1996

Why States, Not EPA, Should Set Pollution Standards Behind the Green Curtain

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Recommended Citation
19 Regulation 18 (1996)

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The solutions to most local environmental problems are no longer in the hands of the state and municipal officials elected by the people most directly concerned. Instead mandates issue forth from Washington in tax-code-like abstractions, their terms dictated by the complex interplay between Congress, the White House, the Environmental Protection Agency (EPA), the federal judiciary, and various special interest groups, including the self-described public interest groups. Just who is responsible for which aspect of any given policy remains a mystery to the local citizenry. Even if they did know, it would be hard to pin responsibility on officials who are accountable at the polls. And, even if the responsible officials did have to face reelection, any local concerns would count for little in the welter of issues in national elections. So, as a practical matter, a federal aristocracy imposes environmental controls on localities, regardless of local wishes.

The nationalization of environmental policy is both radical and recent. Washington sets mandatory environmental quality goals, specifies standards for categories of pollution sources, and dictates deadlines and procedures for states and cities by which to implement them. Yet the regulation of pollution was almost entirely the province of state and local governments before the early 1970s.

The early 1970s were a time of panic, not just about the environment, but also about Vietnam, urban riots, and the ability of government at any level to respond to the needs of human beings. The desperate times produced martial measures. The response to Vietnam was war, the response to poverty was called a "war," and the response to environmental degradation was sufficiently warlike that national politicians could boast that they had won the fight before it began. A federal chain of command was established in which Congress gave instructions to the EPA about how it should give instructions to the states about how they should deal with all environmental problems. The statutory and regulatory instructions take into account every conceivable contingency and also order the states to submit to the EPA voluminous plans and reports to ensure that the primary instructions are carried out. There was little thought that the eco-war would be run from state capitals rather than Washington; after all, the federal government itself had caused many of the most controversial problems of the day (e.g., nuclear power plants, big dams, stream channelization, federal highways, overgrazing of federal lands). Similar problems came from

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nationally marketed goods, which states could not regulate without subjecting manufacturers to a maze of requirements (e.g., new cars, lead in gasoline, DDT). But the federal government did not stop with correcting its sins of commission and omission—it decided to declare war on all aspects of the environmental problem, no matter how local.

After a flurry of federal statutes, environmental quality improved and the panic ebbed. From this, many people, such as Greg Easterbrook in his 1995 book *A Moment on the Earth: The Coming Age of Environmental Optimism*, concluded that the national takeover was necessary to clean up the environment.

Rationales for Federal Mandates

One rationale given for why Washington should take over was that pollution can cross state boundaries. "Everything is connected to everything else," went the mantra. States will not set reasonable standards for interstate pollution because, in regulating local polluters, state officials have little political incentive to take account of the harm that pollution causes out of state. However, the first and largest single step in the national environmental takeover, the Clean Air Act amendments of 1970, failed to deal with interstate pollution. The heart of the Clean Air Act is the federally required state-implementation plans whose function is to achieve the mandatory national ambient air-quality goals. The statute requires the EPA to disapprove a state's implementation plan if it would fail to achieve the national goals instate or allow pollution to significantly interfere with a downwind state's ability to achieve those goals. The EPA has repeatedly enforced the *instate* requirement but, over the last quarter century, has not enforced the *interstate* requirement, despite complaints from downwind states. As an environmental law textbook concludes, "The control of interstate pollution provides an easy rationale for federal regulation of air pollution . . . . Despite this . . . the control of interstate pollution would still have to be considered an unfulfilled promise."

Other federal environmental statutes also focus on intrastate pollution. Under the Resource Recovery and Conservation Act and the Superfund statute, the federal government sets comprehensive standards for the disposal of toxic wastes and the cleanup of contaminated sites, primarily to protect subterranean water and soil, which usually do not cross state lines. Similarly, the Surface Mining Control and Reclamation Act aims primarily at restoring landscape contours, a quintessential local issue, and only secondarily at controlling the runoff of mining wastes into streams and rivers, which can contribute to interstate pollution. Likewise, the Safe Drinking Water Act deals with the local distribution of water. Thus, the national takeover of environmental law must be defended, if it can be defended at all, on the basis that Washington should regulate *local* pollution.

