

## Third Way Environmentalism

Christopher H. Schroeder\*

### I. REINVENTING ENVIRONMENTAL PROTECTION

In the last thirty years, regulating human activities that alter the environment has become a major part of what the American government does. The pivotal agency for the bulk of this regulatory activity is, of course, the Environmental Protection Agency (EPA).<sup>1</sup> As an indication of how significant a piece of governance environmental regulation has become, the EPA is now the federal government's largest regulatory agency, with 18,000 employees and a budget of \$5.2 billion for fiscal year 1999.<sup>2</sup> For comparison, when President Richard Nixon created the EPA in 1970, its employees numbered 4100, and its budget was about \$205 million.<sup>3</sup> Whatever its on-budget expenditures, these are now dwarfed by the regulatory compliance costs induced by its environmental rules. These are estimated at \$180 billion for 1999.<sup>4</sup>

Six years ago, when the Republicans gained control of the House of Representatives for the first time in forty years, the Republican leadership attempted to dismantle as much of this regulatory edifice as it could, thereby unburdening American industry and the American economy from the drag created by government meddling.<sup>5</sup> Although the House succeeded in passing a majority of the other elements of the Republicans' Contract with America, its leaders were quite chastened by the backlash of voters

---

\* A.B. Princeton, 1968; M. Div. Yale, 1971; J.D. University of California, Berkeley (Boalt Hall), 1974. My thanks to Nicole Wilson, Duke Law Class of 2001, for valuable research assistance with this essay, and to Jay Hamilton for his helpful (as always) comments on an earlier draft. A version of this essay was delivered at the symposium on *American Regulatory Policy: Have We Found the "Third Way?"* at the University of Kansas School of Law, February 3, 2000.

1. This essay discusses the pollution and hazardous substances sector of environmental regulation. Natural resources management may also be undergoing a transformation to a "third way." See, e.g., Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 *ECOLOGY L.Q.* 140, 142-46 (1999) (arguing that federal land management policy shifted from a regime favoring development and extractive uses to an effort at genuine multiple-use management, and now to one favoring the non-consumptive uses of recreation and preservation).

2. Paul R. Portney, *Environmental Policy in the Next Century*, in *SETTING NATIONAL PRIORITIES: THE 2000 ELECTION AND BEYOND* 359, 366 (Henry J. Aaron & Robert D. Reischauer eds., 1999) [hereinafter *SETTING NATIONAL PRIORITIES*].

3. See *id.*

4. See *id.* at 367.

5. For an account of these efforts, see Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) the Contract with America: Improving Environmental Policy or Destroying Environmental Protection?*, 5 *KAN. J.L. & PUB. POL'Y* 9, 16-17 (1996).

toward their environmental deregulatory agenda. The 104th Congress closed its books with very little to show for the House leadership's deregulatory efforts.<sup>6</sup> While the Republicans have not abandoned their ambitions to rein in federal regulators, they have "shrunk back from trying to restructure the system."<sup>7</sup> As Republican Senator John McCain put it, by showing themselves "too eager to swing the meat ax of repeal when the scalpel of reform is what's needed," the Republican leadership had succeeded in making their stewardship of the environment "the voters' number-one concern about continued Republican leadership of Congress."<sup>8</sup> After narrowly retaining the House majority in the 1996 elections, this leadership has turned in the meat ax and is now trying out the scalpel approach, seeking more measured and selective efforts to reduce the burden of complying with environmental laws. In the words of one Republican congressional leader, "[i]f you have reasonable goals and you sit down with reasonable people in the administration, then maybe you can accomplish something."<sup>9</sup>

The frontal assault on environmental regulation did not push through to victory in the 104th Congress, but it did land some telling blows. Its most effective weapon took advantage of the public's general hostility toward "big government," which has been a persistent theme in contemporary politics. By basing the program to shrink environmental regulations on the public's perception that government generally is too big, too intrusive, too inflexible, and too incompetent, the deregulatory assault raised some claims to which the Administration thought it could not respond with mere denials. Instead, the Administration concluded that policymakers also need to acknowledge at least the partial validity of those claims and respond with ameliorative measures. Consequently, the Administration has showcased its efforts to "reinvent environmental protection." In 1995, President Bill Clinton and Vice President Al Gore

---

6. This recent experience mimics a similar sequence of events that took place when President Reagan came into office in 1981. At that time, "[a]pprehension over inadequate environmental protection by government, along with increased societal attention to environmental problems such as toxic wastes and ozone depletion, led to a significant resurgence of public support for environmental protection in the 1980s." Robert Emmet Jones & Riley E. Dunlap, *The Social Bases of Environmental Concern: Have They Changed Over Time?*, 57 *RURAL SOC.* 28, 30 (1992). Similar resurgence occurred in 1995 and 1996 when the deregulators once again overestimated the popularity of their program with the voters. The net result in each case was negligible overt progress in rolling back environmental legislation, although in each case implementation of existing statutes was delayed, underfunded, or redirected, at least for a time.

7. Allan Freedman, *GOP's Secret Weapon Against Regulations: Finesse*, 56 *CONG. Q. WKLY.* 2314, 2314 (1998) (quoting Republican House Representative David McIntosh).

8. John McCain, Editorial, *Nature Is Not a Liberal Plot*, *N.Y. TIMES*, Nov. 22, 1996, at A31 (Republican Senator from Arizona).

9. Freedman, *supra* note 7, at 2316 (quoting House Representative Cass Ballenger).

launched the initiative by issuing a report outlining an ambitious strategy to “reinvent environmental regulation,” including programs embracing “alternative strategies that will replace current regulatory requirements, while producing even greater environmental benefits.”<sup>10</sup>

Under the reinvention umbrella, the EPA has launched projects exploring new arrangements for allocating federal-state responsibility in administering efforts to improve environmental quality, giving the regulated community greater decisionmaking flexibility in determining how to comply with environmental standards, testing possibilities for cross-media and integrated assessment approaches to environmental management at the facility level, and disseminating information to the public. These programs build upon earlier statutory and agency-initiated programs and so cannot be considered completely new. What is new about them is the prominence they now receive and their migration from the periphery of the EPA’s agenda to its very center. The EPA has, for example, implemented incentive-based regulatory techniques, such as the acid rain trading program under the Clean Air Act;<sup>11</sup> information dissemination techniques, such as publication of the Toxics Release Inventory<sup>12</sup> and the public disclosure requirements of the 1996 amendments to the Safe Drinking Water Act;<sup>13</sup> and more localized program management, such as the National Environmental Performance Partnership System,<sup>14</sup> whereby states are provided increased flexibility in setting priorities and administering programs.

The reinventing environmental protection initiatives respond to more than the felt necessity of blunting the most effective deregulatory argument. They also incorporate and respond to conclusions drawn by policy experts as to longstanding deficiencies in the EPA’s approach to environmental protection. In recent years, these conclusions have coalesced in a series of blue ribbon commission reports and other expert studies, all of them urging significant reforms to environmental policy. In the words of one such report:

---

10. President Bill Clinton and Vice President Al Gore, *Reinventing Environmental Regulation: Clinton Administration Regulatory Reform Initiatives* (last modified May 23, 1996) <<http://www.epa.gov/reinvent/notebook/clinton.htm>> (issued Mar. 16, 1995).

11. See *infra* notes 50-53 and accompanying text.

12. See *infra* notes 60-63 and accompanying text.

13. Pub. L. No. 104-182, 110 Stat. 1613 (codified as amended in scattered sections of 33 U.S.C. and 42 U.S.C.).

14. EPA, JOINT COMMITTEE TO REFORM OVERSIGHT AND CREATE NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM (May 15, 1995) (agreement signed by Carol M. Browner, Admin., EPA; Fred Hansen, Deputy Admin., EPA; Tom Looby, Dir., Office of Env’t, Colorado Dep’t of Health; Mary Gade, Dir., Illinois EPA).

Despite [EPA's] accomplishments, we conclude that the pollution control regulatory system has deep and fundamental flaws. There is a massive dearth of scientific knowledge and data. The system's priorities are wrong, it is ineffective in dealing with many current problems, and it is inefficient and excessively intrusive . . . .

