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# THE COMMON LAW AND THE ENVIRONMENT IN THE COURTS: DISCUSSION OF CODE LAW AND COMMON LAW

*Bruce Yandle*<sup>†</sup>

## INTRODUCTION

Stuart Buck provides a strong review of common law environmental protection, how it works, and how the record of common law protection may be compared to the protections afforded by statute law.<sup>1</sup> Buck's legal analysis is tightly focused on the way the two systems operate; he also addresses the difficulty encountered when trying to determine which system of law is to be preferred by those who seek efficient and effective environmental protection. In his final assessment, he becomes agnostic on the point of which is best. Noting that common law has worked in many cases where it has been used and that statute law is more systematic in the protections it offers, Buck finds it difficult to choose between the two regimes. Based on the data at hand, he cannot say which of the approaches is best.

I generally agree with Buck's conclusion, which is to say that based on the data he seeks to sift it is difficult to draw a final conclusion as to which is best. However, there is more to the story. The common law offers protection without the need for bringing suits. Word gets out; property rights and the rule of law affect

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<sup>†</sup> The author is Alumni Distinguished Professor of Economics Emeritus, Clemson University, and Senior Fellow, Property and Environment Research Center, Bozeman, MT. He acknowledges a debt of gratitude to Roger Meiners for his guidance and criticisms.

<sup>1</sup> Stewart Buck, *The Common Law & The Environment in the Courts*, 58 CASE W. RES. L. REV. 621(forthcoming 2008).

behavior. In a sense, each property owner is made a deputy to defend his own rights; monitoring costs fall; immediate action follows; this deepens the effect of common law, which is to say that unlike the technical standards associated with EPA permits, common law rules based on property rights and commons sense get embedded in behavioral norms..<sup>2</sup> Of course, parallel but different statements may be made about code law, but I am unable to conclude that environmental code law as a process is superior or even equal to common law protection of environmental assets. (In saying this, I call attention to the words “environmental assets.”) I say this for one fundamental reason. The world where common law is a central institution for generating and maintaining a property rights based order is a very different world from one where legislative code law and administrative regulations are the central order generating institutions. Because of this, I believe it is impossible to make a relative assessment of those two worlds by comparing their important surface features, no matter how carefully one may seek to draw the comparison. Other dimensions of the two worlds need to be considered.

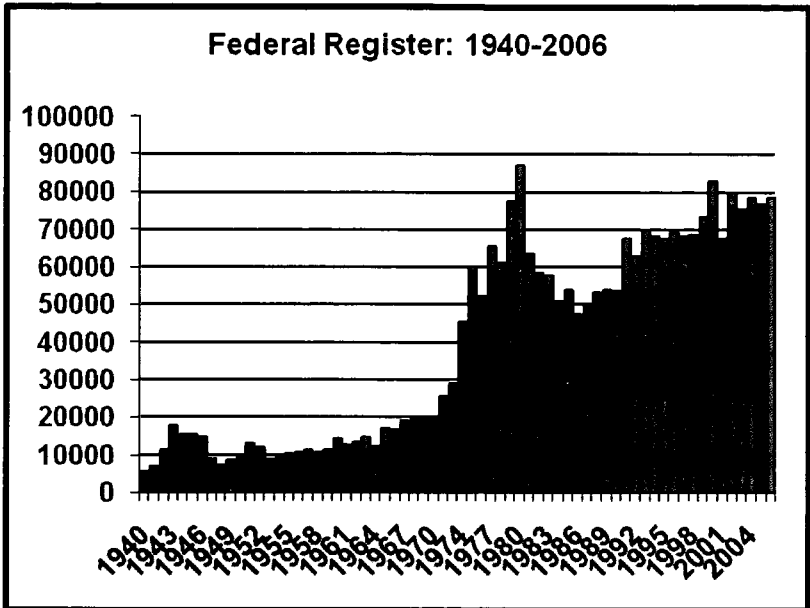
In this comment, I do four things. First, I discuss how the U.S. abandoned common law as a central legal system and became a code law country in the early 1970s. I also briefly seek to explain why this sharp change in fundamental law occurred. I next discuss and compare common law environmentalism with code law protection and discuss Stuart Buck’s final word on the subject. Third, I address rent-seeking afforded by code law and discuss the implications of this. The piece ends with some final thoughts about the relative merits of common law versus code law protections.

