"Empowering those most directly affected by pollution, common law property rights protect powerfully, preventing polluters from arbitrarily fouling streams or spewing poisons onto neighboring property."
— Elizabeth Brubaker
Property Rights in the Defense of Nature

INTRODUCTION

Unless you are well into middle age or were a precocious student, you probably have little memory of the United States without the Environmental Protection Agency and the host of federal statutes it implements. Most Americans presume that the environment is something the government must control to protect. Without government control, they think, we would return to the frightening days of burning rivers, dying lakes, people fleeing their homes at Love Canal, and thick smog filling the air that little children breathe.

Politicians have fostered this notion, and academics of many stripes have supported it. But they are ignoring, in some cases deliberately, a long history of environmental controls through common-law protections. Common law is the term we use for the

legal rules and traditions that have been developed over time through court decisions.

The purpose of this *PERC Policy Series* paper is to show, by examining specific cases in American and English history, that strong legal traditions enabled ordinary citizens to protect their air, land, and water, often against politically potent parties. Even public law officials, such as attorneys general, used the common law to protect citizens against environmental dangers. Unfortunately, as we will see, statutory regulation has largely supplanted the common-law legal regime that once provided solutions for many environmental problems.

THE LAW OF THE LAND

Students are taught that the Constitution was the document that founded the nation and that it is "the supreme law of the land." In fact, however, the founders viewed the common law—the rules and traditions embodied in court decisions—as the law of the land (Sherry 1987). As Harvard law professor Harold Berman (1961, 12) notes, an important part of the founding of the Republic "was the reception of the English common law . . . together with certain English statutes." Common law reflected the view that free people must take responsibility for their actions and must be held responsible for their actions, with the courts providing an important avenue for holding them accountable. Many state constitutions expressly adopted the English common law.

Today, in contrast, law is mostly regulatory management. Citizens and their lawyers negotiate, arbitrate, and litigate with the many arms of the pervasive regulatory state. This arrangement is fundamentally different from the founders' understanding of the relationship between people and their government.

Most of the chipping away of the traditional common-law regime has been done in the guise of the environmental "crisis." No doubt there would have been stronger opposition had not the "crisis" excuse been so strong.

To begin to untangle the regulatory web that has overwhelmed the common law, we will look at how the common law worked to allow people to protect themselves against pollution, whether of water, air, or land. To do this, we will summarize cases that reflect the state of the law in the supposed dark days before the advent of environmental activism. Then we will consider what problems there were with the common law and why it was so broadly supplanted by statutory regulation.

PROTECTING THE ENVIRONMENT

Long ago, before the terminology of environmental degradation evolved and the regulatory machinery began to determine what constitutes illegal pollution, people knew that they and their property could suffer from noxious pollutants. Such pollution was offensive; sometimes it injured people's health; and sometimes it damaged property values. The protection against this invasion came primarily through legal actions for trespass and nuisance. Those who allowed something noxious to escape their control and invade the property of others could be held accountable for their actions through private litigation. (In many cases, either trespass or nuisance could apply, since both actions were often involved when pollution reached others' property.) While evidence of harm had to be shown for damages to be assessed, the basic notions are commonsensical.

Nuisance actions may be private or public. A private nuisance is a substantial and unreasonable interference with the use and enjoyment of an interest in property. Such interference may be intentional or may be due to carelessness. As Supreme Court Justice George Sutherland said in a case in 1926, "Nuisance may be merely a right thing in a wrong place like a pig in the parlor instead of the barnyard."[1] Legal actions can lead to recovery for damages to land as well as to recovery for damages to health or any other benefit attached to our interests in property.

A public nuisance is an act that causes inconvenience or

damage to public health or order or that obstructs public rights. If a business creates noxious emissions that affect many citizens, a public attorney may bring an action on behalf of all affected citizens to have the activity terminated.

Trespass created rights similar to those against nuisance. If a harmful substance is allowed, intentionally or carelessly, to invade the property of another, whether by land, air, or water, there may be a trespass. If so, the defendant is held responsible for damages.

Since water is often not owned by property owners whose land abuts a lake or a stream, the common law extends protection to water quality through *riparian rights.* Riparian rights to water are user rights that allow water users to sue those who damage water quality to the point where its use and enjoyment are reduced.

On the following pages, we will show how the principles of nuisance and trespass protected people against pollution in the past. We will look at protection of surface water through riparian rights, protection of underground water and land, and protection against air pollution. We will see the strengths of the common-law protections as well as their limitations.

SURFACE WATER

In the late nineteenth century, the Carmichael family owned a 45-acre farm in Texas, with a stream running through it, that bordered on the state of Arkansas. In the 1890s the city of Texarkana, Arkansas, built a sewage system and connected numerous residences and businesses to it. The sewage collected by the city system was deposited "immediately opposite plaintiffs' homestead, about eight feet from the state line, on the Arkansas side."[2] The Carmichaels sued the city in federal court in Arkansas.

The Carmichaels were forced to connect their property to a public water system to obtain water for their family and livestock. The cost of the water hook-up and its use was $700. In addition, they claimed that the value of their property was reduced by $5,000; the enjoyment of their homestead over the previous two years was

reduced by $2,000; and the dread of disease was valued at $2,000.

