Judge Smith: With that as the introduction, I am now going to give each of the panelists an opportunity to comment on the remarks of the other panelists and, if they would like to, to ask the other panelists questions. I will begin with Boyden Gray. Since he is going to have to step out just a few minutes early, I wanted to give him his opportunity now to get his shots in at his co-panelists.

Mr. Gray: It is too bad for the excitement level, but I do not violently disagree with much of anything that has been said. I will make several points, however. I do think it is useful to distinguish between natural resource law and pollution abatement issues such as acid rain, global warming, ozone, or whatever, that involve transboundary problems with readily apparent externalities.

Secondly, I would like just to underscore Cass Sunstein’s point, although I am not sure that Peter Huber was intending to dismiss it. In essence, Peter said: “You know, once the public has decided in thorough debate what to do, it does not really matter which model, private or public enforcement, you pursue to get to the end.”1 I do think it does matter a great deal to use the private model of market incentives. The private model is more efficient and, as Cass Sunstein said, it will provide a much better information base for further regulatory intrusions.

But the private model is—and I cannot emphasize it enough—important not just because of better information about pricing and effects; it is essential to avoid the faction gaming which occurs. Ethanol has a powerful farm lobby that gave some $2 million as salt money to both parties.2 That may explain why ethanol got such funny treatment during the campaign. It has all evaporated now, but this is not conduct that we should encourage. Similarly, on the global warming issue, the Europeans thought that they might get an advantage over the United States if they could utilize their natural gas network. But once it was realized that natural gas has methane, which must be discounted against the CO₂ reduction from switching from coal, then all of a sudden the political gaming on a geopolitical basis abated a bit.

Finally, the private model does tend to mean fewer bureaucrats, lessening, therefore, not only the private incentive to impose regulation on one’s competitors, but also the bureaucratic incentive to build empires. If enforcement is taking place in the private sector, and the government is only monitoring enforcement, then the SEC might get a

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little more interested in the regulation, but EPA does not necessarily
salivate all the more. When you combine less bureaucracy with better
information you can avoid bad regulatory initiatives at the outset.

**Professor Lazarus:** Notwithstanding my best efforts, as you can
see, there really is much less disagreement among the panel members
than one might have thought. I have to concur completely with Cass
Sunstein's emphasis on the problem of faction gaming and the prob-
lem of great divergences in risk assessments, which show that we
spend too much on one thing and not enough on another. I could try
out my defense of Superfund, which I try on my students, a captive
audience. But I am not so stupid to try that here. (Laughter.) In-
stead, I just want to address one issue that Professor Sunstein men-
tioned. I think it is a very good and interesting point, which, if pushed
a little bit, explores some of the difficulties with environmental protec-
tion law and what makes seemingly very sensible solutions break
down. That was his idea of information first and regulation second.

That idea makes a lot of sense, and I think it is hard to resist. But
if you notice, there is a little footnote to "information first and regula-
tion second," which is, of course, that you could not allow something
to be on the market that presented an unreasonable risk. Well, this is
what environmental protection is all about; it is about defining that
floor or reasonable risk. So the information-first system does not nec-
essarily avoid the problem, even in a two-party scenario.

But the real difficulty with environmental protection issues is that
they involve third-party problems. The individuals affected are not
just the consumer and the seller. There are also others who are af-
fected and thus are interested in the definition of reasonable risk. So
it is not necessarily a choice just for the person who is buying the
product or buying the pollution to worry about. It is rarely so simple.

Instead, the problem is that you have a lot of third parties who
are affected by these risks over great space and time. As a result, you
need some kind of democratic determination of what the reasonable
risk level is, which is not an easy determination to make. It is not just
a matter of providing information and then allowing the marketplace
to work. While I do not think Professor Sunstein would suggest it is
quite that simple, I did want to push that one point a bit.