#### THE RISE OF CODE LAW

In a changing political landscape, the U.S. became a code law country in 1970. As shown in the accompanying chart, which reports the count of new Federal Register pages from 1940 to the present, 1970 was the year when dramatic increases in federal regulation emerged, following on the heels of major new statutes spawning social regulation.

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<sup>2</sup> It may be worth noting that this social deepening effect may have contributed to Mahoney’s statistical findings regarding the economic superiority of common law countries in producing wealth. Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 503–525 (2001).



This was the watershed year when the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Administration were formed along with other new federal regulatory agencies. The organic legislation that formed the new agencies, and major statutes that followed, raised expectations and then laid the groundwork for a massive outflow of technical regulation that emerged. The new world of regulation affected management of the workplace, production processes, product design, and marketing practices in consumer markets. A country previously regulated primarily by common law, city ordinances, state statutes and regional compacts became a nation regulated primarily by federal statutes. The default position changed. A centralized effort to manage environmental risks replaced a decentralized federalism that relied more on local control and property rights. A part of the rising tide of new code law is seen in the count of Federal Register pages. Most of the new pages of rules were tied to regulations related to safety, health, consumer markets, and environmental quality.

#### WHY 1970?

At this point, it is tempting simply to move on to discuss the rise of code law and the decline of common law as contending legal regimes for protecting environmental property rights. Doing so would avoid

the difficult task of explaining why such a massive legal sea change occurred in the 1970s. But instead of moving on, I will draw on the work of other scholars to identify a rather amazing convergence of social forces that created a strong demand for centralized government and action at the highest level; a demand that able politicians were happy to satisfy.

In his discussion of key social forces that played through the U.S. in the late 1960s and early 1970s, Robert Higgs explains how the political foundation was laid for a “crisis and Leviathan” government reaction.<sup>3</sup> Among the crises Higgs notes are racial disturbances, riots, and the burning of cities. He includes reaction to the Vietnam War and the accompanying draft that generated a massive peace movement. As the turbulent 1960s rolled into the 1970s, the country became split politically and American voters seemed ready to do something about the problems that had emerged. The baby boomers were coming of age and there were plenty of problems in the offing.

Along with these domestic social forces came international ones. The U.S. and industrial world were hit with an Arab oil embargo that caused crude oil and gasoline prices to quadruple.<sup>4</sup> An energy crisis emerged. Higgs’ Leviathan responded with the formation of a Federal Energy Office to be followed by a Department of Energy and more regulations. To top things off, the U.S. economy experienced a serious bout with inflation. The Consumer Price Index rose from the January 1966 rate of 1.92% to 3.48% in January 1967.<sup>5</sup> Then, with inflation embedded in the economy, 1970 saw prices increasing at a rate of 6.18%, eventually hitting 13.91% in 1980. The rise in inflation was driven largely by Federal Reserve increases in the money supply.<sup>6</sup> And then there was the environment. Major episodes of air pollution occurred that could not be adequately explained. Oil spills and the effects of government-sponsored uses of chemicals for pest control emerged. The environment became a dominant theme in songs and literature. Earth Day arrived, and the popular response was massive.

When all was said and done, the period 1964 to 1976 saw major statutes passed that addressed civil rights, highway traffic and auto

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<sup>3</sup> ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 237–54 (Oxford Univ. Press 1987).

<sup>4</sup> David Fischer, *The Great Wave*, New York: Oxford University Press (1996).

<sup>5</sup> Inflationdata.com, *Historical US Inflation Rate from 1914 to the Present*, [http://inflationdata.com/inflation/Inflation\\_Rate/HistoricalInflation.aspx?dsInflation\\_currentPage=3](http://inflationdata.com/inflation/Inflation_Rate/HistoricalInflation.aspx?dsInflation_currentPage=3) (last visited Feb. 11, 2008).

