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Richard Stewart's Perennial Question: "How's This Going to Work?"

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A Symposium in Honor of Professor Richard B. Stewart
Panel on His Contributions to Administrative Law

The members of this panel were asked to assess Richard Stewart's contributions to administrative law, but my knowledge of that field is too fragmentary to capture the totality of his sweeping impact. I will instead focus on only a minor part of it, but in a way that, I hope, sheds light on why his overall impact has been so great. That minor part is his effect on one lesser scholar, me. Revealing his huge impact on my work over the decades will suggest how he has enriched the work of many around him, and has thereby improved the law.

I

My first encounter with Dick's scholarship came in the aftermath of my work at the Natural Resources Defense Council (NRDC) representing environmental groups in the litigation campaign to get the EPA to protect children from lead in gasoline. The authors of the Clean Air Act of 1970 had told voters that they had given the EPA a mandatory duty to issue rules that would fully protect public health from airborne lead.[2] The Second Circuit agreed with our complaint, which charged that the agency was failing to discharge its duty to protect health by 1976.[3] Although our courtroom victories did prod the agency to act a bit faster, EPA under both Republicans and Democrats did little during the 1970s in response to the threat to health from lead in gasoline.[4]

To understand what had gone wrong, I left NRDC for academia in 1979. The problem, I came to see, was that legislators of both parties had in 1970 loudly taken credit for the promise to fully protect health but had shifted to the agency the responsibility to deliver.[5] Meanwhile, some legislators, including progressive Democrats, found it politically convenient to quietly pressure

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[2] DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY AND SHORTCHANGES THE PEOPLE, 29–30 (2005).

[3] Natural Resources Defense Council v. Train 545 F.3d 320, 328 (2d Cir. 1976). The environmental law casebook by Professors Stewart and Krier criticized the decision on the grounds that Congress had not been entirely explicit about the agency's duty. RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY: READINGS, MATERIALS AND NOTES # # (2nd ed. 1978). That the judges so decided is understandable given Congress's promise on lead and the dreadful consequences of failing to keep it.

[4] Most of the cuts in lead in gasoline during the 1970s were to protect the emission control equipment in new cars, starting with the 1975 year. The agency had required new cars starting with the 1975 model year use unleaded gasoline; however, that was not to protect health, but rather to protect the emission control equipment needed to reduce emissions of other pollutants. My litigation aimed to reduce lead in the leaded gasoline used by the 100 million older cars still on the road in 1975. *See* SCHOENBROD, *supra* note 2, at ch. 4.

[5] *Id.* at 9.

EPA to go slow on lead.[6] If, in contrast, Congress had voted on the rule limiting lead rather than delegating the making of that rule to EPA, its members would take the blame for the shortfall in protecting health. The legislators would also have been responsible for the economic burdens of protection. Such responsibility would likely have deterred the legislators from enacting a rule completely protecting health, as the Clean Air Act had promised. Nonetheless, lead in gasoline would have been cut faster. Congress had to legislate on air pollution and lead was the air pollution issue most on the public's mind.[7] As Ethyl Corporation executive Lawrence Blanchard Jr. stated, "'Get the lead out' has become a slogan in every household."[8] We cannot know exactly what Congress would have done on lead in gasoline but do know that it required auto manufacturers to cut new cars' emissions of other pollutants by 90% from 1970 levels by 1975.[9] Congress would not have taken all the lead out, but a cautious estimate is that Congress would have called for a 50% reduction in the lead content of gasoline by 1975. Using EPA's health data and conservative assumptions about what Congress would have done if the option of taking credit for protecting health by delegating had been foreclosed, I estimated the health consequences of the delay: brain damage in tens of thousands children sufficient to permanently reduce their IQs below 70 and about as many dead Americans as those who died in the Vietnam War.[10] In sum, by evading accountability for the hard choice on lead, members of Congress had served themselves at the expense of their constituents.

In response to this injustice, I set out to write an article arguing that Congress itself should enact the federal rules limiting air pollution.[11] It had pretended to do so for new cars[12] and could have done so for lead in gasoline. Yet, there was a problem: I had trouble seeing how Congress could do so for stationary sources, given the need to take account of the wide variations in their costs of controlling emissions. That seemed like an impossibly complex job for a legislature.

