study estimated that the Clean Air and the Clean Water acts alone reduced national income 2 percent by 1981 and 6 percent by 1990.<sup>20</sup> This loss in income grows cumulatively and, moreover, takes account of only two of the many environmental statutes. As a result, the total loss to take home income today is a multiple of 6 percent.

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Ending federal control of local environmental problems is not the same thing as adopting flexible approaches to pollution reduction, but it is a parallel path to the same end — protecting the environment at a far lower cost. Some states and localities might still use command and control regulation. But, even so, command and control regulation at the state and local level is likely to be far more efficient than the federally mandated version because the states and municipalities are far more able than the federal government to adapt regulations to local conditions. More fundamentally, states and localities have every reason to explore flexible alternatives to command and control because they feel the pressure to find efficient means to accommodate local environmental and economic concerns. In contrast, the EPA inevitably resists flexible approaches in order to maintain its own power.

The EPA, of course, feels compelled by public resentment of its heavy hand to claim that it favors experiments and flexibility. EPA Administrator Carol Browner’s list of “Recent EPA Accomplishments” is headed by items claiming to ease regulatory burdens.<sup>21</sup> She claims that the agency cut 15 million hours of required paperwork for business and communities at the beginning of 1995 and would cut another 8 million hours by the end of 1996. According to her account, the majority of these requirements were unnecessary.

There is no explanation of why the agency imposed unnecessary requirements in the first place or how many hours of paperwork are still required.

Browner also points to “Project XL,” the “Common Sense Initiative,” and the “Environmental Leadership Program” as evidence of greater innovation and flexibility. These programs promise that the EPA will give businesses and communities flexibility in how they meet environmental requirements if they can show they will use the flexibility to improve the environment beyond existing standards. These programs let the EPA embrace all the right buzzwords, yet retain control.

The EPA does not make the programs widely available, and the paperwork requirements to qualify are so cumbersome that few businesses or communities find them worthwhile. According to a recent report from the National Academy of Public Administration, “the vast majority of the EPA’s work and workers have been untouched by any of the reinvention initiatives. The rank-and-file EPA employee is skeptical, at best, of the initiatives.”<sup>22</sup> Commissioner Peder Larson of the Minnesota Pollution Control Board, says that the EPA makes the costs to get into these special projects so large that corporations generally get involved “only because the chief executive officer is personally interested, not because there is any payoff for their bottom line.”<sup>23</sup>

In short, the EPA is out to co-opt the flexibility issue rather than give up any real power. The agency’s true intent became apparent after state commissioners seized upon President Clinton’s and Vice President Al Gore’s promises during the 1996 election campaign to let states and businesses find smarter, cheaper ways of protecting the environment. Prior to the election, the commissioners got the blessings of Administrator Browner to negotiate with EPA staff to “reinvent government.” Four months of hard bargaining produced a 16-page agreement allowing the states to deviate from rigid federal requirements when the EPA agrees that such innovations would save money and not harm environmental quality.<sup>24</sup>

Suddenly, in February, after the election, the EPA official in charge of the talks killed the deal. In a “Dear Reinvention Ombudspersons” letter, Deputy Administrator Fred Hansen wrote that the states would be allowed to try only “minor, and I stress minor, changes.”<sup>25</sup> Moreover, the EPA would get to decide how the states’ savings would be spent. This last demand makes clear that the EPA intends to maintain its share of power over the economy rather than enforce its environmental standards. The next day, the commissioners fired back a letter about “damaged trust” and “gross error.”<sup>26</sup>

Why did the EPA insult the state agencies? It had good reason to fear that the states would succeed. The philosophy of “reinventing government,” if taken seriously, is that those closer to a problem can solve it better. Given the opportunity, the states could reduce environmental costs without sacrificing environmental quality.

Environmental policy might go the way of welfare — successful, federally sanctioned state experiments could lead to a wholesale devolution of power. This would be a disaster for the national environmental groups whose power is rooted in EPA regulation and for their political ally, Vice President Al Gore. They had the motive and the power to force Mr. Hansen to take the blame for killing the deal.

