

ZYGMUNT J. B. PLATER\*

## **Dealing With Dumb and Dumber: The Continuing Mission of Citizen Environmentalism**

*Abstract:* Surveying the history of citizen environmentalism in the context of environmental law and politics over the past fifty years, this essay hypothesizes five different categories of corporate, governmental, political, and individual actions that deserve to be called “dumb,” and the societal lessons that have been or could be learned from each. If there is truth to the wistful aphorism that “we learn from our mistakes,” then our society is in position to learn a great deal about our world and how it works, which perhaps provides some ground for hope for the years to come. Environmentalism embodies fundamentally rational and realistic principles of analyzing scientific fact, human needs and behavior, values and risks, and issues of policy and governance—

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\* Professor of Law, Boston College Law School. This essay was presented as a keynote address at the twenty-third annual Public Interest Environmental Law Conference in March 2005. Like the other participants at the Conference, I am deeply grateful to the staff of Land Air Water who organized and managed the extremely successful sessions over those days. I acknowledge with appreciation the special contributions of Christopher Morgan, Boston College Law School Class of 2006, and Timothy Landry and Leigh Cummings of the Boston College Law School Class of 2007, who helped turn a rather rambunctious rambling lecture into a printable essay. Portions of this narrative are drawn from the experiences my students and I have shared over the years working on the Exxon-Valdez oil spill for the State of Alaska’s Oil Spill Commission; the endangered species and dam construction issues involved in the snail darter’s battles against the Tennessee Valley Authority’s Tellico Dam (as to both, see Zygmunt J. B. Plater, *Facing a Time of Counter-Revolution: The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657 (1995)); the Woburn municipal well toxic contamination cases (chronicled in Jonathan Harr’s book *A CIVIL ACTION* (1995) and the movie of the same name), see ENVIRONMENTAL LAW & POLICY: NATURE, LAW, AND SOCIETY (Robert H. Abrams et al. eds., 3d edition, 2004); and a number of other public interest environmental initiatives I’ve shared with my students. I cite herein a number of my own past published works not so much out of conceit as for purposes of convenience, coherence, and to extend past academic conversations.

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so therefore, as in the past, against protracted retrogressive opposition, citizen environmentalism will undoubtedly continue to play an indispensable societal role.

The title of this presentation and essay, when first hypothesized in the summer of 2004, seemed a useful and somewhat light-hearted approach to the subject and the occasion. Over the years, citizen environmentalism has been critically important in catalyzing and shaping the development of environmental protection law and policy, and citizen effort often has been necessary to force corporate and public officials to address the practical as well as legal deficiencies of their ongoing projects and programs. According to the original plan, a series of piquant, revealing vignettes of official astigmatism might usefully illustrate the critically important role that citizens continue to play in twenty-first century societal governance.

But since then, as I suspect most observers have noticed, the near-term prospects for environmental protection policies here in the United States have become a good deal more problematic. There was a national election in November 2004, you may recall, and it did not turn out well for the environment. The current administration, embodying a cresting New Right movement, has implemented an unprecedented agenda for eroding fifty years of bipartisan development of environmental laws,<sup>1</sup> presenting civil society with a very substantial challenge. Then in February of 2005 the Kyoto Protocol to the United Nations Framework Convention on Climate Change officially came into force<sup>2</sup>—a small, shaky, but crucial collective international first step toward planetary climate sanity—but the United States of America, which had initiated the global carbon trading plan in the first place, decided to back off into a corner, sulking, isolated. Also quite recently, a dramatic and petulant critique essay entitled *The Death of Environmentalism*<sup>3</sup> has been lobbed into the midst of the national environmental policy debate and received a great deal of atten-

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<sup>1</sup> For the best general resource on the Bush Administration's ongoing initiatives in this field see Natural Resources Defense Council, *The Bush Record*, <http://www.nrdc.org/bushrecord/>; ENVIRONMENTAL LAW & POLICY, available at <http://www2.bc.edu/%7Eplater/Newpublicsite05/02.7.pdf> (last visited Jan. 16, 2006).

<sup>2</sup> See Press Release, United Nations, In Message to Kyoto Protocol Ceremony, Secretary-General Calls on World Community to 'Be Bold', Quickly Take Next Steps Against Climate Change, U.N. Doc. SG/SM/9721 (Feb. 16, 2005), available at <http://www.un.org/News/Press/docs/2005/sgsm9721.doc.htm>.

<sup>3</sup> Michael Shellenberger & Ted Nordhaus, *The Death of Environmentalism* (2004), available at <http://www2.bc.edu/%7Eplater/Newpublicsite05/02.9.pdf>.

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tion for its declarations that what U.S. environmentalists have been doing for the last few decades is all wrong.

So it seems high time that citizen environmentalism in this country gives itself a gut check. This essay seizes an opportunity to pull together an analysis that goes a good deal beyond a simple two-pronged finger-pointing at “dumb and dumber.” The more I thought about it, the more it seemed worthwhile to define and distinguish *five* different categories of dumb, not just two, and that is what this essay attempts to do, seeking to derive some useful observations from those five distinctions. The essay draws upon the short history of environmental law and some of the particular issues with which, working with many students and friends, I’ve been involved over the years. It lays out some facts and themes that may help in the conversation about how we can make the most of what we are, to get our society and planet to a better and more sustainable future.<sup>4</sup>

Like most environmental analyses, moreover, an examination of the interactive cyclic history of environmental knowledge and policy in the United States over the past forty years teaches broader and deeper lessons, beyond the realm of purely “environmental” issues, with significant relevance for the success of modern democratic governance generally.

## I

### THE FIRST CIRCLE OF DUMB: DECISIONS THAT HOIST THEMSELVES ON THEIR OWN PETARDS

Many citizen environmental efforts over the years have occurred in settings where official decision-making personified a fundamental baseline level of dumb. It would be easy to assemble a long retrospective list of environmental law nominees for the Official Corporate and Governmental Darwin Award competition, if such a competition existed.<sup>5</sup> These are official decisions

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<sup>4</sup> A number of PowerPoint slide illustrations accompanied the original presentation; some of them are reflected in this article and are available at <http://www2.bc.edu/%7Eplater/Newpublicsite05/02.10.pdf> (last visited Jan. 16, 2006).

