MYTHS OF THE REINVENTED STATE

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I. INTRODUCTION

Every social movement has its myths, replete with heroes and dragons, maidens and wizards, all bathed in a noble light. The best myths are one-part fantasy and one-part truth, bearing just enough relationship to reality to provide inspiration to their inventors when the crusade drags on and victory eludes them.

The movement to create a "second generation" of environmental regulation now amounts to such a crusade.¹ Over the last five years or so, its leaders in the nation's capital have achieved considerable momentum, building pressure on policymakers that travels in radiating waves out to the field. Even practitioners and bureaucrats preoccupied with

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* Associate Professor and Director, Environmental Law Clinic, University of Maryland School of Law. I acknowledge my debt to Cass R. Sunstein, whose article, Paradoxes of the Regulatory State, 57 U. Chi. L. Rev. 407 (1990) inspired the grammatical structure of the title and the metaphor used in this piece. I am very grateful for the insightful comments offered by my colleagues, Robert Kuehn, Clifford Rechtschaffen, and Eileen Gauna. Of course, any errors in fact or judgment are exclusively mine.

¹ For the highlights of these efforts, in addition to the articles appearing in this volume of the Capital University Law Review, see CENTER FOR STRATEGIC & INT'L STUD., ENTERPRISE FOR THE ENVIRONMENT: THE ENVIRONMENTAL PROTECTION SYSTEM IN TRANSITION, TOWARD A MORE DESIRABLE FUTURE (1998) [hereinafter E4E REPORT] (proposing a new multimedia approach to regulation that relies on giving industry incentives for good performance); THINKING ECOLOGICALLY, THE NEXT GENERATION OF ENVIRONMENTAL POLICY (Marian R. Chertow & Daniel C. Esty eds., 1997) (containing a series of essays proposing various reforms of existing "command-and-control" regulation) [hereinafter THINKING ECOLOGICALLY]; NAT'L ACADEM. OF PUB. ADMIN., RESOLVING THE PARADOX OF ENVIRONMENTAL PROTECTION, AN AGENDA FOR CONGRESS, EPA, & THE STATES (1997) (focusing on changes in the management structure of the Environmental Protection Agency); NAT'L ACADEM. OF PUB. ADMIN., SETTING PRIORITIES, GETTING RESULTS, A NEW DIRECTION FOR EPA 71–81 (1995) [hereinafter NAPA PRIORITIES] (urging devolution of more authority to the states as a solution to the failures of the existing system). The federal government has done its best to respond to these recommendations. For a general description of the Environmental Protection Agency's (EPA) reinvention initiatives, see U.S. EPA, REINVENTING ENVIRONMENTAL PROTECTION, 1998 ANNUAL REPORT, EPA 100-R-99-002 (March 1999). See also SUMMARY REPORT TO THE PRESIDENT: THE PRESIDENTIAL REGULATORY REFORM INITIATIVE BY THE ENVIRONMENTAL PROTECTION AGENCY, reprinted in 1995 DAILY ENV'T REP. (BNA) 121 (June 23, 1995) [hereinafter EPA SUMMARY REPORT].
implementing existing law are touched by the movement's fervor, which is likely to accomplish profound changes before anyone fully appreciates its implications.

I was invited to this symposium as the loyal opposition to this crusade, or in myth terms, as the trenchant but fatally misguided knight who will be vanquished by the heroes in the end. I do not mind the role, although I am dismayed by its loneliness. Those who agree with me are out there, but clearly do not have the time or inclination to join full force in the academy's version of this battle. Of course, we in the loyal opposition have our own myths to sustain us, including the idea that if the reinvented state is achieved in its most extreme terms, the apocalypse that follows will hurl the pendulum of policy and politics back in our direction.

This essay examines the myths of the reinvented state with the goal of explaining the gist of the crusade to the uninitiated. Given the purpose of the symposium and my assignment in that context, I make no effort to document the truth or distinguish the fantasy of these myths, although I provide references for those who wish to pursue these matters further.

II. THE KING MUST DIE

The threshold myth of the reinvented state is that the old order of traditional health and safety regulation has run its course. In its most extreme formulation, this myth posits that "command and control" is a discredited strategy for most environmental problems. In its less extreme iterations, the myth says that traditional regulation was successful in

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2 For highlights of these critiques, see Henry N. Butler & Jonathan R. Macey, Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority, 14 Yale L. & Pol'y Rev. / Yale J. on Reg. 23 (1996) [hereinafter Butler & Macey] (arguing that federal regulation is so onerous that the system must be fundamentally reformed); Eric W. Orts, Reflexive Environmental Law, 89 Nw. U. L. Rev. 1227 (1995) (decriing the complexity of "top heavy" regulation, its "juridification" and consequent economic inefficiency); Cass R. Sunstein, Paradoxes of the Regulatory State, 57 U. Chi. L. Rev. 407 (1990) (explaining that command-and-control regulation too often adopts "self-defeating" strategies that backfire); and Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 37 Stan. L. Rev. 1333 (1985) (denouncing the economic inefficiency of technology-based environmental regulation) [hereinafter Ackerman & Stewart]. The best-known popular critique of command-and-control regulation is Philip K. Howard, The Death of Common Sense, How Law Is Suffocating America (1994), which presents a wide range of anecdotal evidence to illustrate its thesis that command-and-control regulation, including environmental regulation, is a major threat to the country's economic and social well-being.

3 See, e.g., Butler & Macey, supra note 2, at 23 (comparing the existing regulatory system to "a massive effort at Soviet-style central planning" that "strangles investment and innovation" and "encourages costly and divisive litigation and delay").
solving the environmental problems of yesteryear, but cannot meet the challenges of so-called "second generation" problems, including non-point runoff, mobile source pollution, and global warming. While some of the underlying command-and-control foundation should remain in place, it is time for a new system to become the primary focus of federal, state, and local regulators. In other words, the king must die, or at the very least be exiled, relinquishing his throne to a new monarch.

