

The Corruption of Civic Environmentalism

Rena I. Steinzor

Professor of Law and Co-Director, Environmental Law Clinic, University of Maryland School of Law. I wish to acknowledge my debt to Margaret Kriz, whose astute reporting first alerted me to the confluence of events discussed herein. *See* Margaret Kriz, *Testing the Waters at the EPA*, 32 NAT'L J. 1286 (2000). I am very grateful for the comments provided by my colleagues, Eileen Gauna, Robert Kuehn, and Clifford Rechtschaffen, and appreciate the research assistance provided by Maxine Grosshans and Jacob Herstek.

[30 ELR 10909]

Theory Becomes Practice

Of all the proliferating ideas for reinventing environmental regulation, none are more portentous than those grouped loosely under the heading "civic environmentalism." In a nutshell, such proposals urge the delegation of crucial decisions and their implementation to grassroots groups of interested parties who would collaborate in the development of creative solutions to the problems that have stymied traditional regulation.¹

From the perspective of their sponsors, nothing less than the reawakening of American democracy is at stake. Indeed, the most enthusiastic proponents believe that embrace of such approaches has the potential to render irrelevant the fundamental premises of the existing regulatory system, from the concept of a Tragedy of the Commons to the fear of a race-to-the-bottom if regulatory authority is devolved.²

Last April, in the midst of a political firestorm provoked by the U.S. Environmental Protection Agency's (EPA's) latest efforts to implement a granddaddy of traditional regulatory programs—the establishment of total maximum daily loads (TMDLs) under the Clean Water Act (CWA)—powerful federal lawmakers invoked civic environmentalism to justify legislation that would stop the Agency in its tracks, redirecting its efforts to improve water quality.³ Clearly, the academy's enthusiasm for this bold new direction has filtered into the legislative arena, and is likely to propel civic environmentalism to the front of the line as a key alternative when the major environmental statutes are reauthorized.⁴

The outcome of the electoral contest between Vice President Al Gore and Governor George W. Bush will influence these developments, although pundits may overestimate the differences in their policies toward reinvention when in power. Both men face enormous pressure to do something drastic about the existing regulatory regime. Even hopeful supporters of Vice President Gore cannot ignore the implications of these reform campaigns, spearheaded by heavily regulated industries and some states. Indeed, Gore's modus operandi as presidential understudy has been to struggle to get out in front of such trends; witness the National Performance Review and the Administration's pledge to deliver "cleaner, cheaper, smarter regulation."⁵

This Dialogue argues that while most civic environmentalists are idealistic and sincere, their determination to ignore the nasty details of implementing their proposals has made it far too easy for their ideas to be co-opted by strong political forces with very different agendas. Unless civic environmentalists grapple with the difficult problem of making their theories operational, they should be held responsible for the inevitable corruption of those ideals. "Accountability" and "public participation" are euphemisms in serious writing on the potential of civic environmentalism. Achieving these goals in any form other than window dressing for deals negotiated by industry and government will require a commitment of time and money that civic environmentalists typically ignore.

The Dialogue begins by considering the implications of the Clinton Administration's pledge to deliver "cleaner, cheaper, smarter"

regulation, which has become the mantra of the reinvention movement. It then reviews a representative sampling of the literature on the civic republican revival in American law, which set the stage for the development of [\[30 ELR 10910\]](#) civic environmentalism as a specific application of those ideas. The Dialogue describes the principles that animate the reforms proposed by civic environmentalists and explains how these principles have been applied in recent federal legislation. The Dialogue concludes with an analysis of what it would take to have the public actually participate in accountable reinvention of traditional regulation.

Cleaner. Cheaper. Smarter.

The Clinton Administration's promise of cleaner, cheaper, smarter regulation is a three-legged proposition, with an emphasis on the adjective smart as the means for delivering both clean and cheap. When you think about it, this formulation is nothing less than audacious. It essentially claims that we need not sacrifice any positive attribute of the current system when we reinvent it, but instead will achieve significantly better results for less money because we will adopt more creative approaches.

Many constituencies would undoubtedly settle for plain, old, cheaper regulation. While few admit to the view that we have overdone environmental protection, it is perfectly respectable to believe that we have achieved 90% to 95% of what we set out to do, and should take care not to squander money on gilding the lily. A close cousin of this rationale is that we have targeted the wrong problems and could either save or profitably redeploy our financial resources by developing better priorities.

Some constituencies would emphasize cleaner regulation, without caring how much cheaper it might be. Trained to avoid sounding like advocates of big and expensive government, they nevertheless begin with the premise that many unconquered crises still confront us, from contaminated drinking water supplies to irreversibly damaged ecosystems to the catastrophic effects of global warming. In a sense, this perspective runs parallel to the notion that we are tackling problems in the wrong order, although the caucus for cleaner regulation—national and local environmental and grass-roots citizen groups—would be wary of any relaxation of vigilance regarding problems we ostensibly have at bay.

Still others would focus primarily on smarter regulation. Professional policymakers who believe in sophisticated, new approaches to public administration, as well as economists who have long advocated market-based alternatives to command and control, decry the inefficiency and complexity of the existing system. They crave new approaches to formulating policy as well as new ideas for the substance of those decisions.

When it packaged these three discrete missions in a single, indivisible pledge, the Clinton Administration framed the debate, not just for its two terms in office, but for the foreseeable future. To satisfy the most popular and widely accepted test for effective reform, reinvention must cost less and deliver more protection, leveraging any potential discrepancy between these two goals by adopting miraculously efficient approaches to public and private governance. Or, in more crass terms, the widespread public support for environmental protection, combined with the potent and growing industry rebellion against traditional regulation and the congressional majority's distaste for "big government," mean that EPA must embrace these conflicting agendas, a difficult task in the best of times and a nearly impossible chore at the moment.

To clarify the implications of this dilemma on the implementation—and corruption—of civic environmentalism, the theory, in all its glory, must be defined.

Defining Civic Environmentalism

Republican Roots

Civic environmentalism is the progeny of a modern revival of civic republicanism, a political movement tracing its roots to the struggle between the Framers of the U.S. Constitution over the relationship of citizens and their government.⁶ Civic republicans are devotees of Thomas Jefferson's conception of the nation-state, where the role of government, especially national government, is limited and public affairs are conducted by an informed and engaged citizenry.⁷ This citizenry manages to overcome the selfish interests of each individual member, inspiring the group to act on the basis of a shared vision of the common good. In other words, democracy is achieved through the collaborative negotiation at the grass-roots level of solutions that are best for society. Central to these theories is the belief that rational dialogue among enlightened citizens will develop a definition of the common good, as well as the means necessary to obtain it.⁸

In the Framers' day, civic republicanism was grounded in pre-industrial agrarian culture and adopted a hostile attitude toward

industrialization and the premises of laissez-faire capitalism.⁹ This thread runs throughout the development of the movement, with modern republicans, sometimes labeled "populists," yearning for the quality of life before big cities and big corporations undermined the social fabric.¹⁰

Civic republicanism also developed in reaction to the alternative vision of the nation-state advanced by James Madison, who emphasized the importance of a central government that would ensure the organization of public affairs by civilian professionals to spur economic development at home and abroad.¹¹ Madison and his followers believed that the ideal democratic system is pluralistic, with the three branches of government mediating the demands of understandably **[30 ELR 10911]** selfish interest groups.¹² Pure pluralists reject the notion that the common good can be derived by collaboration among citizens because they doubt that citizens are capable of such consistent virtue.

The upshot of Jefferson versus Madison was a hybrid system of government designed to reconcile two potentially conflicting ideals: first, the American people are politically free in the sense that they are governed by themselves collectively and, second, their political freedom is ensured because the country is governed by the rule of law, as opposed to the whims of the majority.¹³ Modern republicans are convinced that Madison got the better of this compromise. They believe that "corporate domination, empire, the growth of regulatory bureaucracy . . . [and the] closing of the old frontier" threaten to swamp the increasingly fragile foothold that grass-roots civic virtue occupies in public life.¹⁴

Modern republicans argue that the unrestricted growth of government has permitted politicians elected by the people to delegate the protection of the common good to masses of faceless bureaucratic experts. Not only is the growth of the bureaucracy anti-democratic, it has produced a citizenry alienated from its government to a dangerous degree. Equally distressing, government has become captive to a complicated and unworkable regulatory system that costs the nation dearly in economic terms.¹⁵

Obviously, this grossly oversimplified description of the dialogue between Jefferson, Madison, and their followers barely scratches the surface of these issues. For example, it does not consider the implications of the Worldwide Web for the further maturation of the world's most successful democracy. This development rivals the Industrial Revolution in posing extraordinarily difficult challenges for America's hybrid government. Consider the proposal made by self-described populist Ross Perot that we make important decisions by plebiscite, conducted online immediately following abbreviated television debates.¹⁶ While not yet accorded serious consideration, such ideas have the potential to revolutionize the way we make decisions, for better or worse, deepening the import of a return to civic republican methods for resolving policy disputes now processed by the administrative state.