. . . .  
. . . . The future system should be results-oriented, integrated, efficient, participatory, and information-rich.<sup>15</sup>

The reinvention program takes these criticisms to heart. It aims to "promote innovation and flexibility, increase community participation and partnerships, improve compliance with environmental laws, and cut red tape and paperwork."<sup>16</sup>

This essay concentrates on two of the most significant areas of reinvention: the use of market-based incentives and information disclosure as alternatives or supplements to traditional command-and-control regulation. We examine two questions. First, how do these approaches to environmental policy relate to the larger "third way" debate underway in the United States and Great Britain? Second, do these approaches themselves constitute a genuine environmental third way?

## II. THIRD WAY IDEOLOGY

If I can be granted a license for brutal oversimplification, I shall start with the proposition that all environmental policymaking, and all the disputing that surrounds such policymaking, can be said to engage two fundamental issues. The first involves defining the problem, the second involves defining the solution. Quite often we define the problem almost reflexively. The problem, obviously, is that air quality is poor, or that too little has been done to control the release of toxins into the environment, or that a river is too polluted. When such statements attract widespread agreement, they can frequently be adequate starting points for policymaking. In the final analysis, however, these comparative forms of stating the problem make no sense unless the speaker is assuming the existence of some normative baseline against which the present situation is being judged deficient. Thus, it can be fair to ask that such statements be justified by reference to that norm and that the norm be defended. In

---

15. J. CLARENCE DAVIES & JAN MAZUREK, REGULATING POLLUTION: DOES THE U.S. SYSTEM WORK? 48 (1997).

16. Walter A. Rosenbaum, *Escaping the "Battered Agency Syndrome": EPA's Gamble with Regulatory Reinvention*, in ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY 165, 170 (Norman J. Vig & Michael E. Kraft eds., 4th ed. 2000).

other words, the question of problem definition makes relevant issues of political ideology.<sup>17</sup> Developing solutions to environmental problems can also implicate political ideology when, for example, an otherwise effective solution tramples on competing ends, such as free speech, or privacy, or property rights. Whether or not ideology is implicated, the quest for solutions always raises issues of instrumental rationality—determining what approach to the problem is likely to be effective.

The central theses of this essay bear on these two questions. With respect to the issue of ideology and the objectives or ends of environmental policy, no new third way approach can be discerned in the Administration's reinvention initiatives. This does not mean, however, that the political landscape lacks for a third way candidate. An ideological third way, ecologism, has in fact always existed within the broad currents of the environmental movement. As for matters of solutions to environmental problems, here the Administration's initiatives do present a genuine alternative to the heretofore prevailing approaches, an alternative premised on a coherent set of ideas concerning how to craft effective regulation. The remainder of this section explores the claims relating to objectives and ideology, and the following section examines environmental problem-solving.

Since its inception, defining the environmental problem has been the subject of intense debate within the environmental movement. Indeed, if David Broder was correct in declaring in 1990 that "the environmentalists have swept away all opposition," it is a debate that engages all of us.<sup>18</sup> Are we failing to use the environment in an optimal way because most environmental amenities are unpriced public goods and polluters are therefore not accountable for the environmental externalities they generate? Are we failing to preserve natural spaces that contribute to the spiritual renewal and sense of historical continuity necessary for full self-realization? Are we failing to recognize the moral considerability of other species and the ecosystem itself, and thereby committing environmentally harmful acts that would not be justified had our responsibilities to these others been recognized?

Each of these formulations, or others we could choose, identifies environmental problems in terms of deviations from some explicit or implicit norm. As such, each of them expresses an understanding of the proper relationship between humankind and the environment as articulated

---

17. See *infra* notes 20-22 and accompanying text.

18. David S. Broder, Editorial, *Beyond Folk Songs and Flowers*, WASH. POST, Apr. 22, 1990, at B7.

by a particular ideology. According to the Hinich-and-Munger definition, an ideology is "an internally consistent set of propositions that makes both proscriptive and prescriptive demands on human behavior. All ideologies have implications for (a) what is ethically good, and (therefore) what is bad; (b) how society's resources should be distributed; and (c) where power appropriately resides."<sup>19</sup> When we frame environmental problems in comparative terms, the ideology that forms the basis for the comparison frequently remains implicit, and this can have decided advantages. Keeping ideology implicit creates the possibility that people holding competing ideologies can agree on a formulation of the problem, while bracketing their ideological conflicts, or even remaining unaware that those conflicts exist. The three environmental ideologies partially articulated in the last paragraph, for instance, might all agree with the claim that we are producing too much of pollutant "X."<sup>20</sup> So ideologies might be masked by participants for largely benign strategic reasons: exposing them would generate conflict, and exposing them is unnecessary for working together on actions where consensus does exist. Ideologies might also be masked because they remain inchoate. Very few people have thought through a comprehensive ideology. The recurring disputes within liberal, conservative, Marxist, and other ideologies over the best understanding of each shows that sorting through various intra-ideological issues is hard and controversial work.

Nonetheless, ideological disagreements can often be forced into the open when we are confronted with a choice among actions that implicate more than one value and differ in the success with which those separate values are satisfied, thus placing those values in competition with one another. Such moments stimulate efforts to sort out incompletely articulated dimensions of one's own beliefs, both to clarify one's own views and also to understand disagreements with others. Individuals who express a general commitment to the same set of values—individual well-being, freedom, autonomy, equality, collective cooperation, and economic growth, for example—may find themselves at odds when facing specific choices. If disagreements persist after consensus has been reached on the relevant facts and issues of instrumental rationality, the remaining

---

19. MELVIN J. HINICH & MICHAEL C. MUNGER, *IDEOLOGY AND THE THEORY OF POLITICAL CHOICE* 11 (1994).

20. The three statements are examples of stances that might be taken by a conservation-as-efficient-resource-management ideology, a preservationist ideology, and an ecological ideology, respectively. See ROBYN ECKERSLEY, *ENVIRONMENTALISM AND POLITICAL THEORY: TOWARD AN ECOCENTRIC APPROACH* 35-42 (1992) (describing these three perspectives on environmental issues). Each statement is meant to be merely representative. Much more would need to be said as to each in order to articulate fully the underlying ideologies.

disagreement stems from differences in the way each person ranks values, or how each makes trades among values or sacrifices one value for another, or both. In these cases, how the relationship among values is structured within an ideology becomes its most distinctive feature.<sup>21</sup> For example, the famous warring pairs of ideologies within Western political thought, such as collectivism v. individualism, socialism v. neoliberalism, liberalism v. conservatism, clash precisely because each member of any pair structures the relationship among values in a distinctive way, and hence resolves conflicts among competing values differently from the other member. Two ideologies that resolved all such conflicts in identical fashion would in fact be the same ideology.

A "third way" ideology is thus one that resolves conflicts between important values in a manner different from either member of an original pair. Efforts to articulate such an ideology have been very much a part of the third way debate in Great Britain, where Prime Minister Tony Blair has been a strong proponent of the third way approach. In Britain and Europe, the third way discourse explicitly involves articulating a coherent political ideology as an alternative to socialism and communism, on the one hand, and neoliberal free market capitalism, on the other hand. A major factor contributing to this ideological search has been the collapse of the Soviet Union and the communist governments of Eastern Europe. These governmental failures, and the poor domestic economic and social records that preceded them, have undercut the credibility of standard socialist and social democratic ideologies of the West by seeming to suggest that (at least certain versions of) such ideologies could not be successful. Anthony Giddens, who has been a key advisor to Prime Minister Blair on these matters, argues that "[t]he need to cut loose from the past received a . . . dynamic charge from the collapse of East European communism in 1989."<sup>22</sup> Once these countries' communist regimes collapsed, it became practically impossible to espouse socialism as a viable political alternative to the neoliberalism of Margaret Thatcher and, in this country, of Ronald Reagan. As Giddens puts it, "[s]ocial democracy was always linked to socialism. What should its orientation be in a world where there are no alternatives to capitalism?"<sup>23</sup> To offer such an alternative, social democrats

---

21. See, e.g., ANDREW DOBSON, *GREEN POLITICAL THOUGHT* 5 (2d ed. 1995) ("Our distinguishing of ideologies one from another rests not only on identifying distinctive tenets, but also on saying something about the relationship between them. Most understandings of ideology refer to the way in which ideologies systematize their key beliefs."). In the Hinich-and-Munger definition, systematization is implicit in the requirement that the propositions comprising an ideology be internally consistent. See HINICH & MUNGER, *supra* note 19, at 11.

22. ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 17 (1998).

23. *Id.* at 24.

must forge “a new and integrated political outlook” that can pursue the key components of the social democrats’ policy agenda without collapsing into simply a “warmed-over neoliberalism.”<sup>24</sup> Giddens takes it that the

‘third way’ refers to a framework of thinking and policy-making that seeks to adapt social democracy to a world which has changed fundamentally over the past two or three decades. It is a third way in the sense that it is an attempt to transcend both old-style social democracy and neoliberalism.<sup>25</sup>

Turning to the United States, one can say that at a programmatic level—or the level of solutions—third way devotees in the United States share many points in common with their British counterparts, and President Clinton has been as much identified with the third way movement here as has Prime Minister Blair in Great Britain.<sup>26</sup> Strikingly, though, the third way discourse here has largely avoided the ideological side of things, the side interested in defining the ends or objectives of policy. In fact, President Clinton’s public stance has been to portray the third way as the very antithesis of an ideology. In a recent on-line town hall meeting, for example, the President offered the following explanation for what he and the Vice President have been trying to do:

Now, for too long, I felt that both our parties had put ideology above ideas that actually worked. And the American people too often were presented by Washington with false choices, choosing between work and family, between growing the economy and cleaning up the environment, between helping business and helping working people, between being safer or maintaining freedom, between what makes us different as a people and what makes us equal before the law and in the eyes of God. For too long Government seemed to either try to solve all of our problems or to use the failures of Government as an excuse to do nothing at all.<sup>27</sup>

These remarks contain two distinctive elements. The first is President Clinton’s appeal to Americans’ basic pragmatic instinct, our much-discussed dislike of ideological or theoretical disputes in favor of result-oriented “ideas that actually work.” The second is the suggestion that the currently articulated ideologies—conservatism and liberalism in the United States, socialism and neoliberalism in Great Britain—have presented the

---

24. *Id.* at 24-25.

25. *Id.* at 26.

26. For example, a review of the Weekly Compilation Presidential Documents database on Westlaw reveals that he used the term “third way” in public speeches or interviews at least 22 times in the past two years.

27. Remarks in an On-Line Town Hall Meeting, 35 WEEKLY COMP. PRES. DOC. 2293 (Nov. 15, 1999).



average citizen with “false choices,” framing issues in ways that create the appearance of forcing uncomfortable choices between sharply conflicting values when a pragmatic approach could steer a course—a third way—that protects and advances both values.

In tone and content, these elements echo the analysis of American politics offered by E. J. Dionne nearly a decade ago. “Most of the problems of our political life,” Dionne wrote in 1991,

can be traced to the failure of the dominant ideologies of American politics, liberalism and conservatism. The central argument of this book is that liberalism and conservatism are framing political issues as a series of false choices. Wracked by contradiction and responsive mainly to the needs of their various constituencies, liberalism and conservatism *prevent* the nation from settling the questions that most trouble it. On issue after issue, there is consensus on where the country should move or at least on what we should be arguing about; liberalism and conservatism make it impossible for that consensus to express itself.<sup>28</sup>

The reinventing environmental protection initiatives are deeply invested in the idea of false choices, especially the false choice between environmental policy and economic growth. “The most significant plank in Clinton’s environmental platform is the supposed symbiotic relationship between a strong economy and a healthy environment.”<sup>29</sup>

Thus, the Administration’s position is a nonideology because it refuses to discuss just that set of questions that marks an ideology with distinctiveness, namely the question of how value conflicts are to be resolved, by denying that choices posing those value conflicts need to be made.<sup>30</sup> This position could be either globally nonideological or locally nonideological. It is globally nonideological if it claims that we will *never* have to resolve how to structure the relationship between these values when they come into conflict because those conflicts can always be deferred through pragmatic decisions that keep environmental policy “working” for the American people. It is locally nonideological if it more modestly claims that we are able to avoid resolving the structuring question *for the present* because we can agree on constructive steps to take now that are sufficient to satisfy enough different ideologies so that a consensus can be built on the programmatic level if not the ideological level.

None of this suggests that environmental policy lacks a third way ideological alternative, but only that it will have to be found somewhere

---

28. E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 11 (1991).

29. Martin A. Nie, “It’s the Environment, Stupid!” *Clinton and the Environment*, 27 PRESIDENTIAL STUD. Q. 39, 41 (1997).

30. The Clinton Administration is not alone in taking this position. See *infra* note 77.

other than in the Administration's reinventing environmental protection initiatives. In fact, a third way has been part of the broader stream of environmental thought for decades. It goes by various names, including Arne Naess's "deep ecology,"<sup>31</sup> Robyn Eckersley's "emancipatory ecocentrism,"<sup>32</sup> and Andrew Dobson's "ecologism."<sup>33</sup> Here, I will adopt Dobson's usage, but the others would do as well. However labeled, ecologism has been coursing through our environmental discourse from the very beginning of the Environmental Era.

Ecologism has always conceived of itself as an attempt to transcend both old-style social democracy and neoliberalism. Just as Senator Phil Gramm often said during his 1996 bid for the Republican nomination for the presidency that he was conservative before being conservative was cool, ecologists have been third way before being third way was cool. None of the older political ideologies structures the relationship between ecological values and other values in ways at all satisfactory to ecologists.

For instance, Lockean neoliberalism endorses and may even require an expanding stock of wealth and a frontier society where work stands available for all, and where the strictures of liberty guarantee the individual accumulation of wealth, nearly equating that with the pursuit of happiness.<sup>34</sup> As Susan Leeson puts it:

Lockean thought legitimated virtually endless accumulation of material goods; helped equate the process of accumulation with liberty and the pursuit of happiness; helped implant the idea that with ingenuity man can go beyond the fixed laws of nature, adhering only to whatever temporary laws he establishes for himself in the process of pursuing happiness; and helped instill the notion that the "commons" is served best through each man's pursuit of private gain, because there will always be enough for all who are willing to work.<sup>35</sup>

At its worst, neoliberalism ignores environmental values so long as they have not been reduced to possession and thereby incorporated in some persons' property rights. At its best, neoliberalism acknowledges environmental values in ways such as Gifford Pinchot's conversation ethic, in which the environment is attended to because failure to do so results in waste. This infusion of environmentalism into neoliberalism is nicely

---

31. See generally Arne Naess, *The Shallow and the Deep, Long-Range Ecology Movement. A Summary*, 16 INQUIRY 95 (1973).

32. See generally ECKERSLEY, *supra* note 20.

33. See generally DOBSON, *supra* note 21.

34. See, e.g., ECKERSLEY, *supra* note 20, at 24 ("[L]iberal ideals were born in and depend upon a frontier setting and an expanding stock of wealth, with claims for distributive justice being appeased by the 'trickle down' effect . . .").

35. Susan M. Leeson, *Philosophical Implications of the Ecological Crisis: The Authoritarian Challenge to Liberalism*, 11 POLITY 303, 306 (1979).

captured in historian Samuel P. Hays' phrase "the gospel of efficiency."<sup>36</sup> Through careful scientific resource management, public resources, such as the national forest, could be operated to "maximiz[e] output of economic goods per unit of human labor."<sup>37</sup> The core of ecologism, in contrast, includes a commitment to move away from the maximization of any exclusively human-centered value, to think in terms of stocks instead of flows, and to advocate the interrelationships with and the moral considerability of the other elements of our biosphere, including, in various versions, animals, plants, the ecosystem, or the planet itself. This core has never been sympathetically accommodated within neoliberal thinking.

