CONSERVATIVE PRINCIPLES FOR ENVIRONMENTAL REFORM

JONATHAN H. ADLER†

Major environmental policy reform is long overdue. The current regulatory architecture was erected in the 1970s. Since then meaningful reforms have been few and far between. A few reforms and regulatory expansions were adopted in the 1980s,[1] and Congress enacted significant reforms to the Clean Air Act in 1990.[2] Only the most minor environmental bills have been enacted since then.[3]

In 1996, Richard Stewart observed that conventional environmental regulation was a "failing paradigm."[4] At the same time, analysts at Resources for the Future concluded that America's environmental regulatory system was "deeply and fundamentally flawed."[5] Other contemporaneous reviews of federal environmental regulation reached similar conclusions.[6] Yet, little has happened.

---

† Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation, Case Western Reserve University School of Law; Senior Fellow, Property & Environment Research Center. This article is based on remarks delivered at the conference on "Conservative Visions of Our Environmental Future" at Duke Law School, September 24, 2012. The author thanks Audrey Balint for her research assistance.

1. For example, in 1986 Congress enacted the Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

2. *See* Pub. L. No. 101-549, §§ 501–507, 104 Stat. 2399, 2635–48 (1990).

3. The most notable pieces of environmental legislation in the past twenty years were the Safe Drinking Water Act Amendments of 1996, Pub. L. 104-182, 110 Stat. 1613 (1996), the Food Quality Protection Act, Pub. L. No. 104-170, §§ 101–305, 501, 110 Stat. 1489, 1489–1513, 1536–38 (1996) (codified as amended in scattered sections of 7 U.S.C.), and the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002). None of these reforms made significant changes to the nation's primary pollution control or conservation statutes.

4. *See* Richard B. Stewart, *United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585, 585–91 (1996); *see also* Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153, 154 (1988) ("[T]he system has grown to the point where it amounts to nothing less than a massive effort at Soviet-style central planning of the economy to achieve environmental goals.").

5. J. CLARENCE DAVIES & JAN MAZUREK, REGULATING POLLUTION 2 (1997) ("For all its accomplishments, we conclude that the pollution control regulatory system is deeply and fundamentally flawed.").

6. *See, e.g.*, Karl Hausker, *Reinventing Environmental Regulation: The Only Path to a Sustainable Future*, 29 ENVTL. L. REP. 10148 (1999) ("The current system, consisting mainly of

Despite these and other calls for reform, the environmental regulatory system remains largely the same as it did some twenty years ago.[7]

The nation's environmental regulatory architecture may not have changed significantly over the past few decades, but the range of environmental problems has. Regulatory measures designed to address the industrial pollution of the twentieth century are poorly suited to address the more complex and difficult challenges of the twenty-first.

There is an urgent need to debate the future of environmental protection in this country. If the debate is to be productive, it needs to span the political spectrum. Therein lies a problem: It is unclear whether many on the political right are prepared to engage in serious policy discussion about the future of environmental policy. While there is no shortage of complaints about centralized government regulation, few are willing to suggest alternatives. Those on the political right have largely failed to engage in meaningful discussion about how the nation's environmental goals may be best achieved.[8] Perhaps as a consequence, the general premises underlying existing environmental laws have gone unchallenged and few meaningful reforms have been proposed, let alone adopted.

This Essay seeks to outline the foundation of a conservative alternative to the conventional environmental paradigm.[9] After

---

end-of-pipe, technology-based regulations, is inadequate for the challenges ahead . . . ."); Debra S. Knopman & Marc K. Landy, *A New Model of Governance*, BLUEPRINT, Fall 2000, at 34 (observing that existing environmental regulations were becoming "increasingly inefficient in a fast-paced economy and too rigid"); *see also* Elizabeth Glass Geltman & Andrew E. Skroback, *Reinventing the EPA to Conform with the New American Environmentality*, 23 COLUM. J. ENVTL. L. 1, 3 (1998) ("Where it does exist, popular frustration with environmental laws focuses on a perceived unfairness and cost inefficiency built into the existing system."); THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 2 (Marian R. Chertow & Daniel C. Esty eds., 1997) (acknowledging that the environmental regulations of the past will be inadequate to combat current and future environmental problems).

7. *See* Carol A. Casazza Herman et al., *Breaking the Logjam: Environmental Reform for the New Congress and Administration*, 17 N.Y.U. ENVTL. L.J. 1, 1 (2008) ("For almost 20 years, political polarization and a lack of leadership have left environmental protection in the United States burdened with obsolescent statutes and regulatory strategies.").

8. Insofar as those who could be identified as on the "right" have engaged in environmental policy debates, this participation has been largely confined to academics and think-tank analysts.

9. For the purposes of this article, "conservative" is defined to include both libertarian and traditionalist conservative viewpoints, as both were core elements of the post-World War II American conservative movement, particularly with regard to domestic policy. *See generally* GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 (3d ed. 2006). In its current form, the conservative movement represents a fusion of a classical

surveying contemporary conservative approaches to environmental policies, this Essay briefly sketches some problems with the conventional environmental paradigm, particularly its emphasis on prescriptive regulation and the centralization of regulatory authority in the hands of the federal government. The Essay then concludes with a summary of several environmental principles that could provide the basis for a conservative alternative to conventional environmental policies.

I. A MISSING VISION

Is there a conservative vision of environmental policy? It is a good question. For quite some time, there have been two dominant responses from the political right to the expression of environmental concern: One is a moderate "me-too"-ism, the other is a reflexive opposition.[10] The first acknowledges the importance of environmental concerns and endorses whatever environmental goals are on the table but calls for policies that can achieve these goals at less expense. The "me-too" moderate does not challenge prevailing environmentalist priorities nor question the need for more regulation. For the "me-too" moderate, the only problem with environmental protection is that it costs too much, and it is perhaps not subject to a sufficiently rigorous cost-benefit analysis.

Moderate "me-too"-ism is pragmatic to a fault and seeks to achieve the same goals for a little bit less, even if it takes a little bit longer. This approach is necessarily unsatisfactory and anything but inspiring. President George H.W. Bush adopted this approach, promising to be the "environmental president" and supporting the 1990 Amendments to the Clean Air Act,[11] yet environmentalist

---

liberal view of individual liberty and limited government with a commitment to traditional morality. *See, e.g.*, Peter Berkowitz, *Constitutional Conservatism*, 153 POL'Y REV. 3, 5 (2009) (describing post-war conservative "fusion"); *see also* FRANK S. MEYER, IN DEFENSE OF FREEDOM: A CONSERVATIVE CREDO 4–7 (1962) (providing an influential articulation on this fusion).

10. For a broader survey of conservative environmental thought, see Barton H. Thompson, Jr., *Conservative Environmental Thought: The Bush Administration and Environmental Policy*, 32 ECOLOGY L.Q. 307, 312–23 (2005). Most of the strains Thompson identifies are more evident among academics and think-tank analysts than among conservative elected officials, policymakers, or political pundits.

11. Richard L. Berke, *Oratory of Environmentalism Becomes the Sound of Politics*, N.Y. TIMES (Apr. 17, 1990), http://www.nytimes.com/1990/04/17/us/oratory-of-environmentalism-becomes-the-sound-of-politics.html?pagewanted=all&src=pm (noting environmentalist critiques of Bush despite his support for 1990 Clean Air Act Amendments).

leaders still supported his opponent in 1992.[12] If environmental protection is that important, it does not make much sense to nickel-and-dime environmental efforts. Why would anyone endorse a watered-down imitation of ecological concern in place of the real thing? And insofar as existing regulatory institutions are outdated or ill-conceived, more moderate implementation hardly promises greater degrees of environmental protection, let alone an inspiring vision for environmental reform. Insofar as much federal environmental regulation is outdated, outmoded, or (despite the best of intentions) ill-conceived, there is little to be gained from trying to implement it on the cheap.

The dominant alternative on the political right has been reflexive— almost reactionary—opposition to anything green. Quite simply, whatever the Sierra Club or Al Gore supports must be opposed. Environmental policies are suspect because they threaten industrial activity and growth, and environmental concern may even be a stalking horse for a more sinister ideology.[13] In recent years, this approach has become increasingly prevalent within conservative circles—to the point that opposition to environmental regulation has become a litmus test in some quarters.[14] This reactionary posture has expanded beyond reflexive opposition to environmental policy proposals to encompass a reflexive denial that environmental problems, of whatever sort, actually exist. For instance, some

---

12. *See* Scott Bronstein, *The Environment: Is Clinton Cleaner, Greener than Bush? Arkansas Group Balks as Sierrans Back Governor*, ATLANTA J. & CONST., Nov. 2, 1992, at A8 (noting the Sierra Club's endorsement of Bill Clinton over George Bush despite the former's mixed environmental record as Governor of Arkansas).