Then, however, I read Richard Stewart's newly-published article in the 1981 *California Law Review*, "Regulation, Innovation, and Administrative Law: A Conceptual Framework."[13] It showed that Congress could tackle such a problem through market-based devices such as emission fees or transferable pollution rights.[14] Such methods would allow Congress to leave the market to take account of widely varying emission control costs. Dick thus provided the keystone for the article that I published.[15] Although we had not yet met, he generously read a draft and gave me valuable suggestions. My article cited Richard Stewart more than anyone else.

More fundamentally and of enduring importance, Dick's 1981 article introduced scholars, me included, to a new way of thinking about administrative law. The old way focused on the expertise of disinterested regulators. It called for the legislature to enact a statute that directs experts supposedly insulated from politics to issue rules designed to achieve objectives stated in

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[6] *Id.* at 31.
[7] *Saving Our Environment* at chs. 3-4.
[8] [I attached the Kitman article that is the source of this quote.]
[9] [cite section 202 of the 1970 statute]
[10] *Id.* at 36.
[11] David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act* 30 UCLA L REVIEW 740 (1983) (reprinted in 15 Land Use and Environmental Law Review 359 (1984)).
[12] Id. at 761, 778.
[13] Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework* 69 CALIF. L. REV. 1256 (1981).
[14] *See* id. at 1327–37.
[15] See Schoenbrod, *supra* note 8, at 803-16.

legislation. The regulators would use their expertise to find the best means to reconcile any conflicts between those objectives. Dick examined how the old way could be inadequate in the context of the command-and-control statutes that Congress had passed in the early 1970s to limit pollution, especially the Clean Air Act.[16] That statute required the Environmental Protection Agency to impose and enforce emission limits that achieve national standards of ambient air quality by statutory deadlines.[17] To bridge the gap between emission limits sufficient to achieve ambient standards and the emission limits that current plants could achieve, the statute relied upon "technology forcing."[18] The idea was that agency experts would identify new, affordable technologies to control pollution and force their use by setting emissions limits at levels that these technologies could meet.

Of this statutory design, Dick asked the question that he perennially asks, although not necessarily in these words, "how is this going to work?" His answer was, in short, not very well. Technology-forcing could not work as the legislators had hoped because agency experts know far less about how much a firm could cut pollution than does the firm itself.[19] The firms, for their part, do not want to tell the agency of better ways to limit pollution or to invent them because that would bring them the perverse reward of having to pay to install and operate them.[20] Thus, not surprisingly, the agency repeatedly missed statutory deadlines to achieve environmental goals.

In sum, Dick's new approach to administrative law focused on not just the expertise of regulators but also who has the relevant knowledge and who has incentives to use it to achieve statutory objectives. Allowing firms to trade emission rights would incentivize them to use their superior knowledge of how to cut emissions to meet statutory targets.

Dick's analysis also showed that the Clean Air Act discouraged the construction of new plants.[21] The statute directed EPA to impose strict nation-wide emission limits on new plants in order to prevent the disruption that would come from firms fleeing the more industrialized areas that would need tougher emission limits in order to meet ambient standards and relocating to less polluted areas that could get by with laxer limits.[22] On top of the cost of meeting the strict emission limits, the permitting process for new plants brought administrative costs, uncertainty, and delay and so discouraged their construction.[23] Yet, new plants provide the best opportunity to introduce technologies that both reduce pollution and make the economy more productive.[24] Dick's article showed that, in contrast with command-and-control regulation, market-based approaches would create a level playing field for new and existing plants and not require permitting.[25]

As the article concludes, "the dominant concerns of the current regulatory system are enforcement, uniformity, and avoiding disruption."[26] These concerns dominate because failure to

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[16] *See* Stewart, *supra* note 10, at 1288–1312.
[17] Clean Air Amendments of 1970, Pub. L. No. 91-604 sec. 108–110, 84 Stat. 1676.
[18] Stewart, *supra* note 10, at 1296–1307 discusses "technology-forcing."
[19] *Id.* at 1282.
[20] *Id.* at 1283 ("the regulated industry had no incentive– in fact, a powerful disincentive–to develop or disclose promising inventions that would facilitate higher levels of social performance.").
[21] *Id.* at 1270-81.
[22] Clean Air Amendments of 1970 sec. 111.
[23] *See* Stewart, *supra* note 10, at 1280-81, 1317–18.
[24] *Id.* at 1285.
[25] *Id.* at 1313–15.
[26] *Id.* at 1288.