Who adopts which formulation is heavily dependent on the player's role in the overall crusade and the precision demanded by the circumstances of the battle at hand. Politicians, state officials appointed by conservative governors, and industry advocates—the infantry of the crusade—typically adopt the most extreme version when lobbying Congress, speaking at public meetings or explaining themselves to the press, while policymakers and academics—cast as their strategists off the field—parse these views much more carefully. All crusaders believe that command-and-control regulation imposes exorbitant costs for low amounts of social welfare, crippling the country's global competitiveness for no good reason. They are especially incensed by "technology-based" regulation, which requires firms in a given industrial category to install the same pollution control equipment regardless of cost, rather than allowing those that would find it cheaper to reduce emissions to assume the burden of doing it for all the others. Crusaders are convinced that the rigidity and complexity of the current system confounds efforts to apply limited resources to the most pressing problems, in effect squandering money on issues far down any rational list of environmental priorities. Finally, they argue that command-and-control regulation in its most extreme iterations does not keep the environment all that clean because the regulations are so cumbersome that they are virtually impossible to implement.

It is certainly true that the most stringent statutory mandates produced during the reign of command and control appear in hindsight to be

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4 See, e.g., NAPA PRIORITIES, supra note 1, at 70 (explaining that a new system would be a "natural continuation" of the old); E4E REPORT, supra note 1, at 5 (arguing for a "stepping stone" approach to reform that makes changes in the existing system "with care").

5 Perhaps the best example of the first category of crusaders is Representative Tom DeLay, the powerful majority whip of the U.S. House of Representatives, who opined the day before Christmas in 1995 that, "[T]he EPA, the Gestapo of government, pure and simply has been one of the major claw-hooks that the government has maintained on the backs of our constituents." James Gerstenzang, GOP Clouds the Future of Environmental Protection, L.A. TIMES, Dec. 24, 1995, at A1. For examples of more measured advocacy by their strategists off the field, see Orts, supra note 2, and Ackerman & Stewart, supra note 2.
symbolic law at its most ineffective. One has only to consider the application of the Delaney Clause to pesticide residues or the exhortations regarding hazardous air pollutants in section 112 of the early Clean Air Act to find ready examples of traditional regulatory approaches that collapsed under the weight of their own impossible expectations. On the other hand, as documented in such books as *A Moment on the Earth*, traditional regulation has made real progress in controlling pollution from large point and stationary sources. Little of this progress would have been possible without the commands and controls of the last three decades. Finally, Congress recently adopted modifications to both the Delaney Clause and section 112 that are designed to make them easier to administer, relieving these regulations of their role as poster children for the worst excesses of the regulatory state.

How long we should wait to see if a comprehensive regulatory framework will work before sharply reversing course? The loyal opposition believes that a mere thirty years is scarcely enough time, that the king is still young, and that any monarch of such potential should be

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11 See id.

12 For analyses of these modifications, see Percival et al., supra note 9, at 485–97 (Delaney Clause) and 497–508 (hazardous air pollutants); see also Weinstein et al., supra note 9; Wichers et al., supra note 9.
given many more years to reach his prime. In this view, regulation is an iterative process, with society struggling into the foreseeable future over the same epic issues of health, cost, and economic and social disruption. To acknowledge that the regulatory system is sometimes more of a problem than a solution suggests nothing more than that we should modify details of the king’s reign, as opposed to killing him outright.

Further, the loyal opposition argues, proponents of the myth that it is time to kill—and not just maim—the king cannot seriously believe that they will accomplish the deconstruction of traditional regulation immediately, especially if they try to accomplish such changes by amending or repealing the major statutes, as opposed to crippling the bureaucracy that implements them. Presumably the crusade has as its real goal developing alternative approaches that gradually replace the old king’s outmoded edicts. Of course, the broader the scope of the attack on the king, the more resources and political capital it will take to develop this alternative regime, inspiring thoughtful crusaders to advocate a more targeted and gradual battle plan.

Within this middle ground, much remains to be negotiated. The fervency of the crusade’s infantry has made it extraordinarily difficult for its strategists to bargain for more modest changes behind the scenes. Even more troubling, it is much easier to undermine and even paralyze a bureaucracy than it is to reform the law, as discussed below in the section entitled "The Armies Need Not Eat." To stretch the metaphor one step further, we have reached the point where the king is holed up in his castle, rationing supplies, and waiting for the loyal opposition to raise a credible army. The chaos in the kingdom that results from this siege does no one any good. How the crusaders intend to dispatch him is the next chapter in the mythology.

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13 For an analysis of one important statutory mandate from this perspective, see Rena I. Steinzor, Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?, 81 MINN. L. REV. 97, 184–224 (1996) (exploring the history and shortcomings of the Safe Drinking Water Act’s application to community water systems and suggesting possible reforms of the program) [hereinafter Unfunded Mandates].


15 See infra section VI.
III. DEATH IN HIS BED CHAMBER IS ALL THE KING DESERVES

Heroes, villains, and, of course, kings often die in myths, and the mode of their disposal is the final judgment of their worth on earth. To die in battle is the most noble of deaths because it comes closest to revealing why one has lived. The least noble death is to be dispatched in one's bed chamber as the victim of a secret plot. Not only does this scenario deprive the king of the opportunity to confront and denounce his executioners; the reasons he must die are obscured from his subjects.