13. The late conservative columnist Warren T. Brookes described as "watermelons" those environmentalists who were "dark green on the outside, red on the inside." Shawn Macomber, *The Man Who Saw Tomorrow*, AM. SPECTATOR (July 13, 2007), http://spectator.org/archives/2007/07/13/the-man-who-saw-tomorrow. There is also a cottage industry proclaiming that environmentalism masks a radical agenda that will harm the nation. *See, e.g.*, JAMES INHOFE, THE GREATEST HOAX: HOW THE GLOBAL WARMING CONSPIRACY THREATENS YOUR FUTURE (2012); ELIZABETH NICKSON, ECO-FASCISTS: HOW RADICAL CONSERVATIONISTS ARE DESTROYING OUR HERITAGE (2012); BRIAN SUSSMAN: ECO-TYRANNY: HOW THE LEFT'S GREEN AGENDA WILL DISMANTLE AMERICA (2012); ROBERT ZUBRIN, MERCHANTS OF DESPAIR: RADICAL ENVIRONMENTALISTS, CRIMINAL PSEUDO-SCIENTISTS, AND THE FATAL CULT OF ANTIHUMANISM (2012).

14. *See, e.g.*, Jim Tankersley, *Climate Change Skepticism a Litmus Test for GOP*, CHI. TRIB. (Mar. 7, 2010), http://articles.chicagotribune.com/2010-03-07/news/ct-nw-climate-politics-20100305_1_climate-change-united-nations-intergovernmental-panel-climate-science; Andrew C. Revkin, *Still Searching for Republicans With Climate Concerns*, N.Y. TIMES (Jan. 5, 2012), http://dotearth.blogs.nytimes.com/2012/01/05/still-searching-for-republicans-with-climate-concerns/; *see also* Thompson, *supra* note 10, at 309–10 (noting that Republican politicians have become increasingly hostile to environmental measures).

conservative commentators and activists condemned New Jersey Governor Chris Christie, a Republican, for commenting that he believes global climate change is a serious concern, even though his comments came as he vetoed environmental legislation opposed by conservatives.[15] It was not enough that Governor Christie rejected a controversial regional greenhouse gas initiative, for he had committed the heresy of acknowledging a belief in climate change.[16] For some on the right, ideological opposition to greenhouse gas regulation has spawned a litmus test for scientific belief. It is certainly true that some environmental problems are exaggerated, if not illusory, and that environmental activists have a history of hyping false alarms.[17] Yet

---

15. *See* Christopher Baxter, *Gov. Christie Admits Climate Change Is a Real Problem, that Human Activity Plays a Role*, NJ.COM, (Aug. 19, 2011, 7:46 PM), http://www.nj.com/news/index.ssf/2011/08/gov_christie_admits_climate_ch.html. A copy of Gov. Christie's statement is *available at* http://www.scribd.com/doc/62679739/Governor-Christie-Vetoes-S-2946.

16. *See, e.g.*, Doug Powers, *Chris Christie: Climate Change is Real, Humans Contribute*, MICHELLEMALKIN.COM (Aug. 20, 2011, 11:28 AM), http://michellemalkin.com/2011/08/20/chris-christie-climate-change-is-real-humans-contribute/; Kevin Mooney, *Is Gov. Chris Christie of N.J. Now a Global Warming Alarmist?*, NETRIGHTDAILY (May 31, 2011), http://netrightdaily.com/2011/05/is-gov-chris-christie-of-n-j-now-a-global-warming-alarmist/.

17. The most notable recent critique of contemporary environmental alarmism is BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD (2001). For a discussion of Lomborg's critique, see *Symposium on Bjørn Lomborg's* The Skeptical Environmentalist, 53 CASE W. RES. L. REV. 249 (2002). Lomborg was not the first writer to document the exaggeration of environmental threats. *See, e.g.*, EARTH REPORT 2000: REVISITING THE TRUE STATE OF THE PLANT (Ronald Bailey ed., 2000); WILFRED BECKERMAN, THROUGH GREEN-COLORED GLASSES: ENVIRONMENTALISM RECONSIDERED 13–24 (1996) (arguing that appeals by "environmental pressure groups" have become larger in scope and more melodramatic since the 1970s); GREGG EASTERBROOK, A MOMENT UPON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM XVI (1995) ("[O]ur political and cultural institutions continue to read from a script of instant doomsday."); THE STATE OF HUMANITY (Julian Simon ed., 1995); THE TRUE STATE OF THE PLANET 5 (Ronald Bailey ed., 1995) ("There has been a growing gap between the mounting scientific evidence about the actual status of various environmental problems and the often bleaker views promoted by environmental activists."); AARON WILDAVSKY, BUT IS IT TRUE? A CITIZEN'S GUIDE TO ENVIRONMENTAL HEALTH AND SAFETY ISSUES (1995); RONALD BAILEY, ECO-SCAM: THE FALSE PROPHETS OF ECOLOGICAL DOOM (1993); THE RESOURCEFUL EARTH: A RESPONSE TO GLOBAL 2000 (Julian L. Simon & Herman Kahn eds., 1984). Nor was Lomborg the last. *See, e.g.*, SILENT SPRING AT 50: THE FALSE CRISES OF RACHEL CARSON 255–70 (Roger Meiners, Pierre Desroches & Andrew Morriss eds., 2012) (noting some environmental groups' attempts to fan public fear for environmental issues even when evidence of harm has not been established); INDUR M. GOKLANY, THE IMPROVING STATE OF THE WORLD: WHY WE'RE LIVING LONGER, HEALTHIER, MORE COMFORTABLE LIVES ON A CLEANER PLANET (2007); JACK M. HOLLANDER, THE REAL ENVIRONMENTAL CRISIS: WHY POVERTY, NOT AFFLUENCE, IS THE ENVIRONMENT'S NUMBER ONE ENEMY 1–11 (2003) (noting the growth of "environmental pessimism" over the last half century); GLOBAL WARMING AND OTHER ECO-MYTHS: HOW THE ENVIRONMENTAL MOVEMENT USES FALSE SCIENCE TO SCARE US TO DEATH (Ronald Bailey ed., 2002).

environmental problems are real[18] and Americans demand high levels of environmental protection.[19]

While there is no shortage of opposition to environmentalist policies on the political right, there is little evidence of a conservative environmental program. What has been lacking on the political right has been any concerted effort to challenge the dominant environmental paradigm and, in particular, the conventional view that the existence of environmental problems is a justification for increased government intervention in the economy. Both moderate "me-too"-ism and reflexive opposition accept the fundamental premise that prescriptive environmental regulation—and federal environmental regulation in particular—is a necessary response to the existence of environmental problems, but seek to resist the implications. For the former, this means just trimming ten percent off the top. For the latter, it means opposition across the board. Both sides implicitly accept the corollary that support for expanding the scope and severity of environmental regulation is a measure of one's commitment to environmental protection. As a consequence, environmental protection is seen, almost exclusively, as a cause of the "Left," and those who care about environmental protection are inexorably drawn toward a progressive policy agenda.[20] This state of affairs is not sustainable. It will not lead to the adoption of sound environmental policies.

II. CHALLENGING THE DOMINANT ENVIRONMENTAL PARADIGM

The conventional environmental paradigm must be challenged. There is no reason to assume that environmental problems, even big

---

18. Even so-called skeptics recognize the existence of environmental problems. *See, e.g.*, Michael DeAlessi, *Fishing for Solutions: The State of the World's Fisheries*, *in* EARTH REPORT 2000, *supra* note 17, at 85; David Riggs, *Avoiding Water Wars*, *in* GLOBAL WARMING AND OTHER ECO-MYTHS, *supra* note 17, at 219.

19. *See, e.g.,* Noelle Straub, *Gallup Poll Finds Most Americans Supporting Enviro Movement*, N.Y. TIMES (Apr. 22, 2010), http://www.nytimes.com/gwire/2010/04/22/22greenwire-gallup-poll-finds-most-americans-supporting-en-19618.html.

20. *See* Straub, *supra* note 19 (noting "increased political polarization" of environmental issues). Another contributing factor to this phenomenon is the tendency of environmental activist organizations to ally themselves with progressive interest groups and Democratic Party constituencies and the apparent partisanship of some groups, such as the League of Conservation Voters. *See* Jonathan H. Adler, *The Sorry Green Giant*, NAT'L REV. ONLINE (Oct. 1, 2010), http://www.nationalreview.com/articles/248284/sorry-green-giant-jonathan-h-adler; JONATHAN H. ADLER, ENVIRONMENTALISM AT THE CROSSROADS: GREEN ACTIVISM IN AMERICA 24–26 (1995).

environmental problems, necessarily call for big government.[21] Nor does the existence of environmental concerns necessarily justify extending federal authority over local and regional concerns.[22] To the contrary, there are many reasons to question the modern environmental movement's excessive reliance on centralized government authority as its ecological savior and to ask whether political institutions are likely to encourage sound ecological stewardship or environmental sustainability.