<sup>5</sup> The Darwin Awards are a mock-serious annual compilation of anecdotes of hapless individual humans hurting themselves foolishly, usually fatally, in settings demonstrating that humanity’s gene stock may well be improved by their departure. Survival of the fittest; extinction of the unfit. Examples include a trucker who used a lighter to help him see inside the dark tank of a gasoline tanker truck to determine how full it was. The resulting explosion hurled him more than 100 yards through the air to his demise. Darwin Awards, <http://darwinawards.com> (last visited Jan. 16,

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that are dumb-as-a-stump, fence-post dumb, you-should-be-fired-without-a-golden-parachute dumb.

### A. *Dumb Dams*

Dam builders seem to stumble into these situations more frequently than many others.<sup>6</sup> For instance, the engineers and politicians promoting the Sanmenxia Dam on China's Yellow River for irrigation water storage and hydroelectric capacity were resisted by environmentalists and ultimately rejected for funding by the World Bank,<sup>7</sup> but subsequently secured financing from the Soviet Union. Sanmenxia Dam was designed and built to last for 100 years, but, as it turned out, became a tragicomic bust, more than half-filled with silt within four short years of completion. The dam promoters, despite critical warnings from citizen "outsiders," had refused to acknowledge the hydraulic realities of silt loads in the river.<sup>8</sup> The Laoying Dam was even more dramatically dumb: it was completely filled with silt even before the dam construction was completed.<sup>9</sup>

As an even more dramatic example, a coalition of citizen environmental NGOs led by Trout Unlimited litigated for several years, unsuccessfully, against the Bureau of Reclamation's plans to build its Teton Dam on the upper Snake River.<sup>10</sup> The citizens had argued that, in addition to disregarding the loss of a beautiful canyon river, the dam-promoting agency, its contractors, and its boosters, had failed to consider proper geological citing issues.

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2006) (type "gas tanker" into the search box and follow the "Workin' at the Car Wash" link).

<sup>6</sup> See Zygmunt J. B. Plater, *Multilateral Development Banks, Environmental Dis-economies, and International Reform Pressures on the Lending Process: The Example of Third World Dam-Building Projects*, 9 B.C. THIRD WORLD LAW L.J. 169 (1989).

<sup>7</sup> See Marian E. Sullivan, *Note: The Three Gorges Dam Project: The Need for a Comprehensive Assessment*, 8 GEO. INT'L ENVTL. L. REV. 109 (1995).

<sup>8</sup> See e.g., Jean Cutler Prior, *Waterforms*, available at <http://www.igsb.uiowa.edu/Portrait/7WATER/Water.htm>.

<sup>9</sup> See Edward Goldsmith, *Sedimentation: The Way of all Dams*, available at <http://www.edwardgoldsmith.com/page160.html>; see also Philip Williams, *Damming the World*, NOT MAN APART, October 1983, at 11. About 230 dams in China have a significant problem of sediment deposition, leading to a combined loss of fourteen percent of the total storage capacity. The Three Gate Dam on the Yellow River produces less than one-third of the power that was promised due to heavy sedimentation. Some dams have lost more than fifty percent of the storage capacity. The Sanmenxia Reservoir was decommissioned because of sedimentation in 1964, just four years after completion.

<sup>10</sup> See *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974).

An earthen dam of compacted aggregates on a base of fractured rhyolite rock might allow structural leakage. On June 5, 1976, the reservoir that had been impounded behind the completed Teton Dam began to seep through the rhyolite fractures, eroding the earthen dam, and within 90 minutes a cataclysmic 80-billion gallon torrent of raging water cut through the dam face and raced off downriver, killing more than a dozen people in the serpentine canyon and towns below, flooding 8000 homes, and causing more than a billion dollars in damage.<sup>11</sup>

### **B. Kudzu**

A more prosaic example of self-inflicted dumb is kudzu, the rapidly-invasive broad-leafed vine imported from Asia that has been taking over the South.<sup>12</sup> In the 1960s and 1970s the road commissions of the Southern states, over the agonized protests of environmentalists, decided to “treat” scalped and eroding highway rights-of-way with kudzu. The fast-growing Asian plant could quickly mask a linear mile of bulldozed highway ground-cuts and right-of-way shoulders for less than a dollar’s worth of seeds, with no need for topsoil or fertilizer. The road commissions could just stick in the seeds and stand back. But the vine grows fast in all directions and soon swarmed off across fields and forests. One of my Tennessee students measured one kudzu plant tendril’s growth at 17 inches in one day, and I’ve heard reports of a day’s growth of more than 20 inches. Mothers in some Southern counties, it is said, must keep their children’s bedroom windows locked so their babies won’t be strangled in their

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<sup>11</sup> According to a study by the Duke University Nicholas School of the Environment and Earth Sciences, the Teton Dam disaster can be attributed to an extended series of dumb elements:

Medial causes of failure: (1) Incomplete understanding of geological and hydrological system; (2) Lack of a total systems perspective uniting the engineered and natural parts of the system; (3) Lack of an integrated “defense-in-depth” strategy, e.g., multiple independent barriers against failure. Distal (institutional) causes of failure: (1) Poor integration and communication; (2) Arbitrary decision points (e.g., when to stop pouring concrete); (3) Unwillingness to question authority; (4) Absence of a learning culture; (5) Institutional hubris . . . .

Norm Christensen, *Causes of Failure: Getting to the Bottom of Murphy’s Law; Dealing with Disasters*, 2002 Duke Environmental Leadership Forum (Nov. 20, 2002), available at <http://www.env.duke.edu/forum02/christensen.pdf> (last visited Jan. 22, 2006).

<sup>12</sup> See ENVIRONMENTAL LAW & POLICY, available at <http://www2.bc.edu/%7EPlater/Newpublicsite05/02.10.pdf> (last visited Jan. 16, 2006).