The court found that the

> cesspool is a great nuisance because it fouls, pollutes, corrupts, contaminates, and poisons the water of [the creek], depositing the foul and offensive matter . . . in the bed of said creek on plaintiffs' land and homestead continuously. . . . [thereby] depriving them of the use and benefit of said creek running through their land and premises in a pure and natural state as it was before the creation of said cesspool. . . .[3]

The claims for damages were awarded.

The Carmichaels also sought a permanent injunction against the cesspool. Judge Rogers found that the city of Texarkana was operating properly under state law to build a sewer system, but that there was no excuse for fouling the water used by the Carmichaels, regardless of how many city residences benefited from the sewer system.

Citing other cases, the court found that the action at law for damages was proper, as was the request for an injunction. The court cited a leading text on the law of torts:

> If a riparian proprietor has a right to enjoy a river so far unpolluted that fish can live in it and cattle drink of it and the town council of a neighboring borough, professing to act under statutory powers, pour their house drainage and the filth from water-closets into the river in such quantities that the water becomes corrupt and stinks, and fish will no longer live in it, nor cattle drink it, the court will grant an injunction to prevent the continued defilement of the stream, and to relieve the riparian proprietor from the necessity of bringing a series of actions for the daily annoyance. In deciding the right of a single proprietor to an injunction, the court cannot take into consideration the circumstance that a vast population will suffer by reason of its interference.[4]

Judge Rogers noted: "I have failed to find a single well-considered case where the American courts have not granted relief under circumstances such as are alleged in this bill against the city. . . ."[5]

A 1913 New York high court case illustrates how riparian rights could protect the water-quality rights of one citizen even against large business interests.[6] A new pulp mill polluted a creek. A downstream farmer, Whalen, sued the mill for making the water that passed by his land unfit for agricultural use. He had to obtain an alternative water source for his crops and animals. The trial court awarded damages of $312 and granted an injunction, ordering the mill to end harmful pollution within one year or close operations.

But the appellate division overturned the injunction and reduced the damages to $100. The court noted that the mill was an important economic asset to the area. It cost over $1 million to build and employed about five hundred people. Thus, it was worth far more than the water was to the plaintiff. However, the Court of Appeals (New York's highest court) unanimously reinstated the decision of the trial court:

> Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. *Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich*.[7] (italics added)

The Court cited numerous opinions from other states that were in agreement, including a 1900 Indiana holding involving a similar situation:

> The fact that the appellant has expended a large sum of money in the construction of its plant, and that it conducts its business in a careful manner and without malice, can make no difference in its rights to the stream. Before locating the plant the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to

> it without obstruction, diversion, or corruption, subject only to the reasonable use of the water, by those similarly entitled, for such domestic purposes as are inseparable for and necessary for the free use of their land; they were bound also to know the character of their proposed business, and to take themselves at their own peril whether they should be able to conduct their business upon a stream . . . without injury to their neighbors; and the magnitude of their investment and their freedom from malice furnish no reason why they should escape the consequences of their own folly.[8]

Even when a government gave an industry preferential water rights, the common law would not allow the preference to expand to include a right to pollute, as a turn-of-the-century case makes clear. The Idaho constitution stated that mining operations "shall have preference over those using the same [water] for manufacturing or agricultural purposes."[9] A farmer downstream from a mining operation sued for damage to his farm caused by acids dumped in the Coeur d'Alene River, which was used by the farm. The federal appeals court held that even if the mining operation was in "the ordinary and usual mode of mining" and even if it had a constitutional preference for access to water, it had no "right to dump injurious and deleterious materials into a stream."[10] The court noted that, with the exception of one case from Pennsylvania, this view represents "an unbroken line of decisions in the United States and England."[11]

A more recent case, decided during the 1950s, dealt with an International Paper Company plant that had been located on a Louisiana bayou since the 1930s. Recognizing the rights of downstream landowners, the mill had paid forty landowners for the right to discharge effluent into the stream, at a cost of several hundred thousand dollars.

Plaintiff Maddox operated a fishing camp on the bayou twenty miles downstream from the mill and had not sold water-quality rights to the mill. He claimed his livelihood was threatened by the water pollution and sued for damages or, failing that, for an

injunction. Expert witnesses testified that the mill had installed high quality water-pollution control devices, that its ability to improve the devices had been hampered by World War II, and that the mill's effluent still caused damages. The court awarded Maddox $8,000 in damages for the lost value of his business and reduction in property values.[12] The appeals court upheld the lower court's decision.[13]

So, long before the Environmental Protection Agency (EPA) came into existence, firms knew that if they substantially polluted their neighbors' water, they could expect to be found liable. To minimize liability, water polluters installed pollution control devices. Paper mills in Wisconsin routinely owned miles of downstream river property, knowing that otherwise they would be liable for violation of riparian rights (Davis 1971, 777–80).

While such water pollution cases showed up consistently over the years, they did not represent massive numbers of cases. For example, a 1971 survey of all reported American common-law cases involving violation of riparian rights (water pollution) found a total of 445 cases, including cases dating back to the nineteenth century (Davis 1971, 742). From 1945 to 1970, there were never more than four common-law water and air pollution case decisions reported in any given year, most of them involving water pollution.[14] The reason, we believe, is that the law was generally understood and therefore only infrequently contested.