A. *Revisiting the Tragedy of the Commons*

The problems with the existing environmental paradigm are not limited to romanticizing the federal role in environmental protection. The way we think about environmental concerns is also heavily influenced by Garrett Hardin's seminal 1968 essay on "The Tragedy of the Commons."[23] In this essay, Hardin described the fate of a common pasture, unowned and available to all.[24] In such a situation it is in each herder's self-interest to maximize his use of the commons at the expense of the community at large.[25] Each herder captures all of the benefit from adding one more animal to his herd.[26] Yet the costs of overgrazing the pasture are distributed among every user of the pasture.[27] When all of the herders respond to these incentives, the pasture is overgrazed—hence the tragedy.[28] As Hardin explained it, the pursuit of self-interest in an open-access commons leads to ruin.[29] Without controls on access and use of the underlying resource, the tragedy of the commons is inevitable.

---

21. *See, e.g.*, Jonathan H. Adler, *Free & Green: A New Approach to Environmental Protection*, 24 HARV. J. L. & PUB. POL'Y 653, 661–76 (2001).

22. *See, e.g.*, Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVTL. L. J. 130 (2005) (discussing the incongruity of the current jurisdictional regime and arguing for limiting federal efforts to those areas where federal involvement is institutionally advantageous); Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation, in* THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW 263 (J. Chen ed., 2003) (arguing for decentralization as a reform measure).

23. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

24. *Id.* at 1244. It should be noted that what Hardin called the "commons" is more properly described as an *open-access* commons, as there are some resources that are owned or managed in common that do not suffer the tragedy because they are subject to community management of some form or another, but the central point stands.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. As Hardin noted, "freedom in the commons brings ruin to all." *Id*. at 1244.

Hardin's essay was tremendously important, not because he discovered the commons problem—others had documented this dynamic before[30]—but because he popularized a useful way of thinking about many environmental problems. The metaphor of the commons can be applied to virtually any environmental resource. Instead of a pasture one could talk of a herd of animals, a fishery, a lake, or even an airshed. When a common, open-access resource is used as a pollution sink, the same underlying dynamic can be observed.[31] In each case, if access and use are not limited in some fashion, overuse is inevitable as demand grows.

Hardin's diagnosis is often identified as a rationale for prescriptive regulation—what Hardin famously termed as "mutual coercion, mutually agreed upon."[32] This was his way of describing regulations or other restrictions imposed to prevent a resource from befalling the fate of an open-access commons. Paired with conventional economic analysis that calls for governmental intervention to correct for any unaccounted-for environmental effect of economic activity—so-called "externalities"—Hardin's account seemed to justify pervasive environmental regulation.[33] We have

---

30. The commons problem with regard to ocean fisheries was identified several years earlier. *See, e.g.*, H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954); Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116 (1955). The general phenomenon was identified much earlier however. *See, e.g.*, ARISTOTLE, THE POLITICS § 1261.b32, at 108 (c. 384 B.C.E.) (Trevor J. Saunders ed., T.A. Sinclair trans., Penguin Classics rev. ed. 1981).

31. *See* Hardin, *supra* note 23, at 1245 ("In a reverse way, the tragedy of the commons reappears in problems of pollution.").

32. *Id.* at 1247.

33. It is generally argued that the existence of an unaccounted-for environmental effect necessarily justifies government intervention to correct for the existence of the so-called "externality." This too is a presumption that should be challenged. For instance, Nobel laureate economist Ronald H. Coase, whose work on social costs has been very influential in environmental law and economics, argued that the mere existence of "externalities" does not demonstrate the need for government intervention. As Coase explained:

> [T]he existence of "externalities" does not imply that there is a *prima facie* case for government intervention, if by this statement is meant that, when we find "externalities," there is a presumption that governmental intervention (taxation or regulation) is called for rather than the other courses of action which could be taken (including inaction, the abandonment of earlier governmental action, or the facilitating of market transactions) . . . The fact that governmental intervention also has its costs makes it very likely that most "externalities" should be allowed to continue if the value of production is to be maximized . . . The ubiquitous nature of "externalities" suggests to me that there is a *prima facie* case against intervention.

R.H. Coase, *The Firm, the Market, and the Law*, *in* THE FIRM, THE MARKET, AND THE LAW 1, 26 (1988); *see also* James M. Buchanan & William Craig Stubblebine, *Externality*, 29 ECONOMICA 371, 380–84 (1962) (noting that externalities are only relevant in a limited set of circumstances).

largely followed this path in environmental policy for the past fifty years.

Administrative regulations have produced some gains, but also many failings. Our air and water are cleaner today than forty years ago—and substantially so—but many ecological resources are still threatened.[34] Many of the environmental goals embraced in the 1970s proved to be aspirational as federal environmental regulation failed to produce the degree of environmental protection for which many had hoped.[35] In some cases, environmental regulations have actually begun to get in the way of further progress. For example, the imposition of land-use controls under the Endangered Species Act can discourage effective conservation on private land and undermine research efforts.[36] Hazardous waste classifications can discourage recycling of waste streams, and the liability regime imposed under the federal Superfund law has discouraged quick and cost-effective hazardous waste cleanup.[37]

One thing that Hardin overlooked is that the political process often replicates the same economic dynamic that encourages the tragedy of the commons—a dynamic fostered by the ability to capture concentrated benefits while dispersing the costs.[38] Like the herder

---

34. In the case of water quality, for example, the Environmental Protection Agency reports that among assessed waters, over one-half of rivers and streams (measured by stream miles) and over two-thirds of lakes, reservoirs, and ponds (measured by acreage) are "impaired" or "threatened." *See Watershed Assessment, Tracking & Environmental Results, National Summary of State Information*, ENVTL. PROT. AGENCY, http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last visited Mar. 12, 2013). Thus even those who celebrate the Clean Water Act's achievements acknowledge that "the glass is only half full." *See* James Salzman, *Why Rivers No Longer Burn*, SLATE (Dec. 10, 2012), http://www.slate.com/articles/health_and_science/science/2012/12/clean_water_act_40th_anniversary_the_greatest_success_in_environmental_law.html.

35. The Clean Water Act of 1972, for example, had a stated goal of eliminating the discharge of pollutants into the nation's waters by 1985. *See* 33 U.S.C. § 1251(a)(1) (2006). *See also* Richard J. Lazarus, *Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 78 (2001) (describing much of the 1970s federal environmental laws as "remarkably aspirational in scope and in their mandates").

36. *See* Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land-Use Controls*, 49 B.C. L. REV. 301 (2008).

37. *See* Jonathan H. Adler, *Reforming Our Wasteful Hazardous Waste Policies*, 17 N.Y.U. ENVTL. L.J. 724, 737 (2008); Jonathan H. Adler, *The Hazards of Regulating Hazardous Waste*, 16 REG. 13. (1993), *available at* http://www.cato.org/pubs/regulation/reg16n2g.html.

38. *See generally* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (arguing that interest groups produce public goods—available to all members regardless of their contribution—and the general public bears the cost of producing these goods because group members have no incentive to do so).

who has an incentive to put out yet one more animal to graze, each interest group has every incentive to seek special benefits through the political process, while dispersing the costs of providing those benefits to the public at large.[39] Just as no herder has adequate incentive to withhold more animals from grazing, no interest group has adequate incentive to forego its turn to obtain concentrated benefits at public expense. In the political process, the common welfare is, in all practical respects, a "public good."[40] As a consequence, the logic of collective action discourages investments in sound public policy, just as it discourages investments in sound ecological stewardship. This logic, in addition to the pervasiveness of special interest rent-seeking, helps explain many of the failings of centralized regulation.[41] So despite the environmental gains of the past half-century, real challenges remain, and the tragedy of the commons is still with us.

Administrative regulation has been the dominant tool in environmental policy over the past half-century, but it was not the only prescription Hardin offered. What many forget is Hardin actually offered *two* prescriptions for preventing the tragedy of the commons. "Mutual coercion, mutually agreed upon" was one approach, but Hardin had another.[42] In the alternative, Hardin suggested that greater reliance on property rights was a proven way to prevent the tragedy of the commons.[43] As he explained, the tragedy of the commons "is averted by private property, or something formally like it."[44] Indeed, Hardin suggested this was one of the primary functions of property in land.[45]

As Hardin recognized, where property rights are well-defined and secure, the tragedy of the commons is less likely since each owner has ample incentive to act as a steward, caring for the underlying resource and preventing its overuse—benefiting both themselves and

---

39. As a general rule, "the driving force behind the formation of an interest group is the belief that its members have common interests and goals." DENNIS C. MUELLER, PUBLIC CHOICE III 473 (2003).

40. *See id*. (noting that the achievement of a group's common goals is a public good).

41. On the pervasiveness of special interest rent-seeking in environmental policy, see generally ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith, Jr. eds., 1992); Jonathan H. Adler, *Rent-Seeking Behind the Green Curtain, in* POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN 1 (Terry L. Anderson ed., 2000); Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999).

42. Hardin, *supra* note 23, at 1247.

43. *Id.* at 1245.

