

Lecture #22: Regulation to the Rescue: The Rise of Environmental Law

Suggested Readings:

Richard J. Lazarus, *The Making of Environmental Law*, 2004.

Karl Boyd Brooks, *Before Earth Day: The Origins of American Environmental Law, 1945-1970*, 2009.

J. Brooks Flippen, *Nixon and the Environment*, 2000.

Bruce A. Ackerman & William T. Hassler, *Clean Coal, Dirty Air*, 1981.

Outline

I. Bricks in Toilets: The Fisherman's Problem as Tragedy of Commons

I emphasized last time apparent absurdity of putting brick in toilet to help save the world: but maybe it could? optimism of Earth Day flowed from premise that changing values changed actions and world connection of individual actions to social results important to historical understandings, moral responsibility, and political engagement alike: key insight

difficulty is applying insight to action: Fisherman's Problem as Tragedy of Commons: benefits from polluting accrue to individuals, but costs to society, so little incentive not to pollute. if gains from pollution control go to others, why bother?

Garrett Hardin's "Tragedy of the Commons," 1968, could also apply to bricks in toilets

possible solution: don't rely on voluntarism. use coercive power of state to force action

if people don't put bricks in toilets on own, pass law requiring them to do so: but what kinds of bricks? what kinds of toilets? who should pay? tax rebates or government subsidies? unfunded mandates?

just so did a new set of questions enter policy arena...and set up terms of future controversy over role of governmental regulation, especially at federal level, in environmental protection

II. Up the Ladder of Federalism: Clean Air as Case Study

1960s saw extraordinary wave of new laws relevant to environment: Motor Vehicle Air Pollution Control Act, 1965; Water Quality Act, 1965; Air Quality Act, 1967; Clean Air Act Amendments, 1970; Federal Water Pollution Control Act, 1972; Endangered Species Act, 1973

National Environmental Policy Act of 1970 (NEPA) perhaps most symbolically important

note how many came into existence before widespread upsurge of popular concern in 1969-70: these were *not* responses to Earth Day or grass-roots organizing, not high on public agenda

other sources: industry politics as important as grass-roots environmentalism

sequence of government responses to air pollution a useful case study

air pollution mainly perceived as local level rather than national; no fed action until 1950s

government action pioneered at local level: St. Louis ordinance in 1940; Pittsburgh in 1941 (becomes national model); Los Angeles and California take series of steps against smog

initial reactions to air pollution treated as a "smoke" problem; Pittsburgh ordinance used "Ringelmann Chart" for simple eyeball measurement of smoke density, outlawed "dense smoke" as a nuisance: technical apparatus for measuring & understanding air pollution very weak

Pittsburgh efforts involved active cooperation between industrialists and city government

Pennsylvania stepped in after Donora-Webster killer smog of October 1948: sulfur dioxide accumulates in temperature inversion, 42.7% of population, 5,910 people affected; 20 die

Great Smog in London (Dec. 5-9, 1952) killed estimated 4000 people in atmospheric inversion event that trapped high-sulphur coal smoke, made driving impossible, film screenings cancelled because of smoke not until 1955 did federal government pass law budgeting \$5 million per year for research; assumption was that air pollution intrinsically belonged to other levels of government

Representative Paul Schenck (Ohio Republican) had to try three times in 1958, 1959, 1960 to get Congress to pass legislation investigating automobile emissions; resisted by Public Health Service as too political; 1960 law finally passed asking surgeon general to report on possible health effects of auto-related pollution

federal involvement would begin to expand in early 1960s: Kennedy administration interested, Division of Air Pollution now existed in Public Health Service as bureaucratic home with vested interest; municipalities lobbying; sense that state & local couldn't do it alone

1962: Surgeon General's *Motor Vehicles, Air Pollution, and Health*: tentative but influential

1963: Senate Subcommittee on Air and Water Pollution, chair was Sen. Edmund Muskie (Maine Democrat): became congressional leader on pollution questions for next decade

1963: Clean Air Act, basis for all subsequent air pollution law: reaffirmed local/state responsibility, but recognized new "leadership" and financial assistance role for feds; feds empowered to enter abatement process if clear human health danger existed (note consistent focus on human health in early legislation)

1967: Air Quality Act (Muskie authored, set "air quality control regions" with federal designated "criteria" for air quality requisite to health; subtle shift from feds as researchers and coordinators to feds as policymakers and preemptors of local authority