Common-law protection of water does not apply just to those who own property that abuts a waterway but to all who have the right to use the water, for purposes including recreation. Those who enjoy sport fishing in England have long protected water quality through private litigation brought by angling associations. For example, in *Pride of Derby and Derbyshire Angling v. British Celanese Ltd. and Others*,[15] a fishing club, Pride of Derby, and its association, the Derbyshire Angling Association, brought legal action against the borough of Derby, British Celanese, Ltd., and the British Electricity Authority. The defendants discharged sewage, industrial waste, and heated effluent which polluted and raised the temperature of the River Derby, damaging the anglers' fishing. The

suit by the fishing clubs was joined by the Earl of Harrington, who owned land along the river.

The lower court issued an injunction restraining the three defendants from reducing the quality of the river's water, but suspended the injunction for two years to give the defendants time to alter their operations. The defendants appealed the injunction but the Chancery Court upheld it. The borough of Derby argued that Parliament had given it statutory authority to pollute when it authorized the borough to build a sewage treatment works. The Court rejected this argument and noted that the statute did not authorize pollution.

The borough also asked the Court to substitute damages for an injunction, since the community could not easily rebuild its sewage treatment plant. But the court rejected this position, noting that damages would be an inadequate remedy for the angling club, whose members want to exercise their right to fish. The injunction required the borough to redesign its sewage system, Celanese to change its discharge practices, and the British Electricity Authority to reduce its discharge of superheated water. This British case illustrates the effectiveness of common law in protecting property rights, in this case the right to fish, and shows how this protection translates to environmental protection. Because the right to fish is a privately owned right in Great Britain, individuals can protect streams effectively through court suits.

The last major federal water pollution case in the United States was decided shortly before passage of the Clean Water Act of 1972.[16] The state of Illinois sued the city of Milwaukee for sewage pollution of Lake Michigan, which was the source of Chicago's drinking water. The Supreme Court held that the federal district court could issue an injunction against Milwaukee. The Court noted that common law, which looks to states for guidance, can be invoked to abate a public nuisance in interstate waters. "While federal law governs, consideration of state standards may be relevant. Thus, a State with high water quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor."[17]

This ruling became moot some months later, after the Clean Water Act was passed by Congress. Milwaukee returned, asking the Court to vacate its order, and it won. The Supreme Court held that "the establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."[18]

The Supreme Court's judgment that the act displaced federal common law with respect to interstate pollution was reaffirmed in a 1992 case. Oklahoma sued Arkansas for allowing polluted water to flow into Oklahoma. Although the water met EPA and Arkansas standards, it failed to meet the standards of the state of Oklahoma. The Court rejected Oklahoma's claim, noting that Congress had granted the EPA broad jurisdiction over water quality.[19]

Thus, today, the fact that a state asserts that its water quality standard is being violated is legally irrelevant if the EPA says that federal water quality standards are being met. As a result, the states are little more than EPA's agents in water quality issues. Federal water-quality regulations dominate. The regulations do not abolish common-law remedies, as we will see later, but they largely supplant them.

LAND AND UNDERGROUND WATER

The primary problem caused by pollution of land is groundwater pollution due to seepage from improperly disposed wastes. Wastes that are properly contained rarely cause harm. After the famous Love Canal incident in the late 1970s, Congress passed the Superfund law in 1980 (the Comprehensive Environmental Response Compensation and Liability Act) to regulate the cleanup of toxic waste sites. Despite this law, some common-law cases have occurred, and they show how the common law might have dealt with the problem of groundwater pollution over time.

For example, in 1981, the Illinois EPA, backed by the federal EPA, supported the right of a chemical waste landfill to remain in operation. The landfill had been built with state and federal approval, but residents of a nearby village alleged that the landfill was damaging their water supply. The Illinois supreme court found that the landfill was causing groundwater contamination and that there could be a chemical explosion given the disposal technique used.[20] It held that the landfill was a public and a private nuisance. The village residents were there first; their right not to have their property damaged could not be stripped in favor of a "general societal" desire for a landfill. The court noted that toxic landfills are legitimate, but they must be constructed so as not to impose costs on surrounding landowners who have not agreed to the intrusion. The court issued a permanent injunction against the landfill and ordered that the toxic wastes be dug up, moved, and the land restored.

The courts' view of the standards for groundwater contamination has evolved over the decades, as the 1982 case of *Wood v. Picillo*[21] illustrates. Neighboring property owners sued a farmer who maintained a hazardous waste dump on his property. They claimed that the dump emitted noxious fumes and polluted groundwater. The Rhode Island supreme court agreed. In doing so it overturned a 1934 decision that would have supported the defendant's position. The 1934 decision was based on the state of science at that time, when knowledge about the course of groundwater was, as the court stated in 1982, "indefinite and obscure." Since 1934, the court said:

> the science of groundwater hydrology as well as societal concern for environmental protection has developed dramatically. As a matter of scientific fact the courses of subterranean waters are no longer obscure and mysterious. . . . We now hold that negligence is not a necessary element of a nuisance case involving contamination of public or private waters by pollutants percolating through the soil and traveling underground routes.[22]

In other words, the common law now imposes strict liability (that is, liability even when there is no negligence) on polluters who cause damage to waters. This standard of care is consistent with old common-law tort rules imposing strict liability in case of hazardous materials, rules recorded in a famous 1868 British case, *Rylands v. Fletcher*.[23] This case is often cited for restating the ancient proposition, "So use your property as not to injure your neighbor's property." Strict liability is imposed if there is evidence of injury or of potential to cause injury in cases of hazardous substances.