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cribs. Telephone poles and power lines are weighted down and fall. Trees large and small succumb to the blanket of large leaves that block them off from the summer sun.<sup>13</sup> Kudzu has overpowered its way across major portions of many piedmont and Appalachian counties, and has invaded the Great Smoky Mountains National Park.<sup>14</sup>

But kudzu doesn't even accomplish what the road commissions originally wanted. It, unfortunately, was discovered too late that as soon as the year's first frost arrives, all the kudzu leaves shrivel and die, leaving the soil beneath the tangle of vines relatively unprotected because all other vegetative ground cover has been killed off by the blanketing shade of large kudzu leaves. The roots and vines stay alive, however, waiting to surge onward again in the spring. And while it originally cost the road commissions only a dollar or so an acre for the seeds, it can cost hundreds, even thousands, of dollars per acre to get rid of the kudzu infestation—through exotic pesticides, repeated manually-administered syringe injections vine-by-vine, or by carefully sustained and targeted tethering of transient herds of specialized goats.

### C. *The Exxon-Valdez Oil Spill*

Another example of the first circle of dumb: the wreck of the M/S Exxon Valdez, the worst oil spill ever experienced by the United States. The conventionally-retailed story we hear for why the spill occurred focuses on a captain with a drinking problem.<sup>15</sup> The State of Alaska Oil Spill Commission, however, determined that the spill was directly traceable to a repeated course of dumb

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<sup>13</sup> See ENVIRONMENTAL LAW & POLICY: NATURE, LAW, AND SOCIETY 500 (Robert H. Abrams et al. eds., 3d edition, 2004) (hereinafter ENVIRONMENTAL LAW & POLICY) (quoting Natural Resources Defense Council, Inc. v. Grant, 355 F. Supp. 280, 288 (D.C.N.C., 1973): "One can frequently see kudzu along roads and highways . . . growing on banks, stretching over shrubs and underbrush, engulfing trees, small and large, short and tall, slowly destroying and snuffing out the life of its unwilling host.") It has been estimated to extend its coverage by more than 320,000 acres every year.

<sup>14</sup> See U.S. Dept of Interior, National Park Service, Great Smoky Mountains National Park, Non-Native Plants, <http://www.nps.gov/grsm/pphtml/subplants29.html> (last visited Feb. 20, 2006).

<sup>15</sup> From Commission hearings in the Exxon Valdez case it appeared that Captain Joseph Hazelwood probably had several drinks in the hours before the Exxon Valdez left port. According to several reports, however, he appeared very much in control of his senses, and was off the bridge, doing the vessel's paperwork, when the ship hit Bligh Reef.

decisions undercutting safety and spill response procedures throughout the complex system set up to transport Alaska's North Slope oil. The Commission found that the oil industry, acting through its seven-company Alyeska Consortium, had systematically attempted to cut operating costs and speed up delivery of oil, to the detriment of the public interest.<sup>16</sup> The Commission found an endemic official culture of *complacency* within the corporate and governmental actors, ignoring inconvenient warnings of drastic risk.<sup>17</sup>

Across a broad range of transport facilities and procedures, Alyeska had successfully lobbied and suborned the U.S. Coast Guard's watchdog and response functions. By 1989, the Alaska oil maritime trade was operating with a less-expensive, insufficient radar system that could not see clearly across Prince William Sound in icy conditions. Additionally, it was operating tankers longer than three football fields (with oil-filled hulls formed by a single sheet of steel less than an inch-and-a-half thick) through iceberg-infested waters, with a navigation channel where the Vessel Separation Zone was voluntary rather than mandatory.<sup>18</sup> Moreover, at the loading facility at Valdez Terminal, pollution control was haphazard and unenforced and response equipment was broken or undeployable. A spill-response station on Hinchinbrook Island that had been promised was never built.<sup>19</sup> Finally, the Alyeska Consortium had an extensive history of cutbacks of essential personnel at the Valdez Terminal and on the ships themselves.<sup>20</sup> One example uncovered by the Commission: the depleted crew of the Exxon-Valdez was exhausted as they sailed back out through Valdez Narrows, in part because they themselves had had to supervise the loading and turnaround of their vessel because the Terminal's expert loading

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<sup>16</sup> See STATE OF ALASKA OIL SPILL COMMISSION, *SPILL: THE WRECK OF THE EXXON VALDEZ: IMPLICATIONS FOR SAFE TRANSPORTATION OF OIL*, FINAL REPORT, iv (1990); Zygmunt J. B. Plater, *Facing a Time of Counter-Revolution — The Kepone Incident and a Review of First Principles*, 29 U. RICH. LAW REV. 657, 672-73 (1995).

<sup>17</sup> "The vigilance over tanker traffic that was established in the early days of pipeline flow had given way to complacency and neglect . . ." STATE OF ALASKA OIL SPILL COMMISSION, *SPILL: THE WRECK OF THE EXXON VALDEZ: IMPLICATIONS FOR SAFE TRANSPORTATION OF OIL*, FINAL REPORT, at iii (1990).

<sup>18</sup> STATE OF ALASKA OIL SPILL COMMISSION, *supra* note 16, at 9; ZYGMUNT J. B. PLATER ET AL., *ENVIRONMENTAL LAW & POLICY: NATURE, LAW AND SOCIETY* 495 (1st ed. 1992).

<sup>19</sup> STATE OF ALASKA OIL SPILL COMMISSION, *supra* note 16, at 38-51.

<sup>20</sup> See Zygmunt J. B. Plater, *Facing a Time of Counter-Revolution: The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 672-73 (1995).

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crews had been laid off, with agency acquiescence, to save on payroll costs. The ship's only officer (there should have been three) on the bridge as the tanker approached Bligh Reef was groggy and confused. The captain was down in his cabin, according to several accounts, doing the purser's reports for his ship because the purser had been let go to save money.

