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# President Trump, the New Chicago School and the Future of Environmental Law and Scholarship

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# President Trump, the New Chicago School and the Future of Environmental Law and Scholarship

JASON J. CZARNEZKI AND SARAH SCHINDLER<sup>†</sup>

I want to say thank you to each and every one of you, because the EPA touches on the lives of every single American every single day. You help make sure that the air we breathe, the water we drink, the foods we eat are safe. You protect the environment not just for our children but their children. President Barack Obama, remarks to US Environmental Protection Agency (EPA) staff.<sup>1</sup>

Environmental Protection, what they do is a disgrace. Donald Trump, speaking about EPA.<sup>2</sup>

We're going local. Have to go local. Environmental protection – we waste all of this money. We're going to bring that back to the states . . . We are going to cut many of the agencies. Donald Trump, speaking about EPA.<sup>3</sup>

## 1 Introduction

NEPA, RCRA, ESA, CWA, CAA, FIFRA, TSCA.<sup>4</sup> What do all of these acronyms have in common? They are federal environmental statutes that

<sup>†</sup> We wish to thank Audrey Friedrichsen, Katherine Fiedler, Bridget Crawford, the Pace Law Faculty's Summer 10/10 Series, and the Colloquium for Environmental Scholarship participants for their insights on this project.

<sup>1</sup> Barack Obama, "Remarks by the President to EPA staff," The White House, January 10, 2012, available at [www.whitehouse.gov/the-press-office/2012/01/10/remarks-president-epa-staff](http://www.whitehouse.gov/the-press-office/2012/01/10/remarks-president-epa-staff).

<sup>2</sup> Diane Regas, "A Warning for Donald Trump: Gutting EPA Would Be Harder – And More Perilous – Than You Think," *Forbes*, November 17, 2016, available at [www.forbes.com/sites/edfenergyexchange/2016/11/17/a-warning-for-donald-rump-gutting-epa-would-be-harder-and-more-perilous-than-you-think/#1910edb32d92](http://www.forbes.com/sites/edfenergyexchange/2016/11/17/a-warning-for-donald-rump-gutting-epa-would-be-harder-and-more-perilous-than-you-think/#1910edb32d92).

<sup>3</sup> Tom Shoop, "Donald Trump's Plan for Cutting Government," Government Executive, February 26, 2016, available at [www.govexec.com/federal-news/fedblog/2016/02/donald-trumps-plan-cutting-government/126242/](http://www.govexec.com/federal-news/fedblog/2016/02/donald-trumps-plan-cutting-government/126242/).

<sup>4</sup> National Environmental Policy Act of 1969 (NEPA), 42 USC §§ 4321–47 (1969); Resource Conservation and Recovery Act of 1976 (RCRA), 42 USC §§ 6901–92k (1976); Endangered Species Act of 1973 (ESA), 16 USC §§ 1531–44 (1973); Federal Water Pollution Control

were originally passed by Congress in the 1960s and 1970s. (Yes, to the surprise of many, President Nixon was the “Environmental President.”) This influential group of federal environmental statutes has traditionally defined the substantive boundaries of the field of environmental law. They are the statutes that have historically made up the bulk of the standard environmental law curriculum, and many environmental law attorneys have focused on these statutes for their entire careers.<sup>5</sup> However, given the lack of new federal environmental legislation over the past forty years (at least in the traditional sense)<sup>6</sup> and the establishment of new research techniques, scholars, practitioners, and politicians have begun to redefine the field of environmental law: they have expanded the substantive areas that it includes, and the tools used to achieve its desired goals.

Recent presidents including Bill Clinton, G. W. Bush, and Barack Obama have refined how environmental law has been enacted and carried out. For example, due to Congress’s decades-long inaction on environmental issues and in the interest of abating the climate crisis,<sup>7</sup> President Obama employed both administrative law techniques and his executive authority to shape the implementation and enforcement of our existing environmental laws: the Clean Power Plan was created under the Clean Air Act (CAA); the Waters of the US Rule was created under the Clean Water Act; and the Paris Agreement was entered into under the president’s plenary powers to manage foreign affairs and make executive agreements, the CAA, and existing treaties such as the 1992 Framework Convention on Climate Change. These actions represent expansive readings of the underlying statutes and are being challenged by those who want these statutes and powers to be read narrowly.

Indeed, under President Trump, the scope of public environmental law will most certainly narrow. Trump called Obama’s remark, that

Act (Clean Water Act, CWA), 33 USC §§ 1251–1388 (1972); Clean Air Act (CAA), 42 USC §§ 7401–7671q (1970); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 USC §§ 136–36y (1910); Toxic Substances Control Act (TSCA), 15 USC §§ 2601–97 (1976).