<sup>6</sup> For example, the rate of growth of M1 rose from 3.3% in 1969 to 5.1% in 1970, 6.5% in 1971, and to 9.2% in 1973. ECONOMIC REPORT OF THE PRESIDENT, H. Doc. 108-145, at 365 (2nd Sess. 2004).

safety, consumer protection, clean air, water pollution control, energy, consumer products, and occupational safety and health.<sup>7</sup> Each of these statutes called for regulatory actions that formed the new “social” regulatory agencies. These, in turn, produced a massive increase in code law. From 1970 through 1977, the number of pages in the Code of Federal Regulations rose from 54,000 to 75,000, while the expenditures of the new social regulatory agencies rose from \$1,449.3 million in 1970 to \$7,318.3 million in 1977.<sup>8</sup> While the budget numbers alone are large enough to catch ones attention, they are probably swamped by the compliance costs they fostered. Within all this, an appealing logic was provided for taking environmental control to Washington, though little appeal to reason was needed. Once on their way, air emissions and water pollution do not recognize state lines. Yes, the states might be capable of taking care of things within their boundaries, but the environmental problem was larger than this. While logical, it is interesting that the boundary problem was a small subset of the environmental problem, which has to do with human exposure to hazards and is mostly local. It was not necessary to nationalize control of every square mile of the nation to get at the boundary problem. Indeed, statutes could have been devised that targeted pollution sources that in fact discharge wastes that traveled beyond the normal legal control net.

The expanding federal code law did not eliminate common law. In most cases, there were savings clauses in the statutes that spawned the code; these said that nothing in the legislation would preclude the right of individuals to bring suit. But the statutes and code took precedence over common law and state and local codes. Federalism was weakened by a monopolized environmental regulator.

Prior to 1970, the state courts were the main venue for suits involving environmental harm and environmental quality. In an effort to see what happened to the frequency of state versus federal environmental suits, Ceplo and Yandle reported a count of all common law and statute law reported cases involving air and water pollution that were brought in six western states from 1945 to 1993, with the total annual actions divided by GDP.<sup>9</sup> Both common law and federal actions began to expand in 1970. By 1987 the weighted count

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<sup>7</sup> Mahoney, *supra* note 2.

<sup>8</sup> BENEFIT-COST ANALYSES OF SOCIAL REGULATION: STUDIES IN GOVERNMENT REGULATION 2 (James C. Miller III & Bruce Yandle eds., 1979).

<sup>9</sup> See Karol Ceplo & Bruce Yandle, *Western States and Environmental Federalism: An Examination of Institutional Viability*, in ENVIRONMENTAL FEDERALISM 225, 249–52 (Terry L. Anderson & Peter J. Hill eds., 1997). The states were Arizona, California, Idaho, Louisiana, New Mexico, and Texas.

of federal suits eclipsed the number of actions brought at common law. By then, a century of experience with common law environmentalism and state, local, and regional environmental control were beginning to fade into the legal landscape. Indeed, some today might understandably hold the opinion that U.S. environmental protection began *de novo* in 1970, and that we the living are lucky to have survived the gunk and waste that accumulated without constraint to that point. Even though common law might be saved, it mattered little whether the lawyers who make the system work preferred code law remedies or simply were not educated about common law.

Marlow Greene and I discovered just how pronounced the loss of common law memory was in 1995 when we developed an informal telephone survey of thirty-eight U.S. environmental law firms.<sup>10</sup> We presented a set of water pollution facts that involved a downstream landowner whose property was being washed by industrial pollution from an identified upstream discharger. Marlow was able to converse effectively with attorneys at seventeen different firms. Without prompting them beyond the facts, Marlow asked an attorney at each firm what course of action he would recommend to the aggrieved landowner.<sup>11</sup> Thirteen of the seventeen attorneys immediately recommended organizing a citizen suit under the Federal Water Pollution Control Act. Two attorneys recommended bringing a common law suit. The other two offered no favored approach. Generally speaking, the attorneys who favored code law actions saw statute-based suits as being more predictable and therefore easier to organize.

#### CAN WE COMPARE THE TWO REGIMES?

The arrival of code law based on national statutes brought a different kind of environmental law enforcement. Common law relied on simple rules that had evolved to provide protection to owners and occupiers of land who held environmental rights. This judge-made law emerged from specific controversies that involved the parties before the court and no others. When an upstream party imposed cost on a downstream right holder against his will, there was a cause of action against the party causing harm. To gain standing, the aggrieved

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<sup>10</sup> BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT: CREATING WEALTH IN HUMMINGBIRD ECONOMIES 153-154 (Rowman & Littlefield, 1997).

