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MR. LOMBORG AND THE COMMON LAW

Bruce Yandle[†]

INTRODUCTION

While it is still too early to say, it is entirely possible that the publication of Bjørn Lomborg's book, *The Skeptical Environmentalist*,¹ will someday be viewed as a watershed event that contributed mightily to the end of the rise of centralized command-and-control of environmental use and the resurgence of decentralized management of environmental use under a rule of law. Although this is not the first documentation of environmental improvement,² his is clearly the most complete. As the work of an apostate, one converted from pessimism to optimism, it is even more persuasive and therefore the most powerful. Add to this timing, a time when the limits of command-and-control regulation are being reached, and recognition of the virtues of decentralization and market incentives are moving to fore, and Lomborg's book becomes a veritable *tour de force*.³

In an exchange following a discussion of his work at Washington's Competitive Enterprise Institute, Lomborg explained how an intellectual encounter with the work of the late Julian Simon inspired the book. Lomborg wanted to see if it was possible that Simon's positive description of the state of the world could possibly be accurate. The book is the result.⁴

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¹ BJØRN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD* (Cambridge University Press 2001) (1998).

² See, e.g., EARTH REPORT 2000: REVISITING THE TRUE STATE OF THE PLANET (Ron Bailey ed. 2000); STEVEN HAYWARD & JULIE MAJERES, PACIFIC RESEARCH INSTITUTE'S INDEX OF LEADING ENVIRONMENTAL INDICATORS (7th ed. 2002), available at http://www.pacificresearch.org/pub/sab/enviro/ei2002-states/pri_enviro_index_2002.pdf (last visited Nov. 18, 2002).

³ The fact that Lomborg's book has created a firestorm of criticism and controversy within environmental circles, and that the Danish Committees on Scientific Dishonesty on January 7, 2003 ruled his book to be "systematically one-sided" adds to the growing interest in learning what Lomborg has to say. Major elements of this debate are reported on Lomborg's website, www.lomborg.com (last visited Jan. 9, 2003).

⁴ Lomborg discusses his encounter with Julian Simon's ideas and the reactions to his book, both positive and negative, in an interview at Competitive Enterprise Institute. See Q&A with Bjørn Lomborg: Author of *The Skeptical Environmentalist*, CEI UPDATE, Dec. 2001, at 8-9.

But while the book is an empirical encyclopedia on world environmental quality, it also delivers something of a statement about people and what they did and can do to make things better. Near the end of the book, speaking to the question of why things have gone so well, Lomborg tells us that the positive outcome for the environment did not derive from massive world sessions with worry beads:

Things have gone so well because we have worked hard to improve our situation. In some circumstances this has happened almost automatically, as in the continued growth of economic wealth. We have become richer and richer primarily because of our fundamental organization in a market economy and not because we have worried.⁵

Lomborg recognizes that regulation has made things better in some cases, but it was because of priorities, not the regulation *per se*, that things improved. One might paraphrase by saying it was definition and enforcement of property rights, regulatory⁶ and private, that contributed to meaningful environmental improvement. His story is about people living in diverse countries building diverse institutions to get beyond the prospect of a tragedy of the commons. Indeed, the prospect of the tragedy seems to have become a prelude to plenty.

Is there a link between Lomborg's optimistic environmental assessment and common law? I feel strongly that there is, but the linkage is obviously not direct in the sense that he discusses the importance of a rule of law. The linkage I see is about decentralized versus centralized institutions for defining and protecting property rights and what that may mean for wealth creation. This translates into choices as between common and statute law for dealing with environmental problems, the legal framework, if you will, within which Lomborg's assessment is made.

In this Article, I will first lay a foundation by discussing stages and elements of the environmental saga that began to

Lomborg's position is captured in the name ascribed to his book, *The Skeptical Environmentalist: Measuring the Real State of the World*. He indicates that he deliberately chose a title to serve as counterpoint to another best seller, *The State of the World*, a widely read annual publication of Worldwatch Institute. As he takes the reader through reams of charts and data, Lomborg debunks a number of pessimistic assertions found in the Worldwatch publication.