44. *Id.*

45. *Id.*

others who may value the underlying resource. In this way, the institution of property rights "deters us from exhausting the positive resources of the earth."[46]

Hardin was not altogether sanguine about the potential for property rights to avert the tragedy of the commons in many areas, however. He feared it would be too difficult to define and defend such rights in threatened ecological resources, particularly against the threat of pollution.[47] It is one thing to post and fence private land; it is quite another to demarcate property rights in air or water. Yet there is far greater potential here than is commonly realized. Enhanced technologies and greater understanding of ecological conditions make it possible to conceive of property rights today where once they were the stuff of ecological fantasy.[48] Even if it is impossible to apply Hardin's property prescription to all environmental resources, there are many areas in which property-based management regimes are at least as plausible as centralized regulatory regimes.

B. The Fable of Federal Environmental Protection

Even where government regulation to address environmental concerns is warranted, this does not necessarily justify *federal* intervention. Much conventional environmental policy proceeds upon the largely unquestioned assumption that the federal government is in the best position to address environmental concerns and advance environmental values. This premise, which is generally assumed in environmental policy debates, is unjustified.[49] While the federal government has a role to play in environmental protection, the virtues of federal intervention have been oversold.

The traditional account for why the federal government plays a dominant role in environmental protection is based upon a false narrative—a fable of environmental protection—that has led to the over-centralization of environmental protection at the same time as the federal government has abdicated its most important

---

46. *Id.*

47. *Id*.

48. *See* Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 128–29 (2001) *(*explaining how changes in technology can facilitate the definition and enforcement of property rights); *see generally* THE TECHNOLOGY OF PROPERTY RIGHTS (Terry L. Anderson & Peter J. Hill eds., 2001) (same).

49. *See generally* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130 (2005) (arguing that the current division of authority undermines environmental protection).

environmental responsibilities.[50] According to the standard fable, post-World War II environmental conditions got inexorably worse until the nation's environmental consciousness awoke in the 1960s and demanded action.[51] State and local governments were environmental laggards and only the federal government was capable of safeguarding ecological concerns.[52] Events such as the 1969 fire on the Cuyahoga River, memorialized in *Time* magazine with a famous picture of a fire tug fighting a river engulfed in flames, are pointed to as support for this traditional account.[53] This fire, which helped spur passage of the 1972 Clean Water Act (CWA), was frequently cited as evidence of how bad things were before the federal government got involved.[54]

Yet the standard fable is just that: a fable—a fictionalized account with some truth, but fiction nonetheless. The history of the famed 1969 Cuyahoga River fire is instructive.[55] There was a fire on the Cuyahoga River in June 1969; *Time* magazine did run a photo of a fire on the Cuyahoga; the story of the fire did help spur passage of the CWA. That's where the truth of the standard fable ends. The fire was actually a minor event in Cleveland,[56] largely because river fires on the Cuyahoga had once been common,[57] as they had been on industrialized rivers throughout the United States in the late nineteenth and early twentieth centuries.[58] But river fires were costly and posed serious risks to people and property, prompting local governments and private industry to act.[59] The fire was not evidence of how bad things could get, but a reminder of how bad things had been.

---

50. *See generally* Jonathan H. Adler, *The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 CASE W. RES. L. REV. 93 (2004).

51. *Id.* at 101.

52. *Id.* at 96.

53. *America's Sewage System and the Price of Optimism*, TIME, Aug. 1, 1969, at 41.

54. Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 89–93, 136–38 (2002).

55. *See id.* (providing a comprehensive account of the Cuyahoga River fire); *see also* David Stradling & Richard Stradling, *Perceptions of the Burning River: Deindustrialization and Cleveland's Cuyahoga River*, 13 ENVTL. HIST. 515 (2008).

56. *See* Adler, *supra* note 54, at 96–98.

57. *Id*. at 99.

58. *Id*. at 104–05.

59. *Id*. at 106–07.

Further, the June 1969 fire was far smaller and less significant than the fires of years past.[60] Earlier fires had caused substantial damage and put lives at risk.[61] The 1969 fire, by comparison, was a footnote. The fire burned for less than thirty minutes and was out before the cameras arrived.[62] The picture in *Time* magazine was not of the 1969 fire but of a fire from 1952.[63] Apparently, the editors of *Time* felt the need to dramatize their story of environmental ruin with a picture of a real fire, so they used the best picture they could find, even if it was not of the fire featured in their story.

The problems with the standard fable extend beyond the story of one river. While there were plenty of serious environmental problems in the 1960s, it is wrong to suggest everything was getting inexorably worse until the federal government got involved. Just as the problem of river fires had gotten better, not worse, prior to the 1969 Cuyahoga River fire, many environmental indicators were improving before the enactment of the major federal environmental laws. According to the Environmental Protection Agency's (EPA) first national water quality inventory in 1972, levels of some key pollutants had been declining significantly in the decade prior to enactment of the CWA.[64] Ambient concentrations of some air pollutants, such as sulfur dioxide, had declined substantially before enactment of the federal Clean Air Act.[65] Wetland loss rates plummeted, and numerous states adopted their own wetland protection programs, well before the CWA was interpreted to apply to wetlands.[66] And so on. Not every trend was positive, to be sure, but many were. In particular, those environmental concerns that were most obvious, understandable, and costly were improving—largely due to a combination of state, local,

---

60. *Id.* at 95.

61. *Id.* at 101–03.

62. *Id.* at 96–97.

63. *Id.* at 98.

64. *See* A. MYRICK FREEMAN III, *Water Pollution Policy*, *in* PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 97, 114 (Paul R. Portney ed., 1990) ("The results of the EPA's first National Water Quality Inventory, conducted in 1973, indicated there had been significant improvements in most major waterways over the preceding decade, at least in regard to organic wastes and bacteria.").

65. *See* ROBERT W. CRANDALL, CONTROLLING INDUSTRIAL POLLUTION: THE ECONOMICS AND POLITICS OF CLEAN AIR 19 (1983); *see also* INDUR GOKLANY, CLEARING THE AIR 137 (1999); PAUL R. PORTNEY, *Air Pollution Policy*, *in* PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 27, 50–51 (Paul R. Portney ed., 1990).

66. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 41–54 (1999).

and private efforts—whereas emerging or less understood problems were not.[67] In some cases, federal regulation augmented and enhanced these preexisting efforts.[68] In other areas, however, it imposed redundant or excessive controls that crowded out more locally tailored efforts.[69]

The actual history of federal environmental regulation challenges the notion that increased federal regulation was always necessary to enhance environmental protection and that environmental priorities are best set in Washington, D.C. This does not mean that all federal environmental regulation was unnecessary or unwise. There are some environmental problems that state and local governments are unwilling or unable to address on their own. But, contrary to the standard fable, federal environmental regulation was not always necessary or an improvement over the available alternatives. And yet, the standard fable still motivates much environmental regulation.

III. PRINCIPLES OF ENVIRONMENTAL REFORM

Conservatives need not accept the conventional assumptions that government regulation, and federal environmental regulation in particular, is the best approach to environmental protection. With this in mind, I offer five principles to guide conservative efforts at environmental reform.[70]

A. *First, Do No Harm*

Numerous government policies and programs cause, subsidize, or encourage the very environmental harms that environmental programs are designed to address.[71] Federal public works programs, such as those implemented by the Bureau of Reclamation and Army Corps of Engineers, have left a path of environmental degradation in

---

67. *See* GOKLANY, *supra* note 65, at 111–25 (discussing states' roles).

68. Enactment of the Federal Water Pollution Control Amendments of 1972 (aka the "Clean Water Act") accelerated the cleanup of some waterways by, among other things, imposing more stringent limits on industrial dischargers and providing increased funding for state efforts. *See generally* Freeman, *supra* note 64.

69. *See generally* Jonathan H. Adler, *When Is Two a Crowd: The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL L. REV. 67 (2007) (discussing how federal regulation may crowd out state or local efforts).

70. These principles were previously articulated in Adler, *supra* note 21, at 676–94.

71. *See, e.g.*, DAVID MALIN ROODMAN, WORLDWATCH INST., PAYING THE PIPER: SUBSIDIES, POLITICS, AND THE ENVIRONMENT (1996); *see also* GOVERNMENT VERSUS ENVIRONMENT (Donald Leal ed., 2002) (collecting case studies of government programs that undermine environmental protection).

their wake.[72] By some estimates, nearly one-third of the loss of forested wetlands in the lower Mississippi Valley can be attributed to federal flood control projects.[73] Various programs subsidize polluting industries, encourage wasteful resource use, and drive unnecessary development across the nation's landscape. Many private activities that cause or contribute to environmental harm are encouraged by governmental policies. An environmental Hippocratic Oath of "first, do no harm" would serve the conservative goal of shrinking government while reducing environmental harms at the same time.

