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## A Small Step (Cough) for Clean Air

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# One small step (cough) for clean air

BY DAVID SCHOENBROD — 06/04/14 01:00 PM EDT

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When the unlikely duo of Chief Justice John Roberts and Justice Ruth Bader Ginsburg and four other justices recently upheld the Environmental Protection Agency's (EPA) authority to require states to control interstate air pollution, it marked a small victory for clean air. The support from both liberal and conservative justices should also send a strong signal for needed bipartisan cooperation to remove three critical chokepoints that Congress built into the Clean Air Act 44-years ago. The chokepoints shorten the life span of the average American by a half year and increase the costs that we will bear to control pollution, including the controls on greenhouse gases that are currently underway.

While the statute dates back to 1970, the litigation began in 2005 when President George W. Bush's EPA mandated the states to control interstate pollution. A lower court sent this mandate back to the agency and President Barack Obama's EPA issued a revised mandate in 2011. After a lower court struck it down, the Supreme Court upheld it, but the high court could not remove the remaining chokepoints that Congress built into the original statute.

Chokepoint 1. Assuming that unhealthy levels of pollution in a state come primarily from sources within that same state, Congress in 1970 directed the states to take the lead in regulating emissions of the most widespread pollutants. However, most of the pollution that kills people travels hundreds or thousands of miles across state lines and comes from big sources. When Congress's error became apparent, it told the EPA to tell the states to tell the sources within their own borders to protect downwind states. This circuitous response to a national problem has guaranteed litigation and unconscionable delay. It is not good for anyone's health, pocketbook or faith in the democratic process.

Congress can and should remove this chokepoint by having the national government itself regulate the nationally important sources.

Chokepoint 2. Under the 1970 statute regulators would tell each source how much, and often how, to cut emissions. But, experience has shown that this traditional, top-down method of regulation is woefully inadequate. We now know that market-based regulation cuts pollution faster and cheaper. For that reason, Democrat and Republican legislators in 1990 used markets to control one special kind of interstate pollution: acid rain. Congress placed a declining cap on emissions that cause acid rain, gave sources specific allowances to emit the pollution, and let them buy and sell the allowances. Such trading meant that a plant that would face high costs to cut emissions could pay another plant, often in another state, to make extra cuts in its emissions. Cap-and-trade achieved the cut in acid rain that Congress promised and saved electricity consumers and plant owners billions of dollars compared to top-down regulation. However, the 1970 law did not (and still does not) allow EPA to build a national cap-and-trade program into the regulation that the Supreme Court just upheld. To the contrary, the current Clean Air Act stupidly requires much wasteful, top-down regulation.

Congress should remove this chokepoint by establishing national cap-and-trade programs.

Chokepoint 3. Congress assumed that pollution doesn't harm health below some threshold, and in 1970 told the EPA to set national air quality goals below that threshold to "protect health." Legislators knew even in 1970 that there is no such threshold, but assumed its existence to avoid having to balance health benefits against costs of reducing pollution. The EPA, however, has to operate in the real world and so must balance health benefits and costs, yet pretend its air quality goals are set below the magic threshold in order to seem to comply with the statute. The legislators' deviousness ends up harming health.

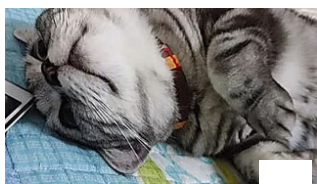
Congress should remove this chokepoint by itself deciding how much to cut total emissions of the most widespread pollutants.

"Breaking the Logjam," a recent project of New York Law School, NYU School of Law, and environmental experts from across the political spectrum shows how to reform the statute to remove the chokepoints.

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EPA's fortunate win in the Supreme Court sets the stage for the requisite non-partisan approach. We have held our breath for 40 years, but we still have a Clean Air Act that recklessly continues to destroy our bodies and our economy. Simply put, the delay is killing us. For a national pollution problem, we need a national, market-based solution. Congress must step up and take responsibility for a change.

*Schoenbrod is a professor at New York Law School, a co-author of Breaking the Logjam (Yale U. Press, with Richard Stewart and Katrina Wyman), a visiting scholar at the American Enterprise Institute, and a former attorney at the Natural Resources Defense Council.*

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