Likewise, socialism and communism do not structure the role of environmental values in ways compatible with ecological thinking. These ideologies also value the accumulation of wealth and the manipulation of valueless nature into valuable human artifacts. Socialism and communism do question the private ownership of the means of production and the rules of distribution of that wealth, but they too promise material well-being, just under more equitable conditions than capitalism provides. Thus, when the collapse of European communist regimes at the end of the 1980s signaled socialism's apparent inability to deliver on that promise, those regimes possessed few other virtues to commend them.

Socialism and neoliberalism sharply differ from each other in their construction of the norms that should govern *human* relations, the overall objectives of which include the development of a prosperous society capable of fulfilling humankind's material desires. However, "[t]he silence of liberalism on [the need to restrain certain kinds of technological advance] is matched by an equally obvious neglect in Marxist theory. Both persuasions have enthusiastically sought freedom in sheer material plenitude . . . ."<sup>38</sup> With respect to the structure of human relations to nature, then, both assert that nature is a resource to be used for human betterment. "Both are dedicated to industrial growth . . . to a materialist ethic as the best means of meeting people's needs, and to unimpeded technological development."<sup>39</sup>

---

36. See generally SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959).

37. Grant McConnell, *The Environmental Movement: Ambiguities and Meanings*, 11 NAT. RESOURCES J. 427, 430 (1971).

38. LANGDON WINNER, *THE WHALE AND THE REACTOR: A SEARCH FOR LIMITS IN AN AGE OF HIGH TECHNOLOGY* 57 (1986).

39. JONATHAN PORRITT, *SEEING GREEN: THE POLITICS OF ECOLOGY EXPLAINED* 44 (1985).

In comparison, the core of ecologism rejects such strong anthropocentrism<sup>40</sup> and constructs a value structure quite different from either conservatism or liberalism. In the words of Vice President Al Gore (prior to becoming Vice President), "we must make the rescue of the environment the central organizing principle for civilization."<sup>41</sup> Ecologism insists that sustainability must be the unifying principle toward which humankind redirects its priorities, both individually and collectively,<sup>42</sup> and that redirecting those priorities will entail some fundamental reorientations: abandoning the goal of ever-increasing material well-being in favor of quality of life; according moral considerability to ecosystems and other species; and embracing "[a] sense of urgency regarding the survival of life on Earth, both long-term and short-term."<sup>43</sup> The older ideologies come up short against these requirements because they fail to accord significance to nature beyond its instrumental value to humankind.

Thirty years into the Environmental Era, the extent to which the distinctive ideological third way of ecologism has become a part of Americans' perspective on environmental issues remains highly uncertain. The individual values contained within ecologism—sustainability, quality of life, ecosystem integrity, and the Earth's survival—have certainly become a *part* of the set of values that most Americans consider when contemplating environmental issues.<sup>44</sup> The crucial determinant of whether or not Americans are committed to ecologism as ideology, though, is whether Americans are committed to the manner in which ecology structures the relationships between and among these and other values. Opinion surveys and other opinion gathering techniques do not sufficiently probe how respondents structure value conflicts to permit any definitive answer to this question, although analysts who have studied the available

---

40. Andrew Dobson helpfully distinguishes between strong anthropocentrism, as defined in the text, which ecologism strives to avoid, and weak anthropocentrism, defined simply as the "human-centered" appreciation of value, which he sees as inevitable in any kind of conscious decisionmaking. DOBSON, *supra* note 21, at 61-71.

41. AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 269 (1992).

42. See, e.g., ROBERT C. PAHLKE, *ENVIRONMENTALISM AND THE FUTURE OF PROGRESSIVE POLITICS* 140-41, 161-64 (1989) [hereinafter PAHLKE, *ENVIRONMENTALISM AND THE FUTURE OF PROGRESSIVE POLITICS*]; Robert C. Pahlke, *Environmental Values and Public Policy*, in *ENVIRONMENTAL POLICY IN THE 1990S* 75, 82-83 (Norman J. Vig & Michael E. Kraft eds., 2000) [hereinafter Pahlke, *Environmental Values and Public Policy*].

43. Pahlke, *Environmental Values and Public Policy*, *supra* note 42, at 77 (setting out a list of environmental values).

44. WILLETT KEMPTON ET AL., *ENVIRONMENTAL VALUES IN AMERICAN CULTURE* 8-11 (1995) (summarizing survey data studies finding Americans have developed a "new environmental paradigm"). This survey data is discussed at great length in Christopher H. Schroeder, *Clear Consensus, Ambiguous Commitment (A Review of Daniel A. Farber's Eco-Pragmatism)*, \_\_\_ MICH. L. REV. \_\_\_ (forthcoming, 2000).

evidence conclude that most Americans have not yet endorsed ecologism as ideology and that many may remain largely unaware of the implications of doing so.<sup>45</sup> At present, the dominant American attitude toward the environment seems much more in tune with the Administration's nonideological stance, placing value on the environment while simultaneously hoping to defer hard choices for as long as possible.

### III. THIRD WAY SOLUTIONS

Developing a third way ideology has not been a significant objective of the Administration's reinventing environmental protection initiatives, and the third way ideology that the environmental movement has developed remains an uncertain influence on policymaking. When we turn to examine third way solutions, a quite different picture emerges. Here, the Administration has backed incentive-based instruments to achieve improvements in environmental quality. These instruments now occupy a place of prominence in policy discussions that promises to make them much more prevalent in the decades ahead than they have been up until now.<sup>46</sup> These instruments are by no means completely new, having been both extensively discussed in academic and policy scholarship, and even implemented on a limited basis on some prior occasions. A carbon tax was discussed prior to the passage of the Clean Air Act Amendments of 1970, for instance, and the first halting efforts at marketable emissions-rights programs were formulated administratively within the EPA in the middle 1970s.<sup>47</sup> Nevertheless, incentive-based instruments have recently gained a heightened degree of legitimacy and have become a source of some

---

45. See, e.g., Riley E. Dunlap, *Public Opinion and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 63, 105 (James P. Lester ed., 2d ed. 1995) ("The growing belief in ecological limits and the increasing value placed on environmental quality are widely interpreted as constituting a change in our society's basic worldview or social paradigm . . . . Most Americans certainly have not fully embraced this emerging ecological worldview, especially its lifestyle implications, nor clearly comprehended the contradictions between it and traditional values such as economic growth, free enterprise, and private property rights." (citations omitted)); EVERETT CARLL LADD & KARLYN H. BOWMAN, ATTITUDES TOWARD THE ENVIRONMENT: TWENTY-FIVE YEARS AFTER EARTH DAY 1-25 (1995) (finding an American optimism that continuing environmental improvement could be balanced with satisfactory economic growth, avoiding severe economic dislocation, or dramatic lifestyle changes).

46. See generally Robert W. Hahn, *The Impact of Economics on Environmental Policy*, at 6 (AEI-Brookings Joint Center for Regulatory Studies Working Paper No. 99-4, 1999) (providing an overview of incentive-based regulatory efforts, noting that "their use has steadily increased over time at the federal level. Moreover, there has been increasing interest in the potential application of economic instruments as well.").

47. For a description of the EPA's early bubble and offset programs, see ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 582-86 (3d ed. 2000).

optimism that we might find more effective means of making further progress in pollution abatement than the traditional methods of command-and-control seem capable of supplying.

The older ideologies each have had characteristic approaches to remediating or preventing environmental degradation that each preferred. Collectivist or socialist ideologies, wary of the ability of self-interested individuals to thwart collective commitments, have favored prescriptive, centralized government regulation of environmental externalities. Individualist or neoliberal ideologies, wary of the chances for corruption and abuse of power when collective bodies enjoy too much power, have favored treating environmental harm as disputes between individual property owners, to be mediated by the common law system of property rights, contract, and tort. Incentive-based implementation devices stand as genuine alternatives to each of these, melding features of each into a new model. They are serious efforts to employ what Charles Schultze has called "the public use of the private interest,"<sup>48</sup> without at the same time endorsing the individualistic and deregulatory view that the market always knows best. In contrast with more collectivist approaches, third way measures provide considerable freedom to act as individuals think best, given the existence of a general collective constraint. Individual choice is encouraged so that individuals can utilize their own creativity in acting to maximize their own self-interest by finding least-cost actions in situations where those actions also are consistent with accomplishing a collectively determined environmental objective. In contrast with more individualistic approaches, collective authority takes an active role in structuring the choice environment so that the choices made work toward accomplishing a collectively determined end, rather than whatever outcome a more unrestrained market would produce. After a description of two of the most prominent of these approaches, the remainder of this section turns to an analysis of why these third way techniques are gaining prominence now.