<sup>5</sup> When one of the authors of this chapter worked at a large national law firm in the Environmental Law practice group, she interacted primarily with these federal statutes.

<sup>6</sup> See David W. Case, “The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication” (2014) 25 *Duke Environmental Law & Policy Forum* 49.

<sup>7</sup> We note exceptions, among others, of the Clean Air Amendments of 1990, the reforms of the Toxic Substances Control Act, 15 USC §§ 2601–97 (1976), in The Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114–182, 130 Stat. 448 (2016), and the Microbead-Free Waters Act of 2015, Pub. L. No. 114–114, 129 Stat. 3129 (2015).

global climate change is one of the greatest threats facing the United States and the world, “one of the dumbest statements that [he’s] ever heard,”<sup>8</sup> and he has expressed a desire to diminish the role of the EPA and withdraw many of Obama’s environmental regulations, with the help of EPA Administrator Scott Pruitt. Thus, it seems likely that the future of environmental law will depend not upon traditional federal command-and-control legislation or executive branch maneuvering, but instead upon activating environmentalism through expanded substantive areas and innovative regulatory techniques that fall outside the existing, traditional norms of environmental law and legal scholarship.

This chapter is an attempt to acknowledge this monumental change, recognizing that these barriers to traditional environmental regulation have and will continue to force an expansion in the boundaries of environmental law and legal scholarship, and in our approaches to environmental regulation. Specifically, the chapter suggests the following in response to the lack of new “traditional” environmental law: (1) environmental law will continue to expand as a discipline and scholarly area of inquiry to include new subfields outside the traditional fields of air quality, water quality, and pollution control to attack environmental problems;<sup>9</sup> and (2) environmental law will continue to focus on alternative methods of environmental regulation by expanding regulatory techniques, expanding the notion of what can be considered a regulated entity beyond that of large institutional stationary sources, and – in light of the new presidential administration – moving away from public environmental regulation and toward private environmental governance.

Section 2 of this chapter considers the expanding notion of what constitutes environmental law. It explores the ways in which environmental lawyers and scholars have expanded substantive boundaries to include subfields outside of the traditional areas of air and water pollution, toxics, and natural resources law to include energy law, local land use law, food and agriculture law, global environmental law, and animal law.

<sup>8</sup> Tal Kopn & Heather Goldin, “Donald Trump: Obama Climate Change Remarks One of ‘Dumbest Things’ Uttered in History,” CNN, November 30, 2015, available at [www.cnn.com/2015/11/30/politics/donald-trump-obama-climate-change-dumbest-thing/](http://www.cnn.com/2015/11/30/politics/donald-trump-obama-climate-change-dumbest-thing/).

<sup>9</sup> Ours is not an attempt to create a restatement of existing environmental law or a taxonomy of environmental law. See Tracy Hester et al., “Restating Environmental Law” (2015) 39 *Columbia Journal of Environmental Law* 1; Todd Aagaard, “Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy” (2010) 95 *Cornell Law Review* 221.

Section 3 considers the ways in which environmental law scholars, lawyers, and policy makers (both politicians and some industry players) are pursuing alternative methods by which to regulate environmental harms. While this change has been building for a number of years, it seems to have taken on new urgency in light of the Trump administration's views regarding the role of the federal government in protecting the environment. A new wave of scholars has been seeking to broaden the environmental law field beyond the methods employed by the aforementioned traditional federal statutes. These new regulatory techniques are part of what Lawrence Lessig describes as the "New Chicago School."<sup>10</sup> The idea is that federal, state, and local governments are not limited to traditional lawmaking to achieve regulatory goals; rather, they can be more creative in their environmental regulatory approaches by considering the way that law interacts with other behavioral controls such as markets, social norms, and architecture.

Section 4 considers more specifically the role that the Trump administration will have in changing the way that policymakers and advocates approach environmental regulation. Here, we suggest that we might see a return to the "Old Chicago School" methods. While the New School has urged law to operate indirectly and in conjunction with other forms of regulation, the Old School looked to alternatives to law; it sought ways to regulate in the absence of law. Here, we see an important role for private individuals and private industry to do more through the use of these alternative regulatory approaches (and for legal scholars to write about them) even if law and lawmakers turn their backs on the project of environmental protection.

This chapter asserts that the environmental field is changing and expanding – with respect to the substance that is being taught and written about in the legal academy, the regulatory devices that governments are using, and the role of private actors and lower levels of government – as a response to a lack of federal congressional initiative on environmental issues. These approaches will likely continue, given the Trump administration's apparent view that environmental regulation should not be the purview of the federal government. This change in environmental law is real and increasingly necessary. And by acknowledging that there are now more answers to the question "what is environmental law and what tools do we use to impose it," we can more confidently navigate the new

<sup>10</sup> Lawrence Lessig, "The New Chicago School" (1998) 27 *Journal of Legal Studies* 661.

administration and its potential lack of interest in environmental protection.