⁵ LOMBORG, *supra* note 1, at 351.

⁶ Commentators have discussed regulatory property rights. See, e.g., Jonathan B. Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677 (1999). Wiener fully develops the notion of regulatory property rights and differentiates this from private property rights. An example of regulatory property rights is seen in discharge permits issued by the U.S. Environmental Protection Agency. Without the permit, which is not transferable but nonetheless valuable, a plant cannot discharge effluent into a river or stream.

emerge in the United States and the developed world in the 1960s. This was the saga that began with environmental plenty, experienced a number of serious tragedies that then helped form an emotional, if not a scientific, basis for ushering in large bodies of statute law. In some cases, the new statute law dismissed common law protection.⁷ In every instance, the dominant statute law imposed new constraints on environmental use. Bad news and environmental pessimism, was important in all of this. A continuing flow of bad news about the environment provided a basis for continued growth of centralized environmental control.

The stages of environmental activity I describe will then be linked to certain elements of Environmental Kuznets Curves (EKC),⁸ those statistical artifacts that describe relationships between income and environmental quality. Then, the more interesting parts of the EKCs will be related to property rights institutions and the protections provided by common law. This decidedly richer-is-cleaner story will make the final connection between Mr. Lomborg and the Common Law.

I. THE STAGES OF THE ENVIRONMENTAL SAGA

In 1977, I began an outline of what I called the stages of the environmental saga.⁹ Now, after almost 30 years to think about the outline, I have some additional ideas. Thinking in terms of stages, it seems that the story about environmental institution building began as the first stage was ending. I call the first stage *Manna from Heaven*. The expression is an attempt to capture the notion of environmental plenty, that happy time when the initial natural endowment of water and air quality, to take two examples, was ample enough either fully to assimilate wastes or to provide new low-cost locations when the older sites have been depleted of the environmental assets. *Manna from Heaven* begins with plenty and extends to the point where custom, tradition, and decentralized private law and statutes slowly emerge as ways to manage conflicts over environmental use.

⁷ See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (holding common law in interstate disputes was replaced by statute law protections). For discussion of similar Canadian experience, see ELIZABETH BRUBAKER, *PROPERTY RIGHTS IN DEFENSE OF NATURE* (1995).

⁸ For an explanation and background on EKCs, see BRUCE YANDLE ET AL., *THE ENVIRONMENTAL KUZNETS CURVE: A PRIMER* (Political Economy Research Center, PERC Research Studies No. 02-1, 2002), available at http://www.perc.org/pdf/rs02_1.pdf [hereinafter ENVIRONMENTAL KUZNETS CURVES].

⁹ For a discussion of the "environmental saga," see HUGH H. MACAULAY & BRUCE YANDLE, *ENVIRONMENTAL USE AND THE MARKET* (1977).

I term the second stage *Common Law & Community Environmentalism*.¹⁰ During this period of evolving order, land rights emerge, along with rules of law for contracting land use and transfers.¹¹ Common law seems to have entered the property rights lexicon as a part of feudal land law. In time, the same common law expands to provide rules that protect the owners of riparian land who might be damaged by upstream dischargers of waste. Eventually, the common law extends to protect holders of land rights from nuisance or trespass formed by air pollution, always tending to do so where environmental scarcity is more severe.

Stage two is characterized by a relatively smooth evolutionary process that yields institutions tending to encourage the formation and preservation of wealth, including environmental protection. Common law rules emerge as environmental scarcity threatens the wealth of holders of land and other rights. Environmental assets become subject to contracts, and environmental rights become recognizable components of the bundle of sticks that define property. *Common Law & Community Environmentalism* ends when crises occur that seemingly cannot be handled by the property rights institutions available at the time. In some cases, this is because of the need for collective as opposed to private action. In other cases, the transition to centralized political decision making is made because doing so is politically profitable. Stage three is called the period of *Holy Water*.