Having decided that traditional regulation must be replaced by second generation approaches, crusaders are determined to deny the system a noble death. Rather than return to Congress to rewrite the federal environmental statutes problem by problem, this aspect of the battle has moved underground, with decisions to ignore or short-change key programs made by bureaucrats instead of elected officials who are directly accountable to the public.16

To be sure, some crusaders call for Congress to enact an umbrella statute that would sanction reinvention projects in the most general terms.17 This piecemeal reform would not rewrite traditional regulatory mandates that are already on the books, however, and therefore would not

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16 The best example of this phenomenon is the National Environmental Performance Partnership System, or NEPPS, which fosters the renegotiation of program priorities between federal and state regulators, with statutory mandates only one of the factors that determine such decisions. NEPPS is the focal point of the Clinton Administration's efforts to devolve more authority to the states. It was created in 1995 via two documents: a two-page statement signed by top-level officials and a nine-page, unsigned explanation of the first document's intent. The two documents are always circulated and read together. Joint Commitment to Reform Oversight and Create a National Environmental Performance Partnership System, May 15, 1995, reprinted in ENVIRONMENTAL LAW INST., AN INDEPENDENT REVIEW OF THE STATE-FEDERAL ENVIRONMENTAL PARTNERSHIP AGREEMENTS FOR 1996 app. (1996) [hereinafter Joint Statement and Joint Statement Explanation]. In an era where budget shortfalls are acute, the inevitable result is that some statutorily-required programs are pushed so far down on the list of priorities that they are implemented ineffectively, if at all. For a discussion of this aspect of the NEPPS process and its implications, see Rena I. Steinzor, Devolution and the Public Health, 24 HARV. ENVTL. L. REV. 351, 426–46 (2000) [hereinafter Devolution].

accomplish changes via a democratic process carried out in full public view. To compound this problem, crusaders never acknowledge that resource shortfalls force regulators to choose among the most basic provisions of existing law, ignoring some and paying only half-hearted attention to others. In no area is this Hobson's choice more apparent than enforcement, where federal and state officials are engaged in a furious struggle over whether to rely primarily on "deterrence-based" lawsuits or to focus the bulk of their resources on "counseling" (read as "coaxing") industry into compliance. Once again, the implications of these resource shortfalls are discussed below under the title "The Armies Need Not Eat." "

The plot to kill the king behind closed doors drives the loyal opposition to distraction, in large measure because it is convinced that he remains a very popular figure and that if his subjects knew he was in danger, they would rush to his aid. The details of his slow, private deterioration are complicated and ponderous, hardly the stuff of two-minute news clips, and the American environment suffers from the public's "compassion fatigue" as much as any other worthy social cause. Thus, the loyal opposition struggles to find a way to make the danger manifest, even as the plot thickens and the king's strength fades.

Because his reign has been so ambitious and deeply entrenched, it may take a very long time for the king to die. For crusaders, the risk is that some kind of catastrophe will strike before the new king is enthroned, exposing the old king's plight and inspiring the masses to call for his resurrection. There are any number of candidates that could serve in this role, from stifling smog on summer days in the cities, to red tides in waters from the Gulf of Mexico to the Chesapeake, to hazardous materials accidents that kill civilians in residential neighborhoods near plant gates. With many members of the loyal opposition in charge of the government,
it is no small irony that they must pray for disaster to strike, dramatizing their own beleaguered state. Even if the old king hangs on for some time, new enemies are gathering on the horizon—enemies the crusaders are convinced he could never beat.

IV. THE FORCES OF DARKNESS HAVE CHANGED

Reinvention crusaders believe that the fundamental nature of pollution problems has changed.\(^{22}\) The evil forces that were so compelling when Rachel Carson's *Silent Spring* launched the modern environmental movement have been conquered, and new monsters have emerged.\(^{23}\) Because the original evil was visible pollution from large industrial sources, and the new evil is less visible pollution from a large number of diffuse sources, crusading knights must outfit themselves with new weapons, exchanging their swords and shields for non-violent temptations capable of capturing entire villages, giving the people incentives to pay homage to a new king.

This myth has two important facets that must be distinguished. The first is the assumption that the dark forces of yore are under control, to the extent that it is safe to turn our attention away from them.\(^{24}\) The second is the conviction that the new evils are not only more urgent than the old, but cannot be combated by the existing king.\(^{25}\) In other words, second

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\(^{24}\) Consider this passage from the introduction of *Thinking Ecologically*, the influential book of essays compiled as a result of Yale University's "Next Generation" project:

> Like nature itself, the size and shape of environmental problems are constantly evolving. Twenty-five years ago, we faced the challenge of cleaning up rivers so contaminated that one (Cleveland's Cuyahoga) even caught on fire. Air pollution in Los Angeles was so bad that motorists couldn't see three traffic lights in front of them. . . . [T]he flurry of economic activity . . . in the late 1960s . . . resulted in the enactment of a broad range of federal environmental laws. . . . To a large extent, these laws worked. Our air and water are cleaner.


\(^{25}\) Professors Esty and Chertow continue:

> But the prospects for further progress on the same path are limited. . . .

(continued)
generation environmental problems have eluded us thus far not because we lack the money to address them or because we have not made them a priority, but rather because they have survived assault by the best weapons traditional regulation has to offer.

Once again, these myths have more and less extreme versions, depending on the roles their proponents play in the crusade. Knights on the front line are confident that the old evils have been tamed. Not only were large industrial sources never as bad as they were made out to be, but the manufacturing sector has experienced a renaissance of "corporate environmentalism."\(^{26}\)

The crusade's strategists back at base camp are a little more cautious. They concede that we must maintain a foundation of command-and-control regulation to keep first generation dragons in their transformed state, but would shift the bulk of their forces to the battle against second generation problems.\(^{27}\)

Just what are these new dark forces? The crusaders believe that the worst sources of pollution are people, not companies, whether they are suburbanites driving sports utility vehicles, consumers in a "throw away" society, or the leaders of third world countries struggling to industrialize. Because second generation problems are caused by sources that are ubiquitous and far more marginal economically than the polluters of yore, command and control must give way to persuasion and the creation of positive incentives to do the right thing. Crusading knights who attack their potential subjects with the crude weapons of the past will encounter overwhelming passive resistance by subjects too numerous to rule by force.