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*Environmental policy might go the way of welfare — successful, federally sanctioned state experiments could lead to a wholesale devolution of power.*

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When I leveled these charges against the EPA in an editorial page column in *The Wall Street Journal* on May, 8, 1997, I expected that Browner would mount some defense.<sup>27</sup> Instead, the EPA responded to my accusation and demands from state commissioners for congressional intervention by reopening negotiations with the states. A new draft agreement commits the EPA to look at state proposals for innovative approaches, but leaves it with broad discretion to disapprove them.<sup>28</sup> If this deal goes through, and it may not because it gives so little to the states and will upset national environmental groups, it won't mean much. The EPA has broad discretion to demand cumbersome paperwork from the states and to kill the request in the end anyway. Thus, the agency gives ground by inches — grudgingly, slowly, and at maximum cost to those who want more flexibility.

The EPA should not have the power to make those who want local flexibility claw for it inch by inch. Rather, the agency should be forced to demonstrate why environmental matters should be ruled from Washington. It could carry that burden for only a tiny portion of its present jurisdiction. It would have to relinquish most of its present power.

In contrast, states are more open to real experimentation; and it makes more sense to experiment one state at a time. State and local environmental agencies continue to develop innovative approaches to every type of pollution problem despite federal mandates consuming such a large proportion of their energy and resources. The drive is there at the state and local level for the same reason that states and localities spearheaded environmental improvement before 1970 — officials closest to the citizens who experience the pollution and to the facilities that are regulated are most aware of need to find sensible solutions. But, the innovations of the state and local agencies went largely unrecognized because, until recently, they lacked any collective apparatus for publicizing their accomplishments. (In contrast, the EPA spends heavily on self-promotion.) Now, however, the fledgling Environmental Council of the States, an association of state environmental commissioners, is beginning to get the story out.<sup>29</sup>

The framers of the Constitution wanted to let the states serve as laboratories for different policies. The federal chain of command kills state-by-state experiment. But, experiment is what we need.

## The Harm to Democracy

The national takeover of environmental protection virtually destroys accountability to the public. This is so for three reasons.

First, attempting to protect the nation's environment from one central location, Washington, D.C., is such a massive undertaking that Congress has a ready excuse for failing to discharge its own constitutional obligation to make law. Instead of enacting the environmental law in statutes, Congress enacts statutes that tell the EPA to make the law by promulgating regulations. Thus, the law is made by bureaucrats rather than legislators directly accountable to voters.<sup>30</sup>

Second, voters upset about how a state or local government has handled an environmental problem can have a real impact in the next election. When the decisions on local problems are dictated by Washington bureaucrats, the same voters' concerns will count for far less in a national election.

Third, by imposing federal mandates on state and local government, Congress and the president take credit for the benefits of environmental programs. Blame for the concomitant costs, however, are placed on the EPA or on state and local officials.

Popular revulsion at such federal opportunism resulted in the

passage of the Unfunded Mandates Reform Act of 1995. The act is an attempt to keep Congress from imposing requirements on state and local governments without providing the necessary funds to implement them. In other words, if Washington politicians take credit for the benefits promised by a new mandate, they must also take responsibility for the costs to lower levels of government of carrying out the mandate.

But, as is well known, the act leaves in place all preexisting statutes that authorize federal agencies to impose mandates. So, the EPA can continue to impose new requirements so long as it acts under statutes enacted before the Unfunded Mandates Reform Act of 1995. In reality, the act exempts all important environmental statutes.

As is less well known, the act does not stop Congress from requiring states to impose costs on private citizens. Congress can still mandate states to regulate or tax without taking responsibility for the costs. Thus, the federal government can still make state and local officials take the blame for making citizens spend money out of their own pockets. The most important mandates in federal environmental statutes require states to regulate the private sector. For example, the requirement that states adopt implementation plans under the Clean Air Act is a federal requirement to regulate.

There are also instances of federal environmental statutes that mandate state taxes. For instance, Title V of the Clean Air Act amendments of 1990, which requires air polluters to secure permits from states, is a mandate to tax. Prior to 1990, most polluters did not have to get permits, yet they still had to comply with emission limitations. Now, polluters must obtain a permit and also pay a "permit fee" at a level that the EPA deems sufficient to fund the bulk of the state's air-pollution control program, not just the cost of issuing the permit. The "permit fee" is a tax in disguise.

So, while state pollution officials previously had to get approval for their budgets from state legislators who also had to take responsibility for the taxes needed to fund the budgets, unelected federal officials now supplant the budgetary and taxing authority of elected state officials. The State and Territorial Air Pollution Program Administrators Association and the Association of Local Air Pollution Control Officials vigorously supported the federal mandate for permits and federal mandates in general. After all, the federally mandated permit fee amounts to a "Full Employment for Air Pollution Officials Act."