Market-creation devices: Environmental amenities constitute public goods. Standard welfare economics predicts that public goods will be under produced because individuals and firms who might produce them are unable to capture their full social benefits. For example, individuals will preserve less of their own land undisturbed than all of us would wish (and would be willing to pay for) because it is impossible for the landowner to capture all that we might be willing to pay for the maintenance of that land. Alternatively, existing public goods, often called common pool resources, will be over consumed because they are unowned, so that consumers are

---

48. See generally CHARLES L SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* (1977).

not required to pay the total costs of over exploiting the resource. For example, a factory will have insufficient reason to reduce air pollution because doing so is expensive and using up the air shed imposes few or no costs on it, even though it may be imposing costs on those downwind in the form of adverse health effects and property damage.

These situations arise when individuals act in ways that maximize their own individual welfare.<sup>49</sup> Traditional collectivist approaches to the problem of public goods have concentrated on overriding these self-interested motivations by prescribing individual behavior. Individual factories are told that they must abate pollution down to a certain level, for example. Market creation techniques, in contrast, attempt to channel rather than trump these self-interested motivations. The acid rain abatement program of the 1990 amendments to the Clean Air Act<sup>50</sup> provides an exemplary case. In Title IV of the Clean Air Act, the Congress established a program to reduce total emissions of sulphur dioxide by about ten million tons per year to approximately fifty percent of 1980 levels.<sup>51</sup> The program does not instruct any specific firm as to how much it must reduce individual emissions, or even whether it must reduce them at all. Instead, Title IV creates a system of marketable permits, or allowances, and mandates that, once the program is initiated, it is unlawful to emit sulphur dioxide in excess of the number of allowances owned.<sup>52</sup> Finally, by statute the program creates the quantity of allowances necessary to permit the mandated levels to be met, but not exceeded, and then makes the initial allocation of those allowances. Coal-fired powerplants in the Midwest receive the bulk of the allowances, based on a percentage of their historical emissions levels. Other allowances are retained by the EPA to be sold at public auction, and still others are made available as incentives to facilities that undertake especially beneficial reduction programs.

---

49. Such self-interested motivation need not always rule the use of common pool resources. Work by Elinor Ostrom and others has demonstrated that communities are sometimes capable of maintaining community norms that satisfactorily regulate the use of common pool resources. *See generally* ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990). Incentive-based devices implicitly concede that such norm-based restraint has proven inadequate to address our environmental problems. Sources of tension between ecologists and advocates of third way mechanisms include disagreement over whether such norms can be established on a sufficient scale to be effective in the modern world, and also over whether the adoption of such mechanisms will frustrate our transition from anthropocentric to ecocentric ideologies. *See infra* note 57.

50. Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in sections of 42 U.S.C.).

51. § 401(b), 42 U.S.C. § 7651(b) (1994).

52. A single allowance authorizes the emission of one ton of sulphur dioxide per calendar year. § 402, 42 U.S.C. § 7651a(3).

The acid rain program gives firms the flexibility to choose the least-cost strategy available to them, given the constraint that they must own allowances to match their emissions. A utility facing steep costs of pollution abatement can go into the marketplace and purchase additional allowances, while one facing favorable costs can reduce emissions below the level of currently owned allowances and then sell the excess. Utilities can also reallocate allowances among their own powerplants according to the same least-cost principle. It has been estimated that the cost savings achieved by this approach compared to the traditional prescriptive approach amount to several billion dollars per year.<sup>53</sup>

Cap-and-trade techniques,<sup>54</sup> such as the acid rain program, constitute a subcategory of the more general set of third way approaches known as incentive-based or incentive-compatible measures. Emissions-based taxes constitute another subcategory. By imposing a cost in the form of a tax on each unit of pollution emitted, emissions-based taxes achieve pollution reduction (and raise revenue) by taking advantage of the incentives emitters have to maximize their welfare. If emitters can find ways to reduce emissions at a lower cost than the tax, presumably they will do so. To date, emissions-based taxes have not made their way into actual policy. While statutory regimes increasingly contain fee and tax provisions of various kinds, none of them are designed to produce pollution reduction as their primary objective.

Ecologists have historically opposed market-creation devices for two principal reasons. First, by enabling polluting firms to acquire a "license

---

53. Prior to enactment, it had been estimated that allowances would trade for approximately \$1000 each. In the EPA's first auction, an allowance for a ton of sulphur oxides sold for around \$300. In subsequent years, the March auction price has remained below \$200. Prices are anticipated to rise as the program moves into Phase 2 in 2000, as this phase ratchets down the overall cap. See PERCIVAL ET AL., *supra* note 47, at 594-96. Not all of the cost savings can be attributed to the market efficiently allocating allowances. A good portion of it is due to deregulation of the railroad industry, which resulted in lowering the transportation costs of low-sulphur Western coal, enabling some utilities to lower emissions by switching fuels. See Hahn, *supra* note 46, at 9 (citing Richard Schmalensee et al., *An Interim Evaluation of Sulfur Dioxide Emissions Trading*, 12 J. ECON. PERSP. 53, 57-59 (1998)); see also Robert N. Stavins, *What Can We Learn from the Grand Policy Experiment: Lessons from SO<sub>2</sub> Allowance Trading*, 12 J. ECON. PERSP. 69, 78-84 (1998) (noting that railroad deregulation, utilities' decision to scrub rather than purchase emissions, and the addition of 3.5 million extra bonus allowances toward the end of congressional deliberations all contributed to smaller savings than anticipated). Still, the flexibility of the Title IV program enables utilities to make significant cost-saving choices. See, e.g., Hahn, *supra* note 46, at 9 ("[P]rimary source of cost savings was not directly from trading across utilities, but rather from the flexibility in choosing abatement strategies within utilities . . .") (citing Dallas Burtraw, *Cost Savings Sans Allowance Trades? Evaluating the SO<sub>2</sub> Emission Trading Program to Date* (Resources for the Future Discussion Paper No. 95-30-REV, 1996)).

54. The approach is called a cap-and-trade technique because the program first puts a cap on total overall emissions and then permits emitters to trade rights to pollute among themselves in order to achieve lower cost solutions.



to pollute," they sanction the amount of pollution that the firm continues to emit.<sup>55</sup> Second, ecologists have been skeptical of the efficacy of such devices, fearing that firms will find ways to avoid actual pollution reductions.<sup>56</sup> While zealous ecologists probably remain highly skeptical of such devices on these grounds, these objections have diminished in significance among the rest of the environmental community. The success of the acid rain program has helped establish the efficacy of market-creation devices, and the license-to-pollute objection, while it has not vanished, has taken a back seat to desire to capture the environmental benefits that such programs promise, if incorporating them into environmental programs assists in breaking the stalemate between collectivist and individualist ideologies.<sup>57</sup>

Information provision devices: A second third way measure consists of publicly disseminating information about environmental effects or actions. Like incentive-based techniques, information-disclosure programs also take advantage of the assumption that individuals are motivated by self-interest, and that they will react to information about harmful or potentially harmful effects. Providing information to exposed individuals in easily digestible form overcomes problems of bounded rationality and rational ignorance, which inhibit individuals from taking action that would be in their self-interest. Examples of such actions include avoiding or reducing exposure by relocating away from the hazard, and not moving close to it in the first place. These responses would protect individuals from exposure. The appeal of information-disclosure measures only began to spread widely, however, when ecologists and others, who favor reductions in pollution rather than relocation of exposed individuals, realized that the information that people were being exposed to

---

55. See Michael J. Sandel, Editorial, *It's Immoral to Buy the Right to Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23.

