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AUDIENCE: This is a question for each of the panelists. It is very simple, maybe even simplistic, and very bottom-line oriented. Adopting Justice Mosk's hypothetical, consider a company that has deliberately disposed of wastes without knowing they were dioxins that were going to leach into the ground water and cause a problem. Let's assume that what is leached into the ground water is 35,000 parts per billion, not a minuscule two parts per billion, but really a serious problem.

The bottom line is: Who pays? Who should pay? One could say that the most obvious candidate is the company that had the benefit of polluting over the past twenty years. The problem is that some of these companies will go belly up. Even putting the company out of business aside, when you impose costs on the company, it will try to pass it off on the consumers. This makes its products become non-competitive, particularly vis-a-vis foreign competitors.

You could say that their insurance company should pay, but the insurance companies did not collect premiums for these kinds of liabilities. I should mention that I represent insurance companies in these matters, and insurance contracts, in my view, do not cover these kinds of costs. In any case, insurance companies would have to raise premiums or withdraw from markets if they were expected to pay.

You could say, of course, that this should be funded out of tax revenues, either state or federal, but that seems to be somewhat problematic as well. Thus, again, the question is who should pay? Assuming CERCLA and RCRA do not exist, who should pay to clean up a real problem?

JUDGE WILLIAMS: I will duck the question in the following way: First, I think that there is an anterior question of what should be done. Governor Ray suggested that in view of the later findings on dioxin, the answer is that nothing should have been done.\(^1\) If that is correct, then nobody need pay. Put that aside.

My primary concern, and what I have tried to address, is how to disentangle the kind of institution that will decide who pays from the level at which that institution should operate. My guess is that you cannot say, as a matter of a priori analysis, whether a court or an agency is more likely to get it right or to come close to a good answer. I would also guess that, for purely intrastate pollution such as you have described, a state institution of any sort is more likely to answer it well than is a federal institution.

PROFESSOR FARBER: Well, to confirm my consensus hypothesis, I agree with everything that Judge Williams just said, including the desire to duck the question.

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I think that there is a mild deterrence argument that would be stronger or weaker depending on the particular context. Given the lag times that are involved in addressing a problem, as Judge Williams mentioned, I am not sure how strong the deterrence argument is. Still, there may be some kind of effect. Other than deterrence, it seems to me to be largely a question of whether the tort system is more or less socially inefficient than the tax system, and I do not have a very strong sense about that.

JUDGE MOSK: As indicated in my previous remarks, I would draw a distinction between a negligent act by the company and a deliberate knowing violation of a law. In the latter instance, I think the company has to be completely and fully responsible.

Of course, another possibility exists if we assume that there is some state regulatory agency, which failed in its responsibility to detect that faulty waste disposal. It is possible that the state could bear some responsibility.

AUDIENCE: As I understand you Professor Farber, you are suggesting that a federal court's exercise of federal question jurisdiction to reject what it believes is legislative nonsense is the rough equivalent of a federal court exercising constitutional jurisdiction to invent new constitutional rights.

I believe these are completely different things. For 800 years, common law courts have refused to endorse nonsense unless the legislature specifically directed them to do so, in which case they had no choice. This is not, however, the equivalent of inventing rights for criminals to go free under the Fourteenth Amendment.

Since the adoption of the summary judgement motion, a case will be dismissed if the defendant relies on scientific nonsense. Under *Erie v. Thompkins*\(^2\) one might be able to force a federal court in a diversity case to endorse scientific nonsense. These environmental cases, however, warrant federal subject matter jurisdiction and it is not an aggrandizement of judicial power for the federal courts to take an active role in rejecting nonsense when they have the power to do so. This is not the equivalent of inventing constitutional rights.

PROFESSOR FARBER: I certainly agree that the constitutional context is somewhat different. Nevertheless, it seems to me that once you accept the position that courts have a better idea of what makes sense than the elective branch of government, it then becomes very hard to confine that to a narrow area.

If the democratic process is that bad, if courts are so capable as platonic guardians that they can make judgements not only about law, but also about science, then I think it does become simply another

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kind of judicial activism. The federal courts, in particular, are then making policy judgments when they simply do not like the policy judgments of the other branches.

It seems to me that once you accept the idea that it is legitimate for a federal judge just to say Congress is crazy, I am not sure you can keep that confined to nonconstitutional cases.