Alyeska's endemic corner-cutting and penny-counting in the face of huge under-acknowledged public and private risks produced a situation where no one should have been surprised by the catastrophe. As Dr. Riki Ott, a local commercial fisherman activist with a degree in marine toxicology, told a group of Valdez politicians on the night of March 23 about the risk of a catastrophic spill; "Gentlemen, *it's not what if, but when.*"<sup>21</sup> And less than two hours after she spoke—as the exhausted officer on the bridge of the Exxon-Valdez allowed the tanker to plow along through Prince William Sound on auto-pilot, and the relief officer noticed too late that the vessel was on the wrong side of the red Bligh Island warning beacon—the Exxon-Valdez crashed onto the sharp granite spikes of Bligh Reef.<sup>22</sup>

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<sup>21</sup> STATE OF ALASKA OIL SPILL COMMISSION, *supra* note 16, at 10.

<sup>22</sup> For an in-depth, eye-opening review of the Exxon-Valdez spill and a cumulative synthesis of the scientific evidence of the spill's extraordinary unforeseen long-term damages upon personnel who had sprayed oiled beaches with solvents and high-pressure steam, as well as upon fish and other wildlife exposed to the spilled oil's polycyclic aromatic hydrocarbons [PAHs], see DR. FREDERIKA OTT, SOUND TRUTHS & CORPORATE MYTHS: THE LEGACY OF THE EXXON-VALDEZ OIL SPILL (2005). The book is directly relevant to an upcoming political fight over whether the 1991 Exxon settlement's "Re-opener Clause" will be invoked to force Exxon to pay an additional \$100 million in damages due to "unforeseen human and wildlife damages."

The clause states:

Reopener For Unknown Injury

Notwithstanding any other provision of this Agreement, between September 1, 2002, and September 1, 2006, Exxon shall pay to the Governments such additional sums as are required for the performance of restoration projects in Prince William Sound and other areas affected by the Oil Spill to restore one or more populations, habitats, or species which, as a result of the Oil Spill, have suffered a substantial loss or substantial decline in the areas affected by the Oil Spill; provided, however, that for a restoration project to qualify for payment under this paragraph the project must meet the following requirements:

- (a) the cost of a restoration project must not be grossly disproportionate to the magnitude of the benefits anticipated from the remediation; and
- (b) the injury to the affected population, habitat, or species could not reasonably have been known nor could it reasonably have been anticipated by any Trustee from any information in the possession of or reasonably available to any Trustee on the Effective Date.

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Official cost-shaving and suborning of governmental watchdogs may have saved the industry a substantial amount of money in the short term, but in any retrospective accounting the oil spill disaster and the public and private lawsuits that predictably followed vividly revealed that those penny-pinching industry and agency decisions were billion-dollar dumb.

***D. Lessons from the First Circle of Dumb***

So I would define the base level of dumb as situations where official private and public decision makers—often quite smart people—get so committed and fixated upon their particular enterprise that they resist rational warnings from citizens and conscientious public servants, and repress, ignore, or cannot rationally process the possibility or probability of contrary negative consequences, even those that can hurt *themselves*, turning their own enterprises into dead losers.

A basic lesson from the first circle of dumb is that everything has consequences that should not be ignored, but many such consequences are likely to be indirect or otherwise difficult to see, hidden in the complex relationships of interconnected causations, or in the future. And there is a marked human tendency to avoid full consideration of possible consequences that are unpleasant. The need to understand cascading consequences is a fundamental perception of the science of environmental analysis, as our society learned from the seminal teachings of Rachel Carson.<sup>23</sup>

A second perception is that official decisions are only as good as their scope of reference. If they evade a comprehensive and objective survey of contexts, conditions, possible consequences, and alternatives, they are likely to be sailing blind. “Environmental” analysis is a basic, rational necessity, surveying the range of

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[Consolidated] Agreement and Consent Decree, *United States v. Exxon Corp.*, Nos. A91-081-083 CV ¶¶ 6, 8 (D. Alaska, Oct. 9, 1991).

If the Alaska and federal governments strive to deny the scientific evidence of dangerous unforeseen damages, as currently seems probable, this book and citizen pressure will be significantly important in pressuring them to invoke the re-opener clause by its deadline of September 1, 2006.

<sup>23</sup> See generally RACHEL CARSON, *SILENT SPRING* (1962). Regarding that book’s fundamental contributions to modern environmentalism, see Peter M. Manus, *Natural Resource Damages from Rachel Carson’s Perspective: A Rite of Spring in American Environmentalism*, 37 WM. & MARY L. REV. 381, 387-88 (1996) (“Rachel Carson’s philosophy is the prototype against which trends in environmental law and politics should be measured to assess our progress along the evolutionary continuum toward a true environmentalist perspective.”).

possible consequences—looking out for the good, the bad, the unintended consequences, the false economies, the worst case scenarios, the interconnections. Thus, especially when one is dealing with innovative technologies that have the potential to go greatly awry, or to cause a flood of direct and indirect harms, the Precautionary Principle is an important rational caveat.<sup>24</sup>

Citizen involvement likewise is a functional necessity. If a cadre of official decision makers is blinded by the prospects of personal and institutional profit, or driven by Enron-like organizational machismo, then it is crucial that the official decisional processes integrate the factual input of informed citizen activists and scientific outsiders who can represent local knowledge of actual conditions and the broader public interests that official decision makers so often ignore. In the Alaska oil spill case it was the fishermen and scientists who lived and worked on the Sound who realistically understood the impending threat to their communities and livelihoods, and who knew better than the official players what could and must be done once the avoidable disaster had occurred.<sup>25</sup> As so often is the case, it was citizen outsiders who were necessary players to bring sense to the table when the official dumbs would not or could not think ahead.

## II

### **THE SECOND CIRCLE OF DUMB: EXTERNALIZATION OF SOCIAL COSTS, IGNORING SHORT AND LONG TERM PUBLIC CONSEQUENCES**

The Second Circle of Dumb is more subtle. In the first level category, the costs and failures of dumb mistakes ultimately come home to roost on the heads of those who caused them. In the much more prevalent second level of dumb, the people making harmful decisions do not suffer direct negative consequences themselves, but pass them on to human society and nature as if such social costs thereby disappear. This version of dumb, in other words, is the inherent instinctive drive in most of us humans to externalize as much as possible the negative costs of our individual actions, while internalizing to ourselves the maximum amount of short term benefit we can derive from public and private sources.