## How to Limit the Federal Government to Federal Issues

The framers of the Constitution believed that issues should be left with states and their subdivisions, unless they are demonstrably incompetent to handle them. The same spirit should guide Congress today. It should leave pollution control to state and local governments except where they are demonstrable incompetent. As a result, the EPA would have only three tasks to perform.

First, the EPA should provide information on environmental problems. It should gather and publicize data on pollution levels and their consequences, both on the national and the local level. It should also evaluate pollution control technology. Finally, it should draft model state environmental laws and publish policy studies that states could use in considering whether to enact such laws. By providing this information, the federal government would help states avoid wasteful duplication of each others' efforts and ensure the free flow of information to states, their subdivisions, and voters.

It is important to emphasize, however, that this federal role is limited to providing information. It would be up to state and local government to decide whether to enact the federal recommendations.

Second, the EPA should propose to Congress rules of conduct to control pollution when state environmental controls fail to stop unacceptable interstate pollution or when federal properties require special protection, such as the Grand Canyon. This is not to say that the federal government should establish rules to control all "interstate pollution." If that were so, all pollution would have to be regulated federally because all emissions, even those from a home furnace, put some molecules across the state line. Because most of the effects from most pollution sources are felt in-state, however, individual states are adequately motivated to regulate most pollution.

Even where there is much cross-border pollution, as where two states border on the same lake, the states may deal with the issue through an interstate compact or less formal means of cooperation. Congress could encourage such cooperation by enacting the proposal of Professor Thomas W. Merrill of the Northwestern University School of Law calling for a "golden rule of interstate pollution."<sup>31</sup> Each state must legally protect citizens of other states as they protect their own. Disputes over interstate pollution that states do not prevent individually could be settled by negotiations between the states or, failing that, by federal courts enforcing these general rules. Thus, the federal government would provide general rules

establishing the respective obligations of the states on cross-boundary pollution. The states would then regulate local sources within those parameters.<sup>32</sup>

Thus, states acting alone or through interstate compacts, as well as general rules enforced by courts, should adequately address most interstate pollution. If unacceptable problems remain, they should not warrant Congress to control *all* interstate pollution. Rather, Congress should tailor its response to the problematic region or industry.

Just as the federal government need not regulate most interstate pollution, it also need not regulate pollution simply because it will touch a federal property. Some molecules of emissions from a home furnace will undoubtedly strike a federal office building, but there is no reason to suppose that the state will not adequately protect that federal building in the course of protecting other nearby property. Where, however, the federal government is concerned about some federal resource which needs special kinds of protection from pollution, such as the visibility in the great national parks, and a state fails to provide that protection, then there is reason for Congress to act.

Third, the EPA should propose rules of conduct to Congress for goods, such as new cars, when state-by-state regulation would erect significant barriers to interstate commerce.

In no circumstance should the federal government mandate state action. In the limited circumstances where there is a federal job, the federal government should do it. Otherwise, the temptation for Congress to play the mandate game would be too great.

Applying these rules would radically contract the federal role. Take air pollution, for example. Federal control is now pervasive, either through direct federal regulation or federal mandates to the states. Under this proposal, states would be under no federal mandates and the federal role would, in the first instance, be limited to new cars and enacting general rules of the sort recommended by Professor Merrill.<sup>33</sup> Instead of assuming that interstate pollution would not be adequately controlled, the federal government should watch what is done by the states and courts and be prepared to step in if it appears that unacceptable interstate harm might occur.

Water pollution — whether of rivers, lakes, or aquifers — could be handled analogously.

There is no substantial interstate impact and no substantial risk of patchwork regulation resulting from state regulation of such issues as the safety of drinking water, pollution from underground storage tanks or abandoned hazardous waste sites, asbestos in schools or other buildings, radon in houses, or lead paint or lead

plumbing in housing. These are important issues, but they are not federal ones.

This proposal suggests that many federal programs should be largely eliminated, with a remnant still operated by the federal government. For example, the federal government should no longer regulate the storage and disposal of hazardous waste under the Resource Conservation and Recovery Act. The effects are almost entirely intrastate. On the other hand, there would be unacceptable interstate harm if wastes from one state were illegally dumped in another state. Thus, the federal government could continue to provide a system to track hazardous waste shipments to the proper disposal site. The system could be mandatory for interstate shipments, with states given the option of requiring it for intrastate shipments.

