Panel IV: Culpability, Restitution, and the Environment: The Vitality of Common Law Rules

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In the evolution of environmental law, there has been a complicated intermingling of two quite separate choices: between use of common law courts and agencies, and between state and federal authority. Congressional enactments in 1970 and 1971 represented a turning point, shifting overwhelmingly from courts to agencies and from state to federal control. That switch is commonly taken as representing a political judgment finding the courts—and the law of nuisance—wanting. Now, with twenty years perspective, this panel considers a possible reassessment of that conclusion.

I stress the dual character of the shift because it greatly complicates any evaluation of the two different approaches. The comparison would be hard under any circumstances, but the combination of the shift from state to federal and from common law to public law makes it doubly so.

My thesis is that the gulf between courts and agencies, in terms of their capacity to handle these matters, is probably not as great as is commonly thought, and that the differences between state and federal control likely swamp the differences between court and agency.

For some types of environmental problems, the switch from court to agency appears essential. Automobile pollution, I think, is the classic case. Try to imagine a nuisance litigation handling that. It would immediately become unmanageable, as everyone would be entitled to sue everybody else—a lawyer's dream, perhaps, but a nightmare for everyone else. The damages would be incredibly complicated to calculate. Moreover, injunctive relief would involve the court telling people what cars they might drive. If a court sought to adopt a mix of solutions, such as limiting cars, instituting high occupancy vehicle lanes, paying cash for clunkers, etc., it would end up making basically political choices and would become a miniature local government—not all that mini, in fact.

The switch from the state to federal level, however, is not quite such a clear cut case. If you assume that the solution for cars is the one we have adopted, namely mandates as to precisely what pollution
controls cars will have, then of course the case for federal control is overwhelming. But that is not the only remedy. There are other solutions that one can imagine—such as charges per automobile based on the tendency of the automobile to pollute—that would work considerably better at the state or local level than at the national level, as such charges could be readily attuned to local conditions.

The case for keeping pollution control jurisdiction at the state level is strongest when all, or almost all, of the pollution from a single large plant is experienced by people within the state. Such a situation seems entirely manageable at the state level.

For pollution from such sources, the usual explanation for selecting federal control is fear of a "race to the bottom." This theory asserts that we have a collective action problem: that states competing with each other for business investment will compete solely or primarily on the margin of minimizing environmental control costs. If they did so, there would of course be a race to the bottom. By hypothesizing such one-dimensional competition, we have defined the process as a race to the bottom.

The difficulty with the argument is that it misstates the nature of interstate competition. Firms are attracted by characteristics other than low environmental compliance costs, and states must therefore compete in other dimensions. Firms clearly seek to reduce labor costs. People are willing to accept less pecuniary compensation in order to live in an agreeable environment. The University of Colorado at Boulder, for instance, was said to enjoy a so-called "Flatirons theory of compensation." The Flatirons are the portion of the Rockies next to Boulder, and the theory ran that the mountains—and the excellent environment for which they stood—was worth several thousand dollars as against the pay of competing institutions in less attractive spots. Since every state must compete with every other state in this dimension, by minimizing the cost of attracting workers, the competition in cutting pollution costs is offset by competition in offering environmental quality. On a net basis, states should be expected to compete in providing an optimal package—incuring costs in environmental control up to the point where marginal cost equals marginal benefit.

Incidently, one would expect this model to yield varying environmental standards from state to state. The taste for environmental

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1. See Thomas W. Merrill, Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy, 21 Ecology L.Q. 485 (1994) (arguing that of three justifications commonly offered for federal control—interstate spillovers, a universal right to a clean environment, and the race-to-the bottom concern (which he dubs "protectionism")—only the third is clearly and generally reflected in the resulting federal legislation).
quality varies with income and other characteristics, and the cost of improving environmental quality varies with several local circumstances—weather, topography, sunk local investment in plant, etc. Accordingly, the optimal degree of control would also vary.²

Let me contrast environmental law with products liability law in terms of interstate distortion. In products liability, there appears a genuine prisoners’ dilemma because every state has a strong incentive to be highly protective of in-state plaintiffs. Virtually all the money transferred by a state’s products liability rules will be transferred to in-state plaintiffs and a very substantial fraction of it will come from out-of-state producers.³ If transactions costs were zero in interstate negotiations and impediments of strategic behavior were removed, the fifty states might work out an optimal products liability law. Without such measures, however, each state has a perverse incentive towards onerous rules. You might call this a race to the top, but it represents, clearly, a distortion of incentives. Except for cases of material transboundary pollution, environmental law does not seem to entail such distortions.

