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The Moral Limits of Jurisdiction

Beau James Brock
Harold Leggett

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The Moral Limits of Jurisdiction

As the states and the public face new rules on emissions under the Clean Air Act, the authors find that environmental policy devoid of economic feasibility equals ethical bankruptcy by policymakers to the detriment of all citizens and their economic liberty.

Harold G. Leggett
Beau James Brock

Any policy that seeks to improve the quality of life must spring from the hearty trunk of the community in order to support the diverse boughs and flowering crown of society. This isn’t only metaphor but reality: the Environmental Protection Agency is attempting to reduce emissions of ozone, particulate matter, and greenhouse gases using standards developed without real consensus and without fully understanding their impact on citizens and on states charged with maintaining compliance with the Clean Air Act. The agency is driving initiatives through its own internal policy process to achieve a political end, potentially causing our citizenry’s limbs to break under the weight while undermining its root principles.

The American people do not see our republic as infallible. An early example came in 1798, when both Virginia and Kentucky passed resolutions of protest to meddling from Washington, declaring, “The rightful remedy against all unauthorized acts done under color of [law] against the states was a nullification by those sovereignties.” These protests took on heightened implications in 1832 when South Carolina, in decrying the economic inequities caused by the protectionist tariffs designed to support fledgling northern manufacturers, passed a nullification ordinance. John C. Calhoun detailed the political and legal basis of nullification and what it meant for the state and the rest of the country: “The crisis stemmed from the ‘radical error’ that the general government is a national, and not, as in reality it is, a confederated government.”

This sectional economic struggle reached fever pitch when the governor of South Carolina called for volunteers to defend the state in case of invasion, and President Andrew Jackson responded with equal swiftness, declaring, “Nullification [is] treason against the United States.” The felling of the tree that is our republic was derailed by a political compromise on the amount of the tariffs.

But “states rights” is no longer a code phrase for denial of civil liberties, and nullification has returned as a real weapon in defense of environmental federalism. According to the Tenth Amendment Center, as of last October some 37 states have introduced “state sovereignty resolutions” and seven have passed them. Clearly, to return to our metaphor, boughs are about to break.

The lack of full public participation in environmental policymaking, which includes not only contributions from citizens but from corporations as well, has never been more evident than in the ongoing unilateral agency actions to strengthen National Ambient Air Quality Standards for two criteria pollutants, ozone and particulates, and to restrict emissions of greenhouse gases for the first time.
The last action may be the most troubling. Last year EPA declared under Section 202(a) of the Clean Air Act that “greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare.” The agency claimed it issued its endangerment finding as an administrative requirement to the order posed by the Supreme Court decision in Massachusetts v. EPA in 2007. However, the Court did not require such a finding. In fact, the Court held that “we need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding. The statutory question is whether sufficient information exists to make an endangerment finding. We hold only that EPA must ground its reasons for action or inaction in the statute.”

Bitter protests follow finding

After the agency’s proposed endangerment finding in the spring of 2009 and before it finalized the finding last December, it did accept comments from the public concerning possible action. However, review of the agency’s responses to those comments shows an utter disregard for any policy determination except for the path it had ordained. In perfunctory responses to questions concerning the economic impact of regulation, EPA smugly stated, “Commenters should take up their concerns with Congress.” But there were bitter protests from not only the energy industry, which might be expected, but also affected states. Texas Governor Rick Perry voiced his strong opposition to the endangerment finding, stating, “EPA relied most heavily on the major assessment reports of both the Intergovernmental Panel on Climate Change and the U.S. Climate Change Science Program. EPA took this approach rather than conducting a new assessment of the scientific literature.” He further stated, “I vehemently disagree that these reports ever provided a sufficient legal basis for the EPA to find that natural gases, such as carbon dioxide, present any danger to public health or welfare.” He went on to cite the most recent findings of fraud and data manipulation in these reports and the need to maintain the integrity of the process.

Despite a clear need to proceed with the utmost caution in this important area, EPA has recently proposed a series of rulemaking and other policy actions addressing greenhouse gas emissions that will likely have dramatic and far-reaching negative impacts on the states. Even under EPA’s conservative estimate of the stationary source universe impacted by its actions, in Louisiana alone there are approximately 757 affected CAA Title V permits and more than 6,000 additional minor sources that would now be subject to increased regulation. In a letter to EPA Administrator Lisa P. Jackson, the Louisiana Department of Environmental Quality questioned the agency’s proposed use of administrative processes as appropriate mechanisms to address global warming, noting, “The CAA requires EPA to identify specific pollutants. While precursors of specific pollutants may be regulated, carbon dioxide equivalents are not precursors and no specific criteria pollutant has been identified.” Prior to the promulgation of any rule or final policy action that could result in the regulation of greenhouse gas emissions at stationary sources, LDEQ requested EPA to quantify the costs and benefits.