56. See, e.g., RICHARD LIROFF, REFORMING AIR POLLUTION REGULATION: THE TOIL AND TROUBLE OF EPA'S BUBBLE 11 (1986) ("Unless the rules governing trading are fairly strict, they will only enable industries to 'game' regulators.")

57. Some ecologists resist market-based instruments for a third reason. For them, the kind of privately motivated decisionmaking encouraged in free markets constitutes a primary source of our current environmental problems, and, thus, endorsing market instruments serves only to perpetuate the dominance of a way of thinking they believe needs to be replaced. The very virtues that market-creation techniques seek to take advantage of—frugality, efficiency, hard work—spawn the development and maintenance of capitalist economies, which depend upon and hence encourage high levels of material consumption. Capitalism, furthermore, contributes to what Daniel Bell has termed "the modern hubris," that is, "the refusal to accept limits, the insistence on continually reaching out; and the modern world proposes a destiny that is always *beyond*: beyond morality, beyond tragedy, beyond culture." DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 49-50 (2d ed. 1979). Both material consumption and the refusal to accept limits lie at the heart of the ecologists' diagnosis of our current situation.

environmental risks could also stimulate polluters to lower emissions levels. Two prominent examples of information-provision programs that have had this effect are the federal government's publication of the Toxics Release Inventory<sup>58</sup> and California's Proposition 65.<sup>59</sup>

In response to a widely publicized release of toxic gases at a chemical facility in Bhopal, India, in 1986, Congress enacted a requirement that facilities annually report releases of toxics into the environment and instructed the EPA to publish this information.<sup>60</sup> In 1989, the initial Toxic Release Inventory (TRI) showed releases of toxics by some 22,000 companies totaling 5.7 billion pounds of hazardous substances, including 2.4 billion pounds of toxic air emissions. The size of these amounts surprised EPA officials; the amounts and the official reaction made dramatic news when the results were first released.<sup>61</sup> Since then, TRI releases have fallen significantly and were down to 2.577 billion pounds in 1997, the last year for which figures are available.<sup>62</sup>

What caused the reductions? The best theory attributes a positive role to the impact of the disclosures themselves: operators of facilities identified in the TRI worried that people around the facility who were being exposed to toxic emissions, as well as their sympathizers, would subject the facility to lost revenues or more stringent regulation, or both, by mobilizing to protest their exposures.

Work by my Duke University colleague, Jay Hamilton, has tested the hypotheses that the greater the health risks posed by their releases and the more politically active local citizens are, the greater the reductions of TRI chemicals firms will undertake. Consistent with these hypotheses, at the facility level he found statistically significant correlations between estimated exposure risk and TRI reductions, as well as statistically significant correlations between his indicators of political activity and those reductions. Without any direct regulation being imposed on these various sources, they apparently have responded to citizen reaction, or anticipated

---

58. See *infra* notes 60-63 and accompanying text.

59. See *infra* notes 64-67 and accompanying text.

60. The EPA makes the Toxic Release Inventory (TRI) data available on the Internet, and provides a search engine. See Environmental Protection Agency, *Toxic Release Inventory: Community Right-to-Know* (last modified Jan. 18, 2000) <<http://www.epa.gov/opptintr/tri>>. Recently, the Environmental Defense Fund has mounted a search engine and comparative risk information that individuals may find even more convenient. See Environmental Defense, *Scorecard* (visited Feb. 16, 2000) <<http://www.scorecard.org>>.

61. See PERCIVAL ET AL., *supra* note 47, at 378.

62. See Environmental Protection Agency, *1997 Toxic Release Inventory Public Data Release Report*, (last modified Jan. 24, 2000) <<http://www.epa.gov/opptintr/tri97/pdf/chap3.pdf>> (relying on tbl.3-1).

citizen reaction, to the information disclosed by the TRI. As Hamilton puts it:

Controlling for the quantity of air toxics released in 1988, I find that plants whose emissions generated higher numbers of expected cancer cases reduced their emissions more between 1988 and 1991. This indicates that the combination of pollution reduction incentives created by command and control regulation, information provision programs, and liability concerns did lead firms to consider cancer risks as they made emission level choices. The type of residents surrounding a facility also affected decisions about pollution reduction. The higher the voter turnout in the area, a proxy for residents' willingness to engage in collective action, the greater the reductions in a plant's release of air carcinogens. This underscores that the likelihood that . . . pollution reduced may depend on underlying variations in the probability communities will engage in collective action.<sup>63</sup>

Proposition 65 is a state-level program that has also had significant effects on reducing exposure at the source.<sup>64</sup> Enacted by referendum in California in 1986, Proposition 65 also mandates disclosure of information from firms or other entities, in this case not the quantity of releases, but rather the fact that the firm is exposing individuals to risk.<sup>65</sup> If a product contains substances calculated to produce risks of cancer or reproductive toxicity over certain thresholds, producers must notify people of that fact.<sup>66</sup> Proposition 65 thus puts manufacturers of products to the choice of providing a clear and reasonable notice of hazard at the point of sale, or else changing their manufacturing process so as to eliminate the risk. If the manufacturer chooses the disclosure option, customers concerned about their health might well choose to buy other products. Knowing this, a number of manufacturers have changed their production procedures in ways that eliminate the risk. For example, a recent assessment of Proposition 65's impact summarized its effect on the use of lead in consumer products:

---

63. James T. Hamilton, *Exercising Property Rights to Pollute: Do Cancer Risks and Politics Affect Plant Emission Reductions?*, 18 J. RISK & UNCERTAINTY 105, 106 (1999).

64. See Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), CAL. HEALTH & SAFETY CODE §§ 25249.5-.13 (West 1999).

65. See *id.*

66. Section 25249.6 of the California Health and Safety Code provides: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10." *Id.* § 25249.6. Section 25249.10 then exempts from disclosure quantities that expose the individual to a less than one-in-one-million cancer risk and less than one one-thousandth of the "no observable effect" level for reproductive hazards. See *id.* § 25249.10 (c).

Proposition 65 differs from most federal requirements by primarily relying on information disclosure to prompt lead reductions. This approach has been especially effective in the consumer marketplace. Because consumer demand can be extremely sensitive to disclosure of adverse health and safety information, particularly with respect to food products, many businesses have elected to reformulate their products rather than provide warnings and risk significant sales losses. By contrast, federal regulation largely relies on traditional, direct regulatory approaches, such as setting lead limits in a particular product. While more prescriptive, these federal requirements trigger far less consumer demand for product changes than information disclosure mandates.

Proposition 65 has been able to quickly and efficiently fill in important gaps in the regulation of lead exposures left by federal law. In 10 short years, the statute's stringent lead limits have forced the development of new technology and substantially reduced pollution across a wide range of media and products. In the plumbing industry, Proposition 65 accelerated the search for new brass alloys, new production methods, and better manufacturing processes. Proposition 65 also prompted the ceramic industry to develop new lead-free glazes and improve its firing techniques, and calcium suppliers to find cleaner sources of calcium deposits. These and other experiences over the past decade illustrate that a simple, multimedia, self-executing statute like Proposition 65 can be more powerful than a host of complex regulatory programs in achieving actual reductions of pollutants in our environment.<sup>67</sup>

Like market-creation measures, information-disclosure measures take advantage of self-interested behavior on the part of individuals and firms. In this way, they "get the incentives right," aligning incentives for private behavior with the collective goal of reducing toxic emissions. One difference between the two measures is that information-disclosure programs do not establish a cap on emissions; they simply let the incentives produce individual behavior that is consistent with a general pollution reduction objective. For this reason, it remains possible that policymakers would revisit the level of relevant exposures after the information disclosure was in place, determine that the amount of reductions was unsatisfactory, and resort to additional control measures.