The crusade's loyal opposition acknowledges that the larger the number and the smaller the size of pollution sources, the more difficult it becomes to apply first generation solutions, such as developing permits,

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Many of today's environmental problems are different from those tackled over the last several decades. . . . [W]e must address the effects of thousands of smaller firms and farms whose releases are individually small but cumulatively very large. We must also try to affect the choices of 265 million Americans . . .

Id. at 2.

\(^{26}\) For an enthusiastic rendition of corporate environmentalism as a potentially momentous development with large benefits for the environment, see BRUCE W. PIASECKI, CORPORATE ENVIRONMENTAL STRATEGY (1995). For a more critical view of the implications of these developments, see Robert D. Shelton, Hitting the Green Wall: Why Corporate Programs Get Stalled, 2 CORP. ENVTL. STRATEGY 5 (1994).

\(^{27}\) See, e.g., E4E REPORT, supra note 1, at 5 (arguing for a "stepping stone" approach to reform that makes changes in the existing system "with care").
inspecting facilities every few months, and enforcing myriad highly technical rules. But a permit system is not the only weapon in the traditional regulatory arsenal. Imposing liability for cleanup costs and undertaking deterrence-based enforcement are strategies used with equal success over the last decade and a half. It took three decades to make progress on first generation sources and second generation problems are just now coming to the forefront. Grappling with these problems effectively will require us to overcome considerable political resistance, no matter what regulatory mode is chosen. Those who promise that a new king will be successful where the old one failed display hubris that could lead the entire kingdom astray.

Once again, there is room here for negotiated solutions that protect the environment more effectively, if not more cheaply. But those negotiations cannot begin until and unless a critical mass of crusaders is willing to discuss a treaty and stop trying to kill the old king. At the moment, their most intemperate forces are far too enamored with their vision of a new king to even contemplate such joint governance.

V. THE NEW KING WILL COST LESS AND BE MORE EFFECTIVE

Born in a different culture and a later generation than the old king, the new king would reinvent both the ends and the means of environmental protection as we know it. His philosophy of government is by no means unique, sharing its central attributes with a "good government" movement that is embraced by fellow sovereigns in both the public and private sectors. That larger effort is making slow progress to convert

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28 For a discussion of these issues in the context of regulating very small community water systems, see Unfunded Mandates, supra note 13, at 184–224.

bureaucracies from a focus on "beans" (tangible units of activity, such as the number of permits issued) to a focus on "results" (actual achievement of ultimate goals, such as amounts of pollution removed from the environment or reduced at the source). Members of the new king's extended family occupy a growing number of thrones elsewhere in the world, although they have proved erratic when asked to support this particular crusade.30

At the risk of oversimplifying, the new king would replace the existing "bean-driven" system with a "performance-based" system that comprehensively assesses the condition of the ambient environment.31 He would establish the ultimate "goals" and interim "milestones" for cleaner air, water, and soil, but would decree that the kingdom's subjects should devise the methods that will achieve them.

Of course, the crusade is first and foremost an inspirational campaign that does not focus on the wounds inflicted on the battlefield, much less the suffering that may attend life after victory. Thus, a cornerstone of the myth characterizing the new king's reign is that it will be painless, engaging the creativity and good will of the people to find "cheaper, smarter, and cleaner" ways to control pollution.32 What will happen if the people do not cooperate is never stated, and the new king would appear to be prepared to rule without methods for punishing the rebellious.

The new king has a few central programs in mind, although the details of their execution remains at a high level of generality. Following the coronation, he would choose a second generation problem to conquer; for

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30 Enthusiasm for this particular brand of good government, or quality management, has produced ferocious competition between the political parties and their conservative, moderate, and liberal wings. The Clinton Administration has embraced GPRA as if it originated the idea. For example, one of the Clinton Administration's most influential policymakers, former OMB head Alice Rivlin, has explained GPRA as a way to "reduce the [budget] deficit in an intelligent way." Alice M. Rivlin, Linking Resources to Results: Management and Budgeting in a Time of Resource Constraints; Government Performance and Results Act of 1993, THE PUB. MANAGER: THE NEW BUREAUCRAT, June 22, 1995, at 3, 4.

31 Conservative Republicans in the U.S. House of Representatives also embrace the law, but they use it to ridicule the Clinton Administration's management style and accomplishments. See Annys Shin, GOP Grades the Feds, But Not on a Curve, 17 NAT'L J. 939 (1998) (describing Republican House members' release of a "report card" on agencies' compliance with GPRA that gives many, including EPA, poor grades).

32 For real-life proposals that would establish performance-based regimes, see E4E REPORT, supra note 1, at 12–18; NAPA PRIORITIES, supra note 1, at 71–74.

