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Thomas W. Merrill
Columbia Law School, tmerri@law.columbia.edu

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Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy

*Thomas W. Merrill, Third Panelist**

From an American perspective, environmental law has undergone two bouts of centralization in the past three decades. Round one occurred in the 1970's, as Congress federalized vast areas of environmental law that had previously been the province of state and local governments. Round two, which is still in an incipient phase, represents the effort to internationalize environmental law.

The question I would like to address is what can we learn from round one about what is likely to happen in round two.¹ My answer, in a nutshell, is that the primary driving force behind the federalization of environmental law in the 1970's was a form of economic protectionism. The dominant motive for federalization was the desire to protect existing industries, jobs, and tax bases against competition from other states with potentially cheaper environmental regulations. This suggests, in turn, that the most promising vehicle for globalizing environmental law is the same type of protectionist impulse, operating now on an international rather than an intranational scale. The trick will be to harness this protectionist impulse toward proper environmentalist ends without letting protectionism get out of control and killing off trade liberalization altogether.

Let me begin with a clarification. I am not saying that environmentalism is some kind of cover for economic protectionism. It could be that some environmental initiatives are best explained on this basis. But I readily concede that the sudden upsurge in public support for environmental regulation that began in the 1970's and continues today is a phenomenon that exists independently of any desire for economic protectionism. My comments are directed at explaining not the fact of environmentalism, but rather the centralizing tendency in environmentalism. In other words, why does a demand for increased environ-

mental protection translate into a demand for centralized controls, rather than more rigorous local controls?

If we look at the legislative histories and public discussions that surrounded the rapid federalization of American environmental law in the 1970's, we can discern three prominent arguments in support of centralization of controls: the spillover argument, the rights argument, and the economic protectionism argument.² Other justifications played a role in the debate, but they were either too general to have any impact on regulatory design, or else justified a federal role to only a limited degree or only in special circumstances. Such justifications can, consequently, be ignored for present purposes.

The spillover argument is in many respects the most obvious justification for federalization. Ozone from Chicago may affect air quality in southern Wisconsin.³ Pollution on the New York side of Lake Champlain may affect persons on the Vermont side of the lake.⁴ These sorts of interstate spillovers are difficult, if not impossible, to regulate under state or local law, since neither the polluting state nor the receiving state has the correct incentives impartially to resolve the dispute. Bringing in the Federal Government as a neutral arbiter that represents the affected interests in both states seems like the logical solution.

A second argument is the claim that individuals have a right to a healthy environment. At first blush, it might seem that there is no necessary connection between rights claims and the federalization of environmental law. But claims of right tend by their very nature toward universality. To say that there is a natural right to the fruits of one's labor means that all persons everywhere have such a right. The same holds true of the statement that torture violates human rights. Thus, it should come as no surprise that when the environmental movement adopted the rhetoric of rights and succeeded in attaching this rhetoric to discussions of environmental policy, the political community naturally thought of those rights as attaching to the broadest political jurisdiction capable of protecting them. In the case of the United States in the 1970's, this was the Federal Government.

The third argument, economic protectionism, is based on the idea of a regulatory race to the bottom among individual jurisdictions. The assumption is that investment capital is mobile and will locate in the

2. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211-19 (1977) (listing "the tragedy of the commons and national economies of scale," "disparities in effective representation," "spillovers," and "moral ideals and the politics of sacrifice" as the driving forces behind federalization in environmental policy).

3. See *Wisconsin v. Thomas*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,964, 20,964 (E.D. Wis. Jan. 18, 1989).

4. See *International Paper Co. v. Ouelette*, 479 U.S. 481 (1987).

jurisdiction with the lowest total costs of production, thereby maximizing returns to investment. Knowing this, individual states will be reluctant to enact tough environmental standards, even if their citizens want them, because the associated rise in production costs may drive investment capital—and hence jobs and the tax base—to other jurisdictions. Fear of this flight of capital thus impels states into a race to the bottom (i.e., the adoption of standards more lenient than their citizens would prefer). The only way out of the dilemma is to impose the tough standards at the federal level and, thereby, eliminate any incentive to shift capital from one jurisdiction to another. Both the theoretical and empirical assumptions of the race to the bottom thesis have been called into question in recent years,⁵ but there can be no doubt that the notion was widely believed in the 1970's, and still carries great weight today.