## 2 Expanding the Substantive Boundaries of a Discipline

The traditional canon of environmental law has included the subjects of air pollution, water, toxics, and endangered species under a series of federal statutes primarily passed and amended more than four decades ago, such as the Clean Air Act, Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Even today, we are dealing with modern-day environmental problems like climate change and wetlands protection through relatively old statutes like the Clean Air Act (via the Clean Power Plan) or Clean Water Act (given the Water of the US Rule), as attempts to expand or substantially revise federal environmental law have not come to pass (e.g., failure of the Clean Water Restoration Act bill to gain sufficient congressional support).

The substantive evolution of the canon in adding new subfields is a result of the lack of new environmental statutes in the traditional fields (e.g., air and water), as well as the realization that the traditional subfields, without revision, cannot handle modern environmental problems. To end this stagnation, scholars and policy makers now see a need to be creative in expanding the field and, as discussed in Section 3, the lens through which one views how the government, private entities, and individuals can and should create environmental reform. This section lays out the substantive subfields that have grown beyond the Eastern US focus of air, water, and other forms of pollution law, and the Western US public lands and natural resources law tradition.

Perhaps the first subfield to become firmly planted in the environmental and natural resources law tradition was energy law. In light of global climate change, interests in greenhouse gases, renewable energy, fracking, and energy distribution grids have expanded the field's scope beyond oil, gas, and electricity rates. And in 2013, the Association of American Law Schools retitled its Natural Resources Law section to include Energy Law. In other words, energy law was an early expansion to the discipline of environmental law that we now have more recently seen in the areas that follow.

The current wave of the expansion of environmental law first includes the incorporation of land use law, which has itself grown to include urban planning and sustainability. For example, a number of land use scholars

have written about sustainability devices like green building, the redevelopment of shrinking cities, development and redevelopment in disaster zones, and tools for adaptation and mitigation that local governments can use in the face of climate change.<sup>11</sup> There has also been a rise in scholarship about smart growth, and the recognition that dense development is sustainable development. All of these land use and planning tools can create more environmentally friendly places and are a key part of this new, expanded field of environmental law.

Second, with the rise of “locavores” and books like Michael Pollan’s *Omnivore’s Dilemma*, food and agriculture law and policy have risen to national prominence and interest among law students and law scholars. Two new casebooks on food and agriculture law have been published,<sup>12</sup> with at least one more on the way, and (Master of Laws (LLM)/certificate programs and food law centers and clinics have proliferated in American law schools.<sup>13</sup> There has also been a rise in food law scholarship and conferences, and there is now a food law professor listserv.

Third, there has been a transition from traditional international environmental law, focusing on international agreements like the Montreal Protocol, to “global environmental law.”<sup>14</sup> Environmental law must now contend with the globalization of environmental harm and the democratization of

<sup>11</sup> See, e.g., Keith Hirokawa, “Local Planning for Wind Power: Using Programmatic Environmental Impact Review to Facilitate Development” (2010) 33 *Zoning and Planning Law Report* 1; Keith Hirokawa & Ira Gonzalez, “Regulating Vacant Property” (2010) 42 *Urban Lawyer* 627; Sarah Schindler, “The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions” (2012) 83 *University of Colorado Law Review* 471 (2012); Sarah Schindler, “Following Industry’s LEED: Municipal Adoption of Private Green Building Standards” (2010) 62 *Florida Law Review* 285; Lisa Grow Sun, “Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City” (2011) *Brigham Young University Law Review* 2157.

<sup>12</sup> Susan Schneider, *Food, Farming, and Sustainability: Readings in Agricultural Law* (Durham, NC: Carolina Academic Press, 2011); Mary Jane Angelo, Jason J. Czarnezki, & William S. Eubanks II, *Food, Agriculture and Environmental Law* (Washington, DC: Environmental Law Institute, 2013).

<sup>13</sup> Richard Lazarus, “Food Law Is the Next Great Area for Environmental Litigation” (2016) 33(1) *The Environmental Forum* (“For example, Vermont boasts of a degree in food law; Pace has a joint food law initiative with NRDC; UCLA has an exciting program for Food Law and Policy Studies; and even my own Harvard Law School has an active food law program, including a food law clinic”).