But this bare bones summary of the tension between republican and pluralist thought suffices to lay the foundation for a more detailed examination of civic environmentalism, with the addition of two crucial caveats that complicate the development of modern republican doctrine.

First, Jefferson's republican vision encompassed a white, male, landed gentry, the only true "citizens" of that period. The assertion that citizens, deliberating as a group of enlightened equals, will act on behalf of the common good, is far more difficult to achieve in a society as diverse as ours. Indeed, classic republican theory dating back to Jefferson's day has a legacy of ousting all those whose "defect of understanding, foreignness of outlook, subservience of position, or corruption of interest" would disrupt what Professor Frank Michelman calls the community's "normative unity."¹⁷

The second, closely related point is that Madison's belief in the rule of law was translated into the protection of the rights of minorities, a goal that has grown in importance since the Framers' day. In other words, we have come to expect that it is the government's responsibility to ensure that the majority's definition of the common good preserves the autonomy of the individual, as well as the civil rights of the disadvantaged.

Modern civic republican theorists have struggled with both issues, which, in a sense, are the flip sides of the same dilemma: is there a way to include representatives of diverse or disadvantaged constituencies in the grass-roots collaboration that will define the public good without reaching a stalemate or having more powerful constituents override their needs?

In response, some have turned the civic republican criticism of the administrative state on its head, going so far as to suggest that the bureaucrats themselves are proxies for the average working citizen, contributing an enlightened commitment to the public interest to their collaboration with other constituencies.¹⁸ But other theorists are unwilling to accept this dilution of republican ideals, and instead argue for radical changes that would reduce adversarial decisionmaking, give bureaucrats the discretion to override rigid command and control requirements, and inspire self-selected participants to develop more creative solutions at the local level.¹⁹

In this second formulation, citizen representatives would be recruited to participate in collaborative solutions to the problems now addressed by bureaucrats in adversarial rulemakings. Some might come from organized public interest groups, although modern republicans question, without ever resolving, whether such professional advocates truly represent the public's interests, or whether they are merely another version of the special interests that are anathema to republican ideals.²⁰ This assertion leads in turn to the quixotic notion that "real" citizens should be recruited, [\[30 ELR 10912\]](#) but the argument typically trails off at this point, without specifying in any convincing detail how such an ideal could be accomplished.²¹

Conscious that they need evidence to support their assertions that collaborative decisionmaking is better than traditional rulemaking, modern republicans have invoked such environmental examples as Project XL, an EPA program involving site-specific regulatory exemptions in exchange for "superior" environmental performance, and recent regulatory negotiations that developed rules in such areas as equipment leaks and wood burning stoves.²² These examples involved incremental approaches to reform, in contrast to the revision of a major regulatory program. Whether such limited and expensive methods are worth pursuing is a subject for another day.²³ However, it is fair to observe that modern republicans do not devote much attention to the question of when grass-roots collaboration would not be appropriate, an issue that will grow in importance if their ideas are adopted by those with the power to implement them.

Environmental Applications

Civic environmentalism is a relatively new body of ideas, and it is easy to select three of the most prominent examples of literature in the area. The first two were written by people who work in Washington, and the third by academics at institutions outside the Capital.

By far the most nuanced and meticulously researched work was done by DeWitt John, a senior official at the National Academy of Public Administration (NAPA), whose 1994 book, *Civic Environmentalism, Alternatives to Regulation in States and Communities*, continues to be the most reliable reference on the subject.²⁴ John views civic environmentalism as an approach that arises organically from traditional regulatory processes and then recedes, depending upon the developmental stage of the environmental problem that is being addressed. For example, in two of his three case studies on the subject—controlling nonpoint pollution from agricultural sources in Iowa and the destruction of ecosystems in the Florida Everglades—he acknowledges that a return to traditional regulation is likely to occur when civic environmental approaches run their course.²⁵

John asserts that there are "five distinctive features of civic environmentalism":

1. A focus on the unfinished business of nonpoint problems, pollution prevention, and protecting ecosystems;
2. Extensive use of nonregulatory tools;
3. Interagency and intergovernmental cooperation;
4. A search for alternatives to political confrontations; and
5. A new role for the federal government as a participant in decisions made at the state or local level.²⁶

The second group includes the most consistent proponents of civic environmentalism in Washington circles these days, advocating their ideas on Capitol Hill, at downtown think tanks, and before any other policy group that will listen. Housed at the Progressive Policy Institute, they are led by Debra Knopman, a former official at the U.S. Department of the Interior (DOI), who describes her work as "building a central political coalition" around "second-generation" environmental policies.²⁷

Like John, Knopman and her colleagues recognize that "not all environmental issues are amenable to civic treatment."²⁸ They acknowledge that traditional regulatory programs, such as the "money and legal hooks of the [CWA]," have been "vital for dealing with urban wastewater treatment and rogue industrial dischargers" and even make a plug for "leveraging Superfund's liability provisions" in the service of faster cleanup of contaminated urban property or brownfields.²⁹ However, again like John, they contend that a new breed of environmental problems, especially nonpoint runoff from facilities near sensitive surface waters, require innovative approaches:

For the federal government to try to force compliance from the small-scale farmers, suburban gardeners, and small-scale businessmen who constitute non-point sources would be the public policy equivalent of herding cats. . . . Government's role is to organize legal tools and financial resources to allow homegrown solutions to flourish. The bottom-line measure of success for civic environmentalism is environmental *and economic* improvement.³⁰

Knopman and her colleagues have no patience for extremists "from the left and the right," disparaging the right for attacking all federal environmental regulations "as if [they] exist solely to deprive private firms and their owners of their liberty," and the left for implying that "all attempts to devolve environmental policymaking authority are merely pretexts for environmental degradation."³¹

Finally, offering a far bolder prescription for replacing traditional regulation with "democracy," is the "backyard environmentalism" advocated by Charles Sabel, Archon Fung, and Bradley Karkkainen.³² Sabel is a well-established political scientist on the faculty of Columbia Law School, Karkkainen is a lawyer who also teaches at Columbia, and Fung is a political scientist teaching at the Kennedy School of Government. Undoubtedly because they are not Washington "insiders" and also have relatively limited backgrounds in environmental policy wars, they are uninterested in an incremental blending of civic environmental and traditional **[30 ELR 10913]** approaches. Rather, they tout a "fundamental reorientation" of the system, one which "replaces regulation based on central commands with a combination of local experimentation and centralized pooling of experience":

In this new architecture—we will call it a rolling-rule regime—regulators use reports on proposals and outcomes to periodically reformulate minimum performance standards, desirable targets, and paths for moving from the former to the latter. In pursuing these targets as they see best, local actors provide the information necessary for regulators to revise their standards and goals, and receive information on the performance of others that guides further experimentation. . . . *The rolling-rule regime should not be confused with voluntarism*, if that term is understood to imply the abdication of public authority and responsibility to private actors For while the rolling-rule regime radically expands the bounds of local autonomy and demands deep participation by private as well as public actors, *it also requires accountability*. Central authorities ensure that local units live up to their commitments by coordinating their activities, monitoring their performance, pooling their experiences, and enforcing feasible standards But unlike conventional, hierarchical forms . . . rolling-rule regulation creates a collaborative and mutual accountability of center to parts, parts to center, parts to other parts, and all to the whole enterprise—and to the public generally.³³

Jefferson would be proud.

To fully evaluate the validity of these theories, more empirical research must be done, especially with respect to civic environmentalists' rather extravagant claims regarding the performance of such paragons as the Chesapeake Bay Program.³⁴ However, before that analysis occurs, and at the threshold of any examination of what civic environmentalism has to offer, is the question of precisely who should participate in the formulation of collaborative, innovative, place-based solutions.