Motor Vehicle Air Pollution Control Act of 1965 tied to auto companies' worries about increasing regulation of emissions at state level, especially in California, but also Pennsylvania, New York
a tangled mixture of different state standards might create nightmare for car company designs, so...
1967: National Emission Standards Act of 1967, preempted all but California's local auto emission standards
use of Federal regulatory apparatus to circumvent state regulation had occurred since 1887 Interstate
Commerce Act, standardizing railroad regulation in response to proliferation of state laws in 1870s
hence: auto companies supported federal legislation in return for federal preemption of state regulation
early acts had weak enforcement measures: complex conference procedures whereby federal, state, local
officials met with interested parties.

III. Hopping on the Bandwagon

note rise in public interest in environment 1969-70 as reflected in polls: May 1969, only 1% listed
"pollution/ecology" among "most important problems" of US; 25% in May 1971; public concern over
air/water pollution rose from 10th to 5th place (Vietnam War, inflation, taxes, economy always higher)
rising public concern meant political opportunity, especially for Washington politicians seeking to identify
selves with national issue suitable for presidential springboard
Senator Edmund Muskie, key figure in LBJ administration; also Sen. Henry Jackson, (Washington
Democrat), who would author NEPA; much rivalry, both saw selves as presidential contenders in 1972
election
their chief antagonist: Richard Nixon, who underwent sudden conversion to environmentalism in 1969 as
polls began to take off, shift managed by John Ehrlichman, former Seattle land-use attorney, designed
to preempt environmental image-making of likely Democratic presidential contenders
December 1969, NEPA passes Congress, Nixon signs as first act in January; delivers Environmental
Message to Congress in February
creates Environmental Protection Agency, National Oceanic and Atmospheric Administration (NOAA) in July
EPA justified as means for coordinating interdisciplinary assault on multi-media pollution
political competition contributed to escalation of specific clauses: rivalry resulted in legislation was probably
stronger than any individual politician might have chosen
Nixon ignored Earth Day, and retreated from environmental initiatives by 1971 in face of economic problems
air pollution another case in point: May 1970 Ralph Nader issues task force report on clean air, attacks
Muskie for passivity and being overly pro-industry; to prove his *bona fides* with environmentalists,
Muskie became much more aggressive in new clean air legislation
Result: Clean Air Act, 1970: 90% decrease in car pollutants within 5 years, EPA to ignore questions of
economic or technical feasibility. much more stringent than earlier; less result of environmental lobbying
than of politicians anticipating public concerns
irrational consequences helped provoke backlash of 1970s: ignoring technically feasible motor vehicle
pollution control, paying little attention to chemical realities or economic trade-offs, meant tactical
retreats from early standards by government; Los Angeles even joined auto manufacturers in resisting
standards for fear that pollution control devices might elevate smog-creating oxides of nitrogen
introduces themes of hard choices, ambiguous trade-offs, increasingly technical nature of policy debates that
would characterize environmental politics from here on
NEPA one result of this complicated series of machinations, authored by Jackson
much of it very broad: "productive & enjoyable harmony between man & his environment"; citizens' right to
healthful env and responsibility to contribute to it
key operational clause other than creation of Council on Environmental Quality (CEQ): requirement that all
Federal agencies henceforth issue environmental impact statements (EISs) before taking any major
action; became device whereby anyone could intervene in policy process
EIS broadened by Judge J. Skelly Wright's decision in *Calvert Cliffs v. AEC* (Atomic Energy Commission),
1971, in which judge ruled that AEC had obligation to conduct EIS on thermal pollution from reactor;
became precedent for much more controversial Alaskan Pipeline EIS
also: broadening of notion of standing suggested by Justice William O. Douglas dissent in *Sierra Club v.*
Morton: env organizations could sue for standing even when not directly involved in case (part of
general expansion of tort law during this period, with many environmental ramifications)
creation of new environmental organizations specializing in use of these new legal tools:
Environmental Defense Fund (1967) initially organized to oppose DDT spraying on Long Island
Natural Resources Defense Council (1970) litigating on wide range of pollution and resource issues
Sierra Club Legal Defense Fund (later spun off in 1997 as Earthjustice) legally represented other
environmental groups
powerful new tools, but an unintended consequence was professionalization of expert environmentalists
distancing from grass roots, and perhaps from larger questions of values?