achieve them would bring blame to Congress and the agency. In contrast, innovation gets short shrift because blame for discouraging it does not readily get pinned on Congress or the agency.[27] Yet, innovation is vital because it increases our ability to both achieve regulatory goals and boost economic productivity. The article's new way of thinking about administrative law thus used insights of economics about incentivizing those with the relevant knowledge to use it in a socially beneficial way.[28]

Later, Dick, writing with Bruce Ackerman, further explored this theme in "Reforming Environmental Law," published in the *Stanford Law Review* in 1985.[29] Dick and Bruce included cap-and-trade among the market-based devices that would foster innovation.[30] They noted that by enacting cap-and-trade, the legislature could, in setting the cap, itself decide how much to reduce pollution.[31] Meanwhile, by deciding how to allocate tradeable emission rights, Congress could take responsibility for distributional decisions. In other words, Congress itself could make the rules of private conduct—that is, the laws that regulate the conduct of private persons, including businesses and other private institutions. Their emphasis was, however, different than mine. Theirs was on using economic incentives, whether enacted by Congress or promulgated by an agency to achieve regulatory goals. Mine was on getting Congress to enact the rules of conduct.

Dick's argument for harnessing the market for regulatory purposes has had a remarkable impact on policy, even though as he and Ackerman noted, "[t]he congressional committees, government bureaucracies, and industry and environmental groups that have helped to shape the present system want to see it perpetuated."[32] For example, only a few years after his 1981 article was published, EPA adopted trading to cut the lead content of leaded gasoline faster and more efficiently than otherwise would have been possible.[33] EPA later adopted a cap-and-trade approach to control some other major pollutants such as particulate matter and ozone, but with the agency rather than Congress taking responsibility for the rules of private conduct.[34]

Now, against the background of these and other successes, it may not be obvious how pioneering Dick's 1981 article was. Yet, up until its publication, no legal academic had to my knowledge called for market-based approaches to pollution control. The reason was in part mistaken moralizing about pollution. To get a flavor of the times, consider that Ralph Nader in 1970 called those who emit pollution "smoggers," thus analogizing them to muggers.[35] From this perspective, it would be as wrong to allow people to pay to pollute as to allow them to pay to

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[27] *Id.* at 1262, 1288.

[28] The article applied these insights not just to propose market-based regulatory tools, but also to propose modifications of traditional command-and-control regulation, a greater use of damage awards and subsidies, and changes in government decisional processes. *Id.* at 1261, 1312-74.

[29] Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 Stan. L. Rev. 1333 (1985).

[30] Cap-and-trade was called, a "system of tradeable emission rights." *Id*. at 1341.

[31] *Id.* at 1341–42, 1353.

[32] *Id.* at 1334.

[33] *Id.* at 1348–49. That EPA got more aggressive on lead in gasoline in the 1980s is, however, explicable. Major oil companies had decided by then that they would profit by no longer selling leaded gasoline. Thus it became less politically precarious to support aggressive action. *See* SCHOENBROD, *supra* note 2, at 35.