Knopman and her colleagues come the closest to sitting out this essential aspect of the debate. The poster child of their piece, former state senator Bernie Fowler, is an icon of Maryland politics long associated with efforts to reclaim and protect the Chesapeake Bay.³⁵ But by reason of celebrity and election to political office alone, he is hardly an example of the average citizen chosen (or even self-selected) at random. As for the Chesapeake Bay Program itself, it is sponsored and staffed primarily by federal and state bureaucrats and the extent to which it has engaged average citizens, or even professional environmentalists, in the process of making decisions that translate into tangible activities, remains to be documented.³⁶

Once again staking out a relatively moderate approach, John suggests that the most important protagonists in his version of civic environmentalism are typically elected officials, state and local regulators, or professionals employed by a range of private-sector organizations.³⁷ John is especially impressed with the efforts of the second group, whom he describes as a "shadow community" of mid-level, career government officials, who "continue to work while the spotlight of public attention shies on itinerant politicians and executive directors," serving as a consistent source of "new policy ideas."³⁸ Thus, John's brand of civic environmentalism does not conform to pure civic republican ideals.³⁹

As one might expect, Sabel, Fung, and Karkkainen brook no such equivocation, labeling their version of the doctrine "*backyard environmentalism*" to emphasize their commitment to the participation of any and all average citizens in republican collaborations:

For two decades, residents of Woburn, Love Canal, and countless other communities across the country have organized to reclaim authority over their lived environment. These pioneers of civic environmental activism typically fought to keep harmful activity out of their neighborhoods . . . In their struggles to protect themselves and their children from poisoned air, soil, and water, ordinary citizens [have been] pitted against certified experts from corporations, government, and even big environmental organizations. . . . Citizens now face the daunting task of determining what *should* occur in their backyards . . . They must transform their traditionally antagonistic relationships with experts into partnerships for

environmental protection . . . They need to fuse the broad experience of professional practitioners with the contextual intelligence that only citizens possess.⁴⁰

Just how will average citizens meet these challenges? Will they get help, or are they to depend on their inherent "contextual intelligence" to overcome "certified experts"? Do Sabel and his colleagues presume that federal, state, and local bureaucrats are on the citizens' "side," or do they think that the bureaucrats have independent agendas? Perhaps most significantly of all, assuming that the toughest problems civic environmentalism has yet to tackle involve scientific and technical issues that are much in dispute, how will a citizen's contextual intelligence match the expertise of those representing the entities that must be persuaded to spend resources to abate such problems?⁴¹

Sabel and his colleagues have no convincing answers to these questions, except to contend that in exchange for relief from "top-down" national regulation, "local actors" will agree to "pool information on their performance, plans, and metrics—on how they are doing, how they plan to improve, and what standards they use to assess performance."⁴² All of this useful information would be reported to a "central monitor" who will use it to determine, in consultation with "local actors," what "minimally acceptable levels of performance" should be sought.⁴³ As for the average citizen participant, **[30 ELR 10914]** "in a performance-based regime, the citizen is called on not merely to express an opinion—or demand a solution—but to help formulate and implement solutions."⁴⁴

Even if one assumes for the moment that "second-generation" problems involve much smaller commercial enterprises than first-generation problems, it is misleading and disingenuous to pretend that these smaller sources are tractable participants in either the development or disclosure of all the information that will be needed to craft better solutions. To use the example most often cited by civic republicans, a major category of nonpoint sources that threaten the Chesapeake Bay watershed are poultry farmers who run very small enterprises at the direction and for the benefit of very large retail marketing companies.⁴⁵ They are ferociously opposed to any local requirements that might diminish their competitiveness with farmers in neighboring political jurisdictions.⁴⁶ Further, although the Blue Ribbon Commission appointed by Maryland Governor Parris Glendening recommended that the state take immediate action to reduce farm runoff thought to contribute to high nutrient levels in the Chesapeake Bay, it also acknowledged that a large agenda of research remained to be conducted.⁴⁷ The upshot is that wherever the debate over how to solve second-generation problems occurs, it will require everyone involved to revisit, again and again, highly complex questions regarding the pollution's effects, the efficacy of new abatement technology, and the economic implications of imposing that burden on one or another segment of the agriculture industry.

But let's leave these issues where they are for the moment. To truly understand the implications of civic environmentalism's sudden popularity, it is necessary to turn our attention to Capitol Hill.

Congress Reacts

Dissatisfaction with command-and-control regulation is a cornerstone of civic environmentalism. Moderate proponents believe that there is a role for traditional rules in some contexts, but argue that sharp departures are warranted with respect to the second-generation problems that confront us. The proponents of more radical "bottom-up" collaboration argue that new ways must be found to address all environmental problems. These theorists would clear away the underbrush of traditional regulation to allow grass-roots democracy to bloom.

But what exactly do we mean by "traditional, command-and-control" regulation? One might suppose that the answer to this threshold question would be clear. Unfortunately, it is not. As civic environmentalism evolves from theory into practice, programs are targeted for reasons that contradict its core principles.

For example, so-called technology-based standards are the bane of the reinvention movement because they are economically inefficient and imposed from the "top-down" by Washington bureaucrats.⁴⁸ Conversely, reinventors extol the virtues of "health-based performance standards" that are tailored to address the specific conditions of a place—for example, an ecosystem or a watershed.⁴⁹ Yet the first instance of Congress adopting—and corrupting—civic environmentalism occurred in the context of its efforts to halt a program that is a performance-based, health-based, and locally derived alternative to the precise type of national standards that are derided by the reinventors.

While the terminology used in this particular corner of the reinvention debate is especially confusing, the phrase "technology-based standards" is used here, as it is by critics of the existing system, to connote requirements that sources achieve emissions limits because such levels of control can be produced by installing the "best available" technology. These technology-based standards must be

distinguished from "health-based" emissions limits that are established because emissions in excess of such limits will harm human health or the environment. So-called performance standards can take both forms, of course, establishing a goal either because available technology is capable of achieving it or because the achievement of the goal is necessary to protect health or the environment. Reinventors ostensibly prefer health-based performance standards because they impose only the amount of compliance costs that is absolutely necessary to ensure protection, as opposed to the potentially excessive costs of installing pollution control technology that achieves more than the necessary emissions reductions. At any rate, in this context, I refer to the health-based performance standards that are required, but have yet to be developed, under the CWA, as opposed to the pure technology-based performance standards that have been the centerpiece of the Act's implementation up until this point.

To return to the story of congressional co-option of civic environmentalism, EPA recently announced that 40% of the nation's surface water bodies are too polluted for fishing and swimming, despite the implementation of technology-based controls.⁵⁰ These shortfalls in pollution control have focused renewed attention on the regulatory alternative specified by the CWA—establishment of TMDLs for impaired water bodies.⁵¹ Responsibility for crafting TMDLs, river-by-river and lake-by-lake, is assigned to the states and is an historical vestige of the federal government's reluctance to assume responsibility for local water [\[30 ELR 10915\]](#) quality.⁵² As the name implies, TMDLs are the total ambient concentration of a pollutant that a specific water body can absorb and still meet applicable water quality standards. It is as if the congressional authors of the CWA foresaw the charges that have been leveled against their reliance on pure technology-based standards and constructed an alternative designed to meet civic environmentalism's core specifications.

The states ignored the mandate to establish TMDLs until about 15 years ago, when environmental organizations brought lawsuits challenging this inaction, accumulating a string of victories from federal courts across the country.⁵³ As the litigation proliferated, EPA adopted one approach to civic environmentalism already endorsed by Congress: as authorized by the Federal Advisory Committee Act, it convened a Federal Advisory Committee of public- and private-sector stakeholders and set about hammering out the details of a new TMDL program.⁵⁴ In the summer of 1998, the Committee issued a report recommending that the program be strengthened.⁵⁵ A year later, having achieved consensus, EPA responded to these recommendations by proposing two rules to guide state implementation of TMDL requirements.⁵⁶

A political firestorm ensued, with waves of different interest groups flocking to Congress, demanding that it stop EPA in its tracks.⁵⁷ Large industrial point sources have a strong incentive to delay or derail the program because they fear that they will bear the brunt of further reductions when federal and state regulators tire of coping with numerous, sometimes small nonpoint sources. Farmers large and small fear exactly the opposite outcome: renewed pressure to rope them into reductions that other dischargers have had to produce for decades. A vociferous group of states joined the campaign to deflect more stringent federal regulation, further confounding efforts to negotiate a workable, albeit pluralist, compromise.

Responding to these complaints, Congress passed a rider forbidding EPA to spend fiscal year (FY) 2001 funds to implement any new rules.⁵⁸ But in mid-July, EPA Administrator Carol Browner promulgated the rules, although she delayed their effective date until 2001, effectively honoring the spending injunction imposed by Congress.⁵⁹ Infuriated by EPA's response to their criticisms of the new rules, Republican staff threatened that a rewrite of the CWA was essential after the 2000 national election.⁶⁰

As controversy grew, two groups of powerful Republican lawmakers introduced separate pieces of legislation that foreshadow the changes they would make in the CWA during the next Congress. The first, introduced by Senate Environment Committee Chairman Bob Smith (R-N.H.) and Senate Fisheries, Wildlife, and Drinking Water Subcommittee Chairman Mike Crapo (R-Idaho), would prohibit EPA from promulgating the rules until the National Academy of Sciences prepares a report to Congress.⁶¹ The second, introduced by Sen. Christopher Bond (R-Mo.) and Rep. John Tanner (D-Tenn.) would establish a nationwide network of "watershed management councils," groups that could form the backbone of a civic republican revival.⁶² Read together, the legislation indicates the emergence of a trend in congressional thinking that has the potential to accomplish profound changes in American water quality policy. Smith/Crapo lays the groundwork for such changes, while Bond/Tanner sketches their future direction.