<sup>11</sup> *Id.* There was more than one question on the survey. In addition to asking what course of action the attorney would recommend, a second question referred to the same set of water pollution facts but noted that the polluter involved was operating within the limits of its EPA discharge permit. In other words, the pollution was harmful but legal. Fourteen of the seventeen recommended common law.

party had to show damages or imminent threat of damages. One could not bring a polluter to trial by simply complaining about a dislike of pollution. Common law courts provided remedies to the damaged parties that included injunction and damages. Of course, the recovery process was not free, and plaintiffs rationed their actions. But remedies could be quite costly; operators of industrial plants who hoped to stay in business were wise to avoid litigation.<sup>12</sup>

To avoid litigation, common law allowed individuals to contract around common law rules. For example, at common law a property owner downstream held a right not to be harmed by an upstream discharger.<sup>13</sup> Evidence of harmful pollution passing the property of a downstream party is a cause of action against the polluter. To avoid suit, an upstream discharger could contract with the downstream party and provide compensation for use of the downstream party's environmental rights. In short, common law provided protection to right holders. The common law rule established a little recognized market in environmental rights. In a way it is strange that modern environmental economists celebrate so when market-like institutions are unveiled for handling water quality and certain air emissions. Contracting for environmental rights was an integral part of the old common law.

The protection of rights provided by common law began with individual right holders and extended to a large number of individuals who might be similarly situated in facing an environmental harm. As pointed out by Buck, the tort actions associated with nuisance and trespass provide protection to individual right holders.<sup>14</sup> A public nuisance tort action provided a common law remedy to a large number of similarly situated individuals. In general, the remedy sought involved both damages and, more importantly for environmental harms, injunctions that stopped the harmful actions.

In contrast, the emergent code law drew on the organic statutes from which the code emerged. The statutes and their attendant regulations sought to achieve widely-applied standards for specific pollutants in the case of air pollution and for overall improved conditions in the case of water pollution. In no instances were the organic statutes concerned directly with particular local conditions or in protecting private property rights. When enforced and not violated, the code protected the statute, which in so doing may indirectly provide protection to the environment and right holders. The code

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<sup>12</sup> Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 926-29 (1999)

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*



approach also protected the legislative process, a key point returned to below.

For example, under air and water pollution statutes, operators of industrial air and water pollution sources must operate within the limits of regulatory permits issued by state agencies with delegated EPA authority. The control system operates under the theory that the environment will be protected as long as dischargers stay within the limits of a permit. Unfortunately, rivers and streams can die biologically while point source dischargers operate within the legal limits. It has just been in recent years that the EPA has begun to focus its water quality regulation on total loads. Code law is different in another fundamental way. Unlike common law penalties that go to damaged parties, revenues collected from code law penalties go to the United States Treasury, not to damaged private parties. Environmental statute law is not based on property rights and offers no compensation to damaged parties. There is yet one last concern that arises when a generation becomes accustomed to expecting the government to take care of important aspects of life. We now have a generation raised with the belief that the environment is the government's responsibility. If there is a problem, you call your representative or the EPA; few people even think of private enforcement.

#### STUART BUCK'S FINAL WORD

Stuart Buck's comparison of relative effectiveness in providing environmental protection ended with a draw, or better stated, an indeterminate outcome. As stated before, I agree totally with Buck's final frustrated conclusion, but for reasons other than those given by Buck. Neither code law nor common law is designed to provide direct protection to some list of environmental assets. Perhaps it bears repeating. Code law is designed to protect the statute that spawned the code. Common law evolved to protect holders of property rights and to prevent the right holder from being damaged. In the absence of defined environmental property rights, neither system is designed to directly protect environmental resources other than those with defined rights. When environmental property rights are defined and enforced, common law offers an effective vehicle for protecting those rights. When the technical rules that emerge from environmental statutes map directly to environmental protection, code law may be an effective environmental protection vehicle. Neither code law nor common law addresses global climate change, CO<sub>2</sub> emissions, crowded expressways, concentrated automobile emissions on urban

highways, and a host of other environmental conditions that many would include in the term “environment.” However, while Buck did come to a draw, he described the data that would be needed to make a determination, recognizing that the data would never be forthcoming.