Agricultural subsidies are a prime example. While some agricultural programs seek to encourage conservation, farm subsidies have encouraged the destruction of wetlands and species habitat, increased chemical use, and dramatically altered the American landscape.[74] Federal mandates for ethanol use have encouraged the farming of lands that would otherwise lie fallow or revert to habitat.[75]

While some portions of the federal government impose regulations to control the environmental consequences of fossil fuels, other programs encourage their use. Federal subsidies for renewable energy sources may attract more attention, but subsidies for fossil fuels remain significant. This includes substantial subsidies for research and development—subsidies that would otherwise be borne

---

72. *See generally* MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986). *See* Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1167 (1999) (noting threats to biodiversity posed by water projects).

73. *See* PAUL F. SCODARI, ENVTL. L. INST., MEASURING THE BENEFITS OF FEDERAL WETLANDS PROGRAMS 16 (1997) (citing Robert N. Stavins & Adam B. Jaffe, *Unintended Impacts of Public Investments on Private Decisions: The Depletion of Forested Wetlands*, 80 AM. ECON. REV. 337, 349 (1990)).

74. *See* J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263 (2000); Thompson, *supra* note 72, at 1166 ("[G]overnmental intervention in agriculture historically has presented one of the greatest threats to biodiversity.").

75. *See, e.g.,* REBECCA BROOKE ET AL., NAT'L WILDLIFE FED., CORN ETHANOL AND WILDLIFE: HOW INCREASES IN CORN PLANTINGS ARE AFFECTING HABITAT AND WILDLIFE IN THE PRAIRIE POTHOLE REGION (2009), *available at* http://www.nwf.org/~/media/PDFs/Wildlife/01-13-10-Corn-Ethanol-Wildlife.pdf?dmc=1&ts=20130312T1953249674. Habitat loss is not the only environmental harm from ethanol subsidies. *See, e.g.*, Erica Gies, *As Ethanol Booms, Critics Warn Environmental Effect*, N.Y. TIMES (June 24, 2010), *available at* http://www.nytimes.com/2010/06/25/business/energy-environment/25iht-rbogeth.html?pagewanted=all (noting that each gallon of ethanol may require several hundred gallons of water to irrigate the corn grown to produce ethanol); Lester Brown & Jonathan Lewis, *Ethanol's Failed Promise*, WASH. POST (Apr. 22, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/04/21/AR2008042102555.html (documenting other harms from ethanol subsidies).

by the private sector. In 2012, for example, federal subsidies for fossil fuel research and development exceeded $1.4 billion.[76]

Government spending programs are not the only sources of environmental degradation that come at taxpayer expense. The federal government is a notoriously poor steward of federal lands, whether one considers lands maintained by the military[77] or even National Parks.[78] Federal facilities and operations are responsible for substantial environmental contamination for which, in all likelihood, taxpayers will end up holding the tab.[79]

Government regulations can also be the source of unnecessary environmental harm, either by encouraging environmentally destructive conduct or penalizing private actions that could have a positive effect. Environmental regulations are no exception. For example, the EPA's 2013 renewable volume requirements for biodiesel will, by the agency's own account, actually produce a net increase in air pollution and cannot be otherwise justified on cost-

---

76. *See* TAD DEHAVEN, CATO INST., POLICY ANALYSIS: CORPORATE WELFARE IN THE FEDERAL BUDGET 1, 3–5 tbl.1(2012).

77. *See* Bruce Watson, *Cleaning Up the Toxic Legacy of Closed Military Bases*, DAILYFINANCE (Sept. 24, 2010) (noting that "Military base closures can leave behind a toxic environmental legacy that's damaging and expensive to repair. In fact, the U.S. Air Force and Navy both rank among the top 100 polluters in America, and many of the bases they've left behind as a result of the BRAC closures have been declared Superfund sites by the Environmental Protection Agency."), *available at* http://www.dailyfinance.com/2010/09/24/closed-military-bases-leave-a-toxic-legacy/.

78. *See* Holly Lippke Fretwell, *Public Land Management*, PROPERTY & ENV'T RESEARCH CTR. (2004), http://perc.org/articles/2004-index-leading-environmental-indicators-ninth-edition (noting that despite the "wealth of resources [provided for National Parks], there are serious infrastructure and environmental problems. There are billions of dollars in maintenance backlogs, sewage contamination in Yellowstone, and 90 to 200 million acres of federal land at high risk of catastrophic fire."); *see also* HOLLY LIPPKE FRETWELL, WHO IS MINDING THE FEDERAL ESTATE? POLITICAL MANAGEMENT OF AMERICA'S PUBLIC LANDS (2009); KARL HESS, ROCKY TIMES AT ROCKY MOUNTAIN NATIONAL PARK (1993).

79. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-380, SUPERFUND: EPA'S ESTIMATED COSTS TO REMEDIATE EXISTING SITES EXCEED CURRENT FUNDING LEVELS, AND MORE SITES ARE EXPECTED TO BE ADDED TO THE NATIONAL PRIORITIES LIST 1, 19 (2010) (finding annual cleanup costs for hazardous waste sites may reach nearly $700 million and only 1/7 of the sites on the EPA's priority list are federal facilities).

benefit grounds.[80] This is just the latest example of the EPA adopting renewable fuel standards that could cause net environmental harm.[81]

Targeting government programs that subsidize environmental harm is an obvious starting point for conservative environmental reforms. Conservatives regularly call for constraining the growth of government. Conservative politicians have proposed substantial cuts in federal spending, particularly on domestic policy matters, and have made reducing the federal debt a dominant policy concern. Thus limiting federal spending that subsidizes or supports environmentally harmful activities would be an obvious principle for conservatives to embrace. Identifying and targeting those governmental interventions that produce net environmental harm can enhance environmental protection while shrinking the size of the state at the same time.

B. Green through Growth

Conservatives should not only seek to constrain government programs that cause or increase environmental harm, but they should also seek to harness competitive markets and economic growth for the environmental benefits they can provide. Economic growth is essential to environmental protection. Market-driven competition not only spurs such growth, it also creates tremendous incentives for more efficient resource use and technological innovation.

As a general rule, increases in societal wealth correlate with increases in the demand for environmental quality and in the means to protect environmental concerns.[82] As people get wealthier, they

---

80. *See* Sophie E. Miller, *When Environmental Quality Isn't the Goal: New EPA Fuel Standards Foul the Air*, REGULATORY STUDIES CTR.: GEORGE WASH. UNIV., (Oct. 31, 2012), http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u41/EPA_RFS_2013.pdf (commenting on Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel, 40 C.F.R. § 80 (2013)).

81. *See* Am. Petr. Inst. v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (finding "arbitrary and capricious" an EPA rule mandating greater ethanol use that EPA acknowledged could worsen air quality). For even earlier history, see Jonathan H. Adler, *Clean Fuels, Dirty Air*, *in* ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 19 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992).

82. *See* RICHARD L. STROUP, ECO-NOMICS: WHAT EVERYONE SHOULD KNOW ABOUT ECONOMICS AND THE ENVIRONMENT 13–14 (2003); Jason Scott Johnston, *On the Market for Ecosystem Control,* 21 VA. ENVTL. L.J. 129, 146 (2002) ("There is abundant evidence that the demand for outdoor recreation and environmental amenities increases with national income."); Matthew E. Kahn & John G. Matsusaka, *Demand for Environmental Goods: Evidence from Voting Patterns on California Initiatives,* 40 J.L. & ECON. 137 (1997) (noting that most environmental goods are normal goods for which demand rises with income); Kenneth E. McConnell, *Income and the Demand for Environmental Quality,* 2 ENV'T. & DEV. ECON. 383, 385–86 (1997) (reporting on empirical evidence on environmental Kuznets curve); Seth W.

have greater levels of disposable income to devote to environmental concerns. Surveys find that support for environmental measures, both public and private, correlates with changes in personal income.[83] Thus, it is no surprise that donors to, and members of, environmentalist groups are predominantly drawn from upper-income groups.[84] There is also evidence that wealthier communities are more likely to support measures to preserve natural resources and are more willing to forego development for environmental reasons.[85]

Economic growth also fuels technological advances, such as the development of less resource-intensive technologies. At the same time, wealth accumulation provides for the resources necessary to deploy advanced technologies that help meet human needs more efficiently and with less environmental impact.[86]

In a competitive economy, businesses face constant pressure to economize on resource use to reduce costs. This, too, can feed environmentally beneficial innovation. Market-oriented economies generally experience more efficient resource use.[87] In the telecommunications industry, for example, copper wire was gradually replaced by fiber optics (made from sand), which was in turn supplanted by wireless technologies.[88] Each of these steps was the result of competitive market-driven innovation, but each produced tremendous environmental benefits as well.[89]

Norton, *Property Rights, the Environment, and Economic Well-Being*, *in* WHO OWNS THE ENVIRONMENT? 45 (Peter J. Hill & Roger E. Meiners eds., 1998) (noting that, insofar as environmental quality is viewed as a "good," consumption of environmental quality will increase as wealth increases).