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<sup>24</sup> On the Precautionary Principle, see ENVIRONMENTAL LAW & POLICY, *supra* note 13, at 14.

<sup>25</sup> See Plater, *supra* note 16, at 670-74.

### **A. Air Pollution, Water Pollution, Toxics**

Any classic pollution case is likely to illustrate this second circle of dumb. Many years ago I worked for three summers in an exurban paper factory on the banks of the Delaware River whose executives regarded waste disposal as a dead loss expense and acted accordingly. Every day, by strategies fair and foul, they sought to discharge the maximum amount of pulpy acid-laced paper production residues down a long submerged outfall pipe into the main channel of the river, while dumping other toxic substances into their power plant's boilers to be blown out through the smokestacks into the country air. Or consider the Riley Tannery made famous by Jonathan Harr's book *A Civil Action*, where the acids, heavy metals, and solid wastes of leather production ended up in a low-lying dump that local kids called "Death Valley."<sup>26</sup> In most industrial settings, wherever they are, one of the cheapest ways to lower production costs is to dump wastes into land, air, and water. This industrial logic, and the serious cumulative public harms it produces, is what necessitated the eruption of regulatory environmental law in the 1970s.

So why is this rational-actor model of behavior dumb? If the people who run a factory are only concerned with maximum short term profit for themselves, is this not, for them, the smart way to do it? They will make much more money, and there's rarely the kind of physical blowback that occurs in the First Circle of Dumb.

But this instinctive calculus of industrial decision makers is twice dumb. Most obviously it is a dumb conceit in public terms to view individual corporate actors as self-contained entities floating like isolated cells in a vacuum, not responsible for their pollution and other externalizations. In terms of the overall society's public interest, it obviously is dumb for the society not to account and take note of all the real costs as well as the benefits of technological actions.

But it is also dumb in the polluting industrialists' own terms. If, as individuals, they care about the long term prospects for the lives of their children and grandchildren, not to mention caring for their nation or for the nature that gives critical meaning and support to human life on this planet, including theirs, then the cumulative effects of their externalizations are dumb indeed.

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<sup>26</sup> JONATHAN HARR, *A CIVIL ACTION* 191 (1995).

They may be able to stock more goods into their individual life-boats, but they thereby are poisoning the communal sea upon which they and their descendants must necessarily navigate, and degrading the destination shores toward which they sail.

### ***B. Porkbarrel Projects***

Beyond the example of traditional pollution, the problem of “pork” illustrates how government agencies as well as corporate industries can be found ruminating in the second circle of dumb. The public works porkbarrel is a powerful process pouring federal tax dollars into projects that typically are not economically justified, in order to harvest political opportunities—draining wetlands, building unnecessary canals and reservoirs, building roads to facilitate timber and mining companies’ free access to public resources, etc.

In the Tellico Dam case<sup>27</sup> the Tennessee Valley Authority (TVA), a public works construction agency, was intent on continuing its dam-building on the last most marginal site it had left; thereby threatening extermination for the last major population of an endangered darter fish previously eliminated from all other river habitats by dams.

TVA was not able to cost-justify its Tellico Dam for normal dam purposes like power, water supply, or flood control because of its small size and its location within a cluster of other dams.<sup>28</sup> The agency therefore based their dam project on a novel accounting justification, labeling it an “economic development demonstration” project.<sup>29</sup> The two major benefits officially

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<sup>27</sup> See 16 U.S.C. 1536 (1973, as amended); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978). For a lengthier account of the snail darter case, see Zygmunt J. B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 J. LAW REFORM 805 (1986), reprinted in 19 LAND USE & ENVTL. L. REV. 389 (1988).

<sup>28</sup> The dam, because it was in such a flat valley, had been identified as a marginal site from the beginning of the agency’s dam-building program. It could impound less than 70 feet of depth even though its back-flooding extended back 33 miles of river channel. The small dam itself cost less than five million dollars to build, with an additional \$29 million for levees. The majority of the project’s \$150 million costs were in land condemnation and road and bridge construction. GENERAL ACCOUNTING OFFICE, *THE TENNESSEE VALLEY AUTHORITY’S TELLICO DAM PROJECT—COSTS, ALTERNATIVES, AND BENEFITS* 7 (1977).

<sup>29</sup> Under the terms of § 22 of the TVA Act of 1933, which empowers the Authority to undertake “studies, experiments, or demonstrations” to “aid further the . . . development of the natural resources of the Tennessee River drainage basin.” 16 U.S.C. § 831u (1982). TVA moved into a new era of dam building in the mid-1960s

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touted for the reservoir project were “recreation enhancement” and “shoreland redevelopment.” The project would seize 60 square miles of private farmland, condemning the family farms at low prices. But only 18 square miles would be flooded. Most of the condemned private lands would be transferred or sold at a profit, to the Boeing Company and other private developers who, it was claimed hypothetically, would then build a model industrial city to be called “Timberlake New Town” which might use the dammed river for barge traffic.<sup>30</sup>

The farmers, environmentalists, and other citizens who opposed the Tellico dam worked for more than a dozen years to bring common sense to the agency, urging that economic development would be better served by keeping the river and agricultural communities, with investments in recreation, tourism, archaeological and cultural management of Cherokee sites, and with several sensitively-sited industrial parks. They testified in Congress, challenged the eminent domain condemnations, won a 16-month NEPA injunction, and held the agency off for another five years with the ESA darter litigation and its sequels.

Ultimately the porkbarrel prevailed, however, as TVA and the House appropriations committee successfully slipped a rider onto a money bill, overturning the ESA statutory protections and ordering completion of the dam.<sup>31</sup>

In the Tellico Dam case TVA’s officials were cost-externalizing—in a sense similar to industrial factory managers who dump pollution into air and water—when they ignored or crassly discounted the social costs they were imposing by destroying valua-

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under the direction of Chairman Aubrey Wagner. Section 22 was used to justify a wide range of projects not directly relating to agriculture, flood control, power, or navigation. The post-1960 dam projects were generally justified in terms of recreational enhancement and land development.