Thus, advances in knowledge of the effects of toxic substances, and the ability to track them, means tougher standards today than in years past. As a New York court noted in 1983, "One who creates a nuisance through an inherently dangerous activity or use of an unreasonably dangerous product is absolutely liable for resulting damages, regardless of fault, and despite adhering to the highest standard of care."[24]

In 1994, the supreme court of Florida, in a common-law case, held that a firm that damaged an underground water supply by negligent disposal of toxic wastes was responsible for the cost of restoring the groundwater to make it fit for human consumption.[25] The company argued that it should only be responsible for the change in the value of the land that covered the groundwater. The court rejected this damage measure, holding the firm responsible for the $3 million spent for alternative water supplies and $5.6 million for the estimated cost of restoration of groundwater quality.

Finally, another recent case involves the granddaddy of all Superfund sites, Love Canal. Readers may recall horror stories of seeping chemical waste from an abandoned toxic dump site run by Hooker Chemical Company. Publicity about this site helped spur public support for passage of the Superfund law, one of the last acts of the Carter administration. This case ultimately involved common-law and regulatory action against Hooker Chemical Company, even though the land involved had been sold to the Niagara school board with warnings about the site contents more than twenty-five years before Love Canal became America's best known waste dump.

Love Canal was a failed entrepreneurial canal built in the 1800s. In 1941, Hooker Chemical bought the 3,000-feet-long trough, which was 8 to 16 feet deep and 60 to 80 feet wide, to use to dump toxic waste from its plant on the outskirts of the city of Niagara Falls, New York. The soil around the canal was a hard clay, so it made an excellent disposal site that never caused significant water contamination.

As the city of Niagara grew, the local school board became interested in land that included Hooker's hazardous waste site. Seeking to build a grammar school, the school board sought to buy the land. Spelling out the risks involved, Hooker initially refused to sell the land. After the school board indicated it would condemn the land and force a sale, Hooker sold the land for one dollar and informed the Niagara school board about the hazardous waste contained in the canal. The firm's efforts to include restrictive covenants in the deed of transfer were frustrated by the school board. Later, over company objections, the board built a public school on contaminated land and sold additional parcels for residential development, without providing any warnings. Problems later arose that received national attention. Hooker had to pay for a cleanup of the site under the Superfund law.

Hooker was later sued by the United States and the state of New York in tort (that is, under common law).[26] The government sought punitive damages from Hooker. The court rejected this request, although it did find Hooker negligent, primarily for not coming forward with more information about the dangers of various chemicals in later years.

> While the Company should have made greater efforts to keep local residents off the property, it violated . . . no legal obligation in failing to do so. It responded to complaints about odors, fires, and exposures to chemicals whenever notified, and there was no evidence of injury during the disposal operations that would have signaled a compelling need to provide more protection.[27]

Despite the notoriety associated with Love Canal, the court noted that its review of injuries from chemical exposure show only "relatively minor noticeable injury."[28] That is, the Love Canal Superfund site, which is the stuff of great environmental legends, was associated with very little harm to humans, none of which would have ever occurred had the school board not forced the transfer of the land and then failed to provide information to subsequent developers.

AIR

In comparison with surface and groundwater pollution cases, few common-law air pollution cases are found. One reason is that most air pollution comes from multiple sources, making it difficult to identify defendants. But it is clear that the courts have long recognized common-law liability for air pollution when liability can be assigned to a polluter causing harm.

An early case illustrating common-law protection against air pollution was *Georgia v. Tennessee Copper Co*.[29] The state of Georgia, on behalf of its citizens, sued two companies that operated copper smelters in Tennessee near the Georgia border. Justice Holmes noted that a public nuisance had been created because the "sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within [several counties in Georgia]. . . ."[30] Defendants argued that they had recently constructed new facilities that reduced the scope of the problem, but the Supreme Court held for Georgia. The Court gave the companies a reasonable time to build more emission-control equipment, but held that if such equipment did not reduce emissions enough to protect plant life in Georgia, the state could ask the court for an injunction to shut down the smelters.

In 1915 the parties returned to the Supreme Court.[31] The companies showed that their new, expensive equipment cut emissions by more than half. Georgia argued that this was not enough and demanded that the smelters be closed. The chief justice

appointed a scientist from Vanderbilt University to spend six months, at company expense, studying the emissions and the likely effect of new controls. In the meantime, the Court ordered the companies to cut back production to reduce emissions further. Based on the evidence presented by the scientist, the companies would either be allowed to continue operation with more emission-control equipment in place, or, if that could not reduce emissions sufficiently, would have to shut down. Finally, after following the guidance of the Vanderbilt professor, the firm satisfied the plaintiffs, and the Court ended its oversight of the case.