**Mr. Huber:** Let me start by reacting directly to this point. We need
democratic determinations of what reasonable levels of risk are. I
agree. I would be interested to find out whether Richard is truly will-
ing to accept that. He used the phrase: "We need a democratic pro-
cess to set a floor." And a ceiling, too? If democracy is able to define
the risks we won't accept, can it not also define the risks we will ac-
pcept? Or is the idea that democracy can say no and the courts can say
no, and that it’s all a ratchet that can only push in one direction, toward ever-stricter standards?

We have a public model that regulates drugs in this country. The FDA approved a drug like Bendectin, but, despite the express public approval, we still litigated the safety of Bendectin for a decade.³ Thirty years ago we set up a standard for tobacco, at least on how to label it.⁴ It is an informational solution. This product will kill you. We told everybody that tobacco was lethal. That should be the end of the matter. But instead, we have launched an endless process of private liability too.

If you are going to be an advocate of the public approach to things, you have to accept that approach both coming and going. You cannot just adopt the notion that what is mine is mine and what is yours is negotiable.

PROFESSOR SUNSTEIN: On information, I think Richard is right to say that there are contexts where it is not a two-party situation, where a third person is being affected, and where it is very hard to get that third party bargaining. There, information would not be enough. But, a lot of environmental problems are two-party situations, among them, hazardous substances in the workplace and environmentally hazardous consumer products. In such cases, if you provide information, the people who are likely to be affected are the people who get the information.

The Occupational Safety and Health Administration (OSHA) has a hazard communication standard, which I think is an intriguing alternative to the regulatory solution.⁵ It looks much more cost-effective by OMB’s estimates. Some early work by Viscusi suggested that if you tell workers that they must take an environmental risk, they are going to quit or demand a higher salary.⁶ This pressures the employer to reduce the risk in a way that is much more efficient and responsive.

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³ See generally Peter W. Huber, Liability: The Legal Revolution and Its Consequences (1988) (citing numerous private tort actions brought against the manufacturer of Bendectin, with widely varying success, despite a regulatory ruling that the drug was "safe and effective"); Louis Lasagna, The Chilling Effect of Product Liability on New Drug Development, in The Liability Maze: The Impact of Liability Law on Safety and Innovation (Peter W. Huber & Robert E. Litan eds., 1991) (arguing that the flood of private litigation and negative publicity drove Bendectin from the market despite regulatory approval of the drug, and despite plaintiffs' rare success in court).


than OMB's specification of a national risk level, which has been extremely inefficient and not wonderfully democratic.

By a floor, I do not mean that EPA should decide what is an unreasonable risk, as a lot of the statutes now charge it to do. I mean something more limited than that, something like a risk that no reasonable person would run. So instead of EPA deciding the reasonableness issue for all of us, it would create a floor, thus eliminating things that are really extremely hazardous, such that no reasonable person could possibly purchase that product or go to that workplace. This is a little like Susan Rose-Ackerman's recommendation for OSHA to set benchmark standards and floors.\textsuperscript{7} Benchmark standards would be negotiable and floors would be non-negotiable. In this system, you would not have litigation in which courts or juries, who do not know much about the subject, can overcome some sensible decision made democratically.

\textbf{JUDGE SMITH:} The word "democratic" is an appealing one to us and it has been used, I think, by all of the panelists. This raises an issue I would like to get some reflection on from the other members of the panel. To what extent can administrative agencies truly be democratic, that is to say, reflect public will, and to what extent are they really immune from the kind of democratic pressures that we think may be salutary? Is there a way to restructure these agencies so that, if we look to democratic results rather than private enforcement through the courts, we can achieve the sort of democratic results we want?

I wonder whether Professor Sunstein, first of all, has any reflection on that, and then any of the others.

\textbf{PROFESSOR SUNSTEIN:} Well, the agencies are not a tremendous democratic success. But I like Judge Breyer's suggestion for a way to discipline some of the agencies' subjection to interest group pressure and some of their arbitrariness.\textsuperscript{8} That is, get an entity that can do cross-agency comparisons, and tell the public about the results.\textsuperscript{9} This would give us better democratic disciplining of agencies than we now have.