These three arguments for federalization of environmental law have very different implications for the type of regulatory regime one would expect to be adopted as a matter of federal law. Stated succinctly, the spillover argument would generate a regime that focuses on interstate pollution, the rights argument would generate a regime that tries to equalize environmental quality across jurisdictions, and the economic protection argument would generate a regime that tries to equalize environmental compliance costs across jurisdictions. It follows that one can draw some inferences about which of these three arguments carried the most weight in the 1970's by examining the nature of the legislation that emerged from Congress: Was it primarily designed to redress interstate spillovers? to equalize environmental quality across jurisdictions? or to equalize environmental compliance costs across jurisdictions?

The spillover rationale may be rather easily eliminated on this basis. If spillover effects were the dominant reason for the adoption of federal environmental laws, federal law would concentrate on environmental media with the greatest potential for crossboundary pollution. This would primarily be air pollution, especially from sources located near state lines, and water pollution associated with interstate waters. In addition, one would expect federal environmental legislation to contain well-defined mechanisms for resolving disputes that arise over interstate pollution.

The federal legislation that was adopted, however, contains little to suggest that interstate spillovers were a dominant, or even signifi-

5. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (concluding that race to the bottom has no valid theoretical basis in environmental law); Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L. J. 2039 (1993) (questioning empirical basis for the theory).

cant, focus of concern. Neither the Clean Air Act (CAA)⁶ nor the Clean Water Act (CWA)⁷ are limited to, or even give special attention to, sources likely to generate interstate conflicts. Instead, the emphasis is on uniform standards for point sources, especially new or modified point sources, regardless of whether they pose a danger of interstate pollution. Statutes like RCRA,⁸ CERCLA⁹, and the Safe Drinking Water Act¹⁰ are primarily concerned with ground water contamination and other localized harms, rather than transboundary pollutants. The same may be said of federal provisions governing oil spills,¹¹ impairment of visibility,¹² and surface mining blight,¹³—since these are nearly always confined to a single political jurisdiction. Perhaps even more tellingly, none of the original federal acts contained an effective mechanism for dealing with interstate pollution. In the Clean Air Act, for example, Congress has never provided an effective remedy for downwind states complaining of pollution from upwind states.¹⁴

What, then, about the idea that there is a right to a healthy environment, accompanied by the unspoken assumption that protected rights are federal rights? If this were the dominant concern, one would expect to find regulatory regimes that seek to equalize the benefits to citizens across jurisdictions. Some evidence of such an equal-benefits policy exists in the major statutes of the 1970's. The national ambient air quality standards of the Clean Air Act provide the most prominent example.¹⁵ As originally enacted, the Clean Air Act Amendments of 1970 seemed to contemplate that federal regulation would by 1977 produce uniformly healthy and pristine air for all Americans, wherever they might live.¹⁶ Similarly, the 1972 Clean Water Act set forth a goal of fishable and swimmable waters throughout the United States by 1983.¹⁷ Both mandates are exactly what one would expect from a rights perspective.

6. 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992).

7. 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1992).

8. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992).

9. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1994).

10. 42 U.S.C. §§ 300f-300j-26 (1988).

11. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (Supp. IV 1992).

12. CAA §§ 169A-169B, 42 U.S.C. §§ 7491-7492.

13. Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (1988 & Supp. IV 1992).

14. *See New York v. EPA*, 852 F.2d 574, 581 (D.C. Cir. 1988) (R.B. Ginsburg, J., concurring).