Holy Water does not come simultaneously for all environmental assets and uses. The transition may come first for air quality in some locations, for water quality in others, for land-based assets in still other locations. For example, water quality in the Ruhr broke across the divide at the end of the 19th century, following a devastating typhoid outbreak.¹² A similar crossing occurred for the Ohio River in the 1940s, after serious problems with gastroenteritis.¹³ Air quality, always troublesome in Los Angeles due to geological and atmospheric features, made the shift in Califor-

¹⁰ For a discussion of common law environmentalism, see Roger E. Meiners & Bruce Yandle, *Common Law Environmentalism*, 94 PUB. CHOICE 49 (1998).

¹¹ For a discussion on some of these issues, see Bruce Yandle, *Escaping Environmental Feudalism*, 15 HARV. J.L. & PUB. POL'Y 517 (1992); Bruce Yandle, *Organic Constitutions and the Common Law*, 2 CONST. POL. ECON. 225 (1991).

¹² BRUCE YADDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT 34 (1997).

¹³ ROBERT CLEARLY, THE ORSANCO STORY (1967).

nia in the 1950s when smog first appeared.¹⁴ And toxic chemical use moved to stage three following the Bophal tragedy.¹⁵

The selection of the name for stage three is not a casual choice. *Holy Water* has mysterious powers to harm human populations. Because of the unknown harms that can be done to and by the environment, it is almost, if not fully, deserving of worship.¹⁶ Where stage two was characterized by evolving environmental use and rights for use, stage three is about restrictions, fear of unknown harms, stepping back and avoiding use, cost to those who make forbidden use, and benefits to the new priestly cast that guards the environment. Political voices in stage three call upon government to do what governments are formed to do – to provide for the public welfare by protecting human communities from environmental harms.

The statutes that emerge with *Holy Water* are built on bad news. Fear, not facts, becomes the driving force. For example, the 1980 *Global 2000 Report to the President* offers this gloomy outlook:

If the present trends continue, the world in 2000 will be more crowded, more polluted, less stable ecologically, and more vulnerable to disruption than the world we live in now. Serious stresses involving population, resources, and environment are clearly visible ahead. Despite greater material output, the world's people will be poorer in many ways than they are today.¹⁷

With such gloom in official forecasts, it is no wonder that water pollution control legislation calls for the elimination of all human discharge to rivers and streams,¹⁸ that parts of air quality con-

¹⁴ See Paul R. Portney, *Air Pollution Policy*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 77, 78 (Paul R. Portney & Robert N. Stavins eds., 2000).

¹⁵ Mariela Mercedes & Nino Restrepo, *Evaluation of Toxic Release Inventory Data Using Risk Assessment Techniques*, in THE MARKET MEETS THE ENVIRONMENT 85, 85 (Bruce Yandle ed., 1999).

¹⁶ Jason Annan, *Is Environmentalism a New State Religion?*, in THE MARKET MEETS THE ENVIRONMENT *supra* note 15, at 295 (arguing that “[t]oday’s modern environmental movement possesses many of the traits of organized religion”); Robert H. Nelson, *Bruce Babbitt, Pipeline to the Almighty*, WKLY STANDARD, June 24, 1996, at 17 (discussing Bruce Babbitt, then Secretary of the Interior, who believes that he is carrying out God’s instructions through his environmental policies); Robert H. Nelson, *Does “Existence Value” Exist?*, INDEP. REV., Spring 1997, at 499, 518 (arguing that the “existence of value amounts to a Trojan horse. Seeming for a time to sustain the social role of economics, in the long run it can only help undermine it.”). *But see* Brian Kropp, *Environmental Organizations: What Makes them Tick?*, in THE MARKET MEETS THE ENVIRONMENT, *supra* note 15, at 259-93 (showing that membership in environmental organizations seems to be a substitute for membership in traditional religious organizations).

¹⁷ GERALD O. BARNEY, GLOBAL 2000 REPORT TO THE PRESIDENT I (1980).