#### AN ATTRACTION TO CODE LAW

Roger Meiners’ and my review of common law environmentalism led us to conclude that the common law was displaced by code law because common law was potentially too effective in protecting environmental assets<sup>15</sup>. We stated that:

Statute law displaced common law for precisely the opposite reasons generally offered by those who extol statute law’s virtues. Critics of common law argue that common law protection is unreliable in that bad consequences still happen despite the law, that evidence of cause and effect is difficult to provide, and that enforcement is subject to unpredictable whims of common law judges and juries. . . . We contend that common law environmental protection was, if anything, too strict for those who wanted to generate pollution with greater impunity. At common law, there were no EPA permits or uniform technology requirements that sanctioned the action of the polluter.<sup>16</sup>

We arrived at this conclusion by reviewing decades of common law cases and noting how tough common law protection could be. Common law rules varied across states and regions. There was no federal common law enforced within states, but federal common law did exist for disputes that involved parties in more than one state. Code law does not impose injunctions; it does not shut down polluters. Common law did. Common law enforcement did not systematically recognize the economic importance of polluters in making enforcement determinations. The developers of code law did.<sup>17</sup>

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<sup>15</sup> Meiners & Yandle, *supra* note 12, 926–29.

<sup>16</sup> *Id.* at 956.

<sup>17</sup> Meiners and I are not alone in our assessment of the logic supporting the move from common law protection to code law enforcement. Noting that the record for state and local environmental protection was far from perfect, David Schoenbrod points out: “But the states had been making progress in controlling pollution—progress that was significant compared with what the federal government later accomplished—and the auto and coal-mining industries asked Congress to establish a federal regulatory agency to slow down the states.” DAVID SHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON* 132 (Yale Univ. Press 2005).

Perhaps one should consider the following thought experiment when seeking to determine which of the two regimes is most effective. If you were the mayor of a city located on a river downstream from a steel producing center and your goal was to facilitate protection of the private and public assets of your community, would you prefer to devote resources to lobby the national government for statutes and codes that would specify operating conditions for the upstream steel mills, hoping to be successful in imposing zero discharge standards on the mills, or would you devote resources to monitoring and measuring pollution that entered the river so that you could rely on common law to protect the right holders in your community? Of course, the outcome that might be intellectually appealing is not necessarily the one that is politically appealing.

#### CODE LAW AND RENT SEEKING

Going head to head with the steel producers in lobbying for regulations described in the thought experiment forces us to consider the political economy of code law, which is a minor consideration when assessing common law. The movement to federal code law that emerged in the late 1960s and early 1970s brought with it enhanced opportunities for special interest rent seekers to cartelize industries and markets. Prior to nationalization of environmental regulation, it would have been incredibly costly, for industry or environmental lobbyists successfully to lobby every state legislature and obtain a uniform rule that would affect every firm in a national industry. To lobby every common law judge in the hopes of obtaining favorable decisions across the nation would have been even more improbable. Yet common law courts occasionally seemed to give in to the power of special interests. As Buck points out, an 1886 Pennsylvania common law judge in *Sanderson v. Pennsylvania Coal Co.*<sup>18</sup> citing the relative economic importance of a coal company versus a single landowner, gave an opinion favoring a coal company in a suit brought by a citizen whose common law rights had been invaded. But the result was just one bad decision affecting one state, not a ruling that would be applied to all coal operators across the nation. Common law was capable of correcting itself in relatively short order, at least in another jurisdiction. In the 1900 New York case of *Strobel v. Kerr Salt Co.*<sup>19</sup>, reference was made to denial of damages in *Pennsylvania Coal*, but the New York high court awarded damages to the plaintiff.

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<sup>18</sup> 113 Pa. 126 (1886).

<sup>19</sup> 164 N.Y. 303 (1900).