83. *See, e.g.*, Richard L. Stroup & Roger E. Meiners, *Introduction: The Toxic Liability Problem: Why Is It Too Large?, in* CUTTING GREEN TAPE: TOXIC POLLUTANTS, ENVIRONMENTAL REGULATION AND THE LAW 1, 15 (Richard L. Stroup ed., 2003).

84. *See id.* (discussing 1992 reader survey for *Sierra* magazine finding that members of the Sierra Club have an average household income more than double the U.S. average).

85. *See* Matthew J. Kotchen & Shawn M. Powers, *Explaining the Appearance and Success of Voter Referenda for Open-Space Conservation*, 52 J. ENVTL. ECON. & MGMT. 373, 388 (2006).

86. *See, e.g.*, GOKLANY, *supra* note 65, at 5 ("[T]he wealthier the society, the more it can afford to research, develop, and install the technologies necessary for a cleaner environment."); *see also* AARON WILDAVSKY, SEARCHING FOR SAFETY (1988) (providing extensive arguments and evidence showing that increasing societal wealth produces environmental and safety benefits).

87. *See* Lynn Scarlett, *Doing More with Less: Dematerialization—Unsung Environmental Triumph?*, *in* EARTH REPORT 41, 45 (Ronald Bailey ed., 2000) (explaining that competitive markets push companies to "do more with less").

88. *Id.* at 51.

89. *See id.*

C. Promote and Protect Private Property

The protection of private property has long been a core conservative value. Property rights provide the foundation for a market economy and hold a central place in the nation's constitutional design.[90] The nation's founders saw the protection of private property as among the central aims of government.[91]

Private property also played a central role in the early American conservation movement. The nation's first conservation groups were formed around the turn of the last century by organized hunters, outdoorsmen, and others to protect private land for present and future generations.[92] The National Committee of Audubon Societies, for example, the forerunner to today's National Audubon Society, emphasized the importance of private stewardship in its early efforts to protect game birds.[93] Where such efforts were not enough, Audubon began to purchase land itself to ensure that vital nesting and breeding grounds would be protected.[94] For early conservationists, private property was an essential means of protecting precious natural resources and undeveloped lands, particularly where there was little political will to enact government protections. Conservation pioneers such as Rosalie Edge and William Hornaday utilized private ownership as a means to protect threatened

---

90. The Bill of Rights and Reconstruction Amendments explicitly enshrined the protection of property into the Constitution. As amended, the Constitution bars government deprivation of "life, liberty, or *property*" without "due process of law" in the Fifth and Fourteenth Amendments. U.S. CONST., amends. V & XIV, § 1 (emphasis added). The Fifth Amendment further protected private property from being "taken for public use without just compensation." U.S. CONST., amend. V. Although "property" is not mentioned in the Constitution itself, other than in its amendments, Alexander Hamilton observed at the outset of *The Federalist Papers* that adoption of the Constitution would provide "additional security . . . to liberty, and to property." THE FEDERALIST No. 1, at 90 (Alexander Hamilton) (Isaac Kramnick ed., 1987). It is also significant that the original state constitutions contained explicit protections for property rights as well. *See, e.g.*, Steven J. Eagle, *The Birth of the Property Rights Movement*, 404 POL'Y ANALYSIS 1, 7 (2001).

91. James Madison, for one, argued that the very purpose of government was to protect private property and to "secure to every man, whatever is his own." James Madison, *Property*, *in* 6 THE WRITINGS OF JAMES MADISON 101, 102 (Galliard Hunt ed., 1906) (1792).

92. *See generally* PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT 85–86 (1993) ("In the first half of the [Twentieth] century, hunting and fishing organizations were the most political effective environmental activists.").

93. *See* FRANK GRAHAM, JR., THE AUDUBON ARK 12 (1990) (noting early efforts focused on "articulate persuasion" and "education").

94. *See id.* at 44 (discussing efforts to purchase Pelican Island in 1898).

environmental resources.[95] Even Aldo Leopold, whose "land ethic" continues to inspire conservationists and ecologists to this day, suggested that property-based conservation strategies were more effective than regulation.[96]

Some contemporary environmental thinkers have recognized the potential of property rights to advance environmental values, but this insight has rarely influenced public policy. As noted above, Hardin identified private property as a means to prevent the tragedy of the commons in his seminal essay on the subject.[97] Wendell Berry, though not a proponent of classical liberal values or free market capitalism, nonetheless recognized that "the best conserver of land in use will always be the small owner or operator, farmer or forester or both, who lives within a securely placed family and community, who knows how to use the land in the best way, and who can afford to do so."[98] He similarly counseled that "a large population of small property holders" offers the best hope for good stewardship of the land.[99]

Where property rights are secure, owners are able to invest in conservation and have the incentive to do so.[100] For this reason, it should be unsurprising that well-defined and secure property rights correlate with positive environmental results. Cross-country

---

95. *See generally* Robert J. Smith, *Private Conservation Case Studies: Hawk Mountain Sanctuary Association*, CTR. FOR PRIVATE CONSERVATION (Mar. 31, 1999), *available at* http://cei.org/studies-issue-analysis/hawk-mountain-sanctuary-association; STEFAN BECHTEL, MR. HORNADAY'S WAR: HOW A PECULIAR VICTORIAN ZOOKEEPER WAGED A LONELY CRUSADE FOR WILDLIFE THAT CHANGED THE WORLD (2012).

96. *See* ALDO LEOPOLD, CONSERVATION ECONOMICS (1934), *reprinted in* THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS, at 193–94 (Susan L. Flader & J. Baird Callicott eds., 1991) ("We tried to get conservation by buying land, by subsidizing desirable changes in land use, and by passing restrictive laws. The last method largely failed; the other two have produced some small samples of success."). Leopold further suggested that private conservation was preferable to government acquisition of land for conservation purposes. *Id*. at 196. ("I do challenge the growing assumption that bigger buying [of public land] is a substitute for private conservation practice.").

97. *See supra* text accompany notes 23–48.

98. *See* WENDELL BERRY, *Private Property and the Common Wealth, in* ANOTHER TURN OF THE CRANK 59 (1995). It is important to note, however, that Berry does not endorse a classical liberal conception of property. *See* Nathaniel Stewart, *The Tragedy of the Commonwealth and the Vision of Wendell Berry*, 18 GEO. INT'L ENVTL. L. REV. 465, 506 (2006).

99. BERRY, *supra* note 98, at 49.

100. *See* Louis De Alessi, *Gains from Private Property: The Empirical Evidence*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 90, 108–09 (Terry L. Anderson & Fred S. McChesney eds., 2003); Robert J. Smith, *Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife*, 1 CATO J. 439, 456 (1981) ("Wherever we have exclusive private ownership, whether it is organized around a profit-seeking or nonprofit undertaking, there are incentives for the private owners to preserve the resource.").

comparisons find that "environmental quality and economic growth rates are greater in regimes where property rights are well defined than in regimes where property rights are poorly defined."[101] As a general matter, those natural resources subject to property institutions are managed more sustainably and in better condition than those subject to political management or left in open-access commons.

The benefits of property rights at promoting both economic efficiency and environmental stewardship can be seen in the context of fisheries. For decades, fishery economists have argued that the creation of property rights in ocean fisheries, such as through the recognition of "catch-shares,"[102] would eliminate the tragedy of the commons and avoid the pathologies of traditional fishery regulation.[103] The imposition of limits on entry, gear, total catches, or fishing seasons has not proven particularly effective.[104] Property-based management systems, on the other hand, have been shown to increase the efficiency and sustainability of the fisheries by aligning the interests of fishers with the underlying resource.[105] A recent study in *Science*, for example, looked at over 11,000 fisheries over a fifty-year period and found clear evidence that the adoption of property-based management regimes prevents fishery collapse.[106] Other research has confirmed both the economic and ecological benefits of property-based fishery management.[107]

---

101. Norton, *supra* note 82, at 51.

102. A "catch share" is defined by the National Oceanic and Atmospheric Administration as "a general term for several fishery management strategies that allocate a specific portion of the total allowable fishery catch to individuals, cooperatives, communities, and other entities. Each recipient of a catch share is directly accountable to stop fishing when its exclusive allocation is reached." NAT'L OCEANIC & ATMOSPHERIC ADMIN., NOAA CATCH SHARE POLICY: EXECUTIVE SUMMARY 1 (2010) *available at* http://www.nmfs.noaa.gov/sfa/domes_fish/catchshare/docs/noaa_cs_policy.pdf.

103. *See, e.g.*, Gordon, *supra* note 30; Scott, *supra* note 30.

104. *See* Dietmar Grimm et al., *Assessing Catch Shares' Effects Evidence from Federal United States and Associated British Columbian Fisheries*, 36 MARINE POL'Y 644, 647–48 (2012) (noting the environmental, economic, and social harms that result under traditional management and the race for fish); J.R. Beddington, D.J. Agnew & C.W. Clark, *Current Problems in the Management of Marine Fisheries*, 316 SCI. 1713, 1714 (2007) (discussing failings of traditional fishery regulations).