\textbf{PROFESSOR LAZARUS:} I am going to endorse something that Cass Sunstein said. One thing which a lot of people, particularly in the environmental community, criticize is OMB review of EPA regulation. I think the basic idea of having some kind of central clearinghouse in the executive branch that performs that kind of review makes a lot of sense. The correct criticism of OMB is that it has been very one-sided.


\textsuperscript{9} See id. at 60-62.
in its review, in that it has only thought that regulations are too costly. It has not conducted a really objective review of the regulations. OMB has had one philosophical bent to its review, and the result has not been a balanced analysis of regulations. But the idea of having some kind of central clearinghouse in the executive branch, at least in theory, makes a great deal of sense.

**MR. GRAY:** On the question of the OMB review, the basic point that somebody has got to do it is an important one. On Judge Breyer’s suggestion in part three of his book—that you must have a sort of super group to process the information\(^\text{10}\)—I am not sure I would go that far personally. But I am not sure you need to.

The point is that the methodology that the agencies use is now totally hidden from public view. I think the public process—the newspapers, the media, the process of rule making—might be able to deal adequately with these issues if the methodology were public. But right now it is a black box. It is a priesthood, and that really does have to be changed.

At least for that purpose, Breyer’s book is a very, very important piece of work. For those of you who have not read it, I would certainly encourage you to read it. It is really very, very powerful.

**JUDGE SMITH:** I have a feeling we should have had Judge Breyer here for an autograph party. We are getting a lot of plugs for his book. Now we will go to questions from the audience.

**AUDIENCE:** It struck me in listening to the panelists, including Mr. Gray, that there is an amazing faith in using government as a mechanism to set the overall goal for the level of pollution, which we will then achieve by letting the market trade around to distribute control responsibilities. I wonder where does that faith come from? Is there a belief that an entity such as government will be good at performing such a function? Or is it simply the usual culprit—we think it ought to be done and since government is the coercive arm in our society, we think it ought to be the one to do it?

**MR. HUBER:** I would be happy to start. I bow to no one in my readiness to criticize the Federal Government. (Laughter.) But we do have to ask: “Compared to what?” Many standards in tort law today seem to invite private parties to masquerade as the Federal Government. In product liability there is the “risk-utility” test, which invites juries to weigh the interests of all consumers and the overall, public, costs and benefits—those are the factors that go into deciding whether a product is “defective.”

In nuisance law, the basic standards of liability are likewise phrased as public standards, simply invented and cobbled together in

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10. See id. at 59-81.
a courtroom. If that is the kind of private law we are going to enforce, I think we are probably better off just enforcing it directly in a place like EPA. If we are going to enforce fundamentally public standards regardless, we are better off enforcing them in a public arena, rather than in the hermetic environment of a courtroom.

**Professor Lazarus:** I do not want to respond because Peter Huber has a lot more credibility than I do in this group to say what I believe. I said that precise same thing before the Federalist Society at the University of Chicago last year and barely got out with my life.

**Audience:** But I guess part of my concern is that if government gets it wrong, there is no one to hold accountable. There is no bottom line to government. You cannot sue because of immunities and because government is not held accountable in the same way that a private actor might be accountable. With government we say: "Well, you got that level wrong and now we have people dead or we have people out of work—sorry, tough luck."

**Professor Sunstein:** I am puzzling over what it means to say that government got it right or got it wrong—as if the question of how many permits to allow for acid rain is a purely technical question. One possibility is that if people are well informed—which is not the most likely thing in the world in the private or public sector about some of these issues—getting it wrong means just mistaking the facts. But I detected in your question not merely a sense that facts are missing, but also a sense that when people are informed, getting it right or getting it wrong is a scientifically resolvable issue.