A similar strong support of the right to clean air was found in a case before the Arizona supreme court in 1931.[32] A heavy-metal smelter nine miles from the plaintiff's farm caused $1,300 worth of damage to his crops in 1926. In 1927, because the smoke continued to deposit harmful levels of chemicals on the farm, the plaintiff did not plant a crop but sued for the value that would have been created had the smoke not continued. The high court upheld the verdict for the farmer, holding that he could recover the profits that he could have earned from planting. The fact that the pollution resulted

> from the carrying on of a perfectly lawful business in the most approved way made no difference. The landowners were deprived of their legal right to farm unmolested by the poisonous fumes none the less by the fact that the discharge thereof was a necessary incident to a business of this character.[33]

A more modern air pollution case is *R. L. Renken v. Harvey Aluminum.*[34] An aluminum plant in The Dalles, Oregon, employed 550 people, making it the largest employer in town. It was sued by several orchard owners who claimed that their crops had been damaged by fluoride emissions. Finding the pollution to be a trespass and a nuisance, the court awarded the orchard owners approximately $10,000 each in damages for the crop losses and ordered the plant to install state-of-the-art emission-control equipment, which was estimated to cost over $2 million. If the

equipment was not in place within a year, the plant could be ordered closed.

The parties ended up in court again several years later over a dispute about a settlement they had agreed to after the previous case.[35] The court enforced the agreement, requiring the company to compensate the orchard owners more than $940,000 "for past or future economic losses in their respective orchards."[36] The same factory, under new owners, ended up in litigation later, *Orchard View Farms v. Martin Marietta Aluminum*.[37] The court awarded $103,000 in compensatory damages and $200,000 in punitive damages to nearby agricultural landowners. Clearly, the orchard owners had a right to air that was not polluted in a way that harmed their cultivation.

A recent case, *Bradley v. American Smelting and Refining Co*,[38] though more complicated, affirms the right of the ordinary person not to be harmed by air pollution. The Bradleys lived on Vashon Island, Washington, four miles from a copper refinery run by American Smelting (ASARCO). The Bradleys sued ASARCO in federal court in Washington for damages in trespass and nuisance caused by the deposit of airborne particles of heavy metals from ASARCO's smelter. The smelter had operated since 1905. It was regulated by state and federal air pollution laws and was in compliance with all regulations. The gases that passed over and landed on the Bradleys' land could not be seen or smelled by humans; they required microscopic detection.

The federal court, which would use Washington common law to determine the case, was uncertain as to what that law was, since there were few precedent cases. The court asked the Washington supreme court to instruct it on the status of the Washington common law of nuisance and trespass as it applied to air pollution.

The Washington supreme court held that ASARCO had the requisite intent to commit intentional trespass. Even though no harm was intended, and ASARCO was not aware of the Bradleys, the company knew particles were being emitted from its facilities. Secondly, the court held that "an intentional deposit of microscopic particulates, undetectable by the human senses, gives rise to a

cause of action for trespass as well as a claim of nuisance."[39] Hence, the ASARCO emissions created a nuisance and a trespass. But the court noted that for a cause of action for nuisance or trespass to be successful, there must be "proof of actual and substantial damages."[40]

Upon return to federal court, that court applied the law as explained by the Washington supreme court. While the elements of a cause of action for trespass and nuisance existed, the case was dismissed because there was no evidence of damage or harm to plaintiffs or their property from the air pollution.[41] This case, once again, illustrates the common law at work. Under common law, even difficult-to-detect emissions can be causes of harm but at the same time plaintiffs must prove damages.

In spite of this history, it is true that air pollution is difficult to solve through common law. Air pollution has been a problem for centuries. Smoke from coal was long a bane of population centers. Cities and states began to pass ordinances and statutes to deal with their smoke problems over a century ago (Stern 1982). In other words, local communities responded to the limitations of the common law in dealing with pollution, first by regulating the quality of coal-fired boilers and setting restrictions on locomotives. As coal use declined, automobiles gradually became the larger problem. California took the lead in investigating how to deal with auto emissions. Other states, including New York and Texas, also imposed ambient air-quality standards before the federal standards emerged.

As a result of these forces—common law augmented by local regulations—air quality improved steadily during the 1950s and 1960s before the passage of the Clean Air Act of 1970. Indeed, the rate of improvement in air quality *slowed* after the EPA became the air quality czar (Goklany 1995, 351–2). It may be that the common law alone could not have solved all air pollution problems, but there seems little doubt that common law, combined with state and local controls, would have taken major strides in controlling air and water pollution.[42] However, it was largely supplanted by politically engineered federal controls.

Since passage of the Clean Air Act of 1970, the Environmental Protection Agency has been the primary controller of air quality in the United States. The agency, and various state pollution agencies operating under EPA supervision, issue pollution permits to major pollution sources and determine pollution limits on vehicles and other emission sources. There have been few common-law air pollution cases since 1970.

LIMITATIONS OF THE COMMON LAW

The cases reported here represent the majority view, but there was a minority view, also. Some courts would rule for polluters, holding that the economic benefit of a factory that employed many people outweighed the damage to a few property holders. Some courts held that pollution was just a fact of modern life and necessary for progress to occur. The courts were not always consistent in their decisions.