105. *See* Christopher Costello, Steven D. Gaines & John Lynham, *Can Catch Shares Prevent Fisheries Collapse?,* 321 SCI. 1678, 1679 (2008).

106. *Id.* at 1680.

107. *See, e.g.*, Grimm et al., *supra* note 104, at 648 ("Catch shares management ends the race for fish by creating incentives for economic efficiency and long-term stewardship."); Trevor A. Branch, *How Do Individual Transferable Quotas Affect Marine Ecosystems?*, 10 FISH &

The recognition of property rights in marine resources can also make it easier to adopt additional conservation measures. For instance, the adoption of catch-shares can reduce the incremental burden from the imposition of by-catch limits or the creation of marine reserves. A shift to catch-shares would have fiscal benefits as well.[108] Yet in recent years, the greatest opposition to the adoption of such property-based management regimes has not come from progressive environmentalist groups, but from Republicans in Congress.[109]

As the experience with fisheries shows, efforts to expand property rights to natural resources can produce positive environmental effects. To maximize the potential of property rights to enhance environmental protection, however, the property rights must be secure.[110] Failing to respect and protect property rights can undermine environmental stewardship, particularly on private land. This is especially important in a country like the United States, in which a majority of land is privately owned.[111] This problem is most evident in the context of endangered species. A majority of those species listed as endangered or threatened rely on private land for some or all of their habitat.[112] If these species are not saved on private

---

FISHERIES 39, 52 (2009) ("There are many positive ecological benefits of [individual transferable quotas]. Primarily, they encourage stewardship towards the resource by linking the value of quota shares to the future stream of income from the fishery."); Ray Hilborn, *Managing Fisheries is Managing People: What Has Been Learned?*, 8 FISH & FISHERIES 285, 294 (2007) ("Strong, well-funded single agencies are able to achieve biological sustainability when given a clear mandate. Economic success is more difficult to achieve, but appears to be rare in the absence of incentives that eliminate the race to fish."). For a summary of this and other recent research documenting the economic and environmental benefits of property-based fishery management regimes, see Jonathan H. Adler & Nathaniel Stewart, *Learning How to Fish: Catch Shares and the Future of Fishery Conservation*, UCLA J. ENVTL. L. & POL'Y (forthcoming 2013).

108. *See generally* Dietmar Grimm, Judd Boomhower & Jason Blau, *Can Catch Shares Reduce the US Federal Deficit?* 3 J. SUSTAINABLE DEV. 118 (2010).

109. *See Fish Stocks: Plenty More Fish In the Sea*, ECONOMIST, May 26, 2012, at 32; Editorial, *The Grand Old Party and the Sea*, N.Y. TIMES, May 16, 2012, at A26.

110. *See, e.g.*, Ragnar Arnason, *Property Rights in Fisheries: How Much Can Individual Transferable Quotas Accomplish?*, 6 REV. ENVTL. ECON. & POL'Y 217, 227 (2012) (reducing property rights quality of catch shares reduces their efficiency); Corbett A. Grainger & Christopher Costello, *The Value of Secure Property Rights: Evidence From Global Fisheries*, 4 (Nat'l Bureau of Econ. Research, Working Paper No. 17019, 2011) (noting quality of property rights affects behavior).

111. RUBEN N. LUBOWSKI ET AL., MAJOR USES OF LAND IN THE UNITED STATES, 2002, v (2006) (noting that over sixty percent of U.S. land is privately owned).

112. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-95-16, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 4 (1994). *See also* David S. Wilcove & Joon Lee, *Using Economic and Regulatory Incentives to Restore*

land, they may not be saved at all. Yet the Endangered Species Act in effect punishes private landowners for having maintained their land in a way that is beneficial for listed species.[113] This is because the presence of a listed species on private land results in the imposition of regulatory controls on private land-use—controls that are unwelcome even to conservation-minded landowners.[114] The end result, as empirical research has shown, is a decline in endangered species habitat on private land.[115] Greater protection of property rights could actually enhance species conservation.[116]

D. Make the Polluter Pay

Conservatives have traditionally emphasized the importance of personal responsibility.[117] This principle is no less important in environmental policy than it is in other contexts. Individuals and corporations alike should be held responsible for the environmental harms that they cause. In short, polluters should pay for the consequences of their polluting activities. At the same time, neither should be subject to prescriptive regulations due to the bad actions of others. Broad drift-net-style regulatory edicts that impose burdens or mandates on large sectors of the economy may be easy to administer, but they are not a particularly efficient or equitable means of controlling pollution. A small number of individuals or firms may well be responsible for a disproportionate share of emissions or

---

Endangered Species: Lessons Learned from Three New Programs, 18 CONSERVATION BIOLOGY 639, 640 (2004) (noting that an estimate that "private lands harbor at least one population of two-thirds of all federally listed species . . . is almost certainly an underestimate").

113. For a discussion of this point, see Adler, *supra* note 36, at 303–04 and the sources cited therein; *see also* Richard L. Stroup, *The Economics of Compensating Property Owners*, 15 CONTEMP. ECON. POL'Y 55 (Oct. 1997).

114. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. &. ECON. 27, 28–29 (2003); *see also* Adler, *supra* note 36.

115. *See, e.g.*, Lueck & Michael, *supra* note 114.; Daowei Zhang, *Endangered Species and Timber Harvesting: The Case of Red-Cockaded Woodpeckers*, 42 ECON. INQUIRY 150 (2004); Amara Brook, Michaela Zint & Raymond De Young, *Landowners' Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation*, 17 CONSERVATION BIOLOGY 1638 (2003). For additional anecdotal accounts, see Adler, *supra* note 36, at 319–25.

116. For various proposals on how to encourage species conservation while engendering less conflict with landowners, see generally REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (Jonathan H. Adler ed., 2011).

117. ROGER SCRUTON, HOW TO THINK SERIOUSLY ABOUT THE PLANET: THE CASE FOR AN ENVIRONMENTAL CONSERVATISM 70 (2012) (noting it is "a fundamental moral idea to which conservatives attach great importance: the idea that those responsible for damage should also repair it").

environmental harms, and environmental policies should be designed accordingly.[118] Wherever possible, environmental regulatory efforts should focus on controlling or sanctioning those who cause actual environmental harm.

In many respects, the principle of making the polluter pay is merely an extension of the protection of private property rights. For centuries it has been well understood that an individual landowner's right to make productive use of her property does not entail the right to prevent her neighbors from doing likewise. This principle is the foundation of the common law doctrine of nuisance.[119] Where the deposit of waste or residuals onto private property is consented to by the owner and the physical effects of such disposal are contained on the property, there may be ecological harm, but no pollution.[120] Thus pollution control can be understood as preventing the forcible imposition of a waste or emission by one person onto the person or property of another. Waste itself is not pollution.

While common law doctrines embody a polluter pays principle, there is ample reason to suspect the common law alone is not capable of addressing many modern pollution concerns, at least not without substantial reforms.[121] Nonetheless, common law principles could inform regulatory policy to a far greater extent than they do today.[122] Under current law, for example, individuals may file citizen suits against firms for violating the terms of pollution permits, even where

---

118. *See* J.G. Calvert, J.B. Heywood, R.F. Sawyer & J.H. Seinfeld, *Achieving Acceptable Air Quality: Some Reflections on Controlling Vehicle Emissions*, 261 SCI. 37, 40 (1993) (noting that an estimated ten percent of vehicles may be responsible for fifty percent of carbon monoxide and hydrocarbon emissions).

119. *See, e.g.*, ELIZABETH BRUBAKER, *The Common Law and the Environment: The Canadian Experience*, *in* WHO OWNS THE ENVIRONMENT? 88–89 (Peter J. Hill & Rojer E. Meiners eds., 1998) (discussing nuisance law as a means of controlling pollution); *see also* Julian Morris, *Climbing out of the Hole: Sunsets Subjective Value, the Environment, and the English Common Law*, 14 FORDHAM ENVTL. L.J. 343 (2003); ELIZABETH BRUBAKER, PROPERTY RIGHTS IN THE DEFENSE OF NATURE (1995).

120. *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 277 (1995) (asserting that "self-pollution may be a harm, but it is not a tort").

121. *See* Jonathan H. Adler, *Is the Common Law a Free-Market Solution to Pollution?*, 24 CRITICAL REV. 61, 63 (2012); *cf.* SCRUTON, *supra* note 117, at 158–59 ("Tort-law reform would restore a corrective device on which the market economy depends, by preventing wrongdoers and exploiters from exporting their costs. The EPA's regulatory regime, by contrast, both enhances the costs and transfers them all to us, in the form of increased prices.").

122. *See generally* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001) (arguing that property rights, not liberalized standing rules, will encourage increased protection of environmental resources).

there is no evidence of environmental or other harm.[123] At the same time, compliance with permit terms may shield polluting firms from liability or displace common law remedies.[124] This is backwards.