The sponsors of the Clean Air Act amendments of 1970 also argued that Washington must take over because the states had failed to protect the environment. But, it was the federal government, not the states, that had been the laggard. With the emergence of the environmental movement in the 1960s, state and local governments responded to public sentiment by enacting broader pollution-control laws. According to Robert W. Crandall's study, published by the Brookings Institution, "Controlling Industrial Pollution: The Economics and Politics of Clean Air," leading pollutants were reduced three times as much in the 1960s as in the 1970s. Yet, the federal government's first substantive steps toward regulating air pollution thwarted aggressive state regulations.

In the early 1960s, the automobile manufacturers, concerned that many states might impose strict and differing emission limits on new cars, sought advice from Lloyd Cutler, an eminent Washington lawyer, former New Dealer, and later counsel to President Carter. Cutler suggested that the manufacturers get Congress to give the secretary of Health, Education, and Welfare (this was before the creation of the EPA in 1970) the authority to regulate emission standards for new cars. He reasoned that the companies would be able to keep the secretary from imposing expensive pollution-reduction measures and that this national authority would be a powerful argument against state regulation. Congress obliged the auto manufacturers in 1965, and in 1967 it actually prohibited most states from regulating new-car emissions. The 1967 statute was also designed to help electric utilities by requiring states to regulate their emissions through a complicated process that was likely to delay and weaken any controls applied to them.

In comparison, the federal government neglected the air-pollution issues with which it was particularly well-suited to deal. It did little to control emissions from new cars, as Cutler predicted, and totally failed to remove the lead from gasoline. In

1970 the political winds shifted in Washington. Earthday and a series of acute air episodes on the East and West Coasts made air pollution a hot-button, national issue. In addition, Ralph Nader published his study "Vanishing Air" in which he accused Senator Edmund Muskie of selling out to polluters. Muskie had hoped to ride his environmental record to the presidency in 1972. A bidding war commenced in which President Nixon, Senator Muskie, and other legislators seeking the 1972 presidential nomination vied to be the environmental champion by proposing the toughest air-pollution laws in history.