### EPA Reactions

I first suggested such a radical reduction in the national role for pollution control at a conference attended largely by EPA officials, and former-EPA officials (whose law practices are built upon their knowledge of the agency's inner-workings). They reacted as if I had released a mouse under their chairs. However, they posed only three arguments, each of which reveals much of what is wrong with the federal environmental aristocracy.

First, they argued that many state pollution-control agencies are short of staff. Of course their concept of the "work that needs to be done" is based on their belief that the cascade of words from the federal chain of command is actually useful. Much of federal environmental officials' time is spent telling state and local officials what to do and checking that they do it.

Under my proposal, we could dispense with a large portion of the EPA's 18,000 staffers. Perhaps some of them could be sent to the states, but that may not be necessary once we get rid of the federal chain of command. Even now, state and local governments mount the majority of enforcement actions.

The EPA loyalists also argued that it takes the national government to stand up to locally powerful industries. Sometimes, of course, the neighbors of a plant are reluctant to see it regulated to the point of purity for fear that it will go bankrupt. The federal environmental elite wants the power to "bomb the village to save it" (to use Vietnam War-era parlance).

A plant also might get its way because it has political leverage. As Professor Arthur Schlesinger, Jr. observed in arguing against devolution of authority to the states on any front, local government is controlled by the "locally powerful."

Of course, the implication is that the national government is

controlled by the nationally virtuous. But, concentrated interests can buy “access” in Washington just as they buy “clout” on Main Street. The difference exists only in the minds of those who wish to see the center of power stay where they have *their* power, in the District of Columbia.

While the state and local political playing fields are not perfectly level, at least people know the score. It would be hard to find an Arkansan who does not know that the Tyson poultry folks have clout in Little Rock. But at the federal level, the workings of concentrated interests are shrouded by the remoteness, size, and complexity of the federal government.

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Finally, the EPA loyalists argued that state governments are not competent to produce sound regulations. But, because the former EPA officials took part in writing the agency’s contributions to the *Federal Register*, they would seem to be throwing stones from a glass house. EPA regulations and guidelines are opaque, arcane, elliptical, repetitive, and evasive. EPA staffers blame these problems on legislative and administrative constraints. Be that as it may, the federal environmental protection house is still glass, regardless of who built it.

Moreover, if the state agencies are viewed as weak, the EPA is too muscle-bound to act with dispatch. It now takes the agency years to transform new information about the dangers of pollution and options for pollution control into a change in the law because it must go through an exhaustive internal process, interagency review, a rule-making proceeding, more intra- and interagency review, and then judicial review. These time-consuming procedures are thought necessary because the final product has the force of law. But, with the EPA proposing the laws to Congress and the states, thereby leaving the judgment calls to them, there would be no need for a drawn out process before new information could be peer-reviewed and made public.

In the downsized EPA that I propose, the agency, stripped of its fiat power, could retain its leadership role only by convincing states to adopt its proposals because of their timeliness, quality, and sensibility. That is how the private organization that proposes the Uniform Commercial Code and other uniform laws to the states attains its influence. We need an EPA that succeeds by *earning* its leadership, not by bringing the states down to mind-numbing mediocrity.

### Will the States Be Perfect?

When the federal government devolved control of welfare to the states, many devotees of federal power predicted disaster for the poor. But, as *The New Republic* now notes, “contrary to liberal assumptions, the states did not seize upon the opportunity of reduced federal mandates to starve their citizens.”<sup>34</sup> That did not happen anymore than the end of federal environmental mandates would lead to environmental disaster. The same public that supports environmental quality at the federal level supports it at the state and local level.

Because this is a big and diverse country, some states will be softer on pollution than others. This is anathema to those environmentalists that believe that any pollution is too much. However, some pollution is inevitable even if we could return to horse-and-buggy days. There is a huge gray area between zero risk and serious risk. Where to set standards in that gray area is a question of policy, not rights.

One of the virtues of allowing states to set their own environmental policies would be that electorates with different environmental values could set their own standards for local pollution. Those who dislike the balance struck in their state could move to a state with more restrictive standards, but I doubt if there would be much of that. The real difference is that the majority at the local level would get its way.

It is also possible that some states might fail to deal with pollution hot-spots that present real dangers. That could happen if elected officials fail to enact necessary laws or the state agency lacks the staff needed to enforce them. The federal environmental aristocracy exaggerates this potential, however, because it looks down on ordinary voters.

If pollution is starkly dangerous in a locale, that would be called to the attention of local voters by the federal EPA under my proposal. Such dangers would also be the stuff of reports by associations of state regulators, the news media, and medical associations.