In the democratic judgment, so long as it is adequately informed and scientifically supportable, a value judgment is being made. Thus, it is not so easy to come up with the criteria for deciding whether the choice is right or whether it is wrong. I think President Reagan was elected partly because government had got it wrong in the sense that the value judgments the government had been making were not publicly supportable. The costs were extremely high and the benefits were too low. So I guess I am puzzling over what it means to say "getting it right" and "getting it wrong."

One other note: the alternative, I think, to government making the decision would be an auction system. That might be better. This would be a more market-like auction system, rather than the democratic judgment auction for permits. But then you still have to figure out how many permits to allow.

**Audience:** Isn't this democratic process, though, subject to the kind of pressures we heard about yesterday in a panel discussing the fundamentally antimodern, almost Luddite, viewpoint of some of the envi-
Isn't there some gamesmanship on the part of those who simply, for whatever reason, would like to reduce the amount of technology and would tend to set standards very low because it suits their own romantic view of a return to nature?

Professor Lazarus: No doubt some environmentalists fit that description. But what I find more than a bit ironic is that it is not as though industry is without a voice and substantial influence on Capitol Hill. Perhaps all we are seeing in the rise in environmental groups' influence before Congress is a levelling of the playing field.

Judge Smith: I think we have some more questions.

Audience: Good morning. I have basically two comments that I throw out to the panel. First, while the panel is comprised of a group of very distinguished individuals from academia and the appellate judiciary, when we are talking about private regulation, it may be helpful to have someone who is actually in the private sector and who deals with issues of private regulation day-to-day. I am Associate General Counsel of a Fortune 500 company.

Some panelists have suggested that one of the problems of market failure has been the failure of the private sector adequately to consider externalities. I suggest that this is a historical problem. Yes, indeed, in the 1950's, the private arrangements between companies and the decisions that companies made did not consider externalities. In light of the political developments over the last twenty years or so, however, that has now changed. The private sector does consider externalities, both current externalities that we know about, as well as hypothetical externalities that might occur in the future. When we deal with contracts, when we deal with decisionmaking, we factor in what happens if, in the future, someone deems our process to be unduly hazardous or what happens if a product we make turns out to have an effect that we do not currently know about. So I think the externality problem has solved itself and it would be interesting to hear your response to that.

The second comment is that, while I am generally a proponent of the market system, as opposed to the public regulatory system, there is one area of litigation where the market fails. And it is not in the area that has been suggested, where there is a small injury to a large number of individuals and, therefore, no one has an adequate interest to vindicate the rights of those individuals and to have them compensated. I think we have seen through the actions of the Sierra Club, the Environmental Defense Fund, the Natural Resources Defense Coun-

cil, and the Public Interest Research Groups that those interests are
going to be vindicated.

Instead, I suggest that what happens in private litigation is that transaction costs on parties with relatively small shares of liability tend to produce inequitable results. Say my company is sued in a case and it has actual liability of $25,000—that is the injury we caused—yet I know that the case will cost me $100,000 to defend. If I get a settlement offer for $50,000, I recommend to my management that we take it. So there is an inequitable result. Spread over large numbers of parties, as you often see in Superfund litigation, the aggregate inequity is fairly substantial. This is the one failure to the market system that I see. I would be interested in the panel’s response.

Professor Lazarus: The speaker’s first point was that the externality problem solves itself. While I am delighted to hear that, if that has happened, I think it is the result of political developments over the last twenty years, particularly the development of the public law command-and-control system, which caused industry to start to internalize these costs. That is exactly what the public law system is supposed to do. So to that extent it is succeeding. I do not view that as a criticism of the public law model. During the 1950’s, when there was no legal backdrop, there was no effort to internalize those costs. That is why the public law model was necessary and the common law, free market model was not enough.

Audience: Perhaps it was necessary at that time. What I am suggesting is that now that those externalities have been identified, perhaps we could modify the existing system.

Professor Lazarus: I presume that you all are rational market players. If the laws change and you will no longer incur the externality costs, you would be crazy to report to your stockholders: “We are going to pay $3 billion for a scrubber, even though the law does not require us to install controls or to reduce our emissions.” I expect that you are controlling pollution because you are rational players in the marketplace.

