

# Michigan Law Review

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Volume 80 | Issue 4

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1982

## Clean Coal/Dirty Air

Michigan Law Review

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### Recommended Citation

Michigan Law Review, *Clean Coal/Dirty Air*, 80 MICH. L. REV. 946 (1982).

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CLEAN COAL/DIRTY AIR. By *Bruce A. Ackerman* and *William T. Hassler*. New Haven, Conn.: Yale University Press. 1981. Pp. x, 193. \$5.95.

In the early 1970s, Congress enacted a host of statutes that required the expenditure of billions of dollars for environmental protection. Although the jury is still out on the effectiveness of this legislation, recent events indicate that at least a preliminary assessment is in order, perhaps with an eye to procedural reform. Bruce Ackerman and William Hassler's reflections on the Clean Air Act of 1970<sup>1</sup> should thus spark considerable interest. In *Clean Coal/Dirty Air*, they examine the regulation of coal-fired power plants, and find that the Environmental Protection Agency (EPA), Congress, and the courts have mishandled a critical environmental issue. In particular, the authors charge, the EPA's 1979 air pollution standards were so ineptly drafted "that some of the nation's most populous areas will end up with a *worse* environment than would have resulted if the new policy had never been put into effect" (p. 2). The regulations often require the use of scrubbers,<sup>2</sup> even when cheaper options are readily available, and "will cost the public tens of billions of dollars to achieve environmental goals that could be reached more cheaply, more quickly, and more surely by other means" (p. 2).

Ackerman and Hassler, however, are concerned more with "serious breakdowns in the administrative process"<sup>3</sup> than with the substantive merits of a particular agency decision. They contend that congressional efforts in the 1970s to reduce the EPA's discretion — a process that they call moving beyond the New Deal — prevented effective implementation of the Clean Air Act. They conclude that the Act in its present form is a failure, but suggest that steps can be taken to improve both the Act and administrative lawmaking generally.

From the beginning of the New Deal until the late 1960s, Ackerman and Hassler note, administrative agencies were enormously independent. Congress recognized its incompetence to deal

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1. Pub. L. No. 90-604, 84 Stat. 1676 (codified in scattered sections of 42 U.S.C.).

2. "Scrubbers" are complex devices that remove sulfur from coal-fire smoke as it passes through a smokestack.

3. Ackerman & Hassler, *Beyond the New Deal: Reply*, 90 YALE L.J. 1412, 1412 (1981).

thoroughly with technical subjects and provided agencies with only general policy guidelines. The model New Deal agency was substantially “insulat[ed] from central political control . . . [and] from judicial oversight” (pp. 5-6).<sup>4</sup> Judicial review centered on the question of whether an agency had fully analyzed a problem before rendering its decision rather than on the decision itself; only if the decision was “arbitrary and capricious” would courts second-guess the substantive determinations of agency policy-makers.

By the time that concern for the environment surfaced in the late 1960s, the style of expert agency policy-making developed during the New Deal had become unpopular. Many observers believed that agency officials were opportunistic lawyers rather than dedicated experts, and that agency independence served primarily to conceal the “capture” of agencies by special interest groups (p. 7). Congress, under pressure to reform the administrative process, responded with what the authors term an “agency-forcing statute” (p. 3) — one that sharply curtailed the agency’s discretion. The 1970 Act specifically instructed the EPA to set quantitative clean air standards that were to be reached by 1977. The Act, moreover, “presumed to specify the *means* of achieving clean air objectives” for new plants (p. 11). Congressional directives gave statutory prominence to technological purification methods in new plants and resulted in decisions that were made in an “ecological and economic vacuum” (p. 12). In 1977, Congress went even further,<sup>5</sup> ignoring the differences in sulfur content between Eastern and Western coal for political reasons and forcing the scrubbing question onto the EPA’s agenda.

The book’s thesis is that Congress has gone too far beyond the New Deal. Although the authors concede that Congress is uniquely equipped to make basic policy choices — and to reconsider those choices after changes in political opinion (p. 54) — they caution that Congress is *not* equipped to conduct expert policy analyses of technical problems. Agencies should thus be empowered and, indeed, required to consider particular problems and to formulate programs designed to achieve most efficiently the ends specified by Congress. Only then can we avoid the “Alphonse-Gaston” problem that Ackerman and Hassler identify in the EPA’s post-1977 actions:

[O]ne player, Congress, enacts an agency-forcing statute with the expectation that the other player will subject a particular policy to hard-headed consideration. The second player, the agency, thinks that Congress has already made the policy judgment and narrowly confines its policy review. Each player allows the other to drop the ball: an

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4. Congress, however, was not powerless to deal with agency decisions. Through its appointment and funding powers, Congress could translate sustained shifts in national opinion into policy changes. For the most part, though, Congress deferred to agencies in technical areas.

5. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

important policy is adopted without the hard thinking that should be required of a sound lawmaking enterprise. [Pp. 104-05.]

The EPA has yet to subject scrubbers to a full inquiry.

To prevent such gaps in the formulation of public policy, Ackerman and Hassler suggest that administrative actions taken under agency-forcing statutes should be subjected to a more searching level of judicial review than the traditional "arbitrary and capricious" standard (p. 105). Applying the "principle of full inquiry" to the scrubbing controversy, they recommend remanding the 1979 standard to the EPA "for further consideration" (p. 107).<sup>6</sup>

Those interested in environmental and administrative law will find *Clean Coal/Dirty Air* both thought-provoking and disturbing. Combined with strict judicial review to ensure agency adherence to the "principle of full inquiry," agency-forcing statutes may go a long way toward solving the problems of agency capture that troubled commentators and Congress in the late 1960s. But the extent to which politics dominates congressional and administrative policy-making is disheartening, and the authors offer no real solution to this problem. If our Congressmen read this book<sup>7</sup> before rewriting the Clean Air Act,<sup>8</sup> and we eventually breathe easier, it will be because the book asks the right questions, not because it gives any answers.

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6. The District of Columbia Circuit Court of Appeals, however, recently upheld the EPA's regulations dealing with emissions from coal-fired plants. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

7. A slightly shorter version of this work appeared in the *Yale Law Journal* before publication as a book. Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 *YALE L.J.* 1466 (1980). See also Smith & Randle, *Comment on Beyond the New Deal*, 90 *YALE L.J.* 1398 (1981); Ackerman & Hassler, *supra* note 2.

8. The rewriting process is underway. See *Natl. L.J.*, Sept. 28, 1981, at 6, col. 4.