Let me now look for a moment at what courts do or did in applying nuisance law, the archetypical doctrine by which common law courts address issues of environmental quality. The Restatement essentially formulates nuisance law as a kind of cost-benefit analysis. It does not use the term, but since virtually every possible factor fits into the Restatement’s balancing process, it certainly looks like a cost-benefit analysis.⁴ If that is what nuisance law really means, then I must agree that courts are incapable of it. To the extent that courts have actually embarked on that process, you get rather crude cost-benefit studies that would, I think, get to first base in the first year of a graduate school in public policy. If nuisance law really means courts


³. If firms could offer goods in each state at prices which reflected that state’s liability rules, and if consumers were immobile, the damages would come (indirectly) from in-state sources. But customers migrate from state to state, and liability may accrue years after a product is sold; a plane sold to a resident of New York may crash while he or his successor in interest is a resident of Texas. Accordingly, such pricing targeted to state liability rules seems improbable.

doing cost-benefit analysis, we can confidently expect them to fail.\(^5\)

I do not think that most courts, in fact, attempt cost-benefit analysis in nuisance litigation. For one thing, if they were applying cost-benefit analysis, you would think that the defense of "coming to the nuisance" might have quite a lot of appeal, not as a direct balancing of costs and benefits, but as a kind of surrogate for it.\(^6\) Another defense that would have quite a lot of appeal would be a claim that the defendant is using state-of-the-art technology—again not a perfect way of balancing costs and benefits, but a useful surrogate.\(^7\) Yet both of these defenses are generally rejected.

In fact, then, I think that most courts recognize their institutional incapacity and do not apply a cost-benefit model. Roughly speaking I would say that Richard Epstein's account of nuisance law,\(^8\) which is partly normative and partly positive and which certainly uses a vocabulary radically different from the courts', is nonetheless a more accurate description than the Restatement's.

If I am right that courts do not attempt a direct pursuit of efficiency in the sense of applying cost-benefit analysis, there remains the possibility that they are able to bring efficiency back in through the manipulation of remedies. This might be done by awarding damages when there is a risk that either an injunction, or complete denial of any relief, would be likely to inflict serious economic damage. If (as in the typical case) the polluters are few and the plaintiffs many, and the court denies any remedy, that is probably the end. The pollution will continue even if it is inefficient for it to continue. By the same token, if an injunction is granted, the firm will in all probability be shut down, because there will be no way of working out a transaction between the defendant and the multiple plaintiffs, even though, if there were no transaction costs, the parties could agree on some continuation of pollution in exchange for payments to all of the victims. The appealing solution is damages, on the theory that these will subject the polluter to the costs that it is inflicting on the downwind property owners and other persons, thus inducing the polluter to take them into account.

This solution is far from a complete answer. Put aside the question of whether the courts are able to measure damages (i.e., to transform risks of health injuries or visual impacts into dollar amounts). Even if they could, there is a deeper problem. If damages are regularly computed on the basis of the current uses of the land, there is a

\(^{5}\) More generally, I doubt if any government institution could be expected to produce high quality cost-benefit studies of such specific issues.


\(^{7}\) *Id.* at 68.

\(^{8}\) *Id.* at 68, 72-73.
risk that the prospect of such damages will yield behavior increasing the amount of damages: if owners of the plaintiff-parcels can count on compensation for whatever damage is inflicted, they can choose among possible land uses without considering the sensitivity of those uses in relation to the plant. Their choice of relatively sensitive land uses will be reflected back in the form of damage liability for the defendants, engendering unnecessarily high control costs. Thus, the courts do not appear particularly well suited to handling the problem—at least in the sense of establishing correct incentives for efficiency.