32 The slogan "cleaner, cheaper, smarter" was coined by the Clinton Administration to communicate its claim that it can find a way to produce more protective regulation at less cost by being smarter than its predecessors. See EPA SUMMARY REPORT, supra note 1, at 121.
example, restoration of a threatened watershed or improvement of air quality in a metropolitan region. Once the root of the problem is identified, such as nutrient-rich run-off from agricultural sources or tailpipe emissions, he would create "market-based mechanisms" to combat them. Perhaps programs could be established that set a cap on total releases, award sources a bank account of emission credits based on their performance in a baseline year, and encourage sources that can reduce pollution most cheaply to sell their extra emission credits to those for whom it would be a great expense.\textsuperscript{33} Or perhaps sources could be permitted to "trade" emission credits within broad categories of pollutants by, for example, establishing a cap on aggregate emissions of volatile organic compounds but allowing sources to shift at will the proportions of specific chemicals within that gross amount. Lastly, trades could occur across media, allowing sources to reduce air emissions of certain chemicals by increasing the amounts that are discharged to surface waters.\textsuperscript{34}

Crusaders also recognize that solutions to the environmental degradation caused by smaller sources, such as an individual person in a developed or developing country, are the most elusive. They have embraced a "bottom up" approach to these problems, commonly known as "civic environmentalism."\textsuperscript{35} Among the most romantic of the myths, this approach recommends that the king allow a thousand village councils to bloom. The king would establish some sort of overall goal, such as attainment of National Ambient Air Quality Standards by a certain date or

\textsuperscript{33} For analyses touting the economic and social benefits of these so-called bubbles and caps, see E. Donald Elliott & Gail Charney, \textit{Toward Bigger Bubbles: Why Interpollutant and Interrisk Trading Are Good Ideas and How We Get There From Here}, F. FOR APPLIED RES. & PUB. POL'Y 48 (Winter 1998); Robert Stavins & Bradley Whitehead, \textit{Market-Based Environmental Policies}, in \textit{THINKING ECOLOGICALLY}, supra note 1, at 105--17.

\textsuperscript{34} One of the Clinton Administration's premier reinvention programs, Project XL (for "eXcellence and Leadership") has depended heavily on these kinds of "cross-pollutant" and "cross media" trades. \textit{See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (May 23, 1995) (announcing the initiation of the program). For a critical analysis of the negative environmental effects of such exchanges, see Rena I. Steinzor, \textit{Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?}, 26 ENVTL. L. REP. 10,527 (1996) [hereinafter Emperor].

\textsuperscript{35} The most carefully constructed explanation of this new movement is JOHN DEWITT, \textit{CIVIC ENVIRONMENTALISM, ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES} (1994). A more exuberant, if less thoughtful, exposition is presented in Charles Sabel et al., \textit{Beyond Backyard Environmentalism, How communities are quietly refashioning environmental regulation}, BOSTON REV. 4 (Oct./Nov. 1999) available at http://bostonreview.mit.edu/BR24.5/sabel.html (last visited Dec. 18, 2000).
restoration of a river to its original designated use as a drinking water supply. He would then direct village councils to work out agreements to reduce the pollution that causes these problems. The councils' competence to undertake this chore is discussed below, in the section entitled "The Serfs Can Live Outside the Castle." 36

Last but not least, the new king believes in the power of enlightening his subjects, motivating changes in behavior through the dissemination of knowledge about the root causes of second generation problems and their long-term ramifications. In essence, this portion of the myth counts on the information superhighway to overcome the "Tragedy of the Commons." 37 Or, in other words, information transmitted on the World Wide Web will give so many more people a stake in the earth's ecology that they will overcome their apathy toward the degradation of our common resources, rising up as a powerful force to safeguard the planet and making compulsory regulation by government bureaucracies much less necessary. The crusaders would probably admit that there is little evidence of these changes to date, but would add that real progress is blocked because so much energy is wasted in obeisance to the traditional system.

As mentioned earlier, the loyal opposition disputes the threshold assumption of this particular myth—i.e., that large and small industrial point sources will achieve and maintain compliance without the pressure of army patrols. 38 Contrary to the belief in some industry circles, the loyal opposition does not argue that corporations are intrinsically bad and immoral. Rather, it is concerned that expensive pollution control is sufficiently antithetical to the central mission of a business that it is unreasonable to suppose that companies in a competitive environment will produce adequate environmental protection if left to their own devices. 39

The loyal opposition suspects that the infrastructure of monitoring

36 See infra section VIII.
37 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. See Garrett Hardin, The Tragedy of the Commons, 168 SCIENCE 1243 (1968). For an explanation of the theory's influence on modern environmental policy, see PERCIVAL ET AL., supra note 9, at 58–62. For a discussion of the potential for information to replace command-and-control regulation, see Bruce Guile & Jared Cohon, Sorting Out a Service-Based Economy in THINKING ECOLOGICALLY, supra note 1, at 76–90.
38 For an articulation of this concern in the context of enforcement, see Rechtschaffen, supra note 19, at 1225–30.
equipment and modeling technology necessary to undertake a comprehensive assessment of the ambient environment simply does not exist.\textsuperscript{40} It argues that we have a shockingly limited ability to understand the magnitude of the risks that face us. With the toxicology of the large majority of common chemicals understood poorly, if at all, we are in no position to abandon the pollution control technology that got us this far.\textsuperscript{41} The sources that cause first and second generation problems have little incentive to cooperate in extending and deepening this information about the ambient environment, whether or not a new king is put on the throne, because they believe, probably rightly, that increased knowledge invariably leads to more liability and regulation. Noting that the majority of first generation industrial actors have vehemently opposed extensions of such programs as the Toxic Release Inventory,\textsuperscript{42} the loyal opposition believes that the new king's promise of a well-grounded, performance-based system is either naive or, more likely, duplicitious. The loyal opposition gives little credence to crusaders' assertions that it is far more important to eschew bean counting by setting goals and milestones than it is to decide what will happen to those who never reach those marks.\textsuperscript{43} It contends that the punishment for failures to achieve goals and milestones must cause real economic pain for the new reign to have any credibility.