Neither market-creation devices nor information-disclosure devices will invariably prove attractive substitutes or complements to prescriptive regulation. They have, however, moved from devices of primarily academic interest, peripheral to actual policy implementation, to accepted components of the overall regulatory tool kit for environmental problem solving.<sup>68</sup>

One of the more intriguing questions about policy change is why

---

67. Clifford Rechtschaffen, *How to Reduce Lead Exposures with One Simple Statute: The Experience of Proposition 65*, 29 ENVTL. L. REP. 10581 (1999) (footnotes omitted).

68. See generally Hahn, *supra* note 46, at 5-10.

certain policy approaches move from the classroom to the statute books or the Code of Federal Regulations when they do. With respect to incentive-based instruments, I believe that five factors have contributed to these recent developments. First, the prescriptive strategies that have been the backbone of federal environmental regulation since 1970 are approaching the point of accomplishing as much as they feasibly can. Automobile emissions provide an excellent illustration. Through the application of increasingly stringent emission controls, we have reduced individual automobile emissions by approximately 90% of their pre-1970 levels. As a result, total annual emissions nationwide of the principal automobile-related criteria pollutants, carbon monoxide, hydrocarbons and nitrogen dioxide, have appreciably declined.<sup>69</sup> However, during the period, 1977-1998, gross domestic product rose by 64%, and vehicle miles traveled rose by 160%.<sup>70</sup> Because we have come close to the limits of what is technologically and economically feasible with existing technology, continued growth in vehicle miles traveled will soon begin to completely offset technological improvements. For instance, the EPA projects that total hydrocarbon emissions produced by mobile sources will start to rise again in 2005.<sup>71</sup>

The automobile case typifies a general problem: if further progress is to be made in pollution reduction, we need to explore alternative strategies that may enable us to avoid the problem of diminishing returns on existing approaches.

Among the available alternatives, pollution *prevention* techniques hold out some hope for further progress at a reasonable cost.<sup>72</sup> Pollution

---

69. See PERCIVAL ET AL., *supra* note 47, at 548 fig.5.5.

70. See Paul R. Portney, *Environmental Policy in the Next Century*, in SETTING NATIONAL PRIORITIES, *supra* note 2, at 361.

71. See Environmental Protection Agency, *Automobiles and Ozone* (last modified July 20, 1998) <<http://www.epa.gov/oms/04-ozone.htm>> (fact sheet OMS-4). The singular success story of the ambient air pollutants is lead, which did not undergo end-of-the-pipe regulation at all. Instead, after conducting a positive cost-benefit analysis, the EPA ordered the phasing down and eventually the phasing out of lead in gasoline.

72. Pollution prevention has spawned a vast literature, much of it lamenting how little muscle the EPA has actually applied to implementing effective pollution prevention programs. For good analysis and a survey of the field, see Kurt A. Strasser, *Cleaner Technology, Pollution Prevention and Environmental Regulation*, 9 FORDHAM ENVTL. L.J. 1 (1997) and Kurt A. Strasser, *Preventing Pollution*, 8 FORDHAM ENVTL. L.J. 1 (1996). See also, NATIONAL SCIENCE & TECHNOLOGY COUNCIL, BRIDGE TO A SUSTAINABLE FUTURE: NATIONAL ENVIRONMENTAL TECHNOLOGY STRATEGY (1995); Nicholas A. Ashford, *An Innovation-Based Strategy for the Environment*, in WORST THINGS FIRST?: THE DEBATE OVER RISK-BASED NATIONAL ENVIRONMENTAL PRIORITIES 275 (Adam M. Finkel & Dominic Golding eds., 1994).

As Ashford puts it:

Technological change is now generally regarded as essential in achieving the next major advances in pollution reduction. The necessary technological changes include the

prevention poses difficulties for traditional command-and-control regulation, however, because government regulation runs into considerable resistance whenever it begins to intrude into decisions inside an industry's production processes. The Environmental Era has, in many circumstances, legitimated government's regulation of what industries dump into the public commons, but so far, direct intervention into the production processes of American industry by government has seldom even been attempted. In contrast to end-of-the-pipe controls, direct government intrusion into the "very processes of production themselves" has had very little political support in domestic politics.<sup>73</sup>

The reasons for this selective endorsement of government environmental regulation relate to a second development in American society that has been occurring alongside the environmental movement. During the same period in time in which the major federal environmental statutes have been enacted and amended, American hostility toward government, and American distrust of government, has never been more pronounced.<sup>74</sup> That distrust manifests itself in a variety of ways, including the readiness of the American electorate to believe that government bureaucracy is cumbersome, slow, and often verging on incompetence. Government is often derided as incapable of understanding how any industry functions and, as a consequence, likely to regulate industry in ways that are oppressive and counter-productive. This sentiment dramatically ascended to the national stage when President Reagan remarked in his first inaugural address that "government is not the solution

---

substitution of materials used as inputs, process redesign, and final product reformulation. Initiatives for focusing on technological change need to address multimedia pollution and to reflect fundamental shifts in the design of products and processes. Distinguished from end-of-pipe pollution control, those new initiatives are known as pollution prevention, source reduction, toxics-use reduction, or clean technology.

*Id.* at 276 (citation omitted). The contentious issues in pollution prevention concern what approach will be most effective in achieving the objective of reducing pollution before it is generated.

73. The legislative history of the Resource Conservation and Recovery Act of 1976 (RCRA), for example, stresses that "[r]ather than place restrictions on the generation of hazardous waste, which is [sic] many instances would amount to interference with the productive process itself, the Committee has limited the responsibility of the generator for hazardous waste to one of providing information." H.R. REP. NO. 94-1491, at 26 (1976). Because RCRA dramatically raises the costs of disposing of hazardous wastes, it creates incentives for pollution prevention. Induced pollution prevention of this sort, which is quite similar to pollution prevention induced by emission taxes or information disclosure programs, raises fewer of the concerns raised by direct government attempts to dictate pollution prevention.

74. See, e.g., WHY PEOPLE DON'T TRUST GOVERNMENT (Joseph S. Nye, Jr. et al. eds., 1997); see also e.g., *supra* notes 11-16 and accompanying text (noting role hostility to government played in the deregulation debate in 1995-1996).

to our problem.”<sup>75</sup> Major elements of the criticism have now been embraced by both political parties. President Clinton signaled this convergence when he announced that “the era of big government is over” in his 1996 State of the Union address.<sup>76</sup>

Compared to prescriptive command-and-control regulation, third way measures reduce the role of government. Under market-creation strategies, for example, government sets the standards and then lets the ingenuity of American industry locate the best techniques for achieving them. This both reduces the role of government in the problem solving process, which the public likes, and also may make the heavy hand of government less noticeable, which beleaguered bureaucrats like. The resulting division of labor also arguably plays to the strength of each sector—government figures out the level of protection appropriate to protect public health, discharging the more public-oriented aspect of the regulatory function, and then industry finds the best technical means to meet those standards, discharging the more private aspects of that function. So, the second reason that third way measures may be emerging is that they allocate responsibilities in ways that coincide with our attributions of competence to the various sectors of our society.

Third, these third way measures enable us to continue to believe in American exceptionalism. Within the environmental arena, American exceptionalism holds that America can solve its environmental problems through technological advance. When the Environmental Era began, such technological optimism was at a zenith. In 1968, the country had succeeded in placing a man on the moon, closing the gap between the United States’ space program and that of the Soviet Union in a remarkably short period of time after President Kennedy had made this a national objective. The sentiment that, if we can put a man on the moon, we can solve the pollution problem rang through the debates on national environmental legislation.

The space program provided more than a rhetorical argument for bold action; its approach to problem solving was mimicked in our early pollution statutes. While the space program drew on the capacities of private industry, the actions of industry were carefully specified and overseen by NASA. Translating this public-private arrangement into environmental affairs produced the kind of prescriptive regulation that typified the early period: government was to study engineering capabilities,

---

75. President Ronald Reagan, *First Inaugural Address* (visited Mar. 9, 2000) <<http://reagan.com/plate.main/ronald/speeches/rfspeech0c.html>>.