The Smith/Crapo bill acknowledges the need for significantly expanded information *and* federal funding to support the TMDL program, estimating in its findings in support of the legislation that it will cost the states between \$ 670 million and \$ 1.2 billion to develop TMDLs "required for currently listed waters."⁶³ However, in a paradox that arguably reveals the sponsors' true intentions, the bill authorizes only \$ 250 million for the implementation of *all* state water regulatory programs for FYs 2001-2007, instructing that \$ 50 million of these amounts be given to the states annually to gather monitoring data.⁶⁴ This sum is obviously a fraction of [\[30 ELR 10916\]](#) what the legislation estimates will be necessary to fully implement TMDLs.

The bill further instructs EPA to contract with the National Academy of Sciences for a study of the "scientific basis underlying the

development and implementation of [TMDLs]," as well as the costs of implementing the program and the "availability of alternative programs or mechanisms to reduce the discharge of pollutants from point and nonpoint sources."⁶⁵ Until the study is complete, EPA would be barred from proceeding with the two new rules.⁶⁶ The legislation as a whole appears to be premised on the assumption that Congress will rely on something other than TMDLs to close the water quality gap.

What that something might be is "comprehensive watershed management strategies (including estuary management programs, source water protection programs, and other voluntary or statutory programs)," which are described as "important tools to coordinate point source and nonpoint source water quality programs."⁶⁷ The legislation asserts that "state and local governments, businesses, and landowners are expected to spend billions of dollars over the next 20 years to implement the watershed management strategies and other programs to address nonpoint source pollution."⁶⁸ So optimistic are the sponsors about the potential of these programs that they direct EPA to establish a "pilot program" to assess the "relative water quality improvements" that result from "up to 5 state watershed management programs or strategies."⁶⁹ What we have, then, is the promise of local watershed management, in the best tradition of civic environmentalism, without any commitment to deliver, or even continue to require, the performance-based standards—TMDLs—that civic environmentalists agree are essential to hold local efforts "accountable."

But the story does not end there. Even if it was possible to imagine how watershed management councils comprised of diverse stakeholders could cope with negotiating protective water quality standards on a river-by-river or lake-by-lake basis, how do we ensure that these standards reflect the common good? Who will sit on these watershed councils and how will their work be conducted? How, in short, can we be sure that the full spectrum of enlightened citizens actively participates in the creation of a sufficiently protective, rolling-rule regime?

The Bond/Tanner bills indicate the congressional majority's latest thinking on this issue. Introduced within hours of the Crapo/Smith bill, the legislation is entitled the "Fishable Waters Act of 2000."⁷⁰ The bills achieved wider support than Smith/Crapo, attracting endorsement not only by a cross-section of agricultural, fishing, and logging industry groups but also two national environmental organizations, Trout Unlimited and the Izaak Walton League.⁷¹

The centerpiece of the legislation is the creation of watershed management councils that would implement "*voluntary, non-regulatory, incentive-based program[s]*,"⁷² including "comprehensive fisheries habitat protection, restoration, and enhancement plan[s]" that would characterize water quality in the watershed.⁷³ In what one journalist has termed a "direct slap" at EPA, federal responsibility for supervising state and local conveners of the councils would be assigned to the U.S. Department of Agriculture and the DOI.⁷⁴ Significantly, the legislation provides that "nothing in this section requires any person to undertake or refrain from taking any action under an recommendation contained in an approved plan . . . unless *willing written consent* is obtained from *each person holding a property interest* in the land affected by the action."⁷⁵

Consistent with this explicit protection of property rights, councils would be "voluntary" organizations that do not "possess" either "direct or indirect regulatory authority."⁷⁶ They should have a membership that is "fairly balanced, in terms of the points of view represented and the functions to be performed" and is "representative of the interests within the watershed that may be affected by the activities of the council (including tribal, private, public, governmental, and nonprofit interests)."⁷⁷ However, as if to underscore the discretion afforded conveners in selecting such groups, states are directed to consider the "balance and representation of the membership of the council" when making decisions to approve or disapprove the councils' comprehensive plans.⁷⁸ Thus, the councils should attempt to include a "fairly balanced" group of "representatives" of "interests," but the legislation does not impose even minimal requirements regarding the relative numbers of participants representing different interests or even that there be a quorum before binding votes are taken.

The adoption of civic environmental alternatives such as the Bond/Tanner legislation is extraordinarily attractive because it allows all the participants to claim they are supporting the revitalization of local, grass-roots democracy rather than gutting the CWA. In the heady aftermath of such short-term victories, civic republicans may find it difficult to remember the risk that key elements of their proposals will drop by the wayside in practice, from the development of performance-based standards to preserving the integrity of local civic collaboration. The next and final section considers these two indispensable attributes of civic environmentalism, arguing that unless they are preserved, civic environmentalism will be corrupted—as a movement, as a set of ideals, and as an alternative to the existing regulatory system.

Accountability and Participation

Performance-Based Standards

Civic environmentalists envision a dramatically reduced role for the federal government. Rather than setting the bar, telling regulated industries what to do, and ensuring that [\[30 ELR 10917\]](#) state regulators punish those who fall short, all but the first function would devolve to the state or local level. The result would leave the federal government—or, in the words of Sabel, Karkkainen, and Fung, a "central authority"—to set the bar periodically and then retreat to the sidelines, perhaps playing the "supportive" role of generating information about the experiences of local collaborators.⁷⁹

However diminished this view of the appropriate federal role, the importance of the responsibility to set the bar cannot be overstated. Civic environmentalism, wherever and however it is practiced, must have benchmarks to hold local groups accountable for delivering adequate results. Without that mechanism, the enterprise becomes little more than a set of social clubs for like-minded individuals engaging in activities that are laudable, but hardly capable of replacing traditional regulation.

Civic environmentalists have yet to focus much attention on how to establish benchmarks, apart from embracing the performance-based approach that is the remedy of choice among other advocates of reinvention. Performance-based standards identify a goal for improvement of the condition of the ambient environment and then allow regulated industries, under the supervision of state regulators, to decide how to go about controlling their activities to the point where the goal is met.⁸⁰

Obviously, there are many ways to establish performance goals. The simplest approach is to call for reductions in current pollution levels, measured either numerically (e.g., X tons) or as a percentage less than a baseline of existing emissions (e.g., X% of actual emissions in 1995). At the opposite end of the spectrum in terms of complexity are goals that reflect a judgment about the desirable condition of the ambient environment (e.g., we will restore this lake or river to a condition where it is fishable and swimmable).

The difficulty with the first, relatively simple approach is that we can never be sure whether the prescribed reductions will be sufficient to preserve environmental quality or, conversely, will be more than what must be done to preserve environmental quality. It is no small irony that "pure" technology-based standards suffer from precisely this problem: they are designed to produce the best reductions that state-of-the-art equipment can deliver, as opposed to the reductions that are absolutely needed to provide adequate protection. To be true to their campaign against "rigid," "one-size-fits-all," "top-down" regulation, civic environmentalists should reject this method of establishing performance-based standards as repetitive of past mistakes.⁸¹

Instead, civic environmentalists should embrace whole-heartedly the alternative method of establishing performance-based standards—setting goals on the basis of the condition of the ambient environment. Whether they advocate a regime based on rolling rules or are more comfortable with a set of transparent,⁸² well-supported, and relatively permanent performance standards, the only way to serve all of civic environmentalism's core values is to assess the condition of the ambient environment and regulate accordingly. In fact, the establishment of TMDLs under the CWA is arguably the best example of such a "performance-based standard" ever established under federal law.

The difficulty with this approach, of course, is that it requires us to know a great deal not only about the actual condition of the ambient environment but about the implications of its contamination. In other words, we need to know not only whether the water is contaminated by chemical X at Y levels, but also the nature and scope of the hazard that chemical X at Y levels poses to human health and the environment. And it is here that civic environmentalism meets one of its two biggest challenges and is so vulnerable to corruption.

To revisit once again the situation on Capitol Hill, it is no secret to anyone even vaguely familiar with the federal and state struggle to implement the CWA that huge gaps in information have stymied efforts to write and implement TMDLs. Not only do the relevant congressional leaders recognize this distressing reality, they recently commissioned a comprehensive U.S. General Accounting Office (GAO) study documenting those data gaps.⁸³ But rather than invoke the GAO report to support a renewed effort to develop the necessary information, the legislators instead used the report to justify their demand that EPA back off efforts to strengthen the program.