But in the case of ozone and smog, EPA has stated in a fact sheet, “The Clean Air Act prohibits EPA from considering costs in setting or revising National Ambient Air Quality Standards.” When the agency came out with a “range” of acceptable NAAQS it placed political expediency above sound science. How can the agency expect the public to maintain confidence in its scientific expertise and its implementation strategies with hyperbole that “the sky is falling” and a closed fist as to the fiscal realities of such pronouncements? We must understand the moral limits of environmental jurisdiction that impact every American citizen. Instead, EPA issued this proposed rule with the time worn cliché of “protecting the children.” At the end of the day, environmental policy devoid of economic feasibility equals moral bankruptcy by policymakers and the detriment of all citizens and their economic liberty.

The level playing field

The sectionalism along geographical lines that confounded our founders (and persists to this day) is being replaced by diverse special interest lobbying. This parallels the rise of the corporation and non-governmental public interest organizations. Upon Teddy Roosevelt’s ascension to the presidency, he directly confronted the issue of corporate hegemony encroaching ever more upon the fabric of our society. In a speech delivered a year into his first term, Roosevelt said the United States must address business’s impacts with evolutionary, not revolutionary, means. “If we are to accomplish any good at all it must be resolutely keeping in mind the intention to do away with any evils in the conduct of big corporations, while steadfastly refusing to assent
to indiscriminate assault upon all forms of corporate capital as such. The line of demarcation must always be on conduct, not upon wealth.” In environmental policy, our initiatives must always be cognizant of this maxim and set our path toward justice through evolutionary means without debasing our cause in flailing at capital itself.

Here then is the question of the level playing field which confronts us now in the policy considerations of new Clean Air Act rules for greenhouse gases and tighter air quality standards for criteria air pollutants. Will our nation consent to new environmental rules that will diminish our citizens’ quality of life and jeopardize the economic viability of our industrial base?

Our American form of government is a highly complex machine that daunts the uninformed, challenges the enlightened, and castigates those whose rhetoric is found to be without substance. Regardless of the cynical talking heads who dominate our airwaves, our nation is not a paternalistic oligarchy, and our citizens will not tolerate any attempts to convert its workings to make it so.

However, is the fear of environmental socialism a rational one? One cannot discount the Obama administration’s public agenda on health care, the socialist form of delivery, and its precedents in Great Britain and Canada. Great Britain, under a Labor Party government, embraced these socialist reforms during the post-war 1940s as their nation devolved from great power to the brink of a commercial collapse of confidence. Churchill, for the Conservative Party minority, spoke out against the revolutionary specter of socialism, stating, “Unless we free our country while time remains from the perverse doctrines of socialism, there can be no hope for recovery.”

There is no question we must advance environmental standards that improve every American’s quality of life, but we must not succumb to blind adherence to political rhetoric devoid of sound science. The citizens of this land will not idly procrastinate when their livelihoods are impacted, when transportation costs tear through supermarket aisles, and high fuel costs chill their homes and deprive them of basic freedom of movement in their vehicle.

A commercial bill of rights

If the federal government persists on a path of greater and greater abridgement of commercial liberties, the response from the people of this country may be a call to action and defend their right to work in a free society through a commercial bill of rights. The establishment of clearly defined boundaries of federal power may be the only true protection for economic predictability, and thus, viability for American corporations and by inference the American worker. This list may include the following:

- Congress shall make no law concerning environmental quality standards unless they are based on sound science and are practical, consistent, and manageable in their implementation;
- Any laws to be established by Congress shall fully account for due process, the mechanisms for just and fair enforcement, and the critical need to update existing standards which no longer are protective of human health and the environment;
- All environmental permits issued by or under the auspices of the federal authority shall, henceforth, be analyzed and considered, including fee structure, not by the size of the facility, but by the risk of potential harm posed to the public by emissions or discharges during its ordinary operation;
- All emissions and discharges from any facility shall be accounted for in annual reporting to governmental authorities, and facilities that successively reduce the footprint of this pollution will qualify for administrative extensions of their existing permits;
- Incorporated municipalities and county governments shall not be subject to unreasonable civil penalties issued by governmental authorities which are only borne by innocent citizens;
- All corporations operating under articles of incorporation filed in our country, regardless of their commercial wealth or size, are entitled to protection from frivolous lawsuits filed by governmental officials or third parties suing under the color of environmental legal authority and thereby are entitled to recover any and all legal fees in defending any suit found by a court to be frivolous, vexatious, or devoid of good faith;
- Corporations and sectors of business shall not be targeted for civil enforcement by our government and are entitled to fair and equitable enforcement in maintaining a level playing field for all;
- No corporation that voluntarily discloses environmental violations, even knowing ones committed by its employees, shall be criminally liable if said disclosure is complete, forthright, and made in waiver of any and all legal privileges, and made prior to the official opening of criminal investigation by the government concerning the violations. All individual employees must be turned over in the disclosure and are subject to criminal prosecution to the full extent of the law; and
- The citizens of any state shall exercise their sovereign right to nullify any environmental law or rule of the federal government which imposes any standards, duties, or obligations upon its commercial interests that undermine the economic viability of its state and violate the sacred compact between sovereigns as prescribed in the Constitution. To ensure full democratic
participation, the proper mechanism for any nullification question shall only be by plebiscite or referendum by all eligible voters within the state.