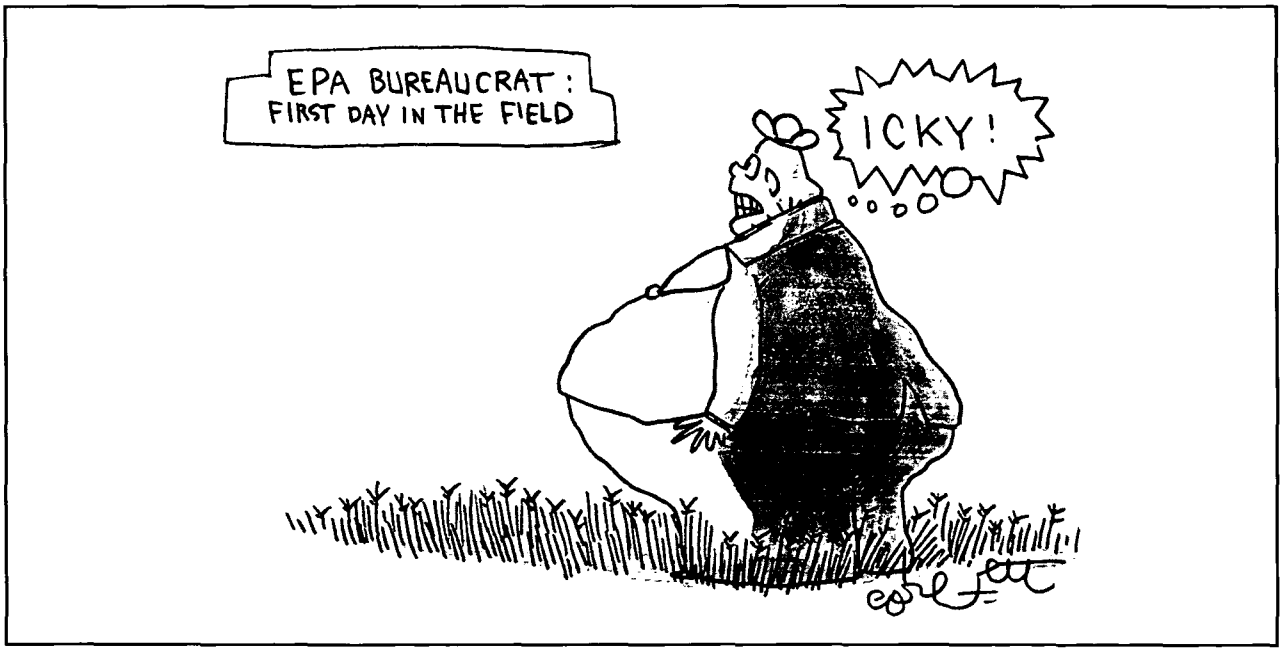
The resulting statute, a 1970 amendment to the Clean Air Act, regulated new cars with vigor and also, as the first step in the national takeover, required the states to regulate stationary sources to achieve national air-pollution goals. As the Supreme Court put it, "Congress took a stick to the states." The EPA later claimed that this federal stick radically reduced pollution from stationary sources. But according to Crandall, "Assertions of the tremendous strides [the] EPA has made are mostly religious sentiment." The belief that it took the federal government to make the states act comes from federal officials who claim credit for what state officials had already been accomplishing.

EPA officials call the national takeover "a dynamic state and federal partnership," suggesting that in Washington "dynamic" means "heads I win, tails you lose." Given the palpable unfairness of this condescending partnership, elected state officials often resist federal environmental mandates. In the ensuing drama, state officials are cast as the environmental bad guys, rounded up by the EPA cavalry and, if need be, hauled before a federal judge. That such typecasting is a function of the structure of the federal statutes, rather than some peculiar environmental insensitivity of state governments, is made clear by one federal environmental statute in which federal officials bear responsibility for most cleanup costs—Superfund. Then the shoe is on the other foot; state officials perennially call for cleanups that cost more than federal officials are willing to pay. In sum, the record does not show that federal officials are more environmentally sensitive, just that they have the power to act more opportunistically.

EPA's Chain of Command

Even though the federal takeover was unnecessary, is there anything to be gained by returning authority over pollution to state and local governments? Yes, indeed. For starters, we could dispense with the entire federal chain of command—its bulk defies belief.

At its pinnacle is a thick volume of statutes in fine print. Under this volume is a stack more than two-feet high, also in fine print, of EPA regulations. The EPA regulations are so lengthy, in part, because those who write them respond more to pressures from the agency to enlarge and protect



its power than to the public's need for clear, concise rules. The problem is not that the agency is oversolicitous of environmental quality; it is that it is oversolicitous of itself. So, the regulations construe the agency's power overbroadly and then react to the obvious instances of overbreadth by providing narrowly defined exclusions and variances. Thus, under a statute regulating the handling of hazardous wastes, the agency takes seventeen pages to define the concept of "hazardous waste"—the definition reads as if written by Monty Python's John Cleese.

This is still just the tip of the pyramid, for the agency copiously supplements its regulations with "guidance" documents. (You can see why guidance is necessary.) For example, one subset of the guidance documents for Superfund cases fills thirteen loose-leaf notebooks. There are probably twice as many guidance documents for that particular statute, but no one knows for sure because the agency itself has been unable to assemble a complete collection. The various mandated state plans and returned state reports provide still lower levels of the pyramid, each exponentially larger than the one before. The entire pyramid would be unnecessary in a system not run from Washington; so would many of the EPA's 17,000 employees and the state, municipal, and private-sector employees who participate in the federal rule-making proceedings and perform the paperwork required by the federal rules.