15. CAA § 109, 42 U.S.C. § 7409.

16. Pub. L. No. 91-604, § 110(a)(2)(A), 84 Stat. 1676, 1680 (1970) (amended 1990).

17. CWA § 101(a)(2), 33 U.S.C. § 1251(a)(2).

Even more striking are some federal environmental statutes that make no sense from any perspective other than the rights justification. Take the Federal Safe Drinking Water Act.¹⁸ This Act cannot be justified on interstate spillover grounds, since virtually all public water systems are confined to a single local political jurisdiction. Nor can the Act plausibly be justified on a race to the bottom theory, which assumes expensive environmental controls may induce industrial sources to close and move elsewhere. Although public water systems might shut down, they are obviously in no danger of relocating to another jurisdiction. The only satisfactory justification for federalizing drinking water quality standards is some notion that all Americans have a right to safe and clean drinking water, and thus that there "oughta be law" at the federal level protecting this right.

Over time, however, the influence of rights claims on the design of the federal environmental laws appears to have faded. The Clean Air Act, for example, has evolved into a kind of de facto triage system, with cleaner-than-national standards or Prevention of Significant Deterioration areas, compliance areas, and dirtier-than-national standards or nonattainment areas. This variation in air quality areas is recognized as a more or less permanent state of affairs.¹⁹ The Clean Water Act never transformed its lofty fishable-swimmable water goal into reality, but instead concentrated on technology-based permitting standards for point sources of water pollution, determined with little regard to impact on water quality.²⁰ Even the Safe Drinking Water Act has devolved into a system of state enforcement of federal standards, which in practice permits significant local variation.²¹ Other federal statutes, ranging from RCRA to NEPA²² to TSCA,²³ set controls based on considerations of feasibility, or available alternatives, or costs and benefits, and thus eschew any notion of a universal right to a given measure of environmental protection.

Only when we turn to the third justification—the economic protectionist rationale—do we see significant congruence between justificatory theory and regulatory design. As noted, the regulatory strategy one would expect under a race to the bottom justification would be an attempt to equalize compliance costs across jurisdictions. Only if

18. 42 U.S.C. §§ 300f-300j-26 (1988).

19. For example, the 1990 Amendments to the CAA extend compliance dates for attainment in some cases to the year 2010. See 42 U.S.C. § 7511(a)(1) (Table 1).

20. See William F. Pederson, Jr., *Turning the Tide on Water Quality*, 15 *ECOLOGY L.Q.* 69 (1988).

21. See ROBERT V. PERCIVAL ET. AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY* 978-79 (1992).

22. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(d) (1988 & Supp. IV 1992).

23. 15 U.S.C. §§ 2601-2692 (1988 & Supp. IV 1992).

compliance costs are equalized will decisions about future capital investment be neutralized with respect to environmental regulation. Owners of capital may still decide to leave Cleveland or Detroit and move to South Carolina, but the decision will be based on factors like wages, unions, local taxes, or the weather, not on the strength or weakness of local environmental controls.

Considerable evidence suggests that equalization of compliance costs is indeed a central concern of federal environmental laws. First, there is what might be called the up-down distinction. Virtually all federal environmental statutes permit the states to adopt regulations that are more stringent than the federal standards, but expressly prohibit the states from adopting standards that are less stringent.²⁴ In effect, the federal statutes create an environmental floor, but not a ceiling.²⁵ The up-down distinction is precisely what one would expect if federal law were driven by a concern with a state race to the bottom. States cannot be permitted to deviate downward from federal standards because they might start competing for mobile capital. The possibility of a race to the top is a matter of indifference.

Second, there is the new-old distinction. Throughout environmental law, we find that new sources of pollution are regulated more strictly than existing sources.²⁶ Uniform federal stationary source and mobile source standards under the Clean Air Act apply only to new sources, not to existing sources.²⁷ Tougher standards are mandated by the Clean Water Act for new point sources than for existing sources.²⁸ New food additives, drugs, chemicals, and pesticides are subjected to a rigid regulatory screening process, while previously marketed substances are subject to more lenient standards or enjoy "grandfather" protection.²⁹ Various justifications for the new-old distinction have been offered. But one explanation is surely a desire to ensure that the allocation of decisions about capital investment with respect to new sources or products are not influenced by differential environmental compliance costs across jurisdictions.