Against this defective institution, the standard analysis posits an administrative agency with a number of advantages. It contains many experts. They are able to acquire additional expertise easily because they are able to use informal methods which are not available to a court. They are able to build up institutional capital—to accumulate scientific information in the minds of the agency's staff and leaders. Further, because of their nonjudicial character, agencies are able to make subtle policy tradeoffs among different remedies. Moreover, by issuing rules and policy statements, agencies are able to make their judgments predictable, enabling people and firms to plan ahead.

We can posit those agencies, as I say, but can we find them? Some of you may be familiar with the Yorktown Project, a joint study of Amoco's Yorktown Refinery by Amoco and the U.S. Environmental Protection Agency (EPA). They set themselves the puzzle of determining the cheapest way to achieve all of the environmental goals of the environmental statutes that Amoco had to comply with at that plant. The consensus reached was that by using the optimal mix of available technologies, Amoco could achieve the goals of all of the statutes for one-quarter the cost involved in complying with EPA's regulations—all of which had been adopted in pursuit of the same environmental goals.9

Of course, it is greatly to EPA's credit that it was willing to embark on this venture. But it remains anomalous that an agency commanding all of the theoretical advantages that I have just outlined should have adopted prescriptions four times as expensive as what is needed. Notice we are not talking about the subtle problem of weighing costs and benefits; the project took as given the degree of pollution reduction that was to be achieved.

Why the apparently useless excess cost? One possible reason is that although only one agency was involved, it was charged with en-

forcing many statutes, each adopted at a different time and with different coalitions in play. Further, partly in response to statutory mandates and partly in the hopes of helping firms arrange their affairs, EPA has worked through means of regulations—a process so time-consuming (in no small part because of the hurdles the courts create) that technological innovations are available now that would not have been thinkable at the time the regulatory process started.

Nevertheless, I think there may be a deeper problem also at work in the political process by which Congress gives EPA its mandate and EPA carries it out. Any coalition able to achieve significant action will want to lock in its victory in the clearest and most rigid terms. Thus, an environmentalist coalition in a strong position is likely to take its victory in a rigid form, such as a requirement of a large percentage cutback. Similarly, a business coalition that is able to get an exemption will prefer to take it in a categorical form, rather than, for example, in the form of an unpredictable balancing test. The Bevill-Bentsen Amendments, giving favored legal status to specified classes of hazardous wastes, come to mind.

The upshot of all these factors, I think, is that the apparent comparative disadvantage of the courts, because of the way judges are selected and the way they go about their business, is nowhere near as great as one might think. They are, at least, relatively immune to the kind of interest group pressures that lead to the kind of regulatory deficiencies revealed by the Yorktown Project. Courts may be relatively well positioned to focus on a particular problem—or so the Yorktown Project suggests by implication.

My ultimate conclusion here is not that courts are better at producing workable environmental solutions than agencies—only that there is not a huge gap between them. The more radical disparity seems to me between state and federal authority. Because the race-to-the-bottom theory is in my view invalid, and because states are subject to a stronger kind of accountability than the Federal Government (accountability that makes them likely to compel only those public or private expenditures that are worth their weight in enhanced environmental quality), the states seem to have a strong edge, once you exclude transboundary spillovers.

Let me return to what I started with, the question of whether the 1970-71 shift represents a fair judgment on the comparative abilities of courts and agencies. I think it is clear that, as of 1970, the courts

10. This analysis is developed at some length in the education context by JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 26-68 (1990).
had failed to provide sufficiently stringent solutions as problems were perceived then. But that may, in part, arise from the fact that environmental quality is a normal good—the demand for it increases with income. Given that, plus ordinary judicial lags, it is not surprising to find the courts left somewhat behind. In the absence of the massive federal intervention of the early 1970's, courts might have engaged in a partially successful catchup.

In short, then, the courts may have got a bum rap on this. In looking to the future, it seems to me more important to focus on the level at which the regulation occurs than on the character of the implementing institution, and to assess the possible institutions with an evenhanded skepticism.