My feeling is that free market forces at the moment are one of the most significant enforcement devices behind the federal environmental statutes and the state environmental laws. Now every time someone thinks about buying a business or not buying a business, they are concerned about the environmental liabilities affiliated with it. That means everyone starts cleaning up because they have to worry about how it is going to affect their market price. This is a very good thing. Free market environmentalism to that extent is extraordinarily important. But it works only because you have the backdrop of the environmental statutes, as inefficient and as crazy as they are in some instances, which help achieve the consideration of externalities.
JUDGE SMITH: For the next question, I will engage in gross favoritism and call on my former law clerk, with what I am sure will be a good question. (Laughter.)

AUDIENCE: All right. Now that you have put me on the spot, I have a question for Mr. Huber. I noticed a dissimilarity between the examples you were using and, particularly, the examples that Mr. Gray was using. Your examples suggested that the private market might not particularly matter, and he suggested that it was very important.

Mr. Gray was talking particularly about permitting systems and other sorts of mechanisms that would treat pollution in an economic sense as a kind of good, or at least less pollution as a kind of good. Therefore, he would open pollution control up to the market to allow people to arrange their affairs as they saw fit. In contrast, you were discussing the existing Superfund system. This is not a system in which people are encouraged to arrange their affairs, but a system in which the government is trying to impose costs on them. Therefore, people's incentive is to do what they can to get out from underneath costs that are being imposed by the government.

I am wondering if your analysis, therefore, would change if somehow we could rearrange the Superfund mechanism so that it was set up to allow people to arrange their affairs rather than to impose a solution on them.

MR. HUBER: It has been said, correctly, that you do not want to do something very efficiently if in fact it should not be done at all. That is my basic concern here. Mr. Gray did carefully preface his remarks by saying that once there is a political decision on what environmental standard should be pursued, then we should move on toward tradable permits and so on.

I agree wholeheartedly. If I didn't dwell on it, it was because that seems to me so obviously right and sensible. With clean air, for example, we should have adopted such initiatives years ago. But the essential point is that there has to be an articulated, accepted environmental objective first. With much of our environmental regulation there isn't.

AUDIENCE: Okay. So you think that if we could set a standard as Mr. Gray suggests and develop some kind of permitting system, then it would, in fact, be better to do it through private means rather than public means?

MR. HUBER: Yes. Once we have a public consensus on the essentially public objectives of environmentalism, we should certainly adopt the most efficient—and that means market-oriented—means for attaining it. Once we've agreed, for example, that we are going to cut 10,000 tons of sulphur emissions this year, by all means let's cut those emissions cheaply, and efficiently—which means using the market as much
as possible. Let's retire clunkers rather than putting catalytic converters on cars. Let's burn low-sulfur coal rather than installing scrubbers. Let's let individuals and institutions make such trades on their own initiatives, as much as possible. Of course, I agree with that wholeheartedly.

But I might add that if we had a better political consensus than we do, much of that could be done more efficiently than it is through command-and-control regulation as well. EPA today already knows darn well that it could remove more pollution by retiring clunkers than by prescribing catalytic converters. It knows it. It is not that this information would only be discovered in the marketplace, by way of tradable permits. Undoubtedly, the market probably would discover it faster and better. But much of the information is already there, in the Agency too.

The failure here is one of politics, more than one of markets. We don't want to go after people who drive old cars. We don't mind nailing people who run large power plants. That sort of political failure is what drives much of the foolishness in the Clear Air Act today. That is a political judgment. A bad one.

JUDGE SMITH: As you may have noticed from the introductions and the biographies, our panel today is dominated by people with Harvard connections. So to lend a little bit of fairness to the proceeding, I will call on my old friend from Yale, to ask a question.

AUDIENCE: Thank you, Judge Smith. Professor Cass Sunstein suggested that if the political debate focuses on environmental ends, rather than on the means of achieving them, the problem of faction is diminished. I would suggest that while theoretically sound, in practice that has not been the case.

