

# Thinking about the Conservative Thinkers

A Book Review by E. Donald Elliott

Look out, EPA! Just when you thought you'd survived the conservative onslaught, here comes Fred L. Smith, Jr., and friends.

The environmental policies of Bush-Quayle/Reilly-Habicht have emphasized reforming EPA's programs to incorporate market incentives, risk-based priorities, cost-effectiveness, and voluntary cooperation from industry to prevent pollution. According to the Smiths of the world, these reforms are mere halfway measures. They amount to "the ecological equivalent of ... market socialism," the failed policy of former Communist countries in which goals were set politically but implemented through markets. They may even be

*(Elliott is Julian and Virginia Cornell Professor of Environmental Law and Litigation, Yale Law School, and is affiliated with Fried, Frank, Harris, Shriver and Jacobsen, New York City and Washington, DC, as a consultant. During 1989 to 1991, he served as EPA Assistant Administrator and General Counsel.)*

dangerous, because they "make it [regulation] easier" (horror of horrors), not to mention cheaper and more efficient.

The real target, argues Smith and a growing segment of the conservative intelligentsia, should be the entire concept of centralized regulation of the environment by the government. Not only is centralized, bureaucratic regulation inherently subject to self-serving manipulation by "special interest groups," including environmental groups and bureaucrats, but, more fundamentally, the concept of centralized regulation protecting the environment is wrong.

*Environmental Politics: Public Costs, Private Rewards*, edited by Michael S. Greve and Fred L. Smith, Jr. (Praeger, 1992; 209 pp.), consists of nine chapters. Seven are case studies by authors of particular environmental decisions, from the Clean Fuels Program (under the 1990 Clean Air Act), to Superfund, and the controversy over the use of the synthetic hormone bovine

somatotropin to increase milk production in dairy cows. The common theme is "rents," the argument popularized by University of Chicago economists that government regulation provides a ready political lever that special interests can use for their own purposes. This is not a new idea, but the case studies are interesting and useful in that they illustrate how the process works in environmental regulation.

The intellectual core of the book, however, is in the introductory and concluding essays by editors Greve and Smith. Greve summarizes the arguments about what is wrong with the present system. Curiously absent from his summary is the criticism that regulation does too little, that the present system requires huge volumes of information and, therefore, is slow and cumbersome, and leaves some problems unaddressed. In the final chapter, Smith develops his provocative theoretical argument that private remedies should replace the

present system of government regulation.

### Market Failure Re-Examined

For decades, the standard theoretical justification for public environmental regulation has been the concept of "market failure": Unregulated markets fail to internalize the true social costs of pollution because polluters can "externalize" the costs of their pollution onto others as damages that go uncompensated. Thus, government should step in to regulate.

This "market failure" argument is useful as far as it goes; however, a number of academics have criticized it for failing to consider the moral—if not outright religious—dimension that underlies our attitudes about the environment; among other things, the conventional economic argument for regulating pollution implies that not having enough pollution is bad (because the money spent could produce greater benefit elsewhere), an idea that many find strange.

Smith attacks the market failure justification for public regulation from a totally different perspective. The best way to protect the environment, perhaps the only way, he says, is not through government regulation, but through expanding private markets to include environmental quality: "Rather than viewing the world in terms of market failure, we should view the problem of externalities as a *failure to permit markets and create markets where they do not yet—or no longer—exist.*" This has some force in areas such as municipal solid waste, where government monopoly on trash collection hides the true costs of waste disposal from consumers.

### Private Environmental Law

In emphasizing private alternatives to government regulation of the environment, Smith is part of a growing chorus of free-market thinkers, as illustrated by the recent books of

Richard Stroup and John Barden, and Terry Anderson and Donald Leal. While this literature is long on criticism of the present system and on theoretical arguments for "private environmental law," it is very short on the practical details of how private property and litigation rights would actually replace public regulation in protecting the environment.

The standard view, which Smith discounts, holds that private nuisance or damage suits by individuals harmed by pollution, while useful in some cases, cannot be relied on to regulate pollution because of the problem of "transaction costs": The costs of developing information about the harm

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caused by pollution are too large, and the provable damages that could be recovered by individuals are too small to make it worthwhile for many lawsuits to be brought, particularly since case-by-case litigation is very expensive and time-consuming.

Smith acknowledges that these problems are "real" but argues that moving the issue into the public sector doesn't make the problems less difficult: "Under a private regime, proof problems and the like will sometimes cause a failure to abate pollution. The political manager, in contrast, can limit pollution even without proof of damage."

Smith's arguments are interesting and provocative, but a bit Utopian. I doubt that "private environmental law" will ever replace government regulation. History never repeats itself

exactly, and the 19th century's approach to regulating pollution is unlikely to be reinstated. A more likely future is a "hybrid" system, in which both private rights and governmental regulation work together.

Elements of public/private hybrid systems already exist: for example, in Superfund, which consists of a strange amalgam of government regulation and private litigation; and in the Toxic Release Inventory, in which government regulation requires the compilation and disclosure of information, but private, local action then "enforces" pollution prevention based on this information. The record of such systems is mixed, but the high costs and long delays in the Superfund program do not inspire confidence that case-by-case litigation in the courts is a cure-all for the problems of public environmental law.

Most conservative thinkers complain bitterly about private lawsuits as a regulatory device where they currently exist—product liability, medical malpractice, toxic torts. It is a strange anomaly that they have such faith in private lawsuits to take on the much larger, and more difficult task of environmental regulation. □