States and localities, if left to their own devices, would not adopt such a compulsive style for making environmental policy. Instead of trying to reason from cosmic first principles to comprehensive solutions, local officials could assess particular problems as they arise and decide what should be done, just as sensible human beings handle issues that arise in their lives.

Professors Henry N. Butler of the University of Kansas and Jonathan R. Macey of Cornell University speak for many liberal and conservative scholars in concluding that the "command and control regulatory strategy. . . has not set intelligent priorities, has squandered resources devoted to environmental quality, has discouraged environmentally superior technologies, and has imposed unnecessary penalties on innovation and investment." And no wonder. People sitting in Washington are trying to choreograph all of the environmentally related activities in the United States in the face of wide disparities in local conditions and ceaseless changes in pollution-control technology. Moreover, EPA officials must respond to elected officials, and the federal courts have jurisdiction over EPA regulations. As Professor Richard Stewart of the New York University School of Law put it, the federal chain of command is a "self-contradictory attempt at central planning through litigation."

The Framers of the Constitution envisioned states serving as laboratories in which different policies would be tried and compared. State-by-state experiment, however, disappears with federal mandates. Yet experiment is what we need. Scholars from diverse political perspectives have suggested pollution taxes, emissions trading, greater reliance on the common law, and other radical alternatives to Washington's command-and-control approach. Others, such as former EPA administrator William Ruckelshaus, have criticized the federal approach under which there are separate regulatory schemes for air pollution, water pollution, and so on. They suggest, instead, that plans be looked at holistically because this approach often can produce better overall environmental quality at lower costs, implying flexibility at the local level. Such innovation, however, threatens the EPA with its worst nightmare—loss of control. So, while the EPA feels compelled to experiment, it hedges innovative programs with so much red tape that flexibility is largely illusory. States, on the other hand, are more open to real experimentation; and it makes more sense to experiment on the state level.

Accountability

With the national takeover, democratic accountability goes by the boards for three reasons. First, the massive job of controlling the nation's environment from Washington encourages Congress to delegate its policy-making responsibilities to the EPA. As a result, environmental policies are made by bureaucrats rather than officials who are directly accountable to voters. Second, voters cannot effectively hold national officials accountable for how they resolved local environmental disputes. Third, federal mandates give federal legislators and the president the means to take credit for the benefits of environmental programs while placing blame for any ensuing costs on state and local officials.

Popular revulsion at such federal opportunism resulted in the passage of the Unfunded Mandates