The principle that polluters should pay for their own pollution should also influence tax policy. Conservatives have long argued that it is preferable to tax consumption, rather than income or wealth creation.[125] For this reason, some have floated the idea of a tax swap, replacing income or wage taxes with taxes on consumption or, given concerns about global climate change, taxes on carbon.[126] Specifically, the federal government should impose a price on carbon that is fully rebated to taxpayers on a per capita basis. This would, in effect, shift the incidence of federal taxes away from income and labor and onto energy consumption and would offset some of the potential regressivity of a carbon tax.

For those conservatives who have long supported shifting from an income tax to a sales or consumption tax and oppose increasing the federal tax burden, this should be a no brainer.[127] If fully rebated, there is no need to worry about whether the government will put the resulting revenues to good use, but the tax would provide a significant incentive to reduce carbon energy use. In theory, there is not much difference between a pollution tax and a tradable emission credit regime. This is because a supply limitation can operate as a tax, and

---

123. *See* Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.").

124. *See, e.g.,* North Carolina ex rel., Cooper v. Tenn. Valley Auth., 615 F.3d 291, 309 (2010) (industrial emissions "expressly permitted by the states in which they are located" are not public nuisances). It is also well-established that federal environmental regulatory statutes displace federal common law remedies for interstate pollution. *See, e.g.*, American Elec. Power Co., Inc. v. Connecticut, 131 S.Ct. 2527 (2011) (Clean Air Act displaces federal common law nuisance claims for interstate air pollution); Milwaukee v. Illinois, 451 U.S. 304 (1981) (Clean Water Act displaces federal common law nuisance claims for interstate water pollution).

125. *See, e.g.*, NEAL BOORTZ & JOHN LINDER WITH ROB WOODALL, FAIRTAX: THE TRUTH (2008) (arguing that the income tax should be replaced with a national retail sales tax); Laurence J. Kotlikoff, *The Case for the 'FairTax,'* WALL ST. J., Mar. 7, 2005, at A18.

126. *See, e.g.*, Bob Inglis & Arthur B. Laffer, Op-Ed., *An Emissions Plan Conservatives Could Warm To*, N.Y. TIMES, Dec. 27, 2008, at WK10; James Hansen, *Cap and Fade*, N.Y. TIMES, Dec. 7, 2009, at A29; *see also* George P. Shultz & Gary S. Becker, *Why We Support a Revenue-Neutral Carbon Tax,* WALL ST. J., APR. 7, 2013, http://online.wsj.com/article/SB10001424127887323611604578396401965799658.html.

127. Shi-Ling Hsu & Yoram Bauman, *Ten Reasons*, 30 ENVTL F. 26 (2013). For a more comprehensive treatment, see SHI-LING HSU, THE CASE FOR A CARBON TAX: GETTING PAST OUR HANG-UPS TO EFFECTIVE CLIMATE POLICY (2011).

vice-versa. In practice, however, the two programs are not equivalent. Among other things, policy makers lack the necessary information to know what tax level would be equivalent to what supply constraint, but this is hardly the only difference.

There are also reasons to suspect that such a tax would be less vulnerable to special-interest manipulation and capture, on the margin, than available alternatives, such as emissions cap-and-trade programs. Implementation of a cap-and-trade regime requires many more decisions about regulatory design than a tax regime, and each decision presents the opportunity for rent-seeking behavior.[128] While a tax can be designed to be relatively uniform, implementing a trading scheme necessarily requires many decisions about how to allocate and value allowances. Users of allowances are not the only ones with something to gain through rent-seeking—those who seek to trade or broker allowances can also capture rents by influencing program design.

E. Decentralize Decision-making

Though some environmental problems, such as climate change, are truly global in scope, most environmental problems are local or regional in nature. Few, if any, environmental concerns could truly be described as "national," save perhaps for the preservation of national treasures. Yet the lion's share of environmental policy is directed—albeit not implemented—in Washington, D.C. Truly local matters, such as the proper level of localized air pollutants or the extent to which a given water system should control for given contaminants in drinking water supplies, are treated as questions of federal law. At the same time, the federal government has largely abandoned many environmental responsibilities that clearly belong on the federal government's plate.[129]

There are many reasons environmental protection efforts would benefit from greater decentralization. First, as already noted, most environmental problems are local or regional in nature, and do not involve the sort of interjurisdictional spillovers that would justify federal intervention. Environmental policy questions also tend to involve difficult trade-offs between competing economic, ethical, and

---

128. *See generally* Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming than Cap and Trade*, 28 STAN. ENVTL. L.J. 3, 37–39 (2009) (explaining why a tradable emission permit regime is inherently more complex than an equivalent carbon tax regime).

129. *See* Adler, *supra* note 121, at 160.

aesthetic values—values that may vary from place-to-place. There is no reason to expect every corner of the country to share precisely the same environmental priorities. At the same time, environmental conditions are incredibly variable across the country. Even where regions suffer from the same environmental concern, such as tropospheric ozone pollution (known as "smog"), the particular causes and contributions will vary, necessitating variable policy responses. Yet the information necessary to address such concerns is most readily available at the local level. One-size-fits-all policy approaches too easily become one-size-fits nobody.[130]

Decentralizing environmental decision-making also creates the opportunity for greater innovation in environmental policy. State efforts at environmental protection long predate federal environmental regulations and many federal programs were spurred by, or modeled after, preexisting state programs.[131] The best way to address a given environmental concern may be difficult, which is even more reason to allow different jurisdictions to experiment with different approaches. Such interjurisdictional competition does not produce a "race to the bottom" or prevent states from adopting environmental measures.[132] To the contrary, empirical research has shown that states seek to address those environmental concerns important to their citizens when they can and are quick to learn about and replicate the successful policy experiments of their neighbors.[133]

---

130. *See* HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 27 (1996) ("Federal regulators never have been and never will be able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources.").

131. *See supra* notes 49–69 and accompanying text.

132. *See, e.g.*, John A. List & Shelby Gerking, *Regulatory Federalism and Environmental Protection in the United States*, 40 J. REGIONAL SCI. 453 (2000); Daniel L. Millimet & John A. List, *A Natural Experiment on the 'Race to the Bottom' Hypothesis: Testing for Stochastic Dominance in Temporal Pollution Trends*, 65 OXFORD BULL. ECON. & STAT. 395 (2003); Daniel L. Millimet, *Assessing the Empirical Impact of Environmental Federalism*, 43 J. REGIONAL SCI. 711 (2003); *see also* Adler, *supra* note 66, at 47–53 (showing the pattern of state wetland regulation is contrary to what a race-to-the-bottom hypothesis would predict).

133. *See, e.g.*, PAUL TESKE, REGULATION IN THE STATES 180–81 (2004) (finding states are more likely to increase, rather than decrease, air quality regulation in response to actions taken in neighboring states, and concluding that "the race to the bottom is not a factor here"); *id*. at 191–92 (finding no "race to the bottom" in groundwater regulation); Wallace E. Oates, *A Reconsideration of Environmental Federalism*, *in* RECENT ADVANCES IN ENVIRONMENTAL ECONOMICS 1, 15 (John A. List & Aart de Zeeuw eds., 2002) ("States appear to be 'pulled' to higher levels of abatement spending by more stringent measures in neighboring states, but relatively lax regulations nearby appear to have no effect on such expenditures."); *see also* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115

Decentralizing much environmental policymaking would also have the added benefit of making it easier for the federal government to focus its efforts on those environmental concerns where a federal role is easiest to justify, such as in supporting scientific research and addressing interstate spillovers.[134] Thanks to the Supreme Court,[135] the EPA will have its hands full dealing with greenhouse gas emissions in a futile effort to forestall the effects of global climate change.[136] Allowing state and local governments to exercise more control over more localized concerns would make it easier for the EPA to focus on this task.

IV. CONCLUSION

In *How to Think Seriously about the Planet: The Case for an Environmental Conservatism*, British philosopher Roger Scruton observes that "conservatism and conservation are two aspects of a single long-term policy, which is that of husbanding resources and ensuring their renewal."[137] The cause of environmental conservation also has deep roots in American history, and is tied in with the American tradition of land ownership and the protection of private property. It is thus dispiriting and distressing to see contemporary conservative politicians turn their backs on environmental concerns.

Conservatives need to recognize that the goal of environmental protection is quite compatible with conservative principles of governance. Recognizing the reality of environmental problems does not require abandoning a commitment to limited government, free enterprise, or constitutional constraints. Embracing environmental protection does not require embracing the Environmental Protection Agency. Yet until conservatives are willing to articulate an environmental vision, they will cede the ground to those on their left—and there is no greater way to ensure that environmental policy will embody the sorts of governmental interventions and controls that conservatives so detest.

HARV. L. REV. 553 (2001) (presenting empirical data that challenges the view that states are ineffective environmental regulators).

134. *See* Adler, *supra* note 22, at 157–69.

135. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007).

136. *See generally* Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 HARV. J. L. & PUB. POL'Y 421 (2011).

137. SCRUTON, *supra* note 94, at 9.