Legal action is always costly. Even the wealthy do not sue everyone who violates their rights. Low-income people may find some litigation beyond their reach, but the existence of contingency fees enables even the poor to bring suits when their cases are good ones. And, as we saw in the case of farmer Whalen and the pulp factory, the common law does not "deprive the poor litigant of his little property by giving it to those already rich." There is no such principle in the legislative process, which is dominated by special interests.

Multiple polluters that each inflict low levels of damage are unlikely to be held liable—especially when the damage is shared by many. For that reason, problems with air pollution caused by automobiles cannot be handled effectively through common-law courts.

Injuries and harms that come after long gestation periods present another challenge. Parties who can show evidence of injury or imminent harm may have a common-law cause of action. However, efforts to obtain injunctions for speculative harms are

not generally successful. Regulation may be the only answer to limit actions that may cause future harms such as cancer. But we cannot know how the law might have evolved had it not been pushed to one side by regulation. It is not difficult to imagine environmental courts—ordinary courts assisted by special masters trained in environmental science—and other arrangements evolving to satisfy the needs of people concerned about their environmental rights.

THE STATUTE LAW SUBSTITUTE

The common-law concept of property rights, with its requirements for proof of damages and its associated rights and duties, formed the foundation for environmental protection in the United States for many decades. This concept was changed fundamentally by the flurry of federal environmental statutes passed in the late 1960s and 1970s. The new statutes give standing to all citizens, whether they are harmed or not. In contrast, common law requires well-identified plaintiffs and evidence of damages to obtain standing to sue. Under statutes, evidence of a technical violation of a statute-based regulation, rather than evidence of harm or the threat of harm, can spur legal action. Some federal statutes also provide funding for groups who can monitor and then sue polluters who fail to meet any one of a host of technical rules.

Unlike common-law remedies, which provide payment for damages to those who are harmed or enjoin polluters to stop their harmful actions, statute law calls for penalties and fines to be paid to the U.S. Treasury or to "public interest" organizations that seek to raise awareness about the environment. Put simply, the statutes provide subsidies to encourage environmental suits that may be totally unrelated to actual environmental harm.

A 1997 South Carolina suit and decision illustrate the dramatic differences between common law and statute-based environmentalism. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*

(TOC), Inc. involved a firm that operated an incinerator.[43] The incinerator's air pollution control system discharged an effluent containing mercury into a river.

Laidlaw had purchased the incinerator from an owner who held a state-issued, EPA-approved, water pollution control permit. The former owner's permit for the plant set maximum allowable daily discharges of listed pollutants—including mercury at a maximum of 20 parts per billion (ppb).

Regulations required the new owner to obtain a new permit. When Laidlaw's permit was issued by the South Carolina agency authorized by the EPA to control water pollution, the maximum daily load for mercury was reduced from 20 ppb to 1.3 ppb. But at the time, technology could reduce mercury only down to a range of 2 ppb to 5 ppb. Laidlaw did not contest the permit on these grounds but began a research program with state regulators in an attempt to meet the new standard. The company even shut down the incinerator for extended periods of time. Laidlaw's permit was temporarily revised to 10 ppb but before the new permit was issued, 500 permit violations had occurred.

Laidlaw was sued by environmental groups, which sought civil penalties ($25,000 per day) for each mercury exceedance (based on the 1.3 ppb standard, which was eventually dropped as impossible). At trial, no acceptable evidence that Laidlaw's emissions had caused harm to fish or the river was provided. Yet Laidlaw was fined $405,800. This was much less than the $10 million that could have been imposed, since the court found that Laidlaw had made good faith efforts to meet the impossible 1.3 ppb standard. But the message of the court was clear: Permits may not be challenged. The federal statute requires payment of penalties when permits are violated. Practicality, evidence of harm, and science may be irrelevant.

Compare the Laidlaw case with the common-law approach. The facts of the case indicate that there were no damages and that the defendant had incurred extraordinary costs to meet a standard that went far beyond any reasonable rule for protecting safety and health. The plaintiffs would not have been able to claim personal

or property damages, and the government authorities could not have supported any claim of harm to the public or the environment. In short, there was no basis for a private or public nuisance action. A common-law action probably would have had no merit. Yet, as in many other modern instances, the Laidlaw episode involved the expenditure of millions of dollars on equipment and legal expenditures in an effort to meet a standard that was found impossible to achieve. Huge costs and little or no benefits occur when standards are not related to health or safety.

COMMON LAW TODAY

Although statute law has sharply constrained common law, common law is still alive and kicking. Unfortunately, combining common law with statutes can generate curious outcomes—including those that impose heavy regulatory costs with little benefit.

In some instances, lawyers add common-law pleadings to a statute-based case, always hoping that something will "stick" when the case is heard. *Concerned Area Residents for the Environment (CARE) v. Southview Farms* is a case in point.[44]

CARE was a citizen suit brought against a dairy operation (Southview) under the Clean Water Act. The suit was augmented by a common-law claim of trespass. Since standing was provided by statute, the plaintiffs did not have to show evidence of damages to get their day in court.

Southview operated a 1,100-acre farm in New York with 2,200 animals. The farm operator collected the animal manure and spread it on agricultural land. Until the *CARE* case, most farm operations were exempt from Clean Water Act rules; no EPA permits were required to operate manure-spreading tractors. Common law offered the primary remedy for parties who were harmed, and, as we have shown, common-law rules are strict when there is evidence of harm.