¹⁸ A. Myrick Freeman III, *Water Pollution Policy*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 169, 174 (Paul M. Portney ed., 2000).

trol are based on the prevention of significant deterioration,¹⁹ which means the strictest possible technical standards, and that toxic chemical control is predicated on the community's right to know about any possible pending disaster. To make certain there is a margin of safety, hazardous waste elimination is based on cleanup standards that are the same as for drinking water. Stage three carries with it a distinct flavor of environmental Calvinism.²⁰ It is Mr. Lomborg's period of worry.

During *Holy Water* stage, two property rights institutions are pushed to one side and replaced by central authorities with command-and-control regulation. Statutes become the guardians of nature's cathedral. Custom, tradition, and common law are not viewed as severe or reliable enough. As stage three matures, the real cost of implementing and living with a multitude of environmental regulations begins to be recognized. Along with cost recognition comes the beginning of understanding how ecological systems work and what happens when various kinds of interventions occur. Little by little, fear of environmental use is replaced with newly gained facts about how to manage environmental use. As costs become visible, incentives for cost-effective management gain some appreciation. Ultimately, recognition that command-and-control may not be necessary, or even desirable, for addressing every environmental concern begins to accompany calls for reform, even a recapture of stage two institutions. This identifies the early boundary of stage four, *Economic Environment*.

When environmental resources and consequences of their use are better understood, when rapidly increasing costs are associated with efforts to gain even trivial amounts of improvement by way of technology-based standards, when local knowledge and incentives to improve are seen as being potentially superior to centralized knowledge and incentives, and when the merits of flexibility and tailored institutions as opposed to one-suit-fits-all solutions become part of the legitimate discourse, then *Economic Environment* has emerged. Elements of stage four thinking show up at different times and places for the management of different environmental assets. For example, property rights and crude permit trading for some air pollutants emerged in California's South Coast in the late 1970s.²¹ Permit trading then became the center-

¹⁹ For discussion of air quality policy, see Portney, *supra* note 14, at 85.

²⁰ See Robert H. Nelson, *Environmental Calvinism: The Judeo-Christian Roots of Eco-theology*, in *TAKING THE ENVIRONMENT SERIOUSLY* 233 (Roger E. Meiners & Bruce Yandle eds., 1993) (comparing modern environmentalism to the theology of Martin Luther, John Calvin, and the Protestant Reformation).

²¹ See Bruce Yandle, *The Emerging Market in Air Emissions*, *REGULATION*, July/Aug. 1978, at 21 (explaining that California's South Coast Air Quality Control Region was the loca-

piece for controlling sulfur dioxide emissions throughout the Eastern United States in 1990.²² Contracting to reduce the cost of water pollution control entered the scene in North Carolina in the early 1990s,²³ this after it was found that command-and-control regulation simply would not solve serious fish kill problems.²⁴ A resurgence of common law protection of environmental rights became apparent in hazardous waste litigation in the 1990s.²⁵ And an announced intention to use markets and trading as a new foundation for U.S. water pollution control was made in 2002.²⁶ Clearly, we have entered the age of *Economic Environment*, which means that at the margin, environmental policy will show greater tendency to be decentralized, to recognize opportunity cost and the use of incentives, and to build on market forces as opposed to seeking to muffle those forces.

This story about the modern environmental saga and its stages implies that human populations regularly seek practical rules for maintaining and improving life, that there is a wealth-conserving force always at work, and that when events push human communities off the wealth-producing property rights path and new hard-edged command-and-control institutions emerge, counter forces will be triggered to pull communities back on path. Those forces will be most effective in societies that respect constitutional principles that include private property protection under a rule of law. Man, the institution builder, is always at work modifying wealth-creating and preserving institutions. But there is still more to the story about institutions, preserving wealth, and the use of envi-

tion where the first experiments with air pollution offsets occurred, later to become EPA policy. The offset mechanism allowed expansion of air polluting firms if the firm could obtain more than equal offsets from existing polluters for the same emissions to be released.)

²² Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?*, 18 *ECOLOGY L.Q.* 1, 22 (1991).

²³ See generally David W. Riggs, *Market Incentives for Water Quality*, in *THE MARKET MEETS THE ENVIRONMENT*, *supra* note 15, at 167 (discussing the factors leading to, and the results of, the information of a water quality market to combat pollution in the Tar-Pamlico watershed).

²⁴ *Id.*

²⁵ See Karol Boudreaux & Bruce Yandle, *Public Bads and Public Nuisance: Common Law Remedies for Environmental Decline* (unpublished manuscript, on file with the author). For a discussion about this and resurgence generally, see also Denise Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755 (2001) (discussing traditional public nuisance law and possible approaches to modernizing the law in light of recent debates regarding appropriate remedies for environmental harms); Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 *STAN. ENVTL. L.J.* 187 (1996) (discussing the history of common law contamination actions and the affects of hazardous waste regulations on such actions).

²⁶ See generally Bruce Yandle & Brian Mannix, *Public Interest Comment on the Environmental Protection Agency's Proposed Water Quality Trading Policy*, Mercatus Center, at <http://www.mercatus.org/waterquality.pdf> (June 26, 2002) (discussing E.P.A. proposal 67FR3409 and recommendations regarding future permit trading policies and regulations).

ronmental assets. For fundamental institutional change to enter the action agenda, calm and rational thought must have replaced fear, pessimism, and religious sentiments about environmental use. Hard and convincing data describing environmental progress must surface. *The Skeptical Environmentalist* may become as much of a *tour de force* for this period as *Silent Spring*²⁷ may have been for the beginning of *Holy Water*.

II. TRAVELING THE EKC IN STAGES

The stages of the environmental saga can be interpreted in terms of an Environmental Kuznets Curve (EKC).²⁸ First reported in 1991²⁹ and now standard fare in environmental economics, the EKC shows a mapping of income, such as per capita GDP, to some specific measure of environmental quality, such as the concentration of sulfur dioxide in ambient air in particular locations. In its general form, the EKC takes on an inverted-U shape. The conventional relationship shows three zones. In the first, the environment is deteriorating as income rises from very low levels. This rising leg of the inverted U corresponds to the final stages of *Manna from Heaven*, that stage where use of the environment, within the limits of custom, tradition, and private law, has allowed part of the environmental endowment to be consumed. This is the period of institutional construction for *Common Law & Community Environmentalism*. Following the inverted U, one can picture the approaching peak, a zone that corresponds to the end of right-protected environmental use and the beginning of conservation and recovery. The peak results from a combination of *Common Law & Community Environmentalism* and *Holy Water*. It is here that statute law and federal regulation largely displace common law and community control. Then, as the EKC progresses, the environment gets cleaner, always in association with rising income, thus corresponding to Lomborg point that environmental progress has been made "almost automatically, as in the continued growth of economic wealth."³⁰ The downward-sloping leg of the inverted U can be related to the stage of *Economic Environment*.

EKCs reflecting the inverted U shape have now been estimated for a diverse collection of measurements of environmental

²⁷ RACHEL CARSON, *SILENT SPRING* (1962).

²⁸ For a recent discussion of the concept and survey of the EKC literature, see ENVIRONMENTAL KUZNETS CURVE, *supra* note 8.

²⁹ GENE M. GROSSMAN & ALAN B. KRUEGER, ENVIRONMENTAL IMPACT OF A NORTH AMERICAN FREE TRADE AGREEMENT (Nat'l Bureau of Econ. Research, Working Paper No. 3914, 1991), available at <http://www.nber.org>.

³⁰ LOMBORG, *supra* note 1, 351.

quality for air, water, and forestry.³¹ However, it must be emphasized that some dimensions of environmental quality, that some argue should be an important human concern, do not follow the EKC model. Carbon emissions, for example, show an upward-sloping linear relationship with income for as far as data allow one to observe.³² Higher income means more carbon emissions, no matter how the income is measured. If there is a turning point for carbon, that point has not as yet been reached. This suggests that there has been no *Holy Water* event for carbon emissions. Quite possibly, the effects of the Kyoto Protocol and debates about climate change have not as yet entered the data.