The GAO report found that EPA's National Water Quality Inventory does not accurately portray water quality conditions nationwide because the "states collectively assess only a small percentage of waters in the United States."⁸⁴ Specifically, the states monitor only 19% of the nation's rivers and streams and 6% of its oceans and other shoreline waters.⁸⁵ GAO acknowledged that it would be "cost-prohibitive to physically monitor all of the waters in the country." However, it concluded that "most monitoring is not done in a way that allows for statistically valid assessments of water quality conditions in unmonitored waters."⁸⁶ To compound these problems,

wide variation exists in (1) the way that individual states select their monitoring sites, (2) the kinds of tests they perform on their waters and how the results of these tests are interpreted, and (3) the methods they use to determine the causes and

sources of pollution in waters that do not meet water quality standards.⁸⁷

[30 ELR 10918]

The Smith/Crapo legislation responds to these recommendations by agreeing that the states do not know enough to set TMDLs and observing that they do not have the resources to carry out the statute's mandates.⁸⁸ But rather than pledging significant federal support to help the states address such data gaps, the bill authorizes only \$ 50 million annually to support state monitoring programs.⁸⁹ Any remaining data gaps presumably would be left to watershed councils and the states themselves to fill.

To further demonstrate the implications of data gaps on the implementation of *accountable* civic environmentalism, consider the other side of the equation: not only must we measure ambient conditions, we must make a value judgment about what the inevitable levels of contamination mean for human health and environmental quality. Our ignorance regarding the risks to public health posed by common pollutants is shocking. In a recent report covering 2,863 organic chemicals produced or imported in amount above one million pounds annually, EPA concluded that there is no toxicity information available for 43% of such chemicals and that a full set of basic toxicity information is available for only 7%.⁹⁰ These yawning data gaps undermine all of the Agency's efforts to establish priorities, assess risk, and achieve results, and the notion that local groups could surmount them is fanciful. Indeed, it makes no sense for individual local watershed management councils, or even the states, to attempt to plug these gaps when the federal government can do this work much more efficiently, distributing the information to all the states.

To restore the integrity of their ideas, civic environmentalists must start talking about the demands and the costs of a credible, performance-based alternative to the traditional regulatory system. Unless they do, there will indeed be watershed management councils in more areas of the country, but these groups will lack the information they need to measure progress, much less to hold themselves accountable for achieving results.

How participants will react when they are thrust into such a situation depends on who they are, and it is to that final, all-important topic that we now turn.

Citizens Versus Professionals

As much as there is to admire in John's thoughtful work, one cannot help but feel that his suggestion that a "shadow community" of mid-level bureaucrats is the embodiment of civic environmentalism sells short the movement's true vision.⁹¹ His descriptions of the efforts of such committed individuals in Iowa may justify the enlightened devolution of federal authority.⁹² But it is not the revitalization of "backyard" democracy sought by his fellow theorists. For that, authentic representatives of those elusive concepts the "public interest" and the "common good" must be found.

For decades, the obvious choice to fill this role has been the paid staff of national and state environmental organizations. But most national environmental groups have suffered a wave of downsizing in the last several years.⁹³ Some ascribe this phenomenon to the popular assumption that with Al Gore in the White House, watchdogs are not needed any more. Others argue that the national groups have failed to articulate a vision capable of attracting widespread public support. Whatever the reason, as collaborative, consensus-building "dialogues" have become more common, and the hostility of Congress to traditional regulation has grown, the staffs of national groups and their state affiliates have made a conscious choice to focus on a rearguard battle to preserve past victories, rather than spending time in collaborative negotiations with their historic foes.⁹⁴ The bottom line is that the relatively small number of professional environmentalists are unlikely to volunteer to participate in localized efforts to renegotiate regulation until they are convinced that they have no alternative.

Civic environmentalists have made a virtue of this reality, arguing that *professional* environmentalists are inevitably prey to an "interest group" mentality that precludes their flexible and constructive involvement in local efforts.⁹⁵ Rather, the only reliable representatives of the public interest are average citizens who may have an affiliation with organized groups, but do not earn their livelihood in such endeavors.⁹⁶

At the outset of this Dialogue, I described civic environmentalists as idealistic and sincere, two adjectives that, depending on the context, are not always complimentary. The negative aspects of these characteristics are manifested most clearly in the double standard that civic environmentalists apply to the question of who will sit at the table with public volunteers. Civic environmentalists refuse to consider who will represent commercial interests. If professionals from organized environmental groups are to be excluded from the collaborations, either because they cannot afford to participate or because they would be disruptive, what about the professionals who

earn their living by representing heavy industry, agribusiness, logging and timber concerns, small business, developers, banks, etc.? Because civic environmentalists do not address in any *normative* way either how commercial representatives should be selected or [\[30 ELR 10919\]](#) the ground rules for their participation, the fact that such representatives will have a dominating presence in local councils is taken as a given.

This premise is objectionable—even disgraceful—for several reasons. The first is the hypocrisy of the double standard that would assume, on one hand, that representatives of organized commercial interests are legitimate, but would question the legitimacy of similarly situated public interest representatives. Either one rejects pluralism (the thesis that mediating between clashing interest groups is the role of democratic government) or one does not.

The second, more practical and important problem is the character of the discussions that will ensue given these threshold assumptions. Eileen Gauna and Jonathan Poisner have written eloquently about the hopelessness of expecting average citizens to engage in debates that cast policy choices in highly technical terms.⁹⁷ Indeed, I would go so far as to posit that there is not a single person earning his or her living in the environmental arena who can, with a straight face, propose that their lay friends would last long in such conversations without substantial technical support. By failing to consider the nature and scope of participation by representatives of commercial interests, civic environmentalists tacitly accept that a highly technical debate is not just likely, but inevitable.

To have integrity, civic environmentalists must either work to insist that collaborative groups frame issues in transparent, nontechnical, and readily understandable terms, or they must advocate that average citizens have the technical support they need to participate. But they cannot wash their hands of these difficult questions, depending on the emergence of civic virtue from situations that would give even Thomas Jefferson pause.

The first alternative—a transparent, nontechnical debate—requires stringent limits on who sits at the table and who sets the agenda. It is very difficult to envision its faithful implementation in the real world, given the well-organized, well-financed, and understandably avid involvement of local, state, national, and even international business in efforts that may affect regulatory requirements. Civic environmentalists may remain hopeful about the development of easily understood performance-based standards. But they cannot really expect affected businesses to refrain from debating either the validity or the achievement of performance-based measures in any given local situation. Such challenges may arise out of self-interest, or they may be genuine expressions of concern we avoid squandering money on unnecessary pollution controls. Whatever the motivation, the establishment of performance-based standards does not, in and of itself, resolve the problem of keeping the debate transparent so that it is accessible to lay participants.

The second alternative—allowing commercial representatives to volunteer freely and the debate to become highly technical—is the inevitable result of civic environmental theory as it stands today. The question then becomes whether average citizens are given the resources they need to actually participate.

Subsidies for Technical Assistance

The issue of whether and how to provide technical assistance to grass-roots citizens engaged in local collaboration is well-known in national policy circles, and is typically met with one of two reactions by government and industry. The first reaction is that local citizens do not need such assistance because any support they require can be provided by federal, state, and local bureaucrats. The second reaction is that, while it is understandable why citizens feel they need such assistance, the pitfalls of providing it overwhelm those legitimate needs.

Given their assertion that citizens rightfully distrust bureaucrats, civic environmentalists should be reluctant to advance the first argument. Citizen distrust deepens when there are no limits on the participation of experts who work for affected businesses, potentially overwhelming the efforts of government experts to serve in the role of honest broker in evaluating the technical issues at stake. Whether perceptions of industry dominance are true or not, an atmosphere poisoned by perceptions is an atmosphere ruined just the same.

As for the second argument—that the pitfalls of awarding such grants overwhelm their advantages—the basic fear is that the money will be misappropriated by illegitimate groups. The premier program for providing technical assistance to local citizen groups, which is authorized at Superfund national priorities list (NPL) sites, addresses these concerns by capping grants at \$ 50,000.⁹⁸ Citizens use these meager grants to understand government decisions. Whether these amounts would be sufficient in a regime that assigned responsibility for making technical decisions to citizens acting in collaboration with government and industry is doubtful.

In any event, no one has suggested extending the Superfund approach to major regulatory programs. In fact, when confronted with this problem in the context of Project XL, the reinvention initiative often cited as a premier example of grass-roots democracy in action, EPA responded by requiring citizens to obtain the agreement of all the other major stakeholder groups before receiving technical assistance of their own.⁹⁹

Recruiting average people to participate in the resolution of complex issues, in a context where even the ultimate standards for measuring success are up for grabs, with no independent technical support, and without imposing any limits on industry and government's participation, inflicts a handicap that would not be tolerated by any other group of participants. Yet the most daunting impediment to grass-roots democracy is not the difficulty of holding one's own in such conversations, but the time it takes to participate.