<sup>30</sup> See TENNESSEE VALLEY AUTHORITY, TELLICO DAM PROJECT EIS I-1-49 (1972). The two classes of claimed benefits that gave the Tellico Dam project a positive benefit-cost ratio were land development profits and increased recreation, neither of which were then, nor since have proved to be, economically credible. There were no generators in the dam, though a small amount of power could be generated by diverted flows into a neighboring dam. Flood control benefits of a small impoundment in the middle of a network of more than 60 dams were trivial. The desperate internal agency pressures to coerce positive economic forecasts for the project are chronicled in WILLIAM BRUCE WHEELER & MICHAEL J. McDONALD, *TVA AND THE TELLICO DAM: A BUREAUCRATIC CRISIS IN POST-INDUSTRIAL AMERICA* 186-88 (1986).

<sup>31</sup> See Zygmunt J. B. Plater, *Those Who Care about Laws and Sausages Shouldn't Watch Them Being Made*, L.A. TIMES Sept. 2, 1979, at A23.

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ble public river valley resources, building a last marginal dam that turned a clear, cool river into a sluggish algae-infested body of eutrophic water. The dam was dumb in terms of public economics as well as ecological and environmental logic. Like many federal public works projects it was completely unrealistic in terms of the way the construction agency inflated future hypothetical benefits and minimized real costs.<sup>32</sup> But the reason that Tellico Dam promoters are best categorized as second-level rather than first-level dumb is that in narrow terms they got what they wanted. As chronicled in the Tennessee historians' study, the agency's actual goal was not concerned with public economic objectives.<sup>33</sup> The Tellico Dam's purported project benefits were fig leaves providing public relations cover. TVA's dominant ob-

<sup>32</sup> Pursuant to Senate Document No. 97, every federal agency, when spending taxpayer dollars, had to show a theoretically profitable benefit-cost ratio—for every taxpayer dollar spent, the proposed project has to be able to claim to earn at least \$1.01 over 100 years. S. Doc. No. 87-97, at 7 (1964). Beyond hyperbolic benefit projections, agency planners were helped in projecting their positive ratios by the fact that due to hyper-low official discount rates they could treat the cost of taxpayer dollars as interest-free, or nearly so.

For the claimed official Benefit-Cost ration as of the 1972 Tellico Dam environmental impact statement, see COMPTROLLER-GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS: THE TVA'S TELLICO DAM PROJECT—COSTS, ALTERNATIVES, AND BENEFITS, EMD-77-58 (Oct. 14, 1977):

<p>DIRECT ANNUAL BENEFITS:</p> <p>Recreation: \$1,440,000</p> <p>Shoreline development: \$714,000</p> <p>Fish &amp; wildlife: \$220,000</p> <p>Water supply: \$70,000</p> <p>Flood control: \$505,000</p> <p>Navigation: \$400,000</p> <p>Power: \$400,000</p> <p>Redevelopment: \$15,000</p> <p>Total Direct Annual Benefits:</p> <p>\$3,760,000</p>	<p>DIRECT ANNUAL COSTS:</p> <p>Interest and amortization: \$2,045,000</p> <p>Operation &amp; maintenance: \$205,000</p> <p>Total Annual Costs: \$2,250,000</p>
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<p><i>BENEFIT-COST RATIO</i> (later downgraded): 1. 7: 1</p>	<p>[From TVA, TELLICO DAM PROJECT EIS at I-1-49 (1972)]</p>
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<sup>33</sup> The historians' study analyzes TVA's drive to build Tellico Dam as an instrument to reinvigorate its institutional malaise with "a new mission." The agency had lost its image as a dam building innovator, and was becoming just another torpid electric utility company generating power mostly by burning coal in huge steam plants. "The agency that had begun as a planning beacon for millions of Americans [had] lapsed into a kind of mediocre commercialism." WHEELER & McDONALD, *supra* note 26, at 3. "The changing national mood, outside criticism, and internal divisions" drove the leadership to search for something "dramatic . . . in order for TVA to survive." *Id.* at 6-7. Finding new ways to justify a dam with an experimental city became TVA's institutional motivation driving the project. *See id.* at 3-6, 218.

jective was to boost sagging agency morale and institutional momentum, by building a project that would pull in millions of porkbarrel appropriation dollars with all the political benefits and leverage that come along with floods of federal money. The TVA project was dumb in terms of its purported objectives, and in its creation of huge net losses of public resource values, but those were not the relevant frame of reference for the project's official entrepreneurs who made the decisions. In this, as in all environmental controversies, however, it would have been far better for society if the public's interest had been the ultimate real test of what was to be done, and in those terms the Tellico project was magnificently second-level dumb.

### ***C. Lessons from the Second Circle of Dumb***

Looking at the paradigm image of cost-externalizing development decisions—a paradigm that can be framed around the average industrial factory, the production and application of pesticides, or chemical compounds in food and consumer products, as well as irrational dam projects, federal agency programs turning over public forests to the hungry blandishments of the timber industry, and a hundred more—what do we learn from this second level of dumb?

One fundamental lesson: that in one way or another *cost-externalization* is the dynamic driving force behind almost all environmental controversies. In the politico-economic marketplace, all economic actors have a powerful natural instinct to try to externalize costs—to pass on as much as possible of the social and environmental costs, in pollution wastes and resource losses, to the public and to nature, while taking in as much as possible of the individual benefit and profit. Without some form of civic (usually legal) restraint, factories and government agencies tend to act with externalizing narrowness, treating public costs and losses of natural resources as costless irrelevancies.