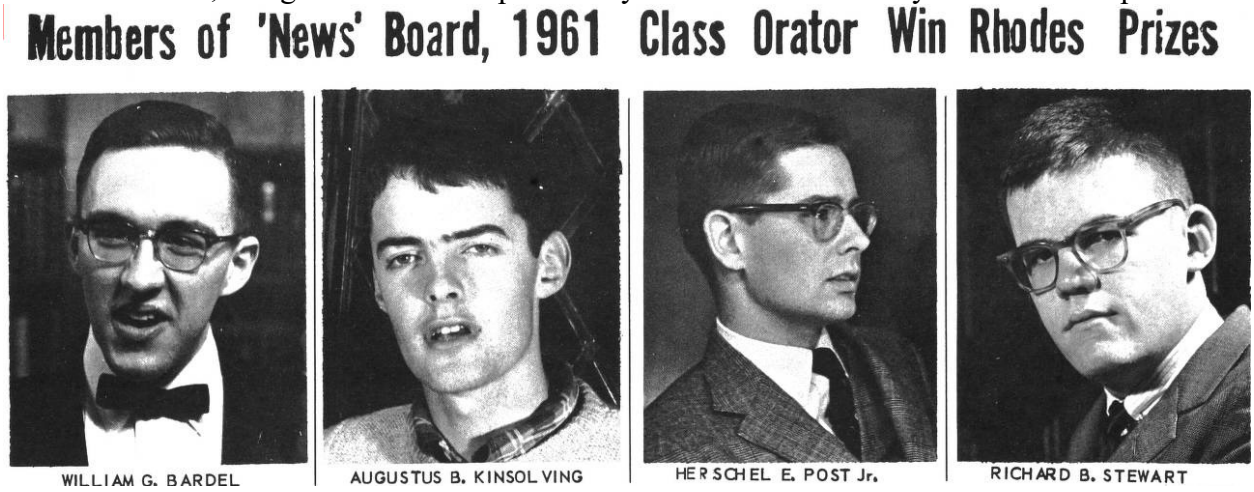
[34] For a discussion of these programs, see "The Overwhelming Case for Clean Air Act Reform," 43 Environmental Law Reporter 10967 (Nov. 2013) (with Bill Pedersen) http://elr.info/news-analysis/43/10969/overwhelming-case-clean-air-act-reform.

[35] JOHN C. ESPOSITO, VANISHING AIR: THE RALPH NADER STUDY GROUP REPORT ON AIR POLLUTION at vii–ix, 293 (New York: Grossman, 1970) (with an introduction by Nader).

mug someone. Now, however, we must own that even the most back-to-basics of us contributes to pollution to some extent. The relevant question is how best to reduce that pollution and Dick showed that market-based approaches are dexterous policy tools.

What, aside from his intelligence and his asking the right question—how will this work?—made Dick the pioneer? The answer, aside from his intelligence and concern for society, is his use of the insights of economics to propose improvements in administrative law. He ascribes his early use of these insights to his joining the board of the Environmental Defense Fund in 1977. Its staff included an economist who, Dick could see, was doing valuable work. In contrast, most environmental groups had no staff economist in 1977. NRDC, for instance, had none and some of its leaders were dubious about market-based approaches.

That raises the question of why I, despite being a veteran of NRDC myself, agreed with Dick's argument and, indeed, ran with it. Dick played a role here too, but a serendipitous one. Two decades before his article came out—on January 4, 1961 to be precise—I as a freshman read on the front page of the *Yale Daily News* a headline that four seniors, including one named Richard Stewart, had gotten scholarships to study at Oxford.[36] The story included their photos.



It dawned upon on me that I too might get to study at Oxford and even get a scholarship to do so. I molded my college career to that end and succeeded. At Oxford, I studied and taught economics and even published in a prominent economics journal.[37]

During my studies, I got to see the foibles of top-down economic planning, which later helped me accept Dick's argument about the problems of top-down pollution-control planning. On a trip to Budapest in 1964, I delivered to the U.S. ambassador a letter from Vice President Hubert Humphrey stating that I had been helpful in his ongoing push for centralized economic planning in the United States and asking the ambassador to arrange for me to meet with Hungarian economic planners. Consequently, I was invited to the home of the head planner. After being seated and handed a little glass of plum brandy, I expected to hear him sing the praises of central planning. Instead, he damned the Hungarian system: The factory managers focus on getting themselves promoted rather than making what Hungarians need. I replied, surely you set quotas requiring them to meet these needs. His response: yes, we do set quotas,

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[36] *Bardel, Kinsolving, Post, Stewart Get Rhodes Scholarships for Study at Oxford*, Yale Daily News, Jan. 4, 1961, at 1, http://digital.library.yale.edu/cdm/compoundobject/collection/yale-ydn/id/45561/rec/25.

[37] "U.S. Steel Imports and Vertical Oligopoly Power: Comment," 56 American Economic Review 156 (1966) (with G.A. Hone).

but the managers fulfill the quotas without regard to whether their products are actually useful to Hungarians and we in Budapest lack the information needed to stop them from gaming the system for their private advantage.