Archer Daniels Midland and the ethanol lobby do not care about ethanol being written into the statute if an emission standard is set so that only they can meet it; they are still going to make their profits and they are still going to seize the market. The same thing is true for environmental cleanup standards. Companies that already have the facilities or methodologies to meet a particular standard are happy to have the debate focused on the standard because they can win in just the same way.

This is an endemic problem; factions will always exist as long as we rely upon political methods to determine what environmental ends should be. Setting aside the truly tough cases, things like ozone nonattainment, global warming, and the like, why should we not as much as possible allow the private market to determine the number of spotted owls we should have the same way it determines how much bread we should have? Why not allow the private market to determine how many wilderness areas we should have the same way it de-
termines how many cathedrals we should have, how many mosques we should have, how many museums we should have?

Would this, in fact, not be a more accurate representation of the values that people in this country place upon environmental amenities and the aesthetic and other benefits they provide?

**Professor Sunstein:** Well, this encompasses both a narrow question and a very broad and complicated question. The narrow question is whether factions would not rematerialize in determining pollution levels?

**Audience:** I think they already have and that they are already in place fighting that debate. The natural gas companies really want tough standard reductions in place for global warming emissions. Other companies really want to set the terms of the debate on particular environmental issues because they stand to make a profit from an environmental issue being regulated.

**Professor Sunstein:** This is a good and true point. All I was suggesting, and I think that Boyden Gray was also, is that the risk of faction is diminished because of the generality of the question. If the issue is what means of technology is appropriate, then it is an invitation for interest group deals. Whereas, if the question is what aggregate level of acid rain is desirable, you will have interest group maneuvering—as you say, it is unavoidable—but the risk is diminished because there is more generality in the question. It is a little harder for factions to turn the debate to their advantage.

On the deeper question about private markets versus democratic deliberation, first, it may be the case that the second best in a world of omnipresent democratic failure is markets. So it might be that markets are better than such democratic outcomes as we are likely to get in our eighth best world.

But I also want to say that the notion of aggregated willingness to pay, which is the market vision, is not our tradition. This was not what Madison meant by his change in the English conception of sovereignty. What he meant was a system in which citizens exchanged reasons. When we decide what to do with the spotted owl, we ought to talk about what we ought to do and why. That need not mean that the spotted owl enthusiasts should win or would win. But they are allowed to say what they have to say and give reasons.

Now the aggregated willingness to pay idea is a system in which reasons are not offered. Aggregated willingness to pay is not the worst thing in the world. It is a lot better than faction-driven systems. But it is a very new idea, and it is not one that is taken seriously by any contemporary philosopher as a first best. It is not fantastic.

**Audience:** I wonder why you are so enthusiastic for expanding standing under Article III for private litigants? Why can't you trust legisla-
tors to appropriate money for all the enforcement that their constituents want? Or do politicians have an incentive to shift some externalities of their own—by shifting the costs of enforcement—into private litigation?

**Professor Lazarus:** Basically, the reason I am a fan of expanded standing is that I do not think you want larger and larger government. It makes a lot more sense to have individuals take on private attorney general functions and bring those lawsuits.

The statutes regulate an enormous quantity of facilities all over the country. It is not feasible to assume that the government is going to engage in the inspections and the enforcement necessary to ensure compliance with the standards that were adopted by Congress and implemented by EPA. The only way you are going to get thorough, fair, and uniform compliance across the country is to allow citizen suits. I think that is exactly why Justice Scalia wants to try to reduce Article III standing: he seeks to undercut the enforcement of those laws because he does not believe that Congress really intended full compliance with their legal requirements.

To say that I am in favor of the public law model is not to say that I am in favor of just the government enforcing that model. I think having citizens supplement the government is absolutely essential and makes a lot of sense from a free market perspective.