<sup>14</sup> “[G]rowing international linkages are blurring the traditional divisions between private and public law and domestic and international law, promoting integration and harmonization,” and leading to the creation of “global environmental law.” Tseming Yang & Robert V. Percival, “The Emergence of Global Environmental Law” (2009) 36 *Ecology Law Quarterly* 615 at 616 and 664 (noting further that “Global environmental law is an evolving set of substantive principles, tools and concepts derived from elements of

pollution sources,<sup>15</sup> and “environmental legal norms have become increasingly internationalized.”<sup>16</sup> This blurring has occurred not only in sectors of law but also in substantive environmental issues and processes to ameliorate environmental degradation. However, the globalization of environmental law and policy is not without irony. Pollution sources remain domestic and increasingly localized despite international impacts. Local cultures of consumption have spread throughout the globe. These factors have necessitated international cooperation on environmental and public health issues, even in traditionally domestic fields like food safety, and have forced policy makers and scholars alike to renew their focus on the developing world.

Fifth, animal law, with the help of the emergence of food and agriculture law, has developed as a subfield within the discipline. Animal law courses are now taught at most law schools, and dedicated animal law journals are filled with articles addressing the way that animals are currently treated under the law (mostly as property) and the protections (or, more often, lack thereof) that they are afforded. While much of animal law focuses on the animals themselves, there is also a tie to environmental law and sustainability, especially with respect to the Concentrated Animal Feeding Operations (CAFOs) in which most animals that are raised for food in the United States are kept.<sup>17</sup> These CAFOs result in runoff, contribute to global warming, and result in land use conflicts as development intrudes into formerly agricultural land. Some similar issues are raised by Right-to-Farm laws.<sup>18</sup>

Finally, we suspect, and perhaps predict, that other related fields will be accepted as subfields into the environmental law nexus and incorporated into the mainstream curriculum and legal scholarship. These fields might include sustainable business/corporate social responsibility, community and economic development, public health law, and international trade and the environment.

national and international environmental law. Yet, it also represents a significant shift in the evolution of environmental law field”).

<sup>15</sup> Jason J. Czarnezki, *Everyday Environmentalism: Law, Nature, and Individual Behavior* (Washington, DC: Environmental Law Institute, 2011), 141 (citing Timothy P. Duane, “Environmental Planning and Policy in a Post-Rio World” (1992) 7 *Berkeley Planning Journal* 27 at 31).

<sup>16</sup> Yang & Percival, “The Emergence of Global Environmental Law,” 615.

<sup>17</sup> See, e.g., David N. Cassuto, “The CAFO Hothouse: Climate Change, Industrial Agriculture and the Law,” *Animals & Society Institute Policy Paper*, 2010.

<sup>18</sup> Right-to-Farm laws intersect with nuisance and zoning law and are typically invoked when there are use conflicts in a given area.

While some traditionalists might cling to a vision of environmental law as defined by the aforementioned group of federal statutes, many emerging scholars and lawyers agree that the field has grown bigger in the way described in this section. Further, not only have we witnessed an expansion in the substantive nature of that which constitutes the field of environmental law, but we have also experienced growth in the nature of the tools that we use to protect the environment. The next section will address that change.

### 3 The New Chicago School and Regulatory Expansion

A new wave of environmental law scholars has taken a page from the New Chicago School. These scholars look, from a theoretical standpoint, to alternative forms of regulation such as shifting social norms and using the law to modify the architecture of the built environment to change behavior.<sup>19</sup> Lessig describes the New Chicago School as follows:

Both the old school and new share an approach to regulation that focuses on regulators other than the law. Both, that is, aim to understand structures of regulation outside law's direct effect. Where they differ is in the lessons that they draw from such alternative structures. From the fact that forces outside law regulate, and regulate better than law, the old school concludes that law should step aside. This is not the conclusion of the new school. The old school identifies alternative regulators as reasons for less activism. The new school identifies alternatives as additional tools for a more effective activism. The moral of the old school is that the state should do less. The hope of the new is that the state can do more.<sup>20</sup>

The alternative regulatory approaches that Lessig cites – markets, norms, and architecture – do not fall completely outside the scope of law but instead may be embraced by and used in conjunction with law.<sup>21</sup> For example, the law can be used to regulate markets, and markets then create

<sup>19</sup> See, e.g., Sarah Schindler, "Architectural Exclusion" (2015) 124 *Yale Law Journal* 1934; Katrina Fischer Kuh, "When Government Intrudes: Regulating Individual Behaviors That Harm the Environment" (2012) 61 *Duke Law Journal* 1111.

<sup>20</sup> Lessig, "The New Chicago School," 661.

<sup>21</sup> *Ibid.*, 672 ("These techniques of direct and indirect regulation are the tools of any modern regulatory regime. The aim of the New Chicago School is to speak comprehensively about these tools – about how they function together, about how they interact, and about how law might affect their influence. These alternative constraints beyond law do not exist independent of the law; they are in part the product of the law. Thus the question is never "law or something else." The question instead is always to what extent is a particular constraint a function of the law, and more importantly, to what extent can the law effectively change that constraint.").

change; the law can require educational programs that influence societal and industry norms; zoning laws can require certain features of the built environment that result in control over individual behavior.