Having learned of the problems of top-down economic planning but being unfamiliar with administrative law scholarship (having not taken or taught administrative law) when I first read Dick's 1981 article, I thought that its approach to administrative law was powerful but did not realize how new it was to the field. I simply internalized it and it has been central to my work ever since.

II

In contrast to the success of Dick's argument, especially in getting agencies to adopt market-based approaches, my argument that Congress should itself adopt the rules of private conduct in pollution control has had next to no impact.[38]

Having failed to persuade the legislators themselves to make the rules, I undertook a second approach: urging the courts to bar Congress from delegating the power to make rules of private conduct. In this, I learned from Dick again, but this time the hard way—by not taking his advice soon enough.

I published an article in 1985 arguing that the Court had prevented itself from stopping delegation because it had adopted the judicially unmanageable "intelligible principle" test.[39] The Court should instead, I argued, adopt the test inherent in the meaning of Article I of the Constitution: that Congress may not delegate the power to make rules of private conduct.[40] This test, I contended, would be judicially manageable.[41]

In 1987, Dick and I were among the speakers at a symposium on delegation. This was the first time I met him in person. At the symposium, Dick argued that my test was infeasible because it would nullify most of the Code of Federal Regulations.[42] Characteristically, he was not putting me down or scoring a point but rather urging me to address that perennial question: how is this going to work?

I sought to answer by, in writing a book on delegation, arguing that the heft of the Code of Federal Regulation was itself a consequence of delegation.[43] In other words, if Congress had to take responsibility for the rules, it would enact simpler, more market-based rules and leave more matters to the states. Yet, I had to acknowledge that Congress could not enact a simpler set

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[38] Existing cap-and-trade programs to deal with pollutants other than acid rain came through rules promulgated by the agency rather than enacted by Congress. Congress does not generally adopt cap-and-trade or other market-based rules because doing so would subject its members to blame for both the burdens imposed and the extent to which the program does not fully protect the environment. The one instance where Congress itself enacted itself a market-based rule, the acid rain program, was forced upon it because a fully fleshed-out program to deal with acid rain was necessary to get air pollution legislation passed in 1990 and a failure to legislate in 1990 would itself be a source of blame. *See* DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN 6–7 (2010). That meant that the agency had to shoehorn these programs into the existing constraints of the Clean Air Act, which made these programs much less effective and efficient than they otherwise could have been. Congress's failure to enact the cap-and-trade programs means more pollution, which will cut short the life of the *average* American by a quarter year, as Bill Pedersen and I have shown in *The Overwhelming Case for Clean Air Act Reform*, 43 Envtl. L. Rep. (Envtl. Law Inst.) 10967 (Nov. 2013) http://elr.info/news-analysis/43/10969/overwhelming-case-clean-air-act-reform.

[39] "The Delegation Doctrine: Could the Court Give It Substance?," 83 Michigan Law Review 1223 (1985).

[40] *Id.* at 1252-71.

[41] *Id.* at 1281–83. An opinion for the Court later cited this argument approvingly, though not in the delegation context. *See* Printz v. United States, 521 U.S. 898, 927 (1997).

[42] Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 327 (1987).

[43] DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 135–152 (1993).

of rules of conduct overnight. So, the book argued that the Court should invoke equitable discretion to allow for a period of transition.[44]

Thinking about that argument now, I can hear Dick saying, how is this going to work precisely? How long will the period of transition be? How will Congress comply? If it does not comply, what would the Court do? My book failed to answer these questions with precision.

I came to appreciate the insufficiency of my answers after my book on delegation was published. Three sitting future Supreme Court justices, from the left, right, and center, none still on the Court, privately indicated to me that they wished to curb delegation if they knew of a workable way of doing so. Dick had warned me, but I had no response. That became painfully obvious after the D.C. Circuit, reportedly partly on the basis of my book,[45] held that the Clean Air Act as interpreted by EPA unconstitutionally delegated legislative power.[46] The Supreme Court, of course, granted certiorari in the case that became *Whitman v. American Trucking*, which turned out to be a stunning defeat.[47]

III

At that sad point, I turned my attention to a third approach to the objective of getting Congress to take responsibility for the rules of private conduct and this time I did listen to Dick's advice. The project was a book explaining to people interested in environmental protection how Congress's delegation of the power to make the rules and centralization of authority over environmental regulation in Washington was hurting the environment and the public.[48] Yale University Press asked Professor Richard Stewart to review the manuscript. He gave it a thumbs up but suggested that I add an appendix describing the changes in the various environmental statutes needed to implement my broad suggestions. In other words, the book should explain precisely how my proposal would work. Given his generosity of spirit, he told the press that it could reveal to me who wrote this review.