\textsuperscript{40} For discussion of how little we actually know about the state of the ambient environment, see Vandenbergh, supra note 22, at 812–14. See also, U.S. GEN. ACCT. OFF., NATIONAL WATER QUALITY ASSESSMENT, GEOLOGICAL SURVEY FACES FORMIDABLE DATA MANAGEMENT CHALLENGES GAO/IMTEC-93-30 (1993) (explaining that a national assessment of water resources has been difficult to perform because efforts to collect, analysis, and store data are expensive and labor-intensive); U.S. GEN. ACCT. OFF., AIR POLLUTION, NATIONAL AIR MONITORING NETWORK IS INADEQUATE, GAO/RCD-90-15 (1989) (describing the obstacles to implementing a national air monitoring network, including insufficient funding at the federal, state and local levels).

\textsuperscript{41} In a recent report covering 2863 organic chemicals produced or imported in amount above one million pounds annually, EPA concludes 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%. See EPA Analysis of Test Data Availability for HPV Chemicals, 22 CHEM. REG. REP. 261 (May 1, 1998). Our ignorance regarding the risks to public health posed by common pollutants is fundamental to any consideration of performance-based systems, because such systems rely so heavily on this kind of information for their effectiveness.

\textsuperscript{42} See, e.g., Joby Warrick, Administration May Relax Proposal on Toxic Chemical Disclosure, WASH. POST, Mar. 21, 1997, at A04 (reporting that EPA proposals to strengthen and expand the Toxic Release Inventory are "under fire" from industry).

MYTHS OF THE REINVENTED STATE

The loyal opposition is wary at best about the potential for market-based remedies to replace traditional regulation, on either a wholesale or piecemeal basis. Early returns on the reign of the pioneering second-generation monarch—the market for acid rain allowances—call the efficacy of these approaches into question, suggesting that they can become a vehicle for displacing pollution to other locations without resolving the underlying environmental crises they were designed to address.44

As the acid rain example suggests, market-based remedies depend on trading at the regional or national level, encompassing a wide range of sources and types of pollution. Within these regions, irrational land use practices have left large populations living far too close to pollution sources.45 Unrestricted market trading could easily prolong the life of older, dirtier facilities located in inner city, often minority neighborhoods. Failure to account for these local “hot spots” will make the new kingdom a more dangerous place for poor people, people of color, and other minorities, especially if the new king withdraws the old king’s armies from the field, leaving individual large sources without meaningful oversight. These concerns bring us to yet another aspect of the core myth: How about that army? What is the state of its morale and the magnitude of its provisions?

VI. THE ARMIES NEED NOT EAT

44 See, e.g., U.S. Gen. Acct. Off., Acid Rain, Emissions Trends and Effects in the Eastern United States, GAO/RCED-00-47 (2000) (concluding that emissions of nitrogen oxides—one of the two causes of acid rain—remained at the same levels during the decade after the allowance market was established, and that emissions of sulfur dioxide, the other major cause, declined by only 17%). Even more interesting, the administration of New York State’s conservative Republican governor, George Pataki, recently concluded that the acid rain trading program has failed to avert damage to New York’s Adirondack region because the Midwest utilities that are the source of the emissions that form acid rain have been able to purchase enough allowances to continue to emit at a high rate. Governor Pataki successfully persuaded the state legislature to pass a law to prohibit the sale of allowances by New York utilities to utilities in other states. See Liam Pleven, Limit on Right to Pollute. Bill to discourage selling of credits, Newsday, May 1, 2000, at A07.

45 For example, in the mid-1990’s, EPA estimated that some 79% of the nation’s worst Superfund sites were located near residential neighborhoods. Letter from Elliott P. Laws, Asst. Administrator, U.S. EPA, Office of Solid Waste & Emergency Response, to John D. Dingell, Chairman, U.S. House of Representatives, Committee on Energy & Commerce (Jan. 28, 1994) (copy on file with author) (estimating that “79% of sites have residential land use surrounding them”). Because Superfund sites mark the boundaries of past industrial development, this figure has implications not just for the abandoned dumps, but for ongoing manufacturing activities.
As mentioned earlier, the crusaders are deeply enamored of the idea that once the battle is done, the transition to the new kingdom will be painless. They simply do not acknowledge that any army brought in to occupy the kingdom will need substantial resources to maintain the new king's reign. The crusaders look the other way as the old army struggles to make do with shrinking rations and deteriorating equipment.46 Because they are so much more noble, and infused with a visionary light, the crusaders need not raise taxes on the people, risking their popularity in order to ensure that any new army gets fed.

Yet, as explained above, there is every reason to believe that a performance-based system would be expensive to operate, especially given the gaps in our knowledge regarding the nature and scope of pollution, much less the harm it causes to public health and the environment.47 A major reason for technology-based regulation is our uncertainty about the amount, characteristics, transport, and fate of pollution. We opt to control as much pollution as state-of-art technology can manage because we are not sure what levels are harmful, much less whether those levels are reached in the ambient environment. Thus, we have invested relatively little in a system of monitors, and even less in investigations of the toxic characteristics of common pollutants.

If we abandon technology-based controls in favor of a performance-based system without a substantial reinvestment in the gathering of such information, the result will be backsliding, perhaps on a catastrophic scale.

46 EPA funding was cut by 42% during the first term of the Reagan Administration. Beginning in 1984, the Agency's budget has experienced modest increases, small cuts, or has remained stable. However, adjusting these figures for inflation reveals that total outlays have remained relatively constant since 1984, despite extraordinary expansion of the Agency's statutory mandates. See GPRA II, supra note 29, at 10,563. EPA administrators have a long tradition of silent stoicism in the face of the Agency's crippling budget deficits, at least while they are in office. However, in a refreshing display of candor, the Agency's first administrator, William Ruckelshaus, minced few words in describing the crisis once he had left:

Currently, some members of Congress seek to stop EPA from doing what previous Congresses have mandated it to do, by refusing to give it the funds to act. That is a little like cheering the launch of an airplane bound from New York to Los Angeles while only giving it enough gas to reach Chicago, and then decrying the crash as further evidence of pilot ineptitude.