Complementing the substantive boundaries discussed in Section 2, procedurally the new environmental law paradigm considers how law is (and should be) shaped, how behavior is altered, and it sometimes seeks to measure impacts empirically.<sup>22</sup> In other words, government action can and should influence norms (perhaps in a much stronger “push” rather than a Sunstein nudge as discussed in the Conclusion), take advantage of the rise of incentives and markets, and think differently about regulation. Thus, in addition to substantive boundary pushing, environmental law is now embracing alternative forms of regulations and expanding the scope of traditional government regulation. This section discusses the Old School and describes the New Chicago School and its application to environmental law.

### 3.1 *The Old School and the New School*

As it is traditionally understood, the Chicago School of legal thought asserts that economic efficiency should be the goal of law and policy. This well-known school of law and economics grew to prominence when many of its foremost proponents were professors or affiliated faculty at the University of Chicago School of Law.<sup>23</sup> Law and economics came to dominate discussions of legal theory and became a key framework through which many scholars began to analyze law and policy. This view also had a dramatic impact on Supreme Court opinions. When most legal academics hear the “Chicago School,” this is the history that comes to mind.

<sup>22</sup> Lisa Bernstein et al., “The New Chicago School: Myth or Reality?” (1998) 5 *University of Chicago Law School Roundtable* 1 at 11 (“Meares: Now, a final word on all this. One thing I can say about the New Chicago School, if there is one, is that when you are working with norms, you have to be very much concerned about empirical questions. It is very difficult to make predictions about what is going to happen. It is very labor-intensive. A very important part of this work is not just theorizing about the ways in which the standard conception of economics might be wrong, but also a willingness to go out there and do the legwork in the eleventh district in the city of Chicago, in the highest crime district in the city, and see what’s actually really going on.”).

<sup>23</sup> Robin I. Mordfin & Marsha Ferziger Nagorsky, “Chicago and Law and Economics: A History” (2011) Fall Edition, *University of Chicago Alumni Magazine*, available at [www.law.uchicago.edu/alumni/magazine/fall11/lawandecon-history](http://www.law.uchicago.edu/alumni/magazine/fall11/lawandecon-history).

Lawrence Lessig coined the term “New Chicago School” in a talk given at a 1998 conference on “Social Norms, Social Meaning, and the Economic Analysis of Law.” According to Lessig’s description, the Old Chicago School is more than mere law and economics. As he envisions it, the Old School focused broadly on seeking out alternative regulatory tools that could serve as substitutes for law. Of course, law and economics were an important piece of this, but the Old School more broadly sought to supplant law with these other forms of regulation, including markets, norms, and architecture.

As Lessig describes it, the New School examines these same tools but recognizes that they are inherently intertwined with law. We can, and should, use law not just to pass statutes or to ban certain activities but to create laws that will have the effect of altering norms, markets, and architecture. In this way, Lessig recognizes that governments can do more than merely “regulate” in the traditional sense. They can look to other forms of regulation to alter the behavior of the governed. Environmental law and environmental policy makers have been doing this for many years.

### 3.2 *The New Chicago School and the Role of Law*

The New Chicago School could be viewed as a new version of law and economics.<sup>24</sup> It does not seek to displace law with alternative forms of regulation; rather, it views each of those alternative forms of regulation as *subject* to law.<sup>25</sup> As Lessig noted, “Law can select among these various techniques in selecting the end it wants to achieve. Which it selects depends on the return from each.”<sup>26</sup> The key is matching the appropriate regulatory tool to the behavior or harm that should be abated.<sup>27</sup>

One question that this chapter seeks to answer is, does the New Chicago School exist? Well-known scholars like Eric Posner, Richard

<sup>24</sup> See Bernstein et al., “The New Chicago School,” 1 (wherein moderator Richard Epstein included himself as part of the “old law and economics” and referred to the New Chicago School as the “new law and economics”).

<sup>25</sup> Lessig, “The New Chicago School,” 666. See also Lawrence Lessig, *Code: Version 2.0* (New York: Basic Books, 2006), 123 (noting the regulatory constraints of the law, social norms, the market, and architecture).

<sup>26</sup> Lessig, “The New Chicago School,” 672.

<sup>27</sup> Czarnezki, *Everyday Environmentalism*; James Salzman, “Teaching Policy Instrument Choice in Environmental Law: The Five P’s” (2013) 3 *Duke Environmental Law and Policy Forum* 363.