The "Vanity of Volunteerism"

The experiments in collaboration over the last decade or so have been very time-consuming. In perhaps the most infamous [\[30 ELR 10920\]](#) example, the Project XL negotiation at an Intel facility in Arizona, the agreement was hammered out in 100 meetings, each lasting 4 to 6 hours, over a period of 10 months.¹⁰⁰ To accommodate citizen representatives, many of these meetings were held at night. Regulatory negotiations have a similar reputation for requiring an enormous commment of time and energy, but typically do not make the concession of meeting at night, probably because the professionals from industry and government are unwilling to make such an extraordinary sacrifice of their personal time. These details should not be dismissed as petty. Unless one is willing to stipulate, at the threshold, that people who work cannot participate, the issue of when meetings are held becomes very important, along with the question of how much time the meetings will consume. Or, to put the point more rudely, unless one's definition of the average citizen is either a relatively affluent retired person, or an even more affluent younger person, such details determine the essential character of the collaboration.

In a recent *New York Times* article entitled *The Vanity of Volunteerism*, Sara Mosle, a former elementary school teacher in the inner city who stopped teaching a decade ago but has tried to continue mentoring herformer students, challenges the capacity of volunteers to take over the government's role in providing vital services to the poor:

"Compassionate conservatives" would probably claim that I am the kind of "caring adult" who can transform the lives of disadvantaged kids more effectively than any government program. I am all for volunteering, but I would disagree. . . . To work, mentoring has to be performed consistently, over a sustained period of time For the first couple of years [after I stopped teaching], I saw my kids as often as twice a week. But now I'm lucky if I see them once a month In their lives, I'm less a caring adult than a random one. And my failure is representative. Although 55[%] of Americans reported that they volunteered at some point in 1998—a 7[%] rise over 1995 . . . Americans donated 400 million fewer hours in 1998 than they [did] in 1995.¹⁰¹

It is possible, of course, that Mosle's observations are of marginal relevance to the projects proposed by civic environmentalists. Perhaps simple charity is less appealing than the prospect of spending hours debating the technical nuances of environmental trade offs in groups where industry and government experts predominate. Even if one is willing to make this assumption, however, the serious problem of available time remains unresolved.

Most Americans are trapped in a syndrome that leaves them with very little discretionary time. On average, Americans work 1,957 hours a year, more than in other, comparably affluent countries.¹⁰² Married couples with children now work a combined 3,395 hours annually, 8 work-weeks more than in 1979, an increase attributable primarily to the growing numbers of women who work.¹⁰³ Married couples spent, on average, 14 more hours per week working in 1998 than in 1969, and more mothers, including single mothers, have joined the work force.¹⁰⁴ In 1969, only 23% of women with children under three were in the work force, but by 1998 that figure jumped to 63%.¹⁰⁵ As a result, the average mother and father spends 22 hours less every week with their children than parents did in 1969.¹⁰⁶

The syndrome, popularly known as the "time-crunch," is not confined to managerial and professional jobs; rather, a decline in real wages means that blue collar workers must put in more hours to support their families.¹⁰⁷ Production and nonsupervisory workers, who make up 80% of the work force, must now work 6 more weeks annually to maintain the same standard of living as comparable workers had in 1973.¹⁰⁸ Obviously, this problem grows more acute as income levels drop, an issue underscored by the growing discrepancy in compensation between the upper and the middle or lower classes: in 1979, the average American college graduate earned 38% more than the average high school graduate but the gap today is 71%.¹⁰⁹ The result is less free time for adults and a ubiquitous and valid preoccupation with the price the time-crunch exacts from family, much less public, life.

Of course, there are notable examples of people from all walks of life finding time to engage in civic pursuits. Juries are one example, school boards and Parent Teacher Associations (PTAs) are another. But such institutions have attributes that suggest they are not precursors of success for civic environmentalism.

Juries are so embedded in American culture that there is significant pressure on employers not to interfere with such service. People are paid, albeit nominally, for their time, and face a call to service only occasionally.

Service in the public schools is motivated, first and foremost, by a concern for the education received by the volunteer's children, a subject of unrivaled importance for most people. School boards control significant budgets, giving them real power over the outcome of the educational enterprise. School boards and PTAs may require toleration of lengthy meetings and outbreaks of strife, but both are supported by professional staff who are responsible for carrying out the main task before them.

Under civic environmental theory, local collaborative groups are unlikely to share any of these attributes. Funding to support the work of such groups, or to implement the plans they develop, is never mentioned. Even more important, an explanation of why people would feel motivated to volunteer is relegated to anecdote. Consequently, it is possible to imagine how upper class, well-educated people living in the countryside near the Chesapeake Bay could feel motivated to spend some of their spare time debating how to preserve the bay's natural beauty. It is far more difficult to imagine how single mothers in the inner city, having made [\[30 ELR 10921\]](#) the link between air pollution and their children's bouts with asthma, will be similarly motivated and have the resources to volunteer to spend seemingly unlimited time in contentious meetings debating in highly technical terms whether and how to clean up the air with the manufacturers of diesel buses, the owners of trash incinerators and power plants, state and local bureaucrats, and a veritable army of associated technical experts.

It is, of course, always easier to poke holes in a bold vision for fundamental change than it is to craft one. Civic environmentalists may have answers to all of the above objections that they have yet to explain. But until they begin to address these issues, with care and in detail, their theories will remain idealistic and sincere, but extraordinarily vulnerable to corruption.

Cleaner? Smarter? Cheaper?

In conclusion, it is worth returning to the promise that reinvention will produce results that are cleaner, cheaper, and smarter. Whether a dramatic or even a gradual shift to civic environmentalism has the potential to produce cleaner and smarter results is anyone's guess, although in the absence of performance-based standards, it is difficult to see how it could.

Further, as John and Knopman recognize, every example of civic environmentalism in action has occurred in the context of a regulatory system that carries the ultimate threat of either a fallback to command and control or severe financial liability. What would happen if this safety net was removed, either directly by legislation or indirectly by Congress' failure to fund the implementation of traditional regulatory programs, is more than a little frightening to contemplate.

But there can be little doubt that civic environmentalism will be a more expensive alternative, especially in the short term, if it is carried out in accordance with the civic environmentalists' stated ideals. Gathering and organizing the information necessary to impose effective performance-based standards will be very expensive, as will the financial support that should be provided to "level the playing field" for local groups.

This, then, brings us to what is, in many ways, the ultimate dilemma. As long as we are in the throes of denying that reinvention will cost money, we will not end up with reinvention as advocated by the academy. Rather, those ideas will be co-opted to justify not rolling rules but roll-backs, not grass-roots democracy but the worst pluralism has to offer: participation by industry in a process where the public interest is unrepresented.

[1.](#) Three representative examples of this literature are: DEWITT JOHN, CIVIC ENVIRONMENTALISM, ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES (1994) [hereinafter JOHN]; Charles Sabel et al., *Beyond Backyard Environmentalism, How Communities Are Quietly Refashioning Environmental Regulation*, BOSTON REV., Oct./Nov. 1999, at 4 [hereinafter *Backyard Environmentalism*]; and Debra S. Knopman et al., *Civic Environmentalism: Tackling Tough Land-Use Problems With Innovative Governance*, 41 ENV'T 24 (1999) [hereinafter *Innovative Governance*]. The Sabel, Fung, and Karkkainen piece is accompanied by several short commentaries by other authors, some critical and some supportive, including one by DeWitt John.

[2.](#) The Tragedy of the Commons posits that each individual citizen has such a small stake in the health of the environment that these

common resources will be squandered unless extraordinary steps are taken to preserve them either by government or private organizations representing the public interest. Garrett Hardin, *The Tragedy of the Commons*, 168 *SCIENCE* 1243 (1968). The possibility that states will engage in a "race-to-the-bottom" to weaken environmental regulation is an equally well-known political theory invoked to justify federal environmental law. *See, e.g.*, ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 118-120 (3d ed. 2000).

Civic environmentalists reject these fundamental premises of modern environmental law because they believe that if problems are identified and resolved on a sufficiently local level, not only will a critical mass of average citizens be galvanized to action, but regulation will be appropriately stringent regardless of the effects of interjurisdictional economic competition.

[3.](#) TMDLs are mandated at 33 U.S.C. § 1313(d), ELR STAT. FWPCA § 303(d). The legislation is: S. 2417, 106th Cong. (2000); S. 2441, 106th Cong. (2000); and H.R. 4278, 106th Cong. (2000).