Ruckelshaus, supra note 17, at 25.

47 The yawning gaps in the information we have available regarding the state of the ambient environment and the toxicity of common chemicals are discussed, supra notes 40-41, and accompanying text.
It is one thing for the crusade to choose lofty goals, quite another for it to shift course midway if those goals remain elusive, and yet another for it to lack the information needed to realize that such a shift in course is necessary.

It is not unusual for grand campaigns to ignore the distasteful realities of victory, and the kingdom's subjects undoubtedly suspect that life under the new king will also have its down sides. Given this native-born cynicism, are there any implications of denying unpleasant realities until they are at hand?

Two spring to mind. First, the grandiosity of the myth that the new kingdom will survive on goodwill and uplifted spirits gives the loyal opposition more incentive to resist because it suggests that the second generation of environmental policy will roll back traditional regulation without spending the money to put an effective alternative in its place. The loyal opposition suspects that performance-based regulation will consist of empty aspirational statements like "making surface waters fishable and swimmable again" and that the government will never bother to check on the environment's actual condition, much less take concrete steps to improve it.\(^\text{48}\) Progress will be lost, and the kingdom could even return to the Dark Ages.

The second implication is that the crusaders may be delusional and, as a result, unprepared to exercise power. Crusaders have spent so much energy debunking the complexity and rigidity of the current system that they have given precious little thought to what will take its place. They are as ill-equipped to rule as they are shallow in their theories of government.

The resources we commit to environmental protection stand at virtually the same level of actual dollars as they did in the mid 1980s, before a dozen expensive new programs were launched.\(^\text{49}\) To vilify the law without acknowledging the effect of these dramatic shortfalls may be necessary to inspire the crusaders but cannot prepare them to rule. All of these problems are compounded fifty-fold by the crusade's commitment to the appointment of princes, each of whom would be given the autonomy to rule in far-flung portions of the kingdom.

VII. WE DO NOT NEED A SINGLE KINGDOM

Assuming that the new king will reign from the bottom up, convening village councils to make decisions in lieu of engaging large armies in

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\(^{48}\) For a discussion of EPA's tendency to rely on such euphemistic statements in planning performance-based approaches, see \textit{GPRA II, supra} note 29, at 10,570–71.

\(^{49}\) For a graphic depiction of such expenditures, see \textit{GPRA II, supra} note 29, at 10,567; for a description of the mandates issued since 1984, see \textit{GPRA II, supra} note 29, at 10,568–69.
battle, the next chapter in the myth is both logical and obvious: the king need not rule with an iron hand from the throne, but rather is in a position to encourage the dispersal of power to his most trusted allies in the field. Otherwise known as devolution, this portion of the myth tells of the gallant deeds that can be done by princes who are close to the people, in particular the EPA's counterparts at the state and local levels.\footnote{See, e.g., Butler & Macey, supra note 2 (urging radical devolution of authority to the states).}

Sensing the shifting of power beneath his feet, the old king has hastened to placate the princes, lest too many defect to the service of the new king.\footnote{Although strains in the federal/state "partnership" have preoccupied most EPA administrators, the deterioration of the EPA's relationship with the states, and the Clinton Administration's efforts to placate rebellious state officials are a central feature of the EPA's recent history. For a description of those tensions, see Margaret Kriz, Feuding with the Feds, 27 NAT'L J. 1598 (1997). For insight into the EPA's efforts to repair these fissures through the National Environmental Performance Partnership Program, see Joint Statement and Joint Statement Explanation, supra note 16.} This development has pushed devolution to the forefront for both the reigning monarchy and the crusade. The old king has given the strongest princes freedom to set their own priorities, with the rules of the kingdom only one factor to consider when ruling at the local level. Notably, this unilateral effort to change the law by administrative fiat is a crucial aspect of the plot to slowly poison the old king, and he has therefore become a tool used in his own destruction.

The most aggressive princes have seized the opportunity to hasten the advent of a new regime, pursuing an assortment of experiments with the market mechanisms touted by the crusaders.\footnote{See, e.g., Status of EPA's Reinvention Efforts and the State/Federal Relationship: A State Perspective: Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce, 105th Cong., 1st Sess. (1997) (reporting on the status of state reinvention efforts and some states' frustration with EPA's reaction to those initiatives).} Unfortunately, aggression does not necessarily translate into competence. Leaders among the princes have emerged on the basis of ideology rather than any well-founded evaluation of their past performance. Even if their experiments are in the best tradition of the states as laboratories of democracy, there is no systematic and objective forum for evaluating their success. Devolution, then, cannot help but assume the trajectory of an unguided missile, as opposed to a more democratic and effective approach.\footnote{For a critical analysis of the implications of unrestricted devolution, see Devolution, supra note 16; GPRA I, supra note 29.}

These developments place the loyal opposition firmly in an awkward position. Opposing "democracy" is a non-starter. On the other hand, there is no question that many princes lack the capacity to supplant the
traditional regulatory regime. Up until this point, the premise of the old king's reign was that princes receive delegated authority only for as long as they are able to implement the law effectively.\textsuperscript{54} If they cannot, the old king is not just authorized, but required, to withdraw that authority.\textsuperscript{55} But he has never done so. In fact, funding shortfalls have brought us to the point that the old king may be unable to deliver on even his infrequent threats to return power to the central throne.\textsuperscript{56} This reality is so apparent to the princes that they sometimes turn the tables on the old king, threatening to return their delegated authority if he pushes them too hard.\textsuperscript{57} In this atmosphere, there is very little reason to be confident that the princes take the place of the old army, so the condition of the environment will remain the same.