After heavy rains, runoff from Southview's fields washed into a local creek and then into the Genesee River. The neighbors

complained to the regulators. State regulators and the EPA refused to take action because of a lack of evidence that Southview was a statutory polluter. Armed with citizen-suit provisions of the Clean Water Act, the neighbors sued, simultaneously arguing that their common-law rights were violated. Eventually, the neighbors won and Southview paid a small fine for trespass.

Because of the link between common law and statutory regulations, the case had national implications. The Court of Appeals held that all manure-spreading tractors are point-source polluters! There are thousands of them. According to this interpretation, farmers nationwide must have EPA permits to operate manure spreaders. The interaction between statute and common law had produced a mixed outcome. Common-law rights were upheld, but the new interpretation of the regulatory term "concentrated animal feeding operation" imposed high costs on all farm operators with large herds, whether they have runoff problems or not.

A thorough review of statute-based environmental suits suggests that *Laidlaw* and *CARE*—examples in which high costs are imposed even where there is no evidence of harm—are not outliers. They are typical of a host of actions that drive an environmental juggernaut. This juggernaut has little to do with protecting environmental assets and much to do with maintaining a costly administrative structure, and the interest groups and bureaucrats supported by that structure.

The record of common-law cases is clear: It imposes tough liability on those who damage the environment. Yes, mistakes are made. Sometimes liability is imposed when it should not be; sometimes the damages assessed are too high; sometimes liability is not imposed when it should be. But it seems far better for such individual mistakes to be made (some of which are rectified on appeal) than for politically inspired policies to impose costs on all.

Few areas of the environment are not protected by the common law. Despite the political handwringing over the Exxon Valdez spill in Alaska, the legislative result—the Oil Pollution Act of 1990—was completely unnecessary. In fact, a common-law jury imposed a multi-billion dollar judgment in that incident. That

judgment was excessive, but the point is that Exxon and other firms are well aware of their potential liability. They do not need Congress to appoint regulators to tell them how to conduct their business. That will not prevent accidents more effectively than the common law will. But at least common law gives potential polluters an incentive to guard against pollution and penalizes them when they fail to do so.

The largest verdicts in the nation are often for common-law environmental cases. In 1996 a Kentucky jury awarded $218 million against Rockwell International for PCB contamination of water (*National Law Journal* 1996, A9). In 1997 a New Orleans jury awarded $3.6 billion in damages for a chemical leak from railroad cars that affected 8,000 people (*National Law Journal* 1998, C2). These judgments may be inappropriately large, and they are among the reasons there are calls for tort reform, but no one can assert that common-law suits for environmental harms do not inspire a greater need for care than does fear of crossing the EPA.

The Lure of Central Planning

Why, if environmental quality is the goal, was the common law abandoned in favor of central planning and political control?

Political control of the environment cannot be based on evidence of superior performance by governmental bodies. The evidence continues to mount that governments are poor environmental stewards and that government regulation is wasteful, cumbersome, and sometimes ineffective. "For all its accomplishments, we conclude that the pollution control regulatory system is deeply and fundamentally flawed," wrote Clarence Davies and Jan Mazurek (1997, 2) of Resources for the Future after conducting a comprehensive three-year assessment of U.S. environmental regulation. Expressing concern about failed federal efforts to build an efficient pollution control system, they concluded: "The United States does not need to wait for a consensus to act: to do so would

be to wait forever. Failure to make the changes will be costly to the economy, to the environment, and to every citizen" (Davies and Mazurek 1997, 2).

Yet the idea that the law and the market have failed, rather than the regulatory system, is today's received wisdom, and the claim is routinely made that insightful political leaders, aided by economists and other theoreticians, can resolve these difficult problems. This idea, which the great economist Friedrich Hayek called the fatal conceit, explains the lure of central planning, which is the alternative to common-law protection.

Politicians can advance their careers by convincing voters of their superior ability to manage problems. Only on rare occasions do politicians yield control, as in the case of transportation deregulation. Such instances are usually driven by special-interest politics that happen to produce results consistent with consumer interests, or else by market competition.

While politicians can perhaps be excused for supporting notions that further their careers, less defensible are the members of academia and other "learned professions" who provide intellectual respectability for destructive central planning. Yet they too have fallen under the sway of misguided theory. Submitting to the "nirvana" fallacy, they often believe that markets will operate better if they are "planned" than if they operate freely under a consistent rule of law. Nowhere is this fallacy more prevalent than with environmental protection.

While it is appropriate to recognize the limitations of the common law in the field of environmental protection, supporters of centralized environmental controls act as if today's statutory approach has no comparable limitations. For example, one critic accuses free market environmentalism advocates of "wishful thinking" about the common law (Thompson 1996, 1359) while failing to address any of the shortcomings of today's political and bureaucratic system.

It should not be surprising that many policy experts are disdainful of free market environmentalism, which is built on voluntary action and common-law rights supplemented by local

rules. Economists and other experts preached for decades that electricity and telephones were natural monopolies. Competitive markets simply could not exist in the face of such monopolies, they said; there was a "market failure" that had to be remedied by government control. Now that the deregulation of transportation and communication has led to dramatic reductions in costs, and the deregulation of electricity is promising to do the same, the argument has switched to environmental problems. Surely, they must be caused by "market failure."