There is a system of property rights for every nation that might be included in an EKC estimate. However, more often than not, the different property rights institutions are not accounted for when estimates are made. That being so, it is not possible to say what happens when communities impose stricter enforcement of contracts, require that contracts be enforced, have constitutional protections that limit government confiscation of property. Qin made estimates of dimensions of air and water quality for a balanced panel of countries from developing to developed, controlling for property rights protection.³³ His property rights variables are adjusted for risk of property confiscation by government and the degree to which contracts are enforced in courts of law. The results show environmental improvement came early for countries with stronger property rights enforcement. The results also show that deterioration was not as severe where property rights were stronger. With EKC learning telling us that richer is cleaner and that property rights enforcement matters, it is not a long leap to suggest that common law enforcement of contracts and protection of environmental rights helps to avoid the worst of the tragedies and brings environmental improvement sooner.

Indur Goklany has done fundamental work on human wellbeing around the world, and his findings are consistent with those found in the EKC literature.³⁴ He has also researched extensively the condition of U.S. air quality, going back as far as monitoring data allow.³⁵ His conclusions on air pollution control generally

³¹ ENVIRONMENTAL KUZNETS CURVES, *supra* note 8, at 13-16.

³² Xiang Dong Qin, *Economic Development and Environmental Quality - A Look at the Environmental Kuznets Curve* (1998) (unpublished dissertation, Clemson University) (on file with Clemson University Library).

³³ *Id.*

³⁴ See, e.g., INDUR M. GOKLANY, *ECONOMIC GROWTH AND THE STATE OF HUMANITY* (Political Economy Research Center, PERC Policy Series No. PS-21, 2001), available at <http://www.perc.org/pdf/ps21.pdf>.

³⁵ See INDUR M. GOKLANY, *CLEARING THE AIR* (1999) [hereinafter *CLEARING THE AIR*]; Indur M. Goklany, *Empirical Evidence Regarding the Role of Nationalization in Improving U.S.*

parallel Lomborg's: air quality has improved significantly in recent decades.³⁶ But Goklany does more than examine trends. He looks for patterns in the data that can be interpreted in human behavior terms.³⁷ On the basis of early actions taken to reduce air pollution – e.g., city ordinances, common law actions – Goklany identifies a “period of perception” for each pollutant he examined.³⁸ At first blush one might think that Goklany's time of recognition corresponds to the approaching peak of the EKC and the *Holy Water* stage. However, this conclusion is just opposite to the point he makes in his work. Indeed, Goklany argues that meaningful action was being taken to control air pollution well before the federal government became involved with statute writing, and he illustrates his point in terms of that portion of an EKC that occurs well before the peak.³⁹ This suggests that the *Holy Water* period is more about getting centralized political action underway than about the sheer necessity of building institutions that protect environmental rights.

Goklany makes this key point at the conclusion of his report on air pollution control:

One of the justifications for nationalization is that it was necessary to improve the nation's air quality because “states had failed to act” and they “could not be trusted to adopt adequate environmental controls” because of interstate competition for business; hence, “Congress imposed national regulations to control pollution only after its efforts to prod states to act had failed.”

In fact, . . . the empirical data . . . show there was remarkable progress in improving air quality prior to nationalization becoming effective.⁴⁰

III. COMMAND AND CONTROL OR COMMON LAW

Goklany's conclusion underlines part of the political rhetoric that reinforced the watershed political decision made in the late 1960s that shifted environmental protection policy from the states

Air Quality, in THE COMMON LAW AND THE ENVIRONMENT 27 (Roger E. Meiners & Andrew P. Morriss eds., 2000) [hereinafter *Empirical Evidence*].