**Mr. Huber:** Could I perhaps add to that? There are citizen suits and citizen suits. One kind of citizen suit simply takes an articulated public norm and enforces it. A very different kind of citizen suit, which has become a great favorite of Congress, moves the whole operation off-budget. Superfund is a dismal example. EPA's central policy today is to move Superfund spending off the public budget in, I believe, direct contradiction of one central conception behind the original Act.

This is where I part company sharply with the public model people. They want to have it both ways. They want the budget to be entirely private so nobody sees it. Let's not discuss what we are spending. Let's not have that debated in Congress. Oh, no, this will come out of private purses, under the mandate of private attorneys general. But we, the public law gurus, get to launch the whole litigious process, and articulate completely unrealistic and unattainable goals that will then be pursued forever in court. That schizophrenia is a recipe for the kind of disaster that Superfund has become. The temptation in Washington is always to do that—to promise the moon, and get somebody else to pay for it. Forget about looking for the best possible solution. That approach is clearly the worst.

**Professor Sunstein:** One very quick note. There is a lot to be said for something like a regulatory budget. But on citizen suits, the policy
issue is very mixed. The constitutional ruling in the \textit{Lujan}\textsuperscript{12} opinion by Justice Scalia has no textual or historical basis. It is entirely made up. If you like substantive due process \textit{Roe v. Wade}\textsuperscript{13} style, then you will love the standing opinion in the \textit{Lujan} case.

\textbf{AUDIENCE:} Professor Sunstein, I would like you to comment about a couple of cases in the early 1980's brought by the Pacific Legal Foundation challenging California regulation of nuclear power plants.\textsuperscript{14} This is curious because, of course, Pacific Legal Foundation is a conservative foundation. If I remember the cases correctly, the legal argument was that California cannot go beyond federal regulation because of preemption.\textsuperscript{15} But what the foundation seemed to be saying was: "You guys are getting hysterical about nuclear power. The experts in Washington have decided that this is the right amount. These are the safe precautions. You should defer to them."

Now, here you have a conservative foundation in effect saying that democratic procedures are all well and good to a point, but you can get hysterical on the local level. Thus, we need some kind of governing rational regime to temper these kind of local outbursts. This goes back to Professor Krier’s comment yesterday that scientific perceptions of risk may not be synonymous or consistent with private perceptions of risk.\textsuperscript{16} Private people may be more worried about unpredictable risk, long-term risk, and invisible risk, while scientists will look at simply how many people will get cancer or something like that. So how does that affect your democratic model for decisionmaking?

\textbf{PROFESSOR SUNSTEIN:} I guess I have a three-part answer. First, there is some hysteria about nuclear power. De Gaulle made a decision in France to go the nuclear route and the air is very clean in France.

Second, I guess that the Pacific Legal Foundation had a Madisonian point about the risk of faction and hysteria at the local level, and saw national solutions as a check on that. It is possible that there are some environmental contexts where there ought to be a democratic decision at the national level to preempt state law, in order to

\textsuperscript{13} 410 U.S. 113 (1973).
overcome that form of local factionalism. That seems to me a plausible contemporary version of the Madisonian theme. If there is possible factional power that could destroy a good industry, then there is a good argument for Congress to preempt.

Third, on the case itself, I do not know enough to say. I would start by saying that in a federal system it is good to have a presumption against preemption of state law remedies. I would want to look at the statute. We have competing democratic ideas at the state level and the national level. I do not think I have anything general to say about how to sort that out.

AUDIENCE: But doesn't that cut against your proposal of first giving information, and then allowing presumably local and state legislative bodies to sort through these things democratically before you impose regulation? Here you are saying that there are times when regulation should be taken out of the local regime and put into a national context. How do you know which risks are which?

PROFESSOR SUNSTEIN: Well, I think the information and economic incentives points are by themselves agnostic on the state versus national question. I do think that greater decentralization would also be desirable, though that is a more complicated question. With nuclear power there are a lot of complexities about interstate effects and about local, not to mention national, hysteria. So I am not sure what to say about that.