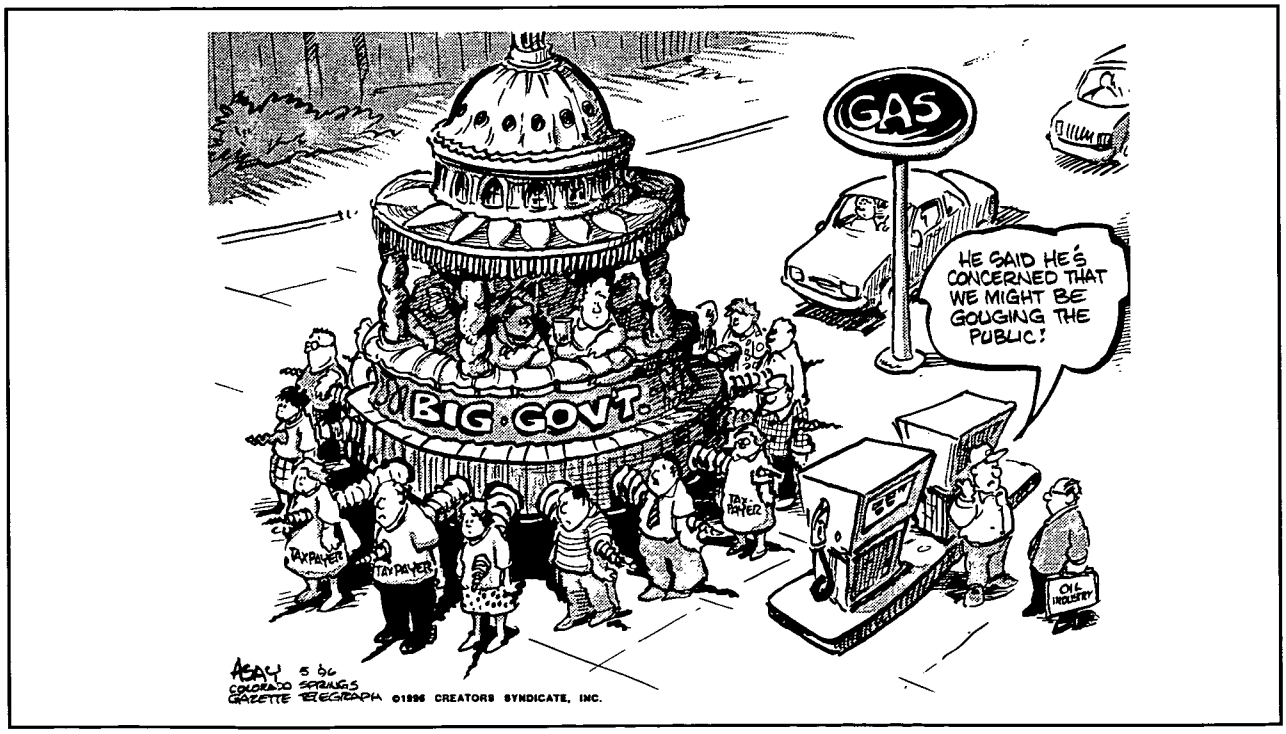
Reform Act of 1995. The act is an attempt to keep Congress from imposing mandates on state and local governments without providing the necessary funds to implement them. In other words, if Washington politicians take credit for the benefits promised by a new mandate, they must also take responsibility for ensuing costs. But, as is well known, the act leaves in place all preexisting mandates, including the entire corpus of federal environmental law.

The national environmental laws are chiefly regulatory mandates and sometimes tax mandates. For instance, Title V of the Clean Air Act amendments of 1990, which require air-polluters to secure permits from states, turns out to be a mandate to tax. Under Title V, states must charge permit fees at a level that the EPA deems sufficient to fund the bulk of the state's air-pollution control program, not just the cost of issuing the permit as the EPA suggests. Prior to 1990, most polluters did not have to get permits, yet they still had to comply with emission limitations. Before the statute, state pollution officials had to get approval for their budgets from state legislators who also had to take responsibility for the taxes needed to fund the budgets. After the statute, unelected federal officials supplanted much of the budgetary and taxing authority of elected state officials. The State and Territorial Air Pollution Program Administrators Association and the Association of Local Air Pollution Control Officials, whose funding comes partly from the EPA, vigorously supported the federal mandate for permits and support federal mandates in general.

The Rise of the National Class

The national takeover of environmental policy is not an isolated event. Professor Robert H. Wiebe, a historian at Northwestern University, in his book *Self-rule: A Cultural History of American Democracy*, argues that the single most striking change this century in American government was the rise to power of a nationally oriented, elitist, antidemocratic group that he calls the "national class." As he tells the story, the heyday of democracy in America (for white men anyway) was the nineteenth century, when power resided in a large middle class oriented around the "Main Streets" of America. The Main Street middle class believed in democracy. Voter self-education was prevalent, and voter turnout was much higher than in the twentieth century.