I told the press that my argument would be stronger with a detailed design for statutory reform as Dick had suggested, but that there were so many quite different sorts of environmental statutes needing reform that such an appendix would swallow the book. So, I suggested to the press and Dick that we join forces to write an additional book that explains the changes needed in the statutes. That he would accept this invitation seemed a hope too good to come true.

Yet, to my elation, Dick did say "yes" and thus began the *Breaking the Logjam* project headed by him, Professor Katrina Wyman, and me.[49] Because the environmental statutes are many, different, and complicated, we needed the help of specialists. Fifty environmental experts from across the ideological spectrum wrote articles proposing changes in a wide array of statutes. The proposals focused on how to get more environmental bang for the buck rather than how clean was clean enough. These articles were discussed at a symposium and published in an issue

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[44] *Id.* at 174–77.

[45] John J. Fialka, Professor Seeks to Limit Congress Ability to Delegate Tasks to Federal Agencies, WALL ST. J. (last updated May 20, 1999, 12:01 AM), https://www.wsj.com/articles/SB927150035434840424 [https://perma.cc/2XLS-FN9Y.

[46] *See* Am. Trucking Ass'ns v. EPA (ATA 1), 175 F.3d 1027, 1034 (per curiam), aff'd in part, rev'd in part, and remanded sub nom; Am. Trucking Ass'ns, Inc. v. EPA (ATA II), 195 F.3d 4, 10 (D.C.Cir.1999), aff'd in part, rev'd in part sub nom; Whitman v. Am. Trucking Ass'n., 531 U.S. 457 (2001). *See also* Fialka, *supra* note 42.

[47] Whitman v. American Trucking, 531 U.S. 457 (2001) (once again allowing Congress to delegate so long as it provides vacuous guidance to the agency on how it should make the rules of private conduct).

[48] *See* SCHOENBROD, *supra* note 2.

[49] *See* BREAKING THE LOGJAM, https://www.breakingthelogjam.org/ (last visited Aug. 11, 2020).

of the *NYU Environmental Law Journal*.[50] Later, Dick, Katrina, and I wrote a book summarizing the project's recommendations[51] and reports to the Congress and president taking office in 2009.[52]

It was wonderful working with both Dick and Katrina, but he is the topic now and so here is one tiny example of the many epiphanies that came from working with him. On the basis that Congress had not updated most of the environmental statutes for more than two decades despite experience showing how to make them more effective and efficient, I wrote in a draft such statutes are "obsolete." In response, Dick kindly but pointedly, termed the statutes "obsolescent," not "obsolete." He was, of course, correct. The statutes were still useful even though they could be made a lot more useful. I had written "obsolete" to be dramatic, but Dick's amendment helped me see that the drama came at price of weakening an otherwise powerful argument through overstatement.

Dick and I went together to Washington to talk to the incoming presidential administration and then the new Congress to urge passage of our recommendations. (Katrina was then focused on another vital matter.) Both Democrats and Republicans on Capitol Hill told us that they wished our proposals were already enacted but that Congress would not do so because its members did not want to take responsibility. In contrast, the existing statutes had been optimized to let legislators claim credit for popular promises and shift blame for the unpopular consequences.

Thus, despite great help from Dick, I had failed three times to achieve my objective of getting the legislators to serve their constituents rather than themselves: first, in urging Congress to itself make the rules limiting pollution; second, in urging the Court to stop Congress from delegating the power to make the rules of private conduct, and third, in urging Congress to change how it delegates the power to regulate the environment in order to make the resulting rules more effective and efficient.

In reflecting on this last failure, Dick and I recognized an irony. If Congress had to vote on the rules that the agencies promulgate, its members would bear blame for the protection not delivered and the burdens imposed. In that case, they would want to adopt statutory changes that, like our proposals, would enable agencies to put forth rules that produce more environmental protection bang for the buck.

