Panel II: Public Versus Private Environmental Regulation

*Cass R. Sunstein, Fourth Panelist**

I have to tell you I am a little discouraged with my topic, which is the defense of democratic approaches to environmental protection. In preparation for this, I really wanted to get a hold of the Vice President's report on reinventing the government.[1] So I called the Regulatory Affairs Office in the Office of Management and Budget (OMB), and they said the person to call was the Public Affairs Office at OMB. I called them and they said the person to call was the Vice President's office. I called them and they said the person to call was the Government Printing Office. It sounded very depressing. But I thought, well, maybe that will work. So I went ahead and called the Government Printing Office, and they said they could have it to me probably within the month. (Laughter.)

I have heard subsequently that part of the Gore report says that the Government Printing Office will have to compete with private enterprise, and that may explain their reluctance to send it out. (Laughter.) Undaunted, I am going to try to defend the democratic approach to environmental problems. Much of what I have to say about private remedies and public remedies will be through a democratic lens. It might be more accurate to say that it is a republican approach, republican in the sense of what James Madison said in his theory of government, designed to limit factional power and to foster public deliberation.[2]

Let me begin with a bill of particulars indicting common law approaches to environmental protection. This is just an effort to abstract a bit from the familiar failures of private law. I guess this is a criticism, a partial criticism at least, of free market environmentalism. It is familiar that there are collective action problems with individually small but, on aggregate, very large injuries, which a common law or private market system will fail to address. So in cases in which there are lots of people injured a little bit, the environmental damage may be very high, but the common law will be unable to respond.

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1. AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993).

2. *See* THE FEDERALIST No. 10 (James Madison).

In addition, it is very hard to get an adequately coordinated system by using the common law, and this is potentially disastrous in the environmental area. Litigation is focused on too few aspects of a problem. It lacks the comprehensive overview that one would need, for example, to come to terms with water pollution. Litigation is also fortuitous in its timing. It is random and ex post. If you like the current law of products liability, then you would love common law approaches to environmental protection, where the problems will probably be even worse.

In addition to the collective action problems and the difficulty of getting adequate coordination, there is a lack of necessary expertise in the judiciary. Now, I see some judges in the room who actually know a lot about environmental problems, but they are exceptions.

There is a concern about judges' lack of political accountability as well. The truth in the *Chevron* opinion is the perception that where there is a policy decision to be made, it ought to be made democratically and not judicially.[3] Maybe a crisper way to make the point is to say that if you had a common law system working really terrifically well, kind of a Posner-Epstein heaven, what you would end up with is, at best, aggregating private willingness to pay. You would produce a system of wealth maximization in which you made policy choices by aggregating private willingness to pay. That is what the common law system and one idealized view of it is about.

But there is a big difference between democratic judgments about social problems and aggregated willingness to pay. And in a democratic system, the democratic judgments ought to be preferred. This is especially the case if what ought to matter in environmental policy includes, as I think it should, the interests of future generations and, if they will suffer, the interests of creatures who are not human. This is not to say that those are decisive interests, but they are relevant interests, and they are not likely to be sufficiently included in the willingness-to-pay criterion.

These various problems—collective action problems, lack of coordination, lack of expertise, and democratic failures—suggest that a common law system will be both inefficient and undemocratic. This was the basic insight that led to the substitution of regulatory machinery for the common law in the environmental area.

The story we have seen in the past twenty years has not been a success, and, ironically, the dimensions along which it has failed are very similar to the dimensions along which the common law itself failed. As several of the previous panelists have suggested, the system we now have is extraordinarily inefficient. By some estimates we have

3. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 866 (1984).

spent $900 billion for pollution control since 1972. I think $1000 billion is actually a trillion, but I was not entirely sure of that, so I took a lower end of the estimate. $900 billion. (Laughter.) And many estimates suggest that we could have achieved the same environmental benefit at one-quarter of the cost.[4]

Not only is there great inefficiency in our command-and-control system, but there is also democratic failure, above all in the influence of well-organized factions over the regulatory machinery. It may be that ethanol is really, really great and that governmental specification of ethanol as the automobile motoring substance of choice would be a good idea. But there is no doubt that the power of the ethanol lobby—the farmer's lobby—has played a role in occasional governmental enthusiasm for ethanol.

The democratic failure means that instead of democratic deliberation—Madison's aspiration—we often have government by faction. This problem is revealed, I think, by the cost-benefit charts published by OMB that are reprinted amusingly and depressingly in Judge Breyer's excellent new book on risk regulation.[5] These charts show that the cost-per-life-saved of environmental regulations varies so widely for different regulations that no sensible person could in the first instance have advocated such regulations.[6]

Now to make a very simple argument, this discussion suggests that the problems of the common law—lack of coordination, lack of economic efficiency, lack of real application of expertise, and lack of democratic deliberation—are just what we have now. I think it would be difficult to contend that we would be better off under the common law system. But certainly it would not be hard to argue that we are not tremendously better off under the system we now have than we would be under the common law system.