Informed voters know what to do with such information.

The EPA now releases annually an inventory of the emissions of toxic pollution, area by area. This information has prompted states and localities to take action and companies to voluntarily reduce emissions. As EPA Administrator Browner told the press in issuing the latest *Toxics Release Inventory*, “We believe that local residents know what is best for their own communities and, given the facts, they will determine the best course of action to protect public health and the environment.”<sup>35</sup> The EPA should act on that knowledge by continuing to provide information but giving up control.

It is Congress that has turned environmental law into a “mass wish” for perfection — perfectly healthy air by 1977, zero discharges to the water by 1985, and other absurdities. The mass wish has not only failed, it also endangers the environment. A public otherwise sympathetic to environmental protection is angry about overly fussy regulation and politicians who evade personal responsibility through federal mandates, passing the buck to bureaucrats, and other ploys.

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*Experience has shown that local democracy is no enemy of the environment.*

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The pursuit of perfection also departs from the roots of environmentalism. The grandfather of modern environmentalism, Aldo Leopold, set out to teach ordinary people about the environment, because he believed that those who don't understand nature will make bad decisions about it. No understanding is needed for voters to wish or for Congress to promise. Leopold, in contrast, wanted to save the environment by educating voters. 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 and at the state or local level for most issues. Such laws will reflect human nature and so, therefore, will not be perfect.

Experience has shown that local democracy is no enemy of the environment. The half century since Leopold has demonstrated the essential validity of his belief that educating the public is the way to save the environment. The environment was getting cleaner

before 1970, and has continued to get cleaner since, because voters demanded a cleaner environment. It was not because the federal government took over.

It is time for the federal environmental aristocracy to give up power.

## Notes

1. This study is based in part upon articles that have appeared in *Regulation* (no. 4, 1996) and *The Wall Street Journal*, "State Regulators Have Had Enough of the EPA," (May 8, 1997), p. 22, as well as presentations made to the board of trustees of the Natural Resources Defense Council and a conference at the University of Pennsylvania School of Law. I am indebted for advice to many people, especially Barbara Bankoff, Kenneth Chilton, Marci Hamilton, Angus Macbeth, Ross Sandler, and Jerry Taylor. Philip Caal and Floyd Englehardt, New York Law School class of 1998, provided thoroughly professional research assistance.
2. Jonathan H. Adler and Kellyanne Fitzpatrick, "For the Environment: Against Overregulation," *The Wall Street Journal*, July 29, 1996, p. A12; Stanley B. Greenberg, "Against the Tide: In Defense of Environmental Quality (Greenberg Research, Inc., May 11, 1995), p. 4.
3. Richard B. Stewart, "Controlling Environmental Policy Risks Through Economic Incentives," *Columbia Journal of Environmental Law*, 13 (1988), p. 154.
4. Richard L. Revesz, "Rehabilitating Interstate Competition: Rethinking the Race to the Bottom Rationale for Federal Environmental Regulation," *New York University Law Review* 67 (1992): p. 1244.
5. In response to Professor Revesz, law professors eager to rationalize the national takeover after the fact have tried to devise assumptions that would make economic models predict a race to the bottom. See, e.g., Kirsten H. Engel, "State Environmental Standard-Setting: Is There a Race and Is it to the Bottom," *Hastings Law Journal* 48, no. 3 (January 1997), p. 271; Daniel C. Esty, "Revitalizing Environmental Federalism," *Michigan Law Review* 95 (December 1996), p. 570; Professor Peter P. Swire, "The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law," *Yale Law & Policy Review* 14 (March 1996), p. 67. Professor Revesz has written a devastating response. Revesz, "The Race to the Bottom: A Response to Critics," 82 *Minnesota Law Review* 535 (1997). Meanwhile, a leading natural resources economist, Professor Wallace E. Oates of the University of Maryland, has examined the controversy and agrees with Revesz, according to an announcement from Resources for the Future of a talk that Professor Oates was scheduled to give there on September 17, 1997.
6. Robert W. Crandall, *Controlling Industrial Pollution: The Eco-*