A second lesson is the inter-connectedness of things. Inevitable chains of direct and indirect consequences follow from particular actions. In 1960 the eminent scientist Rachel Carson triggered modern environmentalism by demonstrating this. She taught us that each factory, each farmer, each technology, is never isolated in a vacuum. In effect Carson spread a broad intellectual catch-basket beneath the Coasian welfare economists' universe of benefit-maximizing individual actors, so as to collect

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and take overall account of their jettisoned “externalized” social costs, even if indirect and unmarketized. We are all interconnected in time and space with each other and the ecosystems around us. A factory’s waste all goes somewhere, downriver, downwind, into groundwater, or over seas. Our industries’ chemical innovations can now be traced and found, causing birth defects and other abnormalities, in penguins, polar bears, and Inupiat Eskimo people.<sup>34</sup> The depredations of dysfunctional porkbarrel projects can be read in the disrupted lives of local citizens and communities, loss of ecological habitats, cultural losses that will never be regained, degraded water quality and recreational quality of life. These real interconnections and consequences are the reason that the atomistic externalizing perspective of actors in the marketplace is unrealistic and dysfunctional as a basis for societal governance. Human society cannot ignore the cumulative extended negative consequences of various technologies on soil, fish, birds, ozone layers, humans, bugs, and economies.

From this comes the next proposition: we all need law. Externalization, the instinct that causes the vast majority of environmental problems, is so powerful, and the politico-economic marketplace so lacking in internal correction that our society’s stability and future prospects require mandatory controls<sup>35</sup> of the externalizing instinct in human nature. Nature needs law to control externalizations, because wherever possible human economic enterprises chronically tend to reckon natural systems and natural resources as free goods, and as free sinks or dumps for the dregs and offal of human industry.

Moreover, although most regulated industries will naturally resist government’s imposition of public accountability and values, individual factory managers need law to provide control over their competitors’ externalizing tendencies as well as their own, so that each sector of industry can be held to do the right thing in societal terms knowing that its competitors are being held to the same standard.

Thus Rachel Carson’s piercing recognitions soon led, in the 1970s, to an avalanche of regulatory environmental lawmaking

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<sup>34</sup> See THEO COLBORN ET AL., *OUR STOLEN FUTURE: HOW WE ARE THREATENING OUR FERTILITY, INTELLIGENCE, AND SURVIVAL* 87-109 (Penguin Books 1997).

<sup>35</sup> Voluntary, non-mandatory, altruistic self-control mechanisms have repeatedly proved to be an oxymoron.

that may never again be equaled in human history. In the six years that followed the first Earth Day, virtually all driven by popular political fervor,<sup>36</sup> came the National Environmental Policy Act of 1969,<sup>37</sup> the Clean Air Act of 1970,<sup>38</sup> the Occupational Safety and Health Act of 1969,<sup>39</sup> the Fish and Wildlife Coordination and Noise Control Acts (1971),<sup>40</sup> Clean Water<sup>41</sup> and Coastal Zone Management<sup>42</sup> Acts (1972), and more than two dozen more. In the years that followed, the scope and number of environmental statutes continued to grow.

The 1970s, moreover, demonstrated to us that law was too important to be left up to the official players. It had to be opened up to the citizenry. For a century or more the traditional model of societal governance had been “di-polar” (or “bi-polar” in Professor Lon Fuller’s associational sense<sup>43</sup>)—government agencies on one side, tasked with counterweighing the harmful excesses of

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<sup>36</sup> Significant federal statutes were indeed passed prior to the late ‘60s, including most notably the Wilderness Act of 1964, 16 U.S.C.A. §1131 et seq., the Parklands Act §4(f) clause in the highway acts, 46 U.S.C.A. §1653(f), and the Wild and Scenic Rivers Act of 1968, 16 U.S.C.A. §1271 et seq. Each of these, however, was relatively adjectival and circumscribed in effective scope, and less the product of wide popular appeal than the back chamber pressure from the mid-century remnants of the early conservation movement, motivated by a rarefied noblesse. This is not to take away from those important and dramatic accomplishments, but rather to note that they were less a function of the new POST-SILENT SPRING paradigm shifts.

<sup>37</sup> 42 U.S.C. § 4321 (2000).

<sup>38</sup> 42 U.S.C. § 7401 (2000).

<sup>39</sup> 29 U.S.C. § 651 (2000).

<sup>40</sup> 42 U.S.C. § 4901 (2000).

<sup>41</sup> 33 U.S.C. § 1251 (2000) (also known as the Federal Water Pollution Control Act).

<sup>42</sup> 16 U.S.C. § 1451 (2000).

<sup>43</sup> *Di-polar* is used here to describe a societal governance system that has two primary sectors: the dynamic “marketplace” sector of commerce and industry, and the structure of official governmental agencies created to correct “market failures” when the marketplace economy, left on its own, causes and cannot adequately resolve major problematic external considerations that a civil society must address. Government intervention was then seen to be necessary in order to impose certain non-market values upon the market, through laws on child labor, antitrust, worker safety, consumer fraud, and so on. Only later, with the appearance of citizen and nongovernmental organizations’ active role in governance in the 1960s, did the legal system become pluralistically “multi-polar” or “polycentric.”

The “di-polar/multi-polar” distinction draws upon Professor Lon Fuller’s analysis of “bi-polar” judicial roles in his report to the Joint Conference on Professional Responsibility. ABA Joint Conference of Professional Responsibility, *Professional Responsibility: Report of the Joint Conference* 44 A.B.A.J. 1159 (1958), reprinted in Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978); see also John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

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industry and commerce on the other. But the market forces that necessitated regulatory law in the first place immediately began to resist those laws when they were put in place, undercutting government's ability to counterweigh. The externalizing dynamic in human nature is not repealed by the mere enactment of civic rules. The resistance instinctively creates a tendency toward "agency capture" by regulated interests.<sup>44</sup> Thus a sad history of regulatory agencies' more-than-occasional inability to regulate has reflected the powerfully broad and intrusive effort that industries can bring to bear to blunt the civic regulatory efforts of government agencies.<sup>45</sup>

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<sup>44</sup> On the classic political science phenomenon of "agency capture," see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-1687 (1975); ENVIRONMENTAL LAW & POLICY, *supra* note 13, at 401-02.

As a prescient example, Attorney General Olney wrote to the president of a railroad in 1892 in response to the latter's plea for abolition of the federal Interstate Commerce Commission:

The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for government supervision of railroads, at the same time that the supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests . . . . The part of wisdom is not to destroy the Commission, but to utilize it.