I want to make some simple recommendations. These reflect an effort, principally from the democratic point of view, to synthesize the best of traditional private law remedies—with a bow in the direction of my colleagues, Epstein and Posner—with the aspirations of the regulatory state. I have tried to import some of the flexibility and potential efficiency of the common law, while at the same time recognizing the need for democracy to lie at the heart of whatever regulatory solutions we come up with.

This approach is very simple. I want to argue first for information and second for economic incentives. The preferred remedy for envi-

4. *See* Cass R. Sunstein, *Democratizing America Through Law*, 25 SUFFOLK U. L. REV. 949, 955 (1991) (citing THOMAS TIETENBERG, EMISSIONS TRADING 41-45 (1985)).

5. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 24-27 (1993).

6. *See id.*

ronmental problems should be disclosure of information. Regulation should be the secondary remedy if there is a reason why information does not work. Information first, regulation second. What we have done over the past generation is the opposite. Centralized governmental regulation has been the first option, and information has been disclosed only if the regulatory option has been rebutted.

Now let me just specify what I mean by information and economic incentives, emphasizing the democracy-reinforcing features of both of these remedies. By information, I mean that in areas such as environmental risks in the workplace or consumer products, with some risks that reasonable people might take, the preferred choice ought to be to let people know about the risk rather than to have government-mandated safety levels. We should have a decent floor so that risks that no reasonable person would take will not be available. But otherwise, we should allow for private flexibility.

This ought to be efficiency promoting, and it also ought to be democracy promoting. One of the real pathologies of our current system is that people do not know about the levels of risk that they face. Hence, it is wrongly thought that nuclear power and toxic waste dumps are top priorities, while indoor air pollution and smoking are towards the bottom. Public assessments of risk levels are all over the map, and that is partly because information is lacking.

We ought to move in the direction of something like a national warning system. This system would reveal risk levels in a way that would have an efficiency-promoting aspect, a democracy-promoting aspect, and a coordinating function. The system would show people what OMB has publicized a bit—that is, what the risk levels are in various sectors of the economy and various aspects of people's lives.

By information, I do not mean just disclosure as a preferred remedy. I mean to endorse also a version of Judge Breyer's suggestion that somewhere in the Federal Government there ought to be an overview entity.[7] This body would be charged with comparing risk levels, with ensuring that there are priorities, with exempting tiny risks, as in the Delaney clause,[8] and with ensuring that we get the biggest bang for the buck. There is no reason that government regulation of the environment should be as uncoordinated as it now is. Currently, responsibility for environmental protection is broken up among a number of different federal agencies, and even offices within EPA have such different mandates that sensible priority setting is impossible.

7. *Id.* at 60.
8. 21 U.S.C. § 348(c)(3)(A) (1988).

Thus, my suggestion is disclosure as the preferred remedy and an overview entity that collects information, dispenses information, and ensures sensible priority setting. That is what I mean by information.

You have heard a bit about economic incentives. What I want to suggest right now is that economic incentives not only promote efficiency, but, equally importantly, have a democracy-reinforcing feature. From the democratic point of view, this makes economic incentives much better than the command-and-control system.

Here is why. Economic incentives focus democratic attention on the question of ends: "How much clean-up at what price?" Incentives do not focus on the question of means: "Which technology is best?" So in thinking about acid rain or any pollutant, the economic incentive approach puts into Congress' hopper the issue not of which technology ought to be imposed, but instead what level of pollution makes best sense.

The issue of ends forces elective representatives to make the tradeoff between environmental and other values explicitly and openly in a way that the current attention to means does not. Not only is there a democratic advantage in focusing on the right question, there also is a democratic advantage in eliminating the special interest deals that are likely when attention is placed on the issue of means. If the question is ethanol, methanol, nethanol, or thethanol, then it is especially likely that a group with a stake in the outcome will choose one of those. If the issue is instead how much reduction are we going to get, then the very generality of the question is likely to decrease the influence of factions.

The attention to economic incentives eliminates the attention to means, reduces factional power, and puts the democratic attention where it ought to be; it also forces a kind of coordinating and comparative judgment that would be a great advantage. If we had economic incentives as our remedy of choice, then the question would be: "Well, we spend X amount for that, how much should we spend for this?" Thus, economic incentives have a built-in mechanism that is democracy reinforcing in the sense that incentives make it very likely that comparisons will be obtained. When comparisons are obtained, democratic judgments are less subject to factions or to sensationalism. Economic incentives also put a high premium on information. If the question is how much should we spend to reduce global warming, then people will obtain a lot of information about the cost to reduce greenhouse gases and about the benefits of doing it. That would be a big democratic advantage over our current system.

The failures of private law and common law are economic, but also democratic. The promise of informational remedies and eco-

nomic incentives is not only economic, but also, more fundamentally, democratic.

Thank you.