Epstein, and Randy Picker were initially extremely skeptical of its existence,<sup>28</sup> blaming its label on a Jeffrey Rosen article in *The New Yorker*.<sup>29</sup> Indeed, the perception in 1998 was that this New School lacked coherent methodology.<sup>30</sup> To this point, Posner stated the following at a roundtable at the University of Chicago Law School:

Now, I'm going to tell a "New Chicago School" story about the New Chicago School. This is my prediction, which will occur, I would say, with twenty percent probability. Rosen chose to write about a handful of scholars [including Ellickson, Kahan, and Lessig, who are still leaders in this area of social norms literature] when a hundred could have been included in his article. This, of course, immediately engaged all the insecurities and jealousies that academics are famous for. What might happen now is that some scholars will write articles charging that there is nothing coherent, interesting, or new about the New Chicago School. But in order to make this argument, they are going to have to describe what the New Chicago School is. And as they describe it, gradually the School will take on meaning. Some will be embarrassed to be identified with such ideas and disassociate themselves. Other people will join the School and defend it. Gradually, over time, the New Chicago School will develop into

<sup>28</sup> Bernstein et al., "The New Chicago School," 30–31 ("Audience Member 9: Did any of you tell Jeffrey Rosen that there was no New Chicago School, or did he miss it? Epstein: He did not ask. Not only that, you've got to understand he did not quite understand the old Harvard school. His description of Langdell was, to put it mildly, wrong. One of the reasons you misconstrue novelty is you don't understand the past. If you haven't read the classical authors, you can describe them in two sentences and get them wrong. It's not necessarily perverse, but it is inaccurate. Picker: The story here is no school, no story. He's a journalist building up a story, and if the existence of a Chicago school is a useful fiction for doing that, I'm all in favor of it.").

<sup>29</sup> Jeffrey Rosen, "The Social Police: Following the Law, Because You'd Be Too Embarrassed Not To," *The New Yorker*, October 20 and 27, 1997.

<sup>30</sup> Bernstein et al., "The New Chicago School," 12–13 ("Posner: Now, what's the New Chicago School? Many of you know that the term was coined by Larry Lessig at a symposium last spring. My view is that there is very little to this school. There was very little at that time, and there is very little now. First of all, there is no coherence in methodology. As you can see, I like to use game theory, Tracey likes to use sociology, Randy uses computer-generated models, Dan uses a variety of sources. Second, there is no unity in normative implications. We all have different ideas about what one should do. It's not like the old Chicago School, or other schools, in which there was an ideological and normative label that was easily attached to it. The only thing that unifies us is subject matter. We all talk about social norms, although we use the term in different ways. We talk about how the government can affect people's beliefs. But people have been talking about these things for ten, twenty, thirty, forty, a hundred, a thousand years. So at the time that Lessig wrote this comment, my view was that his claim would die a deserved death almost immediately. And I think it would have except for the intervention of the all-powerful media.").

a coherent body of thought. So when that happens, there will be a New Chicago School.<sup>31</sup>

We suggest that Posner was right. This coherent body of thought is developing in the field of environmental law and has been embraced by new scholars, yet it remains in need of further definition. This chapter seeks to ensure that the “Posner Prophecy” comes true.

### 3.3 *Application to Environmental Law*

At least two components of the New Chicago School are gaining traction as it relates to environmental regulation and scholarship: (1) the expansion of the notion of regulated entities to include individuals and (2) the activation and changing of social norms through regulation. Another component progresses beyond these two and will be necessary due to the failure of public national action in the environmental arena: (3) the expansion of avenues for regulation such as local activism and private governance through public action, private initiatives, and public-private partnerships.

First, the individual can and should be viewed as a regulated entity in the context of environmental protection. In recent years, legal scholars and local governments have expressed interest in examining individual behavior and its impacts on the environment, and some have gone so far as to begin treating the individual as a polluter.<sup>32</sup> This is new because traditional environmental law has thought of large-scale industries and institutions as the polluters that should be regulated as opposed to individuals. The law is still struggling with whether and how to regulate individual actors and other small sources of pollution. For example, lawn mowers, leaf blowers, and watering hoses all seem puny when examined individually. However, individual environmentally harmful actions in the aggregate have significant environmental impacts; some states and localities have recognized this and have decided that more must be done to target regulation on these behaviors.<sup>33</sup> For example, anti-idling

<sup>31</sup> Bernstein et al., “The New Chicago School,” 13.

<sup>32</sup> Michael Vandenberg, “Order without Social Norms: How Personal Norm Activation Can Protect the Environment” (2005) 99 *Northwestern University Law Review* 1101; Michael Vandenberg, “Individual as Polluter” (2005) *Environmental Law Reporter*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=847804](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=847804).