[4.](#) The last reauthorizations of the CWA and the Clean Air Act took place 13 and 10 years ago, respectively, Pub. L. No. 100-4, 102 Stat. 1018 (codified in scattered sections of 33 and 42 U.S.C.) (CWA); Pub. L. No. 101-549, 104 Stat. 2399 (codified in 42 U.S.C.) (CAA). Since the 1994 national elections, Congress has been gridlocked on every piece of major environmental legislation that does not enjoy overwhelming bipartisan support.

[5.](#) *See, e.g.*, SUMMARY REPORT TO THE PRESIDENT: THE PRESIDENTIAL REGULATORY REFORM INITIATIVE BY THE ENVIRONMENTAL PROTECTION AGENCY, *reprinted in* Daily Env't Rep. (BNA) June 23, 1995, at A-121 [hereinafter SUMMARY REPORT].

[6.](#) Civic republicanism was the subject of a symposium issue of the *Yale Law Journal* published in July 1988, featuring articles by such respected intellectuals as Paul Brest, Michael Fitts, Jonathan Macey, Jerry Mashaw, Frank Michelman, Kathleen Sullivan, and Cass Sunstein, 97 *YALE L.J.* 1493 (1988). Among the more notable recent advocacy on the subject that includes environmental examples of its potential application are two articles by Jody Freeman published in 1997 and 2000: *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1 (1997) and *The Private Role in Public Governance*, 75 *N.Y.U.L. REV.* 543 (2000) [hereinafter Freeman I and Freeman II]. For a comprehensive, eminently readable treatment of the subject, see DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* (1990) [hereinafter KEMMIS].

[7.](#) KEMMIS, *supra* note 6, at 9-13 (describing Jefferson's beliefs at the time).

[8.](#) For a description of republican theory in modern times, see Cass Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539. 1546-58 (1988) [hereinafter Sunstein].

[9.](#) KEMMIS, *supra* note 6, at 19-24 (explaining the theoretical link between agrarian society and civic virtues).

[10.](#) *Id.* at 64-83 (describing what it would mean to restore these values).

[11.](#) *Id.* at 13-19 (describing Madison's beliefs at the time).

[12.](#) Sunstein, *supra* note 8, at 1542-47 (explaining pluralism and its history).

[13.](#) KEMMIS, *supra* note 6, at 18-19 (describing the constitutional compromise). *See also* Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1508-10 (1988) [hereinafter Michelman] and Sunstein, *supra* note 8, at 1558-64 (describing the hybrid government that emerged from this dialogue).

[14.](#) KEMMIS, *supra* note 6, at 13.

[15.](#) For a grim account of the damage inflicted by the growth of the administrative state and the "stalemate" in contemporary politics, see *id.* at 44-63.

[16.](#) Norman Ornstein, *E-Democracy Sounds Great but Watch Out*, USA TODAY, Oct. 18, 1999, at 19A.

[17.](#) Michelman, *supra* note 13, at 1495. *See also* Sunstein, *supra* note 8, at 1539 (noting that "various strategies of exclusion of the nonpropertied, blacks, and women were built into the republican tradition").

[18.](#) *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) ("having administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity") [hereinafter Seidenfeld I]. It is worth noting that a more recent article by Professor Seidenfeld is less enthusiastic about the potential of government to fill this role. Instead, he predicts that attempts to involve actual members of the public, including representatives of public interest groups, will fail because such individuals will not cooperate in the collaboration between industry and government and, as a result, will be expelled from such decisionmaking. The resulting "deals" between industry and government will rightfully be suspect, calling into question the viability of collaborative decisionmaking as an alternative to traditional regulation. Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000) [hereinafter Seidenfeld II].

[19.](#) *See, e.g.*, Freeman I, *supra* note 6.

[20.](#) *Id.* at 75-77.

[21.](#) *Id.* at 77-82.

[22.](#) *Id.* at 41-66.

[23.](#) In other articles, I have argued that incremental, site-specific experiments are not worth the resources they cost and that sweeping reform will require the comprehensive review of each major federal environmental statute. *See* Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey From Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 185-86 (1998) [hereinafter *Dangerous Journey*]. For a contrary view, see Dennis D. Hirsch, *Bill and Al's XL-ent Adventure: An Analysis of the EPA's Legal Authority to Implement the Clinton Administration's Project XL*, 1998 U. ILL. L. REV. 129.

[24.](#) JOHN, *supra* note 1.

[25.](#) *Id.* at 118-20 (discussing likely future developments in Iowa); 191-97 (discussing the future of the Florida Everglades dispute).

[26.](#) *Id.* at 260.

[27.](#) *Innovative Governance*, *supra* note 1, at 32.

[28.](#) *Id.* They offer acid rain and global climate change as examples of problems that must be solved at the national or international level.

[29.](#) *Id.* at 26 (CWA) and 29 (Superfund).

[30.](#) *Id.* at 27 (emphasis added).

[31.](#) *Id.* at 32.

[32.](#) *Backyard Environmentalism*, *supra* note 1.

[33.](#) *Id.* at 4 (emphasis added).

[34.](#) This point was made by Professor Cass Sunstein in his commentary on the article by Sabel, Karkkainen, and Fung. *Id.* at 22.

[35.](#) *See* Lyndey Layton, *University of Maryland Renames Marine Lab for Fowler*, WASH. POST. Nov. 15, 1998, at M10 (describing Fowler's accomplishments).

- [36.](#) A page on the Chesapeake Bay Program's website highlights the program's organizational structure. The links to each committee and subcommittee on the page lists the state and federal officials comprising the membership of each committee. *See Chesapeake Bay Program Organizational Structure* (visited July 28, 2000) <http://www.chesapeakebay.net/info/committ.cfm>.
- [37.](#) *See* JOHN, *supra* note 1, at 95-101 (describing key players in the Iowa situation), 136-66 (describing key players in the Florida Everglades settlement).
- [38.](#) *Id.* at 261-62.
- [39.](#) *See, e.g.,* the evolution of Professor Seidenfeld's thinking, as reflected in Seidenfeld I versus Seidenfeld II, *supra* note 18.
- [40.](#) *Backyard Environmentalism*, *supra* note 1, at 4.
- [41.](#) Similar questions were raised by Professor Daniel Farber in his commentary on the Sabel, Karkkainen, and Fung piece. *Id.* at 19.
- [42.](#) *Id.* at 5.
- [43.](#) *Id.* at 5.
- [44.](#) *Id.*
- [45.](#) *See* BLUE RIBBON CITIZENS PFIESTERIA ACTION COMM. FINAL REPORT app. 10, at 12 (1995) (describing the structure of the poultry industry on the Delmarva peninsula) [hereinafter BLUE RIBBON REPORT]. The commission was convened by Maryland Governor Parris Glendening to respond to an outbreak of *pfisteria piscicida*, or the "cell from hell," in Maryland and Virginia rivers during the summer of 1995. For an account of the incident and its aftermath, see Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351, 396-99 (2000) [hereinafter *Devolution and the Public Health*].
- [46.](#) Ted Shelsby, *Perdue Mulls Pullout From Maryland, Decision to Depend on Pfiesteria-Related Rules on Farm Runoff, National Solution Sought, Planned Regulations Prompt Concerns About Area's Costs*, BALT. SUN, Nov. 7, 1997, at C1 (describing relocation threats by the third-generation chief executive of family-owned Perdue, one of the largest chicken producers in the country).
- [47.](#) *See* BLUE RIBBON REPORT, *supra* note 45, at 39-46 (describing future research and monitoring needs).
- [48.](#) For an example of prominent critique of technology-based controls, see Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).
- [49.](#) *See, e.g.,* JOHN, *supra* note 1, at 289-302; *Innovative Governance*, *supra* note 1, at 27; and *Backyard Environmentalism*, *supra* note 1, at 5-6.
- [50.](#) Margaret Kriz, *Testing the Waters at the EPA*, 32 NAT'L J. 1286, 1287 (2000).
- [51.](#) 33 U.S.C. § 1313(d), ELR STAT. FWPCA § 303(d).
- [52.](#) For a history of this and related aspects of the history of the CWA, see Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, [27 ELR 10329](#) (July 1997).
- [53.](#) For a history of this litigation, see Oliver A. Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, [27 ELR 10391](#) (Aug. 1997).
- [54.](#) 5 U.S.C. app. 2 §§ 1-15. For an explanation of the purposes of the Act and recent problems with its implementation, see Thomas C. Beierle & Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in*

Environmental Decisionmaking, [29 ELR 10399](#) (July 1999). For an analysis of the Federal Advisory Committee's work in the context of related developments at EPA, at other federal agencies, and in the courts, see Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program*, [28 ELR 10415](#) (Aug. 1998).