IV

That recognition started me on a fourth approach to the same objective: to write a book explaining to citizens how Congress's ducking responsibility serves its members and disserves the public.[53] The book would show how changes to the manner in which Congress has operated over the past half century have allowed its members to claim credit for the popular yet evade

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[50] Symposium, *Breaking the Logjam: Environmental Reform for the New Congress and Administration*, 17 NYU Environmental Law Journal, No. 1. For the event's program, see *Symposium Agenda,* BREAKING THE LOGJAM (last visited Aug. 12, 2020), https://nylssites.wpengine.com/breakingthelogjam/wp-content/uploads/sites/23/2014/06/Symposium_Agenda.pdf.

[51] *See* DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, BREAKING THE LOGJAM: ENVIRONMENTAL PROTECTION THAT WILL WORK (2010).

[52] *See* DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, BREAKING THE LOGJAM: PROJECT REPORT (Feb., 2009), https://nylssites.wpengine.com/breakingthelogjam/wp-content/uploads/sites/23/2014/06/BreakingLogjamReportfinal.pdf; DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, BREAKING THE LOGJAM: ANNEX TO PROJECT REPORT (Feb., 2009), https://nylssites.wpengine.com/breakingthelogjam/wp-content/uploads/sites/23/2014/06/ClimateReportv1r4.pdf.

[53] DAVID SCHOENBROD, DC CONFIDENTIAL: INSIDE THE FIVE TRICKS OF WASHINGTON (2017).

blame for the unpopular, not just on environmental protection but everything from war to the government loan guarantees that helped caused the fiscal crisis of 2008.

Although I could not call upon Dick for help as much as I would have liked in this project, I still needed to answer his question: how would the book proposals work? To use regulation as an example, I suggested a reform based on a recommendation from James Landis that Congress commit itself to vote on, in his words, "administrative action . . . of large significance."[54] In 1984, Stephen Breyer, then a court of appeals judge, showed quite specifically how Congress could structure a statute to force itself to vote on agency actions promptly.[55] Judge Breyer framed his proposal as a way for Congress to reclaim the power that it lost when *Chadha* struck down the legislative veto and so confined it to actions previously subject to a legislative veto. I proposed that, to stop the blame-shifting on regulation, Congress should require Breyer's fast-track design apply to those regulations defined as "significant regulatory action" for the purpose of review by the Office of Information and Regulatory Affairs in the Office of Management and Budget.[56]

Thanks to my book showing, as Dick teaches, *how* its proposals would work, it drew forewords from public figures as prominent and diverse as Governor Howard Dean and Senator Mike Lee.[57] Yet, my public interest campaign that began with Congress' sleight of hand on lead in gasoline came to another dead end.[58] The many crises in the presidency of Donald Trump left little time or energy for long-term concerns such as how Congress could reform itself to better serve the public.

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[54] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 77, 79 (1938). He argued that for administrative officials, "it was an act of political wisdom to put back upon the shoulders of Congress" responsibility for such actions. *Id*. at 76.

[55] Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785 (1984). If approved by both houses, the bill would be presented to the President for signature, thus avoiding the objection that doomed the legislative veto in *Chadha*. I.N.S. v. Chadha, 462 U.S. 919, 946–951 (1983). The statute would set deadlines by which the House and Senate must vote, limit debate, and bar filibusters on such votes. Such an arrangement would be analogous to the fast track procedures embraced in both the approval of trade agreement and base closures. *See* IAN F. FERGUSON & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RL43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 22 (2019); CHRISTOPHER T. MANN, CONG. RSCH. SERV., RL45705, BASE CLOSURE AND REALIGNMENT (BRAC): BACKGROUND AND ISSUES FOR CONGRESS 2–3 (2019).

[56] Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641–42 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2012). President Clinton's executive order was in turn a variation on one issued by President Reagan. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638. There would be about as many such regulations as current votes on symbolic public laws such as those naming post offices. *See* SCHOENBROD, *supra* note 50, at 153. Voting on significant regulations would require legislators to shoulder more responsibility than voting on the names of post offices, but the Constitution includes voting on regulatory rules in Congress's job description, not naming post offices. E.g. U.S. CONST. art. I, § 8.