Around 1890 the new national class began to emerge—it was urban, educated, and believed that its expertise and highly rationalized means of analyzing problems were engines of progress. While the Main Street class was to be found at



the village school board, the Rotary Club, or behind the counter at the local bank, the national class gathered in the higher counsels of government, nationally oriented groups like the American Bar Association, and nationally oriented corporations. Thinking that experts like themselves should not have to be accountable to "lay people," the national class restructured elections and governmental processes to insulate policymakers from electoral accountability. A prime example was delegating law-making power to administrative agencies, often thought of as a pet project of the New Dealers. Professor Wiebe shows, however, that the haughty mind set of the national class was entrenched at the national level with the election of Herbert Hoover, who ran for office as the "Great Engineer." Its methods of trying to insulate decisions from the voters also included federal mandates and the turning of questions of policy into questions of "rights," including environmental rights.

Professor Wiebe's description of the national class is not the same as how the national class defines itself, for such aristocratic pretensions are hardly compatible with its self-image of reasoned tolerance. So each one of its institutional innovations for blunting popular control of policy issues comes with a set of less-aristocratic-sounding rationales. In the case of the national takeover of environmental policy, the rationale was that states would not make good decisions on intrastate pollution because, in competing to lure employers, each state would set ever lower environmental standards, so all states would end up with the poorest possible environmental standards—a "race-to-the-bottom" argument.

It is true that a state is likely to set lower environmental standards than it otherwise might in order to attract industry from other states. But sellers of goods set prices lower than they otherwise might to attract customers. The question is, why isn't such competition between states, as with sellers, a good thing? In the early days of the New Deal, many policymakers believed that competition among sellers was inherently disastrous because sellers would engage in a race-to-the-bottom price that would lead most of them to bankruptcy. This thinking resulted in the New Dealers' attempts to control all prices. Soon, however, economists showed that price competition does not lead to a race to the bottom, except in rare circumstances. The proponents of a national takeover of environmental regulation never thought much about what conditions would be necessary to produce a race to the bottom among states regulating pollution. They knew that there was a race to the bottom because they wanted more stringent regulations, and they knew themselves to be reasonable.

Professor Richard Revesz of the New York University School of Law concluded that "race-to-the-bottom arguments in the environmental area have been made for the last two decades with essentially no theoretical foundation." Revesz has not proven that there never could be a race to the bottom, but he has shown that it was not the real reason for the national takeover. The clincher is that the national government has taken control of many environmental issues for which a race to the bottom is impossible because the facility in question is not portable—for example, abandoned waste sites.

The race-to-the-bottom argument does not justify the continued national control of intrastate pollution. The argument focuses upon just one determinant of state environmental policy—the competition to attract employers—ignoring other determinants such as the competition to avoid pollution, which goes by the name NIMBY—that is, "not in my back yard." NIMBY is a race to the top. The national class deplores both race to the bottom and NIMBY. In one thing it is constant: people like themselves should shoulder the experts' burden of supplanting the decisions of the communities affected. Moreover, the logic of the race-to-the-bottom argument suggests that all aspects of state and local government that would tend to affect industrial location should be taken over by a government with broader jurisdiction and, in an increasingly global economy, that government should be international in scope. This is an argument for the nascent "international class." Even if enough scholars could torture economic models long enough to produce some set of assumptions under which there would be a tendency towards a race to the bottom, it is implausible that its impact would be sufficient to offset the benefits of getting rid of the federal chain of command.

In rejecting the race-to-the-bottom argument, I own that some states will end up at the bottom relative to others. This is anathema to environmentalists who are fervent enough to think that any pollution is too much and naive enough to think that environmental standards divide purity from danger. In fact, between purity and danger is

a huge gray area entailing risks smaller than those we face crossing the street. Where to set standards in that gray area is a question of policy, not rights. One of the virtues of allowing states to set their own environmental policies would be that electorates with different environmental values could set their own standards for intrastate pollution; those who dislike the balance struck in their state could move to another one.