- nomics and Politics of Clean Air* (Washington, D.C.: Brookings Institution, 1983), p. 20.
7. E. Donald Elliot, Bruce A. Ackerman, and John C. Milliam, "Towards a Theory of Statutory Evolution: The Federalization of Environment Law," *Journal of Law, Economics, and Organization* (1985), pp. 330-33.
  8. Ralph Nader, forward to John C. Esposito, *Vanishing Air* (New York: Grossman, 1970), p. vi-vii.
  9. *Train v Natural Resources Council*, 421 US 60, 64 (1975).
  10. Quoted in Peter Brimelow and Leslie Spencer, "You Can't Get There from Here," *Forbes*, July 6, 1992, p. 60.
  11. Indur M. Goklany, "The Federal Role in Improving Air Quality in the United States." Prepared for presentation at the American Society for Environmental History Conference on Government, Science and the Environment, Baltimore, Maryland, March 6-9, 1997.
  12. *Ibid.*, 47.
  13. Celia Campbell-Mohn, Barry Breen, and J. William Futrell, *Sustainable Environmental Law* (St. Paul, Minnesota: West, 1993), p. 55.
  14. Henry N. Butler and Jonathan R. Macey, *Using Federalism to Improve Environmental Policy* (Washington, D.C.: AEI Press, 1996), p. 1.
  15. Richard B. Stewart, "Controlling Environmental Risks Through Economic Incentives" *Columbia Journal of Environmental Law* 13, no. 2 (1988), pp. 153-62.
  16. Barry G. Rabe, "An Empirical Examination of Innovations in Integrated Environmental Management: The Case of the Great Lakes Basin," *Public Administration Review*, July 17, 1996, pp. 372-81
  17. Amoco/USEPA Pollution Prevention Project, Executive Summary (rev. ed., May 1992), p. v.
  18. Thomas Teitenberg, *Environmental and Natural Resource Economics* (New York: Harper Collins College, 1996), p. 362-63.
  19. Calculated using cost estimates from Alan Carlin, *Environmental Investments: The Cost of a Clean Environment* (Washington, D.C.: U.S. Environmental Protection Agency [EPA-230-12-90-084], December 1990) and population and household estimates from Tables 17 and 65, *Statistical Abstract of the United States, 1995* (Washington, D.C.: U.S. Department of Commerce, September, 1995).
  20. Michael Hazilla and Raymond Kopp, "Social Cost of Environmental Quality: A General Equilibrium," *Journal of Political Economy* 98, no. 4 (1990), pp. 853-73.

21. Carol A. Browner, "Recent EPA Accomplishments," August 15, 1997, located on the world wide web at <http://www.epa.gov/epahome/accomp.htm>.
22. *Resolving the Paradox of Environmental Protection: An Agenda for Congress, EPA, and the States* (Washington, D.C.: National Academy of Public Administration, 1997), p. 35.
23. Interview, September 18, 1997.
24. "Joint EPA/State Agreement to Pursue Regulatory Innovation," (Draft, February 12, 1997).
25. Memorandum addressed "Dear Reinvention Ombudsperson" (February 1997). On file with author.
26. Letter of February 26, 1997, from the Environmental Council of the States, the organization of state environmental commissioners, to Carol Browner and Fred Hansen. The letter was signed by the president of the Environmental Council of the States, Georgia Commissioner Harold Reheis, and the environmental commissioners of New Jersey, New Hampshire, Illinois, Minnesota, and Arkansas.
27. "State Regulators Have Had Enough of EPA," *The Wall Street Journal*, (May 8, 1997), p. 22
28. Joint EPA/State Agreement to Pursue Regulatory Innovation, Draft, September 3, 1997.
29. *The ECOS 1997 Annual Meeting: State Innovation Reports*, Environmental Council of the States, September 21, 1997; Alexander Volokh and Lynn Scarlett, *Race to the Top: The Innovative Face of State Environmental Management*, The Reason Public Policy Institute (forthcoming).
30. David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven, Connecticut: Yale University Press, 1993).
31. Thomas W. Merrill, "A Golden Rule for Transboundary Pollution," *Duke Law Journal* (April 1997) (forthcoming).
32. Henry N. Butler and Jonathan R. Macey, *Using Federalism to Improve Environmental Policy* (Washington, D.C.: AEI Press, 1996), pp. 54-57.
33. An argument can be made for leaving new cars to the states. The rationale for federal regulation is to avoid a welter of differing state requirements. In practice, however, states might well coalesce on only a few regulatory templates.
34. TRB, "A Promise Kept," *The New Republic*, September 1, 1997, p. 6.
35. Carol M. Browner, "Remarks Prepared for the Delivery Release of the Toxics Release Inventory Data," Washington, D.C., May 20, 1997.



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