³⁶ *Empirical Evidence*, *supra* note 35, at 48.

³⁷ *Id.* at 41-42.

³⁸ *Id.* at 39-40.

³⁹ *Id.* at 41-42.

⁴⁰ *Id.* at 44 (citations omitted) (quoting John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1193 n.37 (1995) & Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1160 (1995)).

to the federal government. That decision was about property rights. It was a choice as between private property rights protected by common law coupled with community and state action⁴¹ and regulatory property rights spawned and enforced by statute law.⁴² The choice made can be visualized as a fork in the policy road that leads to various property rights institutions.⁴³ Private property rights and common law protection head in one direction; regulatory property rights and statutes go in the other direction. The regulatory path was taken 30 years ago, and a huge amount of regulatory concrete has been poured since then. The decision to centralize truncated, or at least filtered the continued evolution of, common law environmentalism. There is no way for us to know how common law would have evolved in such an environment, but the case law would have undoubtedly been enriched by 30 years experience with pollution cases.

To suggest that common law protections will be more dominant in a more optimistic world, is to suggest that statute-based regulation will wither away. But rather than expecting the sudden appearance of the equivalence of jack hammers breaking up the concrete and deregulating, we should rather expect to see some erosion at the margin, some experimentation with market-based regulation that calls for common law contracting, greater recognition of the relative merits of state and local experimentation and control,⁴⁴ and taking the private property, common law, route for newly identified problems.⁴⁵

IV. FINAL THOUGHTS

Bjørn Lomborg's controversial good news treatise is fortified by a substantial body of empirical work that supports the idea that common law and community, no matter how discredited by *Holy Water* evangelists, can provide protection for an important part of

⁴¹ For discussion of this point, see BRUCE YANDLE, *COMMON LAW AND COMMON SENSE FOR THE ENVIRONMENT* (1997).

⁴² Regulatory property rights is a notion developed and discussed in Wiener, *supra* note 6.

⁴³ Bruce Yandle, *Legal Foundations for Evolving Property Rights Technologies*, in *THE TECHNOLOGY OF PROPERTY RIGHTS*, 9-10 (Terry L. Anderson and Peter J. Hill eds., 2001).

⁴⁴ For a recent report on action and possibilities, see Jonathan Adler, *Let Fifty Flowers Bloom: Transforming the States into Laboratories of Environmental Policy*, 31 ENVTL L. REP. 11284 (2001), available at <http://www.federalismproject.org/masterpages/environment/flowers.pdf>.

⁴⁵ The prospect for this is seen in EPA's recent call for comments on the market-based approach for managing water quality. The proposal calls for watershed or river basin management based on contracting, which clearly means increased use of common law and a reduction in the use of technology-based command-and-control regulation. See Notice of Public Information Collection(s), 67 Fed. Reg. 34,710 (May 15, 2002); Bruce Yandle & Brian Mannix, *Public Interest Comment on the Environmental Protection Agency's Proposed Water Quality Trading Policy*, Mercatus Center, at <http://www.mercatus.org/waterquality.pdf> (June 26, 2002).

the environmental rights bundle. This is not the same thing as predicting that 30 years of regulation will be neutralized and that common law will assume its pre-1960s' status. Nor is this a prediction that Lomborg's treatise will lead to a mass epiphany where thousands of regulatory rooters will suddenly exclaim that they have seen the light and become common law environmentalism advocates. This is not about a contest between two legal institutions. It is about designing the least-cost way to provide meaningful protection of environmental rights.

The prediction that comes with this review is that common law logic that focuses on practical information about the circumstances of time, place, and harm, and even common law protection, will enter the policy arena with greater force. The one-suit-fits-all protection afforded by statutes and regulation may be necessary in an age of *Holy Water* when many are led to believe that humanity is engaged in a goal-line stand against environmental demons. But the strictures of regulation are costly and often can be counterproductive. Perhaps, with the all-clear being heard, the more sophisticated common law can once again be an important component of the panoply of institutions that delivery environmental protection.