24. See, e.g., CAA § 116, 42 U.S.C. § 7416; CWA § 510, 33 U.S.C. § 1370.

25. There are a few examples of federal statutes that preempt state regulation altogether. See, e.g., CAA § 209(a), 42 U.S.C. § 7543(a) (motor vehicles); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) § 24(b), 7 U.S.C. § 136v(b) (1988) (labeling and packaging of pesticides); Toxic Substances Control Act (TSCA) § 18(a)(2), 15 U.S.C. § 2617(a)(2) (manufacturing of toxic chemicals). But these provisions are the exceptions, rather than the rule, and are essentially confined to circumstances where particular products that are distributed nationally would otherwise be subject to multiple and conflicting regulatory standards.

26. See generally Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025 (1983) (offering examples and criticizing the distinction).

27. See, e.g., CAA §§ 111, 202, 42 U.S.C. §§ 7411, 7521.

28. See CWA § 306, 33 U.S.C. § 1316.

29. See Huber, *supra* note 26.

Third, and perhaps most importantly, is the overriding concern in federal statutes with uniform technology-based standards for industrial sources of pollution, as opposed to incentives that would modify inputs used by these sources or demand for the products they produce. The Clean Water Act, for example, is almost wholly concerned with "point sources," and makes little effort to control nonpoint sources, even though such sources are universally acknowledged to be important contributors to ambient water pollution.³⁰ Similarly, RCRA focuses its regulatory firepower on hazardous waste disposal facilities, and does little directly to modify the waste-generating habits of individuals or firms.³¹ The Clean Air Act, which seems on its face to make everything turn on ambient air quality standards, in its administration and implementation turns out to be largely a regulator of stationary sources. Even the mobile source provisions are driven largely by compliance cost equalization. The major strategy for dealing with mobile source pollution is to impose nationally uniform tailpipe emissions standards, which has the effect of equalizing compliance costs for both manufacturers and users of autos.

I conclude, therefore, that the foremost factor driving the federalization of environmental law is the desire to protect existing shares of industrial output, jobs, and tax revenues. A secondary factor is the belief by many that there should be a right to a healthy environment, and the concomitant assumption that this means federal rather than state or local protection. Concerns with redressing interstate spillovers, while perhaps rhetorically important in justifying federalization, take up a distant third place in the actual design of these statutes, and hence should not be regarded as an important driving force.

What are the implications of this analysis in terms of the second round in centralization—the emerging trend toward globalization of environmental regulation? First, the analysis suggests that a concern over transboundary pollution is unlikely to generate significant support for new forms of international environmental law. I am not entirely sure why this should be so. Perhaps it reflects the fact that pollution is still largely a local phenomenon, and that instances of transboundary pollution are too episodic or do not generate sufficient harm to the affected states to generate widespread interest in an international solution. Perhaps it reflects the fact that the extreme asymmetry between the costs and benefits of controls in these cases make an international solution very difficult to attain, and one that few are willing to commit to in advance.

30. PERCIVAL ET AL., *supra* note 21, at 945.

31. *Id.* at 417-20.

Second, the American experience suggests that the rights perspective is unlikely to generate a strong commitment to an enforceable regime of international environmental law, at least not in the near-term. To be sure, the idea that people have a right to a healthy environment is spreading throughout the world. The idea has great appeal in the recently liberated nations of Eastern Europe and the former Soviet Union, which have witnessed immense environmental devastation. The idea also seems to be catching hold in many parts of the developing world, where one might expect citizens to prefer rapid economic growth to environmental amenities. But even if the right to a healthy environment is an idea whose time has arrived, there is little evidence that individuals around the world regard the global community as the proper locus for protection of these rights. No doubt there has been some movement in this direction, as the universalization of claims of human rights attests. But we are still some way from the day when most individuals around the world think of the United Nations, as opposed to individual nation states, as the appropriate entity to secure the protection of individual rights. Until that day arrives, the idea of environmental rights is unlikely to supply the motive force necessary to complete the drive toward a second round in the centralization of environmental law.

Third, to the extent that we see real movement in international environmental law, it is likely to be in response to a demand for economic protectionism. Federalization of environmental law in the 1970's took place largely in response to fears that industry would flee to areas with cheaper environmental regulation. Similarly, the internationalization of environmental law is most likely to occur as part of an effort to head off the flight of industry to "pollution havens." The only difference is that this time the centralization of standards will occur not through recourse to a sovereign central government, but through bilateral and multilateral negotiations that take place in conjunction with trade liberalization.

