

The views of our critics range from the enthusiastic to the deeply skeptical. What they have in common is sincere and incisive engagement with fundamental issues; for this we thank them. In general, doubts concern either the feasibility of the architecture we describe, or its normative desirability. Of those who question its feasibility, some deny that it is workable at all, while others view it as a limited adjunct to the existing regulatory regime. Those who raise normative questions ask— explicitly or implicitly—for a more fully developed theory of the democratic underpinnings of backyard environmentalism than the one we present. They wonder how one could know that backyard environmentalism, even if fully realized, would more accurately reflect the desires of citizens or better translate those desires into effective policy than the current regime.

The most vociferous critics of feasibility dismiss the alternative as "wishful thinking" , or, more harshly, as the have-your-cake-and-eat-it-too "propaganda" of the "decadent phase of classical liberalism". So anxious are they to prove the impossibility of the emergent regime that they would deny the underlying facts. But if there are facts that counter our claims, they have not found them. Thus Lowi attributes Massachusetts' apparent progress in toxics use reduction to large-scale deindustrialization. But the record amply documents otherwise: *production-adjusted*, use and emissions of toxic substances have fallen dramatically under TURA, both in the aggregate and for individual firms and facilities. Similarly, Savitz characterizes documented reductions in toxic emissions under TRI as the mere by-product of conventional regulation, in particular the ban on CFCs, combined with "paper reductions" produced by changes in estimation methods. In fact, CFCs represent only a small fraction of TRI pollutants, and even discounting for paper reductions, TRI emissions have fallen deeply and across-the-board for virtually all listed substances, well beyond levels demanded by regulatory standards (where they exist at all), in virtually every industrial sector.

Buttressing our confidence that the successes of backyard environmentalism are not wholly imaginary is the circumstance that we are far from alone in recognizing them. Thus, while concerned about practical limits and transition paths, DeWitt John and Dan Fiorino take it as given that in crucial respects the new architecture has already been demonstrated in practice. Though fallible, both are close observers of emerging regulatory trends and active participants in debates concerning the posed alternatives, thus unlikely to commit the gross error of confusing academic bombast for practical innovation. Similarly, we quite agree with Shogren, who argues that the collaborative model will be no news at all to his fellow Westerners, for whom it is already commonplace.

Finally, Susskind, drawing from his broad professional experience as a master practitioner of Alternative Dispute Resolution (ADR), takes it for granted that parties holding contrary views might, through practical deliberation and exchange of views, transcend their fixed understandings to reach mutually acceptable solutions. This capacity to innovate in the midst of conflict is surely among the most counterintuitive requirements of the new regime. (While in this sense ADR is an important precursor of the regime we propose, we disagree with Susskind's view that a comprehensive alternative could emerge from the myriad of discrete local ADR decisions, if only those decisions had precedential character. Despite its broad accomplishments, ADR has remained peripheral to the reform of public administration in part because it has no notion of how the center might be transformed to reflect, learn from, and guide the successes of local practical deliberation.)

A deeper challenge to our view is the contention of several critics that the new architecture is feasible, but only narrowly so, insofar as it has proved useful and practicable only in exceptional circumstances, and then only given the continuing backdrop of conventional regulation. From this perspective, the phenomenon we describe may never amount to more than tinkering at the margins of the established regime. The core of this view is that effective regulation depends on state coercion that is inherent in the current regime and absent from our architecture. Some of our critics believe in addition that the current system is less rigid and more extensible to new circumstances than we credit. At the limit, this leads to Farber's claim that correcting the current regime through bilateral negotiation between regulators and private parties is preferable to our "multilateral" approach. Others appear to agree with our characterization of the limits of the current regime, but see our participatory remedy as so demanding as to be unworkable in most circumstances. We consider these objections in turn.

As we argued in *Backyard Environmentalism*, we fully agree that coercion is indispensable to effective regulation. Even where there are long term mutually beneficial solutions to regulatory disputes, self-interested parties would be tempted to sacrifice broad and long-term gains for narrow and short-term benefits unless deterred by credible threats of penalties. The dispute with our critics, then, turns on whether the necessary coercion can only be supplied by the current fixed-rule regime, or whether our rolling-rule alternative can provide it better. As an illustration, consider again the evolution of Habitat Conservation Planning. Without the coercive threat of the Endangered Species Act (ESA), there would have been no HCPs. In this sense, the emergence of the new regime depended upon the coercion of the old. Effective HCPs, however,

establish locally-contextualized coercive regimes of their own: developers who fail to comply with requirements of the habitat regime, whether or not these are connected to the fate of a listed species, lose the right to develop. These regimes form a kind of halfway house between the status quo and a full-fledged alternative. But is it true, as the critics seem to suggest, that the construction of local HCPs can be triggered only by waiver from a fixed (and draconian) uniform rule like the ESA? We think not. To be sure, strong incentives, positive or negative, will be necessary to secure the cooperation of landowners. But imagine a congressionally-sanctioned alternative regime in which participation in local HCP planning is compulsory (and subject to stiff penalties for non-compliance) wherever habitats are judged to be in serious decline. That latter determination, in turn, would be made under processes and standards that are themselves not fixed, but continuously improving with the experience and learning generated by the HCP program itself. This bootstrapping alternative would obviate the need for fixed regulation, and establish in its stead a full-scale rolling-rule regime. In this progression, we shift from one coercive regime to another without ever passing through a phase in which regulation depends on voluntary compliance.