<sup>33</sup> See Czarnezki, *Everyday Environmentalism*; Katrina Fischer Kuh, “Personal Environmental Information: The Promise and Perils of the Emerging Capacity to Identify Individual Environmental Harms” (2012) 65 *Vanderbilt Law Review* 1565.

regulation has been proposed by some legal scholars as a method to dramatically reduce carbon emissions.<sup>34</sup>

An advantage of direct regulation of individual action is that it makes the costs of regulation more transparent, though this may invite public or political resistance.<sup>35</sup> This resistance, however, should not be presumed to present an insurmountable obstacle to the use of direct mandates to regulate environmentally significant individual behaviors,<sup>36</sup> especially since such behaviors have significant environmental costs.

Second, environmental law can influence social norms. Jeffrey Rosen's 1997 article in *The New Yorker*, "The Social Police: Following the Law, Because You'd Be Too Embarrassed Not To," notes that social-norms theorists favor enlisting the government in ambitious programs of creating new norms, noting Ellickson's conclusion from *Order Without Law*: "People frequently resolve their disputes in a cooperative fashion without paying any attention to the laws."<sup>37</sup>

While Rosen described the movement as "still defining itself," he noted that it might "change the way we think about law and regulation in the twenty-first century."<sup>38</sup> Policy makers are already using both small-scale and large-scale regulation to shift norms leading to behavior change. Examples include requiring calorie-menu labeling, the installation of bike lanes, and allowing chickens in residential backyards. Often, major government initiatives are needed to change social norms. For example, recycling norms did not emerge from primarily bottom-up, informal, causal processes; governments passed laws in this area.<sup>39</sup> That said, norm change is often insufficient without the development of adequate and convenient infrastructure (what Lessig has called architecture). "In fact, increasing convenience is so effective that individual commitment toward the desired behavior bears little relationship to whether someone

<sup>34</sup> Michael P. Vandenbergh, Jack Barkenbus, & Jonathan Gilligan, "Individual Carbon Emissions: The Low-Hanging Fruit" (2008) 55 *University of California Los Angeles Law Review* 1701 at 1723–30 (calculating the environmental benefits of changes in idling behavior and describing the use of anti-idling laws in conjunction with public information campaigns to reduce vehicle idling).

<sup>35</sup> Katrina Fischer Kuh, "When Government Intrudes: Regulating Individual Behaviors That Harm the Environment" (2012) 61 *Duke Law Journal* 1111 at 1125–26.

<sup>36</sup> *Ibid.*

<sup>37</sup> Rosen, "The Social Police," 172–73.

<sup>38</sup> *Ibid.* 172.

<sup>39</sup> Steven Hetcher, "Norms as Limited Resources" (2005) 35 *Environmental Law Reporter* 10770.

will engage in it.”<sup>40</sup> That said, norm change is difficult and still not totally understood.<sup>41</sup> This empirical quandary forces us to question what role public law should directly play in norm change, and at what level and to what extent public law should simply influence and promote private and local innovation.

Third, due to the challenges of regulating large-scale individual action and the limits of norm change, two alternative avenues of regulation must be pursued: (1) encouraging actions by local governments that are in a better position to understand and change individuals in their communities and (2) promoting and supporting private environmental governance (e.g., sustainable business, corporate social responsibility, green and sustainable public procurement) through both public law, private initiatives, and public-private partnerships. The advantage of these options is that, while they help progressive values of environmental protection, they promote traditionally conservative values of supporting local control and promoting business innovation.

Local communities are key to norm change, especially in a large and diverse country like the United States:

In a heterogeneous liberal democracy, there’s often too much disagreement about social norms at the national level for the federal government to try to manipulate values without taking sides in the culture wars. This means that norms cascades of the future may come from partnerships between local governments and the traditional sources of moral values: local community groups, schools, and churches. And they may involve activities that bear little resemblance to traditional law enforcement.<sup>42</sup>

In particular, Katrina Fischer Kuh suggests that local governments are the key players in capturing individual harms, often through changes in physical architecture and through the use of traditional regulation to change social norms.<sup>43</sup>

<sup>40</sup> “The manner in which the expressive function of law works to transform norms is not clearly understood.” Ann Carlson, “Recycling Norms” (2001) 89 *California Law Review* 1231 at 1236.

<sup>41</sup> Andrew Green, “You Can’t Pay Them Enough: Subsidies, Environmental Law, and Social Norms” (2006) 30 *Harvard Environmental Law Review* 407 at 431.

<sup>42</sup> Rosen, “The Social Police,” 180–81.