[55.](#) *TMDL Advisory Group Recommends Implementation Plan to Improve Program*, 29 Env't Rep. (BNA) 742 (Aug. 7, 1998).

[56.](#) U.S. EPA, Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46012 (Aug. 23, 1999); U.S. EPA, Revisions to the National Pollutant Discharge Elimination System Program and Federal Anti-Degradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46058 (Aug. 23, 1999).

[57.](#) Kriz, *supra* note 50, at 1286; Susan Bruninga, *Pressure Mounts on EPA Officials to Withdraw Proposal on Impaired Waters*, Daily Env't Rep. (BNA), June 5, 2000, at A-5.

[58.](#) Susan Bruninga, *Final TMDL Rule Signed by Browner, Prompting Criticism From Hill, Industry*, Daily Env't Rep. (BNA), July 12, 2000, at AA-1 (reporting on the passage of the rider in the context of an emergency spending bill) [hereinafter *Final Rule Signed*]. President Clinton signed the bill into law on July 13. Lorraine Woellert, *It's Open Season on the EPA*, BUS. WK., July 31, 2000, at 48.

[59.](#) *Final TMDL Rule Signed*, *supra* note 58. The two rules were published in the *Federal Register* on the same day that President Clinton signed the rider into law. U.S. EPA, Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43585 (July 13, 2000).

[60.](#) Kriz, *supra* note 50, at 1287.

[61.](#) S. 2417, 106th Cong. §§ 4 and 6 (2000). The *Almanac of America, Politics* describes the two senators voting records as "very conservative," noting that Senator Smith received a League of Conservation Voter (LCV) rating of 0%, while Senator Crapo received a 15% rating. See MICHAEL BARONE & GRANT UILFUSA, NATIONAL JOURNAL GROUP INC., THE ALMANAC OF AMERICAN POLITICS 511-15, 1008-14 (1999) (profiling Senators Crapo and Smith). Like Senators Crapo and Smith, Senator Bond and Representative Tanner also have conservative environmental voting records. Senator Bond's 1998 LCV rating was 0%, while Representative Tanner's was 38%. *Id.* at 922-25, 928-29, 1499-501 (profiling Senator Bond and Representative Tanner).

[62.](#) S. 2441, 106th Cong. (2000); H.R. 4278, 106th Cong. (2000).

[63.](#) S. 2417, 106th Cong. § 2 (2000).

[64.](#) *Id.* § 3.

[65.](#) *Id.* § 4(a).

[66.](#) *Id.* § 6.

[67.](#) *Id.* § 2(4).

[68.](#) *Id.* § 2(5).

[69.](#) *Id.* § 5.

[70.](#) S. 2441, 106th Cong. (2000); H.R. 4278, 106th Cong. (2000).

[71.](#) Kriz, *supra* note 50, at 1286.

[72.](#) S. 2441, 106th Cong. § 2 (2000); H.R. 4278, 106th Cong. § 2 (2000) (emphasis added).

[73.](#) S. 2441, 106th Cong. § 3 (2000); H.R. 4278, 106th Cong. § 3 (2000).

[74.](#) Kriz, *supra* note 50, at 1286. S. 2441, 106th Cong. § 3 (2000); H.R. 4278, 106th Cong. § 3 (2000).

[75.](#) S. 2441, 106th Cong. § 3 (2000); H.R. 4278, 106th Cong. § 3 (2000) (emphasis added).

[76.](#) *Id.* (emphasis added).

[77.](#) *Id.*

[78.](#) *Id.*

[79.](#) *Backyard Environmentalism*, *supra* note 1, at 4.

[80.](#) A major impetus toward the development of performance-based standards is the Government Performance and Results Act, Pub. L. No. 103-62, 107 Stat. 285 (1993) (codified in scattered sections of 5 and 31 U.S.C.). For an analysis of how performance-based standards could replace more rigid command-and-control regulation, see Robert M. Sussman, *The Government Performance and Results Act and the Future of EPA: A Second Look*, [29 ELR 10347](#) (June 1999). For a critique of this approach, see Rena I. Steinzor & William Piermattei, *Reinventing Environmental Regulation Via the Government Performance and Results Act: Where's the Money?*, [28 ELR 10563](#) (Oct. 1998).

[81.](#) Instead of rejecting straight numerical reductions, Knopman and her colleagues endorse this approach in the context of the Chesapeake Bay Program, although they acknowledge that only some of the program's numerical goals have been met. *Innovative Governance*, *supra* note 1, at 27. They do not mention that the frightening outbreak of *pfisteria piscicida* in 1997 occurred despite those reductions. For further information on this incident, see sources cited *supra* notes 45 and 46.

[82.](#) Whatever else they might be, rolling rules are unlikely to be easily understood by members of the public who are not directly involved in their negotiation.

[83.](#) U.S. GAO, GAO/RCED-00-54, WATER QUALITY, KEY EPA AND STATE DECISIONS LIMITED BY INCONSISTENT AND INCOMPLETE DATA (2000) [hereinafter GAO DATA GAPS].

[84.](#) *Id.* at 5.

[85.](#) *Id.* at 5-6.

[86.](#) *Id.* at 6.

[87.](#) *Id.*

[88.](#) S. 2417, 106th Cong. § 2 (2000).

[89.](#) *Id.* §§ 3 and 4.

[90.](#) *EPA Analysis of Test Data Availability for HPV Chemicals*, 22 Chem. Reg. Rep. (BNA) 261 (1998).

[91.](#) JOHN, *supra* note 1, at 261-62.

[92.](#) *Id.* at 85-123.

[93.](#) For a discussion of these developments and the various analyses of why they have occurred, see *Dangerous Journey*, *supra* note 23, at 173-80.

[94.](#) It is also worth noting that within the last few years, national environmental organizations committed substantial resources to the Enterprise for the Environment, a high profile group of chief executive officers and other top officials chaired by former EPA Administrator William Ruckelshaus that was convened to undertake collaborative, consensus-building negotiations on some of the largest issues in environmental policy. However, the environmentalists ultimately walked out of these negotiations without reaching agreement because they did not feel they could live with industry-supported compromises. See ENTERPRISE FOR THE ENVIRONMENT, THE ENVIRONMENTAL PROTECTION SYSTEM IN TRANSITION, TOWARD A MORE DESIRABLE FUTURE (1998); Linda E. Greer, *Why We Didn't Sign*, ENVTL. F., Mar/Apr. 1998, at 37.

[95.](#) See, e.g., *Backyard Environmentalism*, *supra* note 1, at 11 ("some parts of the established environmental movement continue to prefer the insider's game of pluralist grappling for influence at power centers"). Sabel, Karkkainen, and Fung urge national groups to "reinvent themselves as independent monitors of local performance and poolers of best practices." *Id.*

[96.](#) See, e.g., *Innovative Governance*, *supra* note 1, at 31-32 ("At the national level, environmental questions all too often veer off into symbolic disputes in which partisan camps sacrifice palpable goals to score ideological points. Those who want to protect a particular place cannot afford to play such games.").

[97.](#) Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998); Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53 (1996).

[98.](#) 42 U.S.C. § 9617(e), ELR STAT. CERCLA § 117(e).

[99.](#) U.S. EPA, Regulatory Reinvention (XL) Pilot Projects, Notice of Modifications to Project XL, 62 Fed. Reg. 19872-82 (Apr. 23, 1997). EPA's reaction may well have been motivated by a virulent backlash among some industry groups that have gone so far as to argue that expanded public participation is not just unnecessary, but harmful. See, e.g., *Fracas at Roundtable Shows Pitfalls of Public Involvement, Industry Says*, INSIDE EPA WKLY. REP., Oct. 25, 1996, at 20.

[100.](#) See *Participants in Project XL to Meet, Discuss Problems With Stakeholder Process*. Daily Env't Rep. (BNA), Jan. 21, 1997, at A-10.

[101.](#) Sara Mosle, *The Vanity of Volunteerism*, N.Y. TIMES, July 2, 2000 (Magazine), at 22, 24.

[102.](#) *The Future of Work*, ECONOMIST, Jan. 29, 2000, at 92 [hereinafter *Future of Work*].

[103.](#) *Id.* at 92.

[104.](#) Laura Pappano, *Running Out of Time: Are You Working More and Playing Less Than You Used To? Or Does It Just Feel That Way?*, BOSTON GLOBE, June 25, 2000 (Magazine), at 18 [hereinafter *Running Out of Time*].

[105.](#) *Id.*

[106.](#) *Future of Work*, *supra* note 102, at 92.

[107.](#) *Running Out of Time*, *supra* note 104, at 18.

[108.](#) *Id.*

[109.](#) *Future of Work*, *supra* note 102, at 92.