We think, unsurprisingly, that those who advocate the extension of the current regime rather than construction of an alternative overstate its adaptability and the persistence of its core principles in the face of such change as does occur. Two kinds of evidence weigh against the preference for extension over renovation. First, reformers developed unconventional approaches like the Chesapeake Bay Program, TRI and TURA to address the biggest and most complex problems—ecosystem decline, non-point source pollution, and toxic pollutants—outside the existing regimes precisely because extension of the existing rules proved unworkable. Moreover, even in cases like HCPs, where rules were extended and made flexible through processes that are arguably related to those described by Farber, the underlying regime was reoriented rather than stabilized. HCPs make the ESA "work," but only at the cost of raising deep questions about whether the ESA is the right way to conserve habitat in the first place.

On the question of whether the degree of participation that we observe is limited to the described instances, caution is in order, but false certainties about alleged limits are not. Participation in the cases we present already exceeds what the most skeptical critics would have thought possible under any circumstances. It is a general and understandable pessimism, and not any well founded theory of what citizens can do, that drives them to conclude that the limits of participation have been reached with these successes. We are not blind

to the dismal history of popular participation in the many fora of representative democracy, nor do we think that participation can come for free in any imaginable democratic regime. However, experience with the institutions of backyard environmentalism reveals unexpectedly deep deliberative capacities among a surprisingly broad range of the citizenry. A great advantage of our experimentalist program is that it can be built incrementally. Each step places greater demands on citizens and proceeds until the limits of participation have been demonstrably reached. This way, institutional practice disciplines democratic optimism without allowing reform to be prematurely truncated by untested and unfounded skepticism.

We come finally to two normative concerns. On what conception of democracy should backyard environmentalism count as democratic, let alone more so than the current regime? Relatedly, to use Cass Sunstein's terms, does it outperform—either procedurally or substantively—that which already exists? These are of course vast and crucial questions. Here we can do little more than name an alternative theory that might be elaborated to explain the democratic character of backyard environmentalism and that might begin to address the question of its comparative performance.

The background view of democracy that informs the views of many of our critics is, broadly speaking, Madisonian. Power is carefully parceled among separate branches of government. Deliberation – preference-changing reflection in the service of the public interest – is the province of a political or administrative elite buffered from everyday concerns. Citizens participate primarily on election day by passing summary judgements on the large choices made by their representatives. Whatever its failings, this system generates large outcomes that reflect citizens' preferences, and protects their liberties.

The alternative view underpinning our environmental proposal might be called neo-Madisonian. First, in place of deliberation at a distance, it emphasizes the capacity of practical problem-solving activity to reveal new possibilities and thus to open the way for solutions that are different from both the ideal of elite deliberation and the reality of interest group dealing. Second, where Madisonianism relies on the separation of powers, this alternative harnesses competition among institutions to ensure that they all act in the public interest. Thus, on the expanded version of HCPs we envision, the practice of other HCPs would provide a rich pool of information and comparative standards against which to hold local jurisdictions accountable in regard both to substantive performance outcomes and their respect for democratic procedure

(for instance, whether they are as representative as practice shows that they can be).

While this neo-Madisonian scheme may respond to the desires of actors locally, general decisions it frames may not reflect the preferences of citizens in the aggregate. Thus Sunstein wonders whether the regime we envision may result in radical over- or under-regulation, or perhaps both simultaneously, over-regulating in trivial areas while failing to address more important problems. Even as he raises this issue, he highlights the distance between the ideal and reality of the Madisonian system while overlooking the possibilities for addressing this problem in the neo-Madisonian framework.

As Sunstein correctly notes, environmental decision-making, and democratic decision-making generally, more often reflect interest group bargaining than deliberation of any kind. To do better, he implies, any reform should more closely approximate the Madisonian deliberative ideal, reflected perhaps in the generation of regulations that would pass a comprehensive and systematic cost- and risk- benefit analysis. From this perspective, Backyard Environmentalism appears attractive but risky: attractive because it addresses some defects of the current regime; risky because it does not strive to attain that ideal.

Backyard Environmentalism rejects that standard without denying the importance of global assessment and accountability. A central theme of our argument throughout has been that it impossible to attain the panoptic knowledge required by the Madisonian ideal. Recall the repeated failure of large-scale studies in the Chesapeake Bay Program to generate definitive answers to the problems of that ecosystem. In the face of this impossibility, the new regime institutionalizes mechanisms for monitored experimentation, learning, and continuous improvement at both local and aggregate levels. HCPs, for example, pair developers concerned with over-regulation with environmentalists concerned with under-regulation to develop plans and monitoring regimes that generate rich and continuous flows of information, correct errors, revise targets, and adjust means as conditions change and new information emerges. Local results are compared against one another so that parochial and hasty judgements about the feasibility of regulation will be checked by the full range of experience. Without such fine grained information, how can there be effective decisions about allocation of regulatory resources among environmental and other purposes?

The decisions that emerge from these searches can not pretend to be globally optimal. Nonetheless, they should over time result in a vast improvement in our

information about the choices we face and their costs. Ironically, then, by abandoning the pretension to comprehensive knowledge supposed by traditional cost-benefit analysis and related deliberative ideals, Backyard Environmentalism may generate a far richer canvas of our possibilities, and their relative prices, than we could otherwise have.

Backyard Environmentalism, in both theory and practice, has a long way to go before making good on these promises. But in crucial areas it has already delivered more than the traditional institutions of representative democracy are able to supply. To progress further it will have to overcome the limits the critics have identified. For the sake democracy, we hope it does.