It is also possible that some states will fail to deal with pollution hot-spots that present real dangers; however, the national class exaggerates this potential because it looks down on ordinary voters. If pollution is starkly dangerous in a locale, it will be the stuff of reports by associations of state regulators, the news media, medical associations, and the EPA. Informed voters know what to do. Indeed, federal laws requiring firms to make public their emissions of toxic pollution have caused firms to reduce emissions on their own and have led states such as Louisiana, often thought of as a polluter's haven, to tighten regulations. And if worse comes to worst, people can move or sue. Although there are many obstacles to redress under common law, there are significantly less when a threat is defined and imminent. Finally, the federal chain of command has failed to respond to egregious threats for years on end; you can look it up in the congressional testimony of environmental groups.

A Proposal to Reform the EPA

The Environmental Protection Agency should be stripped of its power with four exceptions. First, it should gather and publicize information on pollution and its consequences, both on the national and the local level. Second, it should propose to Congress rules of conduct to control types of interstate pollution that are not adequately addressed by the states or that require special protection, such as the Grand Canyon. Third, it should propose to Congress rules of conduct for goods, such as new cars, when state-by-state regulation would erect significant barriers to interstate commerce. Fourth, it should draft model state environmental laws and conduct policy studies that states could use when considering whether to enact such laws. States, however, should be free to amend or reject federal proposals in favor of different approaches to pollution control.

I first suggested such a radical reduction in the national role for pollution control at a conference attended in large part by EPA officials, and former-EPA officials, whose law practices are built upon their knowledge of the agency's inner-workings. Threatened with rustication from the national class to mere Main Street status, they reacted as if I had released a mouse to run around the room. For all their yelping, they came up with only three arguments to keep their privileges, each of which reveals much of what is wrong with the federal environmental aristocracy.

First, they argued that many state pollution control agencies are short staffed. Of course their concept of the "work that needs to be done" is based on the paper-pyramid model of the federal chain of command—they actually think it is useful. Much of federal environmental officials' time is spent telling state and local officials what to do and checking that they do it. Under my proposal, we could dispense with a large portion of the EPA's 17,000 staffers. Perhaps some of them could be sent to the states; but, that may not be necessary once the paper pyramid has been composted. Even now, state and local governments mount the vast majority of enforcement actions.

The EPA loyalists further argued that it takes the national government to stand up to locally powerful industries. Sometimes, of course, the neighbors of a plant are reluctant to see it regulated to the point of purity for fear that it will go bankrupt or move. As loyal members of "the best and the brightest," the federal environmental aristocracy wants the power to "bomb the village to save it." On the other hand, a plant might get its way because it has greased some palms. As Professor Arthur Schlesinger Jr. observed in arguing against devolution of authority to the states, local government is controlled by the "locally powerful." The premise of his argument is that the national government is controlled by the virtuous rather than the powerful. Concentrated interests buy "access" in Washington just as they buy "clout" on Main Street. The difference is lost on me. While the state and local political playing fields are not perfectly level, at least people know the score. It would be hard to find an Arkansan who does not know that the Tyson poultry folks have clout in Little Rock. But at the federal level, the workings of concentrated interests are shrouded by the remoteness, size, and complication of the federal government.

Finally, the EPA loyalists argued that state governments are not competent to produce

sound regulations. But, being the folks who took part in writing the EPA's contributions to the *Federal Register*, they were throwing stones from a glass house. The language that the EPA produces is—and I mean this—worse than the babble that comes from the Internal Revenue Service. It is opaque, arcane, elliptical, repetitive, and evasive. The policies are often dumb and sometimes perverse. EPA staffers explain that such problems derive in part from the legislative and administrative constraints under which they operate. True enough, but the federal house is still glass, regardless of who built it. In the downsized EPA that I propose, the EPA, stripped of its fiat power, could retain its leadership role only by convincing states to adopt its regulations by the quality and sensibility of its policies. That is how the private organization that proposes the Uniform Commercial Code and other uniform laws to the states attains its influence. We need an EPA that succeeds by earning its leadership, not by bringing the States down to mind-numbing mediocrity.

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