As for their subjects, so long dependent on the army's benign protection, what will happen to them? Their future is the last chapter of the myth that culminates the glorious crusade.

VIII. THE SERFS CAN LIVE OUTSIDE THE CASTLE

The old king's belief in the Tragedy of the Commons, combined with the intrinsic complexity of environmental problems and the substantial resources of those that pollute, have made the kingdom a feudal society.


\textsuperscript{56} Whether EPA has the capacity to deliver on such threats is a controversial proposition. For contrary views, see U.S. GEN. ACCT. OFF., EPA AND THE STATES: ENVTL. CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP 21, GAO/RCED-95-64 (1995) (arguing that EPA would be hard-pressed to assume responsibility for withdrawn delegations); NAPA PRIORITIES, \textit{supra} note 1, at 76–77 (arguing that although there are fiscal and political pressures that constrain EPA "recapture" of inadequate state-run programs, the Agency has "sufficient national capacity to operate non-delegated programs centrally").

\textsuperscript{57} \textit{See}, e.g., \textit{Drinking Water: Reilly to Meet with Governors to Consider "Crisis" Over Funding, State Primacy Issues}, 23 ENV'T REP. 645 (June 12, 1992) (describing threats by key states, including California, to return drinking water programs to EPA because new rules would be too expensive to implement, and then-Administrator William Reilly's efforts to forestall such developments).
Like all such societies, the backbone of this one is a population of serfs who till the soil peacefully, trusting the king to take care of difficult technical problems. Having decided to beat their own swords into scepters, the crusaders have decided that they no longer wish to pay for such protection, and instead propose to push the serfs out of the castle, sending them to camp in the forest around it where they would be compelled to fend for themselves in most matters of state.

In the forest, the story continues, the serfs will find some dragons, which they must slay through patient negotiations, not by force. Helping them in this endeavor will be the creators of the old dragons—industries large and small, that stand ready to modify their behavior if the serfs will do the same.

There is no more discouraging spectacle than the circumstances of the serfs in this context. Because they must grow their food, raise their young, and engage in normal commerce, few serfs have the resources to attend village councils at all the times they are meeting, leaving this job to the relatively affluent or elderly among them. At the threshold, then, the civic republic is not a perfect democracy but rather an extremely limited test of the ability of a few self-selected, well-meaning individuals to metamorphose into highly sophisticated technocrats, virtually overnight.

Serfs designated in this manner often raise the sensitive issue of technical support, in ample supply among the dragon keepers but virtually unavailable to the serfs. They are told to trust emissaries from the king or his princes, who arrive from a great distance and have a vested interest in getting the serfs to go along with the dragon keepers. After days, months and years enmeshed in the deliberations of the village council, it is only human for the serfs to wish to become part of the solution rather than part of the problem. But again, only the naive or duplicitous can believe that their consent in such circumstances should serve as the final word on the rules used to govern the kingdom, or for that matter, the safety that all the serfs deserve.

Of course, the reign of command and control did not spring full-blown

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58 This approach is typical of the most extreme versions of civic environmentalism. See, e.g., Sabel et al., supra note 35 ("[C]itizens now face the daunting task of determining what should occur in their backyards . . . [T]hey must transform their traditionally antagonistic relationship with experts into partnerships . . . to determine what the tolerable activities are . . . they need to fuse the broad experience of professional practitioners with the contextual intelligence only citizens possess.").

59 For a critical account of how this approach has played out in the context of the high-profile Project XL, see Emperor, supra note 34, at 10,532–35; Dangerous Journey, supra note 39, at 144–46.

60 See Dangerous Journey, supra note 39, at 145–46 (describing these demands by grassroots activists, and their ultimate futility).
from the old king's brow, but was instead motivated and strengthened by
the passionate interest of the serfs in a free and wild natural
environment.\footnote{Even the most vehement crusaders ignore these sentiments at their peril. See, e.g., Lee, \textit{supra} note 21, at A6 (describing warnings by Republican Party political strategists regarding the dangers of appearing hostile to environmental protection in popular elections).} The loyal opposition would be the first to concede that
there is both a time and a place for grassroots democracy, especially with
respect to the fundamental goals pursued by the kingdom. But the
difficulties that arise when ordinary citizens are asked to implement the
details of these broad concepts cannot be overcome without expenditures
of time and money that will never be available.\footnote{For a discussion of what it would mean to truly involve grassroots citizens in such decisionmaking, on equal terms with government and industry, see \textit{Dangerous Journey}, \textit{supra} note 39, at 180–83.} To perpetuate this final
myth is worth no more or less than the disillusionment it breeds in the
people.

\textbf{IX. CONCLUSION}

Environmental protection as America knows it today is a dynamic
system that has developed at a breathtaking pace. The more we know, the
less we realize we know, and the more we achieve, the more we realize we
are falling behind.

In a sense, the second generation crusade is but the latest
manifestation of the forces that have tempered populist environmentalism
since the nation was created. It is the nature of our system to constrain
destabilizing swings in government policies, and perhaps we can count on
those checks and balances to work again. Yet there is no escaping the fact
that myths must eventually give way to a different reality, and the real
question is whether that reality will be better or worse.

The world has many examples of societies that never bothered to tame
certain first generation dragons and are now paying a staggering price.
We started so far ahead of the game that we have an ample, but not
endless, margin for error. In the end, perhaps the most we can hope for is
that we do not become so deluded by mythology that we lose that hard-
earned ground.