In short, the experience with the federalization of environmental law in the United States in the 1970's suggests that future centralization of environmental law is more likely to occur as an adjunct to trade law than in the form of freestanding multinational environmental treaties. The dominant model for the global environmental future will not be the freestanding treaty on environmental concerns, such as the Montreal Protocol on Ozone Depletion,³² where the nations of the world gather to agree upon common measures to address a global commons-type problem. The American experience would suggest

32. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989).

that the Montreal Protocol was an aberration, explainable in part by the fact that an international treaty banning CFC production was consistent with the economic interests of the dominant chemical companies of the West.³³ Instead, the dominant model of the future is NAFTA,³⁴ with its efforts to standardize American and Mexican environmental law in order to forestall a flight of U.S. industry to the South.

This general prediction has both negative and positive implications for the global environmental future. On the negative side, it suggests that any regime for dealing with a problem of the global commons—such as the greenhouse effect—will, if it emerges at all, be highly inefficient. An optimal regulatory strategy for dealing with global commons problems would seek to internalize the costs that actors in different jurisdictions impose on the commons. With respect to global warming, for example, such a strategy might focus on reductions in emissions of greenhouse gases in some countries, on reductions in carbon fuel consumption in others, and on forbearance from destroying gas-absorbing forests in still others. Under such a regime, compliance costs would vary with the degree of damage each jurisdiction imposes on common resources. The regime that is more likely to gather political support, however, is one that tends toward the imposition of uniform compliance costs, regardless of the impact on environmental media. Such a regime might insist, for example, on the use of standardized emission-controlling devices everywhere. This outcome would have some mitigating effect on global warming, but not nearly as much as would a more finely tuned strategy that mixes and matches regulations depending on each country's individual circumstances.

On the positive side, there are two points to be made. First, the American example suggests that there is at least one institutional force—fear of a race to the bottom—with the potential to evolve into a genuine form of international environmental law. The experience of the European Union corroborates this. The Europeans moved toward harmonization of environmental standards in the 1970's and 1980's, in large part to eliminate incentives for industrial relocation within the EU caused by disparate environmental regulations. Over time, however, community-enforced environmental protection became something of an end in itself.³⁵ Although protectionist impulses may still supply the bulk of the political support for a regime of European-wide

33. See Daniel F. McInnis, *Ozone Layers and Oligopoly Profits*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith, Jr., eds., 1992).

34. North American Free Trade Agreement, Dec. 8, 1992, 32 I.L.M. 605.

35. See Philippe Sands, *European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection*, 100 YALE L.J. 2511, 2513-18 (1991).

environmental controls, the institutionalization of centralized controls may also create a mechanism for tackling spillover and commons problems, which otherwise would go begging for a solution.

The second positive point has to do with concerns about global equity and the fairness of demanding that Third World nations adopt strict provisions to protect the environment when they have not yet had a chance to enjoy the fruits of industrialization. If I am correct that the movement toward globalization is likely to take place primarily in the context of bilateral and multilateral trade negotiations, then this suggests a built-in mechanism for dealing with the equity problem. Specifically, the more developmentally advanced nations will be able to induce the developing nations to adopt regimes that call for stricter environmental protection only by offering them greater access to markets in the developed world. In effect, trade liberalization will act as implicit compensation for agreeing to stricter environmental standards. This implicit compensation goes a long way toward offsetting the complaint that globalization of stricter environmental norms is unfair to the Third World.

In sum, my advice to environmentalists would not be, as one commentator recently said, to "end their alliance with protectionists."³⁶ Environmentalists, if they are to produce a genuine regime of international environmental law, desperately need the protectionists. The trick for the environmentalists will be to harness protectionist anxiety by imposing environmental conditions on trade liberalization agreements, without letting the anxiety get out of hand and killing off these agreements altogether. As the NAFTA experience suggests, walking this tightrope is not going to be easy.

36. Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L. L. 700, 727 (1992).