[57] *See* SCHOENBROD, *supra* note 50, at vii-viii (Governor Dean), viii-ix (Senator Lee).

[58] Republicans in Congress put a version of Landis/Breyer into a bill called Regulations from the Executive in Need of Scrutiny Act (REINS) but presented it as a way to reduce regulation and thus ensured that the bill would not pass. *See* Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017, H.R. 26, 115th Cong. (as passed by House, Jan. 5, 2017). Thus, these Republicans can tell their base that they are against regulatory burdens without having to vote against specific regulatory protections. Democrats, for their part, are satisfied with the present statutes under which they can be for regulatory protection without having to vote for regulatory burdens. As Rep. Tom Coles (R. Okla.) explained at a recent House Rules Committee hearing, "I have a lot of colleagues on both sides that like to rail against the administrative state, but they certainly wouldn't want to have to vote on all those rules and regulations, because they are high risk votes." Rules Committee Meeting on Article One at 1:16:36–1:16:47, YOUTUBE (Mar. 10, 2020), https://youtu.be/2Y6MoUBJP5U?t=4596.

Yet, early in 2018, the Supreme Court granted certiorari in a delegation case, *Gundy v. United States.*[59] Although the Court rejected the delegation challenge in that case, five justices seemed to be interested in limiting delegation in some future case.[60] Justice Gorsuch's dissenting opinion asks, "What's the test?"[61] In other words, how is this going to work? The answer cannot be the one I long embraced: that Congress must approve all rules of private conduct. Although that is what the Constitution means, that cannot be the test because there are too many such rules for Congress to vote on them all. Yet, Dick's perpetual question, how is it going to work?, had led me to an answer in the course of writing the book described in part IV.[62] The Court should strike new rules of private conduct promulgated in regulatory actions that OIRA finds significant unless their promulgation is approved through the Article I legislative process.[63] It would be up to Congress to decide whether to arrange to do so through the process suggested by Landis and Breyer or some other way.[64]

So, I naturally asked Dick, who was feeling better then, to read a draft of an article suggesting an answer to Justice Gorsuch's question.[65] This would be my fifth approach to making regulation better serve the public. He started asking questions about how the Court would distinguish the making of rules of private conduct from their interpretation and enforcement—once again, how is it going to work? It struck me that I was encountering the Socratic method about which I heard so much when I was a law student but never quite observed back then. Dick's questions led me to an answer than was more precise and concise.[66]

* * *

Richard Stewart became a guiding light when I read his article on innovation in 1981. Ever since, he has been the scholar whom I have most cited. Now, four decades later, my laptop tells me that the file folder that I use most often is labeled "RBS delegation." He is not only a clear and forceful scholar when explaining his positions, he is also a gentle and intelligent colleague that helps others improve their scholarship. Whenever I have asked him for advice, as with the recent article on delegation, he was more concerned with helping me to state clearly what I thought rather than getting me to think what he thought. Without fail, he asks the right question and answers with precision. He has improved many, many scholars as well as institutions of government. His impact on administrative law has been vast, deep, and transformative.

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[59] United States v. Gundy, 695 F. App'x 639 (2d Cir. 2017), cert. granted, 138 S. Ct. 1260 (Mar. 5, 2018) (No. 16-1829).

[60] The dissent by Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, calls for reinvigorating the norm. *Id.* at 2135 (Gorsuch, J., dissenting). Justice Alito stated in his concurring opinion that, "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support the effort." *Id.* at 2131 (Alito, J., concurring in the judgment). Justice Kavanaugh did not participate in the decision. Later, Justice Kavanaugh wrote an opinion in which he stated that Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of certiorari).

[61] Gundy v. United States 139 S.Ct. 2116, 2135 (Gorsuch, J., dissenting).

[62] DC Confidential at 150-56.

[63] David Schoenbrod, "Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce," 43 Harvard Journal of Law and Public Policy 213 (2019)

[64] Id. at 257.

[65] The relevant portions of the article as published is "Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce," 43 Harv. J. of L. & Pub. Pol'y 213, 219–24, 253–65

[66] *Id.* at 219–24.