Would-be central planners argue that when it comes to the environment, markets and the law on which the nation was founded cannot protect us. Instead, we must have knowing, wise leaders with the "institutional expertise to fully evaluate complex scientific and technical evidence" and the ability to "make important policy decisions" (Thompson 1996, 1363). Americans, like children, need their help. Needless to say, we disagree.

CONCLUSION

Several years ago we were asked by reporters from *Forbes* if we believed that the EPA should be abolished (Brimelow and Spencer 1992, 432). It seemed at first like a radical notion. But it is a logical extension of the history reported here. The Interstate Commerce Commission and the Civil Aeronautics Board have disappeared, and the railroads, trucks, and airlines still function—substantially more efficiently than when regulation "saved" us from exploitation. We are seeing the benefits of communication and electrical service deregulation. Perhaps the environment could be next.

If so, we would be able to return to the regime that served us well in the past and that has shown signs of evolving as knowledge and environmental concerns began to change. The common law provides harsh penalties against firms that disregard the rights of citizens by exposing them to harms. Indeed, when real harm is inflicted, citizens get far better relief through common-law suits

than they do from appeals to the Environmental Protection Agency.

Ideas have consequences. Eventually, citizens will recognize that the common law, bolstered by local regulation, can protect the environment more effectively and fairly than can congressional statutes and bureaucratic regulations.

NOTES

1. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
2. *Carmichael v. City of Texarkana*, 94 F. 561 (W.D. Ark., 1899).
3. 94 F.Supp. 561 at 562.
4. 94 F.Supp. 561 at 573.
5. 94 F.Supp. 561 at 574.
6. *Whalen v. Union Bag & Paper Co.,* 208 N.Y. 1 (Ct.App., N.Y. 1913).
7. 208 N.Y. 1 at 5.
8. 208 N.Y. 1 at 5 citing *Weston Paper Co. v. Pope,* 57 N.E. 719.
9. *Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak,* 7 F.2d 583 (9th Cir., 1925) at 585.
10. 7 F.2d 583 at 585.
11. 7 F.2d 583 at 584.
12. *International Paper Co. v. Maddox,* 105 F. Supp. 89 (W.D.La., 1951).
13. *International Paper Co. v. Maddox*, 203 F.2d 88 (5th Cir., 1953).
14. Authors' count of cases recorded and reported by Westlaw.
15. 1 Ch. 149 (1953) discussed in Brubaker (1995, 282–4). Also see Roger Bate (1994, 13) for discussion of this form of water quality protection in England. Over 2,000 such actions have been brought; only two have been lost by the anglers. Few actually reach the courts because the precedents are clear.
16. *Illinois v. Milwaukee,* 406 U.S. 91 (1972).
17. 406 U.S. 91 at 107.
18. *City of Milwaukee v. Illinois*, 451 U.S. 304 at 319 (1981).
19. *Arkansas v. Oklahoma,* 503 U.S. 91 (1992).

20. *Village of Wilsonville v. SCA Services*, 426 N.E.2d 824 (1981).
21. 443 A.2d 1244 (1982).
22. 443 A.2d 1244 at 1249.
23. L.R. 3 H.L. 330 (1868).
24. *New York v. Schenectady Chemicals, Inc.,* 459 N.Y.S.2d 971 at 976 (Sup. Ct., N.Y., 1983).
25. *Davey Compressor Co. v. City of Delray Beach,* 639 So.2d 595 (Sup. Ct., Fla., 1994).
26. *U.S. v. Hooker Chemicals & Plastics Corp.*, 850 F.Supp. 993 (W.D., N.Y., 1994).
27. 850 F.Supp. 993 at 1068.
28. 850 F.Supp. 993 at 1039.
29. 27 S.Ct. 618 (1907).
30. 27 S.Ct. 618 at 620.
31. *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915); 237 U.S. 678 (1915); and 240 U.S. 650 (1916).
32. *United Verde Extension Mining Co. v. Ralston,* 296 P. 262 (Sup. Ct., Az., 1931).
33. 296 P. 262 at 265.
34. 226 F.Supp. 169 (D. Ore., 1963).
35. *Renken v. Harvey Aluminum*, 347 F.Supp. 55 (D. Ore., 1971). The decision was upheld on appeal by the polluter, which was found to be frivolous. See 475 F.2d 766 (9th Cir., 1973).
36. 347 F.Supp. 55 at 57.
37. 500 F.Supp. 984 (D.Ore., 1980).
38. 709 P.2d 782 (Sup.Ct., Wash., 1985).
39. 709 P.2d 782 at 792.
40. 709 P.2d 782 at 792.
41. *Bradley v. American Smelting & Refining Co.*, 635 F.Supp. 1154 (W.D., Wash., 1986).
42. States were active in pollution reduction efforts prior to the establishment of the EPA. For example, in the early 1960s there was an average of three *arrests* per month in Wisconsin for violations of water standards. See Davis (1971, 777).
43. 956 F. Supp. 588 (D., S.C., 1997).
44. 34 F.3d 114 (2nd Cir., 1994).

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