Environmental Protection in the Twenty-First Century

Cass R. Sunstein

In the United States, environmental law has come in two stages. The first stage—from the creation of the Republic to about 1970—involved the use of the common law. The second stage—from about 1970 to about 1980—involved an extraordinary explosion of federal statutes. We are now entering an exciting third stage, whose contours are just beginning to emerge, and which might well simultaneously promote economic, environmental, and democratic goals. To understand that third stage, it is necessary to explore its predecessors.

As a regulatory system for protecting the environment, the common law had many advantages. It was highly flexible; it was decentralized; it allowed different accommodations to be reached in different areas. For many years, the common law worked reasonably well, at least insofar as it could control the worst abuses without imposing unnecessary obstacles to economic development.

As a complete solution, however, the common law is hopelessly inadequate. Judges are not experts in the complex issues of environmental protection. Equally important, they are not democratically accountable. The common law depends on the assumption that causation is clear; in the environmental context, causation is typically ambiguous. Finally, the common law depends on private initiative, when environmental protection affects so many people (including future generations) as to require a public role.

But what should replace the common law? The first generation of national environmental law was built on the understanding that the government should enact clear requirements, often to protect a “right” to a clean environment and usually to be imposed on all firms in order to bring about immediate compliance with new national principles. Some of these requirements were unrealistic, in the sense that they attempted to eliminate pollution entirely. Some of the requirements were based on sensationalistic anecdotes rather than a thorough
levels of reduction are appropriate, but instead on the largely incidental and nearly impenetrable question of what technologies are now available. The focus on the question of “means” also tends to increase the power of well-organized private groups, by allowing them to press environmental law in the service of their own parochial ends.

BAT strategies are simply one example of what is wrong with our current system: insufficient attention to incentives, excessive interest-group power, and too little information about the real-world of pollution control. In thinking about the next hundred years of environmental law, we are likely to focus on four emerging possibilities: (1) economic incentives, under the basic principle of “polluters pay”; (2) pollution prevention; (3) information and disclosure; and (4) the internationalization of environmental law.

1. By far the most important step involves the creation of economic incentives to engage in environmentally desirable conduct. An increasingly popular approach is to impose a tax on environmentally harmful behavior, and to let market forces determine the response to the increased cost.

Most generally, government might adopt a simple, two-step reform policy. First, those who impose environmental harm must pay for it by purchasing permission to do so, perhaps through a licensing procedure. Second, those who obtain the resulting permission should be able to trade their “licenses” with other people. This would mean that people who reduce their pollution below a specified level could trade their “pollution rights” for cash. In one bold stroke, such a system would create market-based disincentives to pollute and market-based incentives for pollution control. Such a system would also reward rather than punish technological innovation in pollution control and do so with the aid of private markets. An idea of this kind might be part and parcel of a system of “green taxes.”

A large advantage of this shift would be democratic: it would ensure that citizens and representatives would be focusing on how much pollution reduction there should be, and at what cost. The right question would be put squarely before the electorate. Moreover, a system of financial penalties allows far less room for interest-group maneuvering. Special favors cannot readily be provided through a system of economic incentives.

2. Regulators will increasingly avoid specification of the technology “at the end of the pipe.” Instead they will create incentives to ensure that pollution and other harms are addressed at their source by, for example, eliminating lead from gasoline. Pollution prevention, rather than technological fixes, is an increasingly prominent principle for environmental law. This means that regulators should reduce the levels of dangerous substances that are actually introduced rather than control those substances that have already been introduced.

3. In the future, environmental law will rely increasingly on education, disclosure, and the provision of information. An inexpensive way to prevent pollution is to promote awareness

People who reduce their pollution below a specified level could trade their “pollution rights” for cash. In one bold stroke, such a system would create market-based disincentives to pollute and market-based incentives for pollution control.

analysis of the facts. The result has been a system that has accomplished enormous good, but that is much less effective and efficient than it should be.

A pervasive strategy, in this second generation, is the use of rigid, highly bureaucratized “command and control” regulation, which dictates, at the national level, control strategies for hundreds or thousands of companies in an exceptionally diverse nation. Such regulation often takes the form of requirements of the “best available technology” (BAT).

We have encountered numerous problems with BAT strategies. An initial difficulty is that they ignore the enormous differences among plants and industries and among geographical areas. It does not seem sensible to impose the same technology on industries in diverse areas—regardless of whether they are polluted or clean, populated or empty, or expensive or cheap to clean up. BAT strategies also penalize new products, thus discouraging investment and perpetuating old, dirty technology. Such strategies fail to encourage new pollution control technology and indeed serve to discourage it by requiring its adoption for no financial gain. BAT strategies are extremely expensive to enforce.

Equally fundamental, the BAT approach is deficient from the standpoint of a well-functioning democratic process. That approach ensures that citizens and representatives will be focusing their attention not on what...
corporate law and corporate law practice in the 1990s.

International corporate transactions, already very important, will become more important. Mexico, Central and South America, Europe (particularly the E.C.) and Japan are likely to be especially significant. However, the lessons for U.S. corporate law from foreign law will continue to be difficult to decipher or to apply.

There will be fewer voluntary or involuntary domestic mergers and acquisitions. Most domestic mergers and acquisitions are likely to be in the same or closely related industries. In the U.S., conglomerate acquisitions have in general been failures. Financial markets and boards of directors in the U.S. are likely to remember this for as long as five to ten years. Antitrust law enforcement in the U.S. with regard to mergers and acquisitions in the same or closely related industries is likely to remain relaxed because of the concern of politicians about very large, successful competitors in Japan and Europe.

The number of foreign acquisitions in the U.S. will increase. Most of these will be voluntary, not hostile takeovers. Many of them will be by foreign conglomerates. Surprising as it may appear, Europe and Japan do not seem to have learned the lessons of failed conglomerations from the U.S. yet.

Institutional stockholders who now own approximately 50 percent of the stock of large U.S. public companies will continue to increase their stock ownership absolutely and relatively. And they will continue to try to define what they can and should do with their power. There are many legal and practical obstacles to the effective use of that power and these are unlikely to go away. From the standpoint of the U.S. economy, the big danger is that institutions will try to do too much, in particular, that they will yield to pressures from their constituents and politicians and contribute to politicizing the U.S. economy.

As always, there will be pressure for more federal regulation of corporations. However, concern about international competitiveness may act as a moderating factor. U.S. law and enforcement policies will continue to be too late and too punitive with regard to legal-ethical transgressions by large companies, particularly investment banks and other financial companies. The reasons for this are deeply embedded in U.S. society and are unlikely to change soon.

Delaware will continue to dominate state corporation law. Large states appear unable to separate corporation law from politics sufficiently to become effective competitors. It is probably too late for small states to duplicate the economies of scale which Delaware has with its chancery court system and corporate bar.

As the takeover market declines in importance, more attention will be paid to making boards of directors more effective. Boards perform quite well during crisis but their day-to-day performance is generally considered mediocre. There is no widely agreed upon solution to this important problem.

Derivative and class stockholder litigation will continue without much change. Arguments about conflict of interest and effectiveness will remain unresolved and legislative and judicial reforms will be minor. Litigation among large corporations will continue at high levels despite organized efforts for reduction by using alternative dispute resolution techniques. The high propensity to litigate reflects the combative nature and division in American society.

Corporations law practice will continue to become more specialized but very...