76. President William Jefferson Clinton, *State of the Union Address* (visited Mar. 9, 2000) <<http://www.whitehouse.gov/WH/New/other/sotu.html>>.

health data, and other relevant information, decide in fine detail the best action to take, and industry was to comply. Beyond the NASA example, this approach to industry resonated with a fairly widespread suspicion that industry could not be trusted to perform according to collective mandates without it. Even though President Reagan would place government on the problem side of the problem/solution divide a short decade later, the passage of the Clean Air Act, the Clean Water Act, and other significant pollution statutes came at a time when more people were saying that it was industry that was part of the problem. Notably, General Motors gave the automobile a huge black eye when it placed Ralph Nader under surveillance and then was forced to admit this in open congressional hearings. The whole role of corporate power in society was also being subjected to criticism from progressives who conceived of government as a countervailing power to offset the undesirable features of corporate dominance. In this environment, command-and-control seemed consistent with the American expectation that we can solve any problem once we focus our attention on it.

By the end of the century, social attitudes toward corporate power had shifted and have become now considerably more accepting of that power. The presence of international competition and the swift rise of the computer industries and e-commerce have convinced many that competition and the dynamics of markets themselves discipline corporate excesses. Firms also argue that they need flexibility to meet competition and thereby to generate the new jobs upon which the country must rely for future prosperity. In this new environment, American technological optimism has remained but has shifted from valorizing government to valorizing private industry. Now it is popular to believe that American industry, once unfettered so that it can experiment and create new solutions, will use its ingenuity to produce significant amounts of environmental improvement at acceptable costs. Both market-creation devices and information-disclosure devices rely upon a confidence that they will lead to cost-effective pollution reduction because we believe that getting the incentives right will produce such change. If it turns out that industry lacks the capacity to respond to those incentives in ways that are both environmentally meaningful and economically viable, third way measures will come under pressure.<sup>77</sup> At present, though, many people seem content to believe that third way measures are, in fact, approaches

---

77. See generally Michele Ochsner, *Pollution Prevention: An Overview of Regulatory Incentives and Barriers*, 6 N.Y.U. ENVTL. L.J. 586, 588 (1998) ("Viewing pollution prevention as a solution to the problem of environmental regulation may risk provoking a backlash against this approach, should it fall short of unrealistically high expectations.").



that will make the environment/economic growth clash into the "false choice" that President Clinton insists it is.<sup>78</sup>

Fourth, third way measures benefit from the suffusion of environmental values throughout the society. For some time, a number of early ardent environmentalists conceived of environmentalism as a vanguard movement, devoted to strenuous criticism of current ideologies but remaining a minor voice on the large political scene. For example, vanguardism shines through William Ophuls's early work, *Ecology and the Politics of Scarcity*, which advocates authoritarian solutions to environmental problems because of democracy's inability to make the hard choices required.<sup>79</sup> Robert Heilbroner<sup>80</sup> and Garrett Hardin<sup>81</sup> embraced similar proposals, rooted in the need to circumvent the fecklessness of democracy. This authoritarian strand within environmentalism contributed to accusations that environmentalism resembled Marxism<sup>82</sup> and that environmental politics were but camouflage for an agenda designed to sink intrusive, autocratic controls deep into American society.

It is fair to say that in recent years this authoritarian element in environmentalism has been receding. In its place, environmental scholars are propounding theories of environmental politics that seek to reconcile environmentalism and democracy, some even arguing that meaningful democratic participation is essential to achieving environmental goals.<sup>83</sup>

---

78. Finding win-win solutions to problems clearly has more attractions than confronting win-lose situations, and this surely has something to do with the appeal of the "false choice" hypothesis, which relies upon technological optimism and which can be found in Europe as well as the United States. The Brundtland Report, for example:

emphasizes the mutual reinforcing of economic growth, social development and environmental protection. . . . Brundtland concludes that continued economic growth is essential for environmental protection. This interpretation of sustainable development has been widely endorsed at all levels. It is easy to understand why such a definition of sustainable development could be supported by many different and often antagonistic parties in that it apparently offers the panacea of combining economic growth and environmental protection.

JAMES CONNELLY & GRAHAM SMITH, *POLITICS AND THE ENVIRONMENT: FROM THEORY TO PRACTICE* 57 (1999); see also *id.* at 241 (describing EU environmental policy as dependent upon the "ecological modernisation" argument, which minimizes the conflict between environmental quality and economic growth by betting on technological advances).

79. WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY: PROLOGUE TO A POLITICAL THEORY OF THE STEADY STATE passim* (1977).

80. See generally ROBERT L. HEILBRONER, *AN INQUIRY INTO THE HUMAN PROSPECT* (1980).

81. See generally GARRETT HARDIN, *EXPLORING NEW ETHICS FOR SURVIVAL: THE VOYAGE OF THE SPACESHIP BEAGLE* (1972).

82. See, e.g., Robert W. Hahn, *Toward a New Environmental Paradigm*, 102 *YALE L.J.* 1719, 1754 (1993) (fearing that ardent environmentalists, "like the Marxists before them," will "demonstrate little tolerance for opposing views.").

83. See, e.g., *DEMOCRACY AND GREEN POLITICAL THOUGHT: SUSTAINABILITY, RIGHTS, AND CITIZENSHIP* (Brian Doherty & Marius de Geus eds., 1996) (collection of essays).

This happier union of environmentalism and democracy comes more easily now that environmental values are widely shared within American society. The American public has strongly supported environmental measures for better than three decades and that record of endurance makes environmentalism stand apart from the normal pattern of issues that push onto the public agenda, have their moment in the sun, and then recede from view.

The third way measures that rely upon consumer or citizen response draw upon this same base of support. Thus information-disclosure measures can be supported by environmentalists with some confidence that citizens in fact will react to the knowledge that is being disseminated. TRI disclosures, Proposition 65, the dolphin-free-tuna boycott movement, the interest in eco-labeling, and the recently initiated push to have grocery stores disclose whether they are selling genetically modified food stuffs all trade on the confidence that consumers care enough about the health and environmental effects of their purchases to base consumption decisions on that concern—at least when reasonably comparable alternative products are available. So long as that is the case, information-disclosure techniques will have some efficacy.

Fifth, incentive-based instruments have increasing influence because they have developed a track record. The success of TRI, Proposition 65, the acid rain program and other market-creation devices lends some credence to the claim that they are indeed “ideas that actually work.” Early successes induce policymakers to consider new applications. Tradeable permits have become an integral part of the Kyoto Accords on greenhouse gases, for instance.<sup>84</sup>

\* \* \*

The regulatory instruments that the Clinton Administration has emphasized under its reinventing environmental protection umbrella, which extend beyond market-creation and information-disclosure devices,<sup>85</sup> have thus far been promoted in a political environment that has largely permitted the suppression of ideological debate, thus reflecting the way in which President Clinton and Vice President Gore have advocated them. Eschewing ideological battles, and embracing only the view that we need to do more, the Administration pursues solutions that seek to gain further progress by blunting the major deregulatory argument against big

---

84. See PERCIVAL ET AL., *supra* note 47, at 1138-39 (reproducing Article 6 of Kyoto Protocol).

85. See *supra* notes 11-16 and accompanying text (summarizing the reinvention program).

government while building on broad popular agreement with that view.

The tactical nature of these third way measures constitutes both their strength and their potential weakness. Avoiding ideological debate enables people of differing ideological commitments to come together around practical measures that make progress, that move in a direction congenial to each of their differing ideologies without being explicitly derived from any of them. So long as targets of opportunity exist for such tactics, they can be applauded as "ideas that actually work," and it becomes a point of merely academic interest whether they are globally nonideological in nature, or simply locally nonideological.

Their political weaknesses are that they are dependent upon external circumstances being such that these targets do exist, and that they are completely unequipped to resolve significant disputes between environmental improvement and economic growth, say, when and if those disputes can no longer be avoided. Indeed, most ecologists will continue to dissent from these tactics precisely because they believe that a commitment to non-human-centered environmental principles compels action much bolder and much more discontinuous with existing practices than the third way measures described here. It may be that the ideological dimension of the third way debate will have to be engaged, but in the meantime it makes good sense to explore and capture the gains that can be made through third way environmental solutions.