This commercial bill of rights may signal the pendulum reversal that will ensue if the proposed environmental policies of the Obama administration are implemented without consensus. Leadership from the bully pulpit certainly has its place in our country, but a bold vision without due consideration of the cascading affects upon our nation’s commercial infrastructure is the very definition of economic anarchy. Only three months after assuming the presidency, Theodore Roosevelt, the original bully pulpit president, began our nation down the path of conservation of natural resources, and urged federal authorities to take a hand in protection of flora, fauna, and waters of our country. President Obama likewise has begun his tenure by stating, “Global warming is not just the greatest environmental challenge facing our planet — it is one of our greatest challenges of any kind. Combating global warming will be a top priority of my presidency, and I will attend to it personally.” But the citizens of Louisiana in particular will bear a heavy economic burden if the Obama administration’s air emission policies are enacted as presently advertised. According to economist Loren Scott, stockholders and taxpayers, often one and the same, would pay the heavier costs in depleted investment returns and higher gas pump prices. “That the people would fall for this is a great tribute to the economic illiteracy of Americans,” Scott says.

The Supreme Court, and its institutional obligation of final legal review, is designed since Marbury v. Madison to interpret, not make new laws or regulations, and within this obligation is the inherent decision whether to hear a case at all. These decisions do not come without great consideration and review, and when a writ of certiorari is granted by the Court, a ruling fundamentally should provide not only a final answer, but clarity to a host of similar and possibly divided issues around the country.

A recent Supreme Court case of much debate is Rapanos v. United States, a case involving wetlands and whether the EPA maintained the jurisdiction to bring civil enforcement proceedings against Rapanos for the alleged illegal filling of wetlands under the Clean Water Act. The resulting votes on the case were a highly divided court with a celebrated concurrence by Justice Kennedy that has unleashed a flood of unpredictability on both the regulatory and commercial development side of the debate on jurisdictional waters of the United States. It cannot be said the Court has done its duty by our nation if it resigns itself to intellectual machinations that not only fail to provide clarity, but instead subject all environmental stakeholders, regulatory bodies, and yes, even our courts themselves in to a significant vortex of confusion on a matter as fundamental as jurisdiction.

**Emperor’s Clothes or Stone Soup?**

In moving forward with impending major environmental initiatives, we as Americans must decide the path we will travel. Will we choose to marvel at the new coat of the emperor, and not dare to interject, even if we perceive it to exposing our commercial livelihood to the elements? Or, will we strive together, with government, industry, and environmental activists to feed our hungry village by combining our intellectual and social yields to produce practical, consistent, and manageable environmental solutions?

The answers we seek are only ones which will provoke more questions, such as to how clean can our waters be? How clear can our skies become? These are unanswerable without debate, without the ability to differ in opinion, and possibly without practical applications for everyone even today. For example, when the Clean Water Act was established, the policy spiritting the effort was to be made whole by the NPDES system. Most people do not even know what NPDES stands for, or simply get it wrong. Courageously, it stands for National Pollutant Discharge Elimination System. Its original purpose was to eliminate all pollutant discharges into waters of the United States in twenty years.

Instead, we have added countless unanticipated new point sources under the regulatory ambit and worked to identify sources of water degradation and systematically reduce pollutant loads through a complicated system of permitting, enforcement and modeling.

How will the law of unintended consequences affect future endeavors to reduce greenhouse gases and new standards for criteria air pollutants? If we do not engage on these issues and understand all stakeholders’ special needs and their critical value to our nation’s infrastructure, we may suffer the fate of tyrants. Never hearing the voice of the individual worker, we may eventually be overridden by the screams of the mob.

The choice is ours as citizens of this democracy. Do we continue to do our duty to actively participate in our democratic processes, and challenge environmental policy in Washington, or do we skulk away from the field, and abdicate our rights to a small band of elites (who may be wrong)? It is in the democratic process, conducted around a table where no prince sits at its head and no citizen sits at its foot, that policy will be effectively formulated that raises the quality of life for all Americans and emboldens the public confidence of our nation.