The common law rule was upheld. The polluter paid the damaged party. The NY high court noted at 317 that the Pennsylvania court in Strobel was “influenced by the necessities of a great industry.” But it rejected that approach (as did most states) and said at 319 “We have never adopted that rule in this state” (it was overturning a decision by a lower court that would have allowed water pollution by the Kerr Salt Co.) At 320 the court said “The rule of the ancient common law is still in force.” And at 321-22, the court said “The lower riparian owners are entitled to a fair participation in the use of the water and their rights cannot be cut down by the convenience or necessity of the defendant’s business.”

The old common law, though not always, could also be tough on emitters of air pollution from copper operations in a two state setting. For example, in the early case *Georgia v. Tennessee Copper Co.*,<sup>20</sup> 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 [Georgia].”<sup>21</sup> Yet while the smelter operator argued that new improved technologies had been installed to reduce the damage, the Court held for Georgia, ordered the smelter to take action further to reduce pollution to Georgia’s satisfaction and to remain under supervision of the Court until the plaintiff was satisfied.

In contrast, when the U.S. EPA made the emission guidelines final for U.S. copper smelters in the 1970s and announced that there would never be another green field copper smelter built in the United States, copper prices rose and massive amounts of wealth were transferred from consumers to owners of copper firms.<sup>22</sup> I should note that it was the nature of the EPA regulations specified by Congress that transferred wealth to the copper shareholders. Command-and-control regulation with differential standards that impose higher cost on new plant construction did the job. Sadly for those seeking cleaner air, the guidelines meant that old smelters would operate longer than they might have otherwise. Air quality did improve somewhat. In a similar way, the code law regime that evolved in the post-1970 period made it possible for lobbyists for Eastern high sulfur coal producers and coal miners to obtain a statute that effectively eliminated the competitive advantage of Western clean coal producers in the entire Eastern United States, led to higher priced electricity for consumers in

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<sup>20</sup> 206 U.S. 230 (1907).

<sup>21</sup> *Id.* at 238.

<sup>22</sup> Michael T. Maloney & Robert E. McCormick, *A Positive Theory of Environmental Quality Regulation*, 25 J.L. & ECON. 99 (1982).

the region, and did little to produce additional clean air.<sup>23</sup> While one can find common law decisions that seem strange if not downright inefficient, there is a massive rent-seeking literature that documents what some term the systematic “unintended consequences” of federal code law. Yet if something is systematic across time, it becomes difficult to call the outcomes unintended.<sup>24</sup> In assessing the anticompetitive character of environmental code law, David Schoenbrod, a New York University Law School professor and former senior litigator with the Natural Resources Defense Council, put it this way:

Major corporations today understand that the EPA provides them with substantial benefits. Its lawmaking is necessarily slow because of procedural requirements imposed by Congress and the courts. The EPA also buffers large corporations from competition from small and emerging businesses. . . . A powerful EPA is good for many big businesses and all national legislators, but bad for small businesses and local flexibility—good for national advocacy organizations and industries that sell pollution control services, but bad for civic and neighborhood associations and the rest of us.<sup>25</sup>

#### BUT HOW BAD IS IT?

Unintended consequences may lead to outcomes that cartelize industries and feather the nests of some polluters, but what about the environment? Is it still possible that in spite of all the rent seeking, code law outcomes still provide effective environmental protection? Unfortunately, as Buck points out, the data does not exist to answer the question. Yet achieving effective environmental protection would not necessarily mean that the goal had been achieved at least cost. Indeed, the literature is replete with studies that show how the EPA’s mandated command-and-control regulation, which is based on inputs, not outcomes, is generally the most costly way to provide

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<sup>23</sup> BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (Yale Univ. Press 1981).

<sup>24</sup> For 30 years and through bureaucratic interpretation of New Source Performance Standards under the Clean Air Act, the EPA allowed the nation’s coal-fired utilities to operate older more polluting plants without requiring them to meet tougher new plant standards. The issue was finally put to rest by the Court on April 2, 2007 in *Environmental Defense v. Duke Energy*, 549 U.S. 561 (2007).

<sup>25</sup> SCHOENBROD, *supra* note 17, at 13–14.

environmental protection. Common law remedies, on the other hand, are based on outcomes, not inputs.