<sup>43</sup> Katrina Fischer Kuh, “Capturing Individual Harms” (2011) 35 *Harvard Environmental Law Review* 155 at 166 (“The capacity of local governments to change the physical architecture of communities is an important way that local governments influence individual lifestyles and behaviors and the environmental harms they occasion. This also supports local involvement in climate mitigation efforts. However, while this Article incorporates local control over the built environment into its analysis, the

While individuals should be regulated entities as discussed earlier, private environmental governance in the corporate sector (what might be thought of as social norms for industry) will also need to gain traction, especially given the large carbon footprint of industrial activities.<sup>44</sup> Michael Vandenberg defines private environmental governance as “actions taken by non-governmental entities that are designed to achieve traditionally governmental ends such as managing the exploitation of common pool resources, increasing the provision of public goods, reducing environmental externalities, or more justly distributing environmental amenities.”<sup>45</sup> Importantly, he includes private standard-setting activities such as global private and labeling certification systems for consumer products and “bilateral standard-setting in the definition of private environmental governance, such as when private supply chain contracts include provisions that are designed to reduce the environmental harms arising from the suppliers’ operations.”<sup>46</sup> The inadequacy of public environmental law has led to a rise of certification systems like those established by the Marine Stewardship Council and Forest Stewardship Council, as well as private labeling schemes like dolphin safe tuna.<sup>47</sup>

Companies are additionally moving now toward true cost accounting of their supply chain and developing life-cycle costing methodologies, at least at some points in the supply chain to measure their carbon and environmental footprints, as well as to meet consumer demand for more environmentally friendly products. Also, public law can promote more eco-friendly supply chains and innovation in product development as, for example, recently done in the new European Union Public Sector Directive that encourages the purchasing of sustainable goods and services by public institutions:

It is no longer sufficient to assume that government is the only or even the best actor for many environmental problems. The available environmental instruments are not limited to those that governments have the legal

Article focuses on two different types of regulation of behavior: norm management and direct mandates.”). Ibid. 170 (“Significantly local governments possess community information important for ascertaining which concrete norms are feasible to activate and translate into behavior change in a community.”).

<sup>44</sup> Michael P. Vandenberg, “Reconceptualizing the Future of Environmental Law: The Role of Private Climate Governance” (2015) 31 *Pace Environmental Law Review* 382.

<sup>45</sup> Michael P. Vandenberg, “Private Environmental Governance” (2013) 99 *Cornell Law Review* 129 at 146–48.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid. 161–62

authority, expertise, and political will to implement. Positive law and government action are still very important, but private environmental governance is surprisingly important for many of the most pressing environmental problems. The key conceptual step offered by private governance is that public action is not the only way to achieve public ends. This is a deceptively simple proposition, but it is remarkable how often the question asked in public debates is “what can government do?” The existence of private governance suggests that the question should be whether a public or a private actor can be mobilized and whether a public or private governance option, or some mix of the two, will produce the desired outcome.<sup>48</sup>

Private environmental governance has the ability to influence corporate norms, and thus could be useful given the large environmental impacts of corporations. Going forward, due to the Trump administration’s hostility to public environmental law and its unwillingness to deal with the climate crisis, it seems that we must rely on private environmental governance.

#### 4 Conclusion – Donald Trump and a Return to the Old School?

The election of Donald Trump raises a number of questions. One of the most important for legal scholars is, what of the role of law? Given the cabinet nominations and appointments that President Trump has made, it is quite possible that both the executive and legislative branches of government will turn away from the use of law to regulate, at least in the traditional sense. Indeed, Trump’s former advisor Steve Bannon stated publicly that they were seeking a “deconstruction of the administrative state.”<sup>49</sup> Thus, the New School model – which seeks ways to use the law to alter norms, markets, and architecture – might no longer hold much force.

Thus, we believe that we might see a return to the Old School, where we must find ways to use norms, markets, and architecture directly, in lieu of law, to change behavior. This means reliance on local and community initiatives (the public itself rather than public law) and private behavior (changing personal choices and placing both external and internal pressure on industry action). And by focusing their scholarship

<sup>48</sup> Ibid. 198–99.

<sup>49</sup> Philip Rucker & Robert Costa, “Bannon Vows a Daily Fight for ‘Deconstruction of the Administrative State,’” *Washington Post*, February 23, 2017.

on these alternatives to traditional law, legal scholars can help to encourage these actions and increase public awareness of their benefits.

Rosen asserted that the “libertarian camp . . . is skeptical whether government can do very much to transform people’s taste, no matter how hard it tries.”<sup>50</sup> In contrast, “the more leftist liberal norm scholars . . . believe that an activist government can transform social norms on a national scale.”<sup>51</sup> The question now is whether liberal activism (from lawmakers, scholars, and citizens) combined with libertarian individualism can sufficiently influence environmental norms, markets, and the built environment to avoid a total environmental crisis in the face of climate change and a president who appears hostile to environmental interests.

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<sup>50</sup> Rosen, “The Social Police,” 176.

<sup>51</sup> *Ibid.* 179.