We know that major dimensions of air quality have improved markedly since 1970, but we also know that air quality was improving markedly before 1970.<sup>26</sup> For example, David Schoenbrod describes the situation this way:

After 1970 the states acted under EPA supervision, so it deserves some of the credit, but how much? The states did more in the 1960s to reduce sulfur emissions than was accomplished in the 1970s, when the EPA was presiding. The states in the 1960s tended to go after the cheapest and easiest reductions, but they deserve credit for acting when support for pollution control was still building. Their accomplishment is part of the record that shows that the will for pollution reduction did not come from the EPA on high.<sup>27</sup>

As Stuart Buck points out, Indur Goklany's painstaking work on U.S. air pollution indicates that progress was being made prior to 1970 and that the way emissions fall through time suggests the imprint of technological change and community recognition of harms that may accompany pollution.<sup>28</sup>

Yet while environmental quality has improved significantly, we cannot know how much of the stimulus comes from code law versus higher priced energy and related technological change. We know less about water quality, simply because unlike the case for air there is no national system of water quality monitoring data and no standardized way for states to report conditions of rivers, lakes and streams. Indeed, there are reasons to believe that while industrial pollution has fallen substantially, discharge from public and agricultural sources, which are somewhat immune to common law suits in the case of municipal treatment plants and exempt from federal water pollution statutes in the case of agriculture,, has increased markedly.

Hints as to the magnitude of code law's failure to deliver environmental improvement are found in anecdotal data that go back to the late 1980s and come forward. Included is EPA's own 1987 self study that concluded that the agency, following congressional direction, had assigned its enforcement resources in reverse order to

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<sup>26</sup> For more discussion and documentation of the points to follow, see Meiners and Yandle, *supra* note 12, at 923–24.

<sup>27</sup> SCHOENBROD, *supra* note 17, at 49.

<sup>28</sup> INDUR M. GOKLANY, CLEANING THE AIR: THE REAL STORY OF THE WAR ON POLLUTION, 87–98 (Cato Inst. 1999).

the seriousness of environmental risks.<sup>29</sup> More resources were committed to low risk problems than those with higher risk. Then, there was a series of New York Times articles that included interviews with former EPA Administrators and other environmental leaders. The series concluded that code law protection had basically failed to deliver.<sup>30</sup> To this is added the 1997 conclusion reached by researchers at Resources for the Future, who in essence said the code law system for protecting the environment is broken and must be fixed.<sup>31</sup> Finally, there is the 2005 OECD report card on the U.S. that criticized the U.S. command and control approach but praised the flexibility being introduced as regulation devolves to local and state regulators.<sup>32</sup> In effect, the OECD report card assigned high marks to common law characteristics—flexibility and local control—now taking hold in newer environmental statutes.

Taken together, these pronouncements do not mean that American citizens are wading through more sludge today than in the late 1960s, nor does it mean that the U.S. EPA has completely missed targets in reducing serious environmental risks. What it may mean, given the sketchiness of the data and the massive size of the environmental economy, is that code law should not be celebrated as superior to a common law regime just because that's the way we do it, and things are getting better. Going further, we who prize the environment and our economic freedoms should be concerned that even now we lack the monitoring infrastructure to know with greater certainty how we are performing in protecting environmental assets. The fact that the infrastructure is still sketchy after more than 30 years suggests that control priorities are not associated with outcomes. Yet, singing common law's praises is not the same thing as recommending that the U.S. should return to the common law of yesterday. Nor is this the same as saying that one approach such as common law should be used for managing all dimensions of the environment. There can be no institutional silver bullet that works for everything. Instead, a useful criticism of competing legal regimes might best support an institutional evolution of the sort that has characterized common law for centuries. Based on what we know, a feature of that evolution should allow for more local and state control, greater opportunities to

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<sup>29</sup> ENVIRONMENTAL PROTECTION AGENCY, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS—OVERVIEW REPORT. (Feb. 1987).

<sup>30</sup> Keith Schneider, *New View Calls Environmental Policy Misguided*, N.Y. TIMES (March 21, 1993) at 1.

<sup>31</sup> CLARENCE DAVIES AND JANICE MAZUREK, DOES THE U.S. SYSTEM WORK? RESOURCES FOR THE FUTURE (1997).

<sup>32</sup> ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENTAL REPORT CARD FOR THE U.S. (Jan. 2006).

use common law courts, and an enabling of federal common law that allows for common law suits in multi-state disputes.