Letter from Richard Olney to Charles Perkins, in Louis Jaffe, *The Effective Limits of the Administrative Process*, 67 HARV. L. REV. 1105, 1109 (1954).

"We don't want to be a regulatory agency. We want to be a development agency on our national lands," said former Secretary of the Interior Manuel Lujan, during a trip where he delivered a speech to coal industry executives and held a press conference, while explaining why his department would continue to refrain from strict enforcement of strip-mining regulations. Keith Schneider, *U.S. Mine Inspectors Charge Interference by Agency Director*, N. Y. TIMES, Nov. 22, 1992, at 1.

<sup>45</sup> See Zygmunt J. B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733, 774 (1996):

Like water flowing downhill, market forces, and the Coasian natural laws that drive them, inherently resist any artificial barriers that curtail their profit-maximizing externalizations of social costs. To place a single sandbag into the current is difficult and not likely to have significant effect. As others are added with great effort, the natural forces still pour around them. When finally a working accumulation of sandbags is secured, the waters may mostly turn to the path of less resistance, but do not stop trying to infiltrate and undercut the obstacles blocking their maximum satisfaction. Across the entire face of the environmental law dike the pressures are felt. Lobbyists, lawyers, media managers, and political action committees applying insistent and comprehensive pressures, to obtain specialized subsidies and to suborn the public programs created for broader societal interests. Agencies are blunted or captured by the classic double-pronged tactics of

Over the years it has consistently been *citizens* who have provided the critical vital catalyst to force creation of new laws, and force governmental agencies to enforce them. Building on the pluralistic revolution of the 1960s—using courts, media, and the streets to galvanize the political process, as Martin Luther King, Ralph Nader, and war resisters had done—environmentalism continued the evolution toward political pluralism in its legal innovations.<sup>46</sup> Citizen litigation shaped most of the modern administrative structure of environmental law every step of the way, in a vast swath of law-building, from NEPA as a tangible procedural requirement to the most intricate questions of how air pollution offset credits can be brokered in interstate transfers.<sup>47</sup> Citizen environmentalists evolved a remarkable range of pluralistic organizations, many with marked sophistication in science, policy analysis, communication, and politics, as well as legal skills.

From those years of response to second-level dumbness, moreover, came a distillation of some basic principles of environmental thinking:

- That a society, like any responsible adult, should look before it leaps. NEPA's EIS requirement, so bitterly resented by many corporate and governmental players, is basic human common sense. Planning should not be a dirty word. It makes sense to check out the best and worst that realistically may happen before we act.
- Science matters: What we know can help us; what we do not know can hurt us.
- Nature matters: Nature sustains us. The resources we take from nature and rely on are not free, and costs dumped back into nature do not disappear into nothingness.<sup>48</sup>

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the marketplace—strident resistance and seduction—and when citizens attempt to get around the phenomenon of agency capture by going to the courts, the forces of the marketplace try to undercut citizen standing and judicial remedies.

*Id.*

<sup>46</sup> See RICHARD LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004).

<sup>47</sup> One cannot understand the legal development of major command and control regulatory systems like the Clean Air Act without knowing the role played by NGOs and their attorneys, like Natural Resources Defense Council's David Doniger and Rick Ayres. The primary exception to the primacy of citizen litigation is probably the field of toxics regulation, in which agency initiative has built most of the doctrine not so much in response to citizen litigation as to the astonishing and somewhat anomalous popular political revulsion against toxic contamination.

<sup>48</sup> Robert Costanza and his colleagues have analyzed the multi-trillion dollar values of "natural capital," the resources and services provided free or far below their

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- Law matters: It was necessary and probably inevitable that American society, and other legal systems all over the world, began in the 1970s to create regulatory systems to control environmental social costs (and likewise inevitable that these regulatory systems would be resented and resisted by the industries they constrained).

- Acts have interconnecting continuing consequences, like big pocket billiard balls ricocheting along in a giant pool game that goes on and on. Everything goes somewhere. Rachel Carson taught us that.

- Thoughtful accounting processes—assessing what has been going on and what may be—are important feedback mechanisms that any healthy society needs, and ignores at its peril.

- Economics matter: But the art and practice of economics must look beyond just the realm of things that have an established cash register price. Given what we know today about economic realities, any economist who focuses on marketplace dynamics, ignoring the full range of economic impacts on humans and natural systems, direct and indirect, short and long term, is either naïve or a prostitute.

- Outsiders matter: Citizen activists from outside the official establishment's ranks of industry and government are a critical pluralistic part of the governance process, and will continue to be so.<sup>49</sup>

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true value, without which the marketplace and human life would be impossible. Costanza and Daly have come up with very impressive “natural capital” numbers:

We have estimated the current economic value of 17 ecosystem services for 16 biomes, based on published studies and a few original calculations. For the entire biosphere, the value (most of which is outside the market) is estimated to be in the range of US\$16–54 trillion per year . . . . Because of the nature of the uncertainties, this must be considered a minimum estimate. Global gross national product total is around \$18 trillion per year.

R. Costanza et al., *The Value of the World's Ecosystem Services*, 387 NATURE 253 (1997). See also P. HAWKEN ET AL., NATURAL CAPITALISM: THE COMING EFFICIENCY REVOLUTION (1998); R. Costanza & H.E. Daly, *Natural Capital and Sustainable Development*, 6 CONSERVATION BIOLOGY 37 (1992); PAUL HAWKEN ET AL., NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION (1999).

<sup>49</sup> See James R. May, *Now More than Ever: Trends in Environmental. Citizen Suits*, 10 WIDENER L. SYMP. J. 1 (2003).

### III

#### **THE THIRD CIRCLE OF DUMB: MARKETPLACE INTERESTS HIJACK GOVERNMENT, FREEING THEMSELVES FROM THE MUTUAL CIVIC RESTRAINTS THAT PROTECT US ALL**

The story of the third level of dumb is the story of how over the span of the last thirty years a remarkable New Right movement, designed, orchestrated, and funded by coalitions of industry and commercial associations, has successfully taken over American government, posing a major challenge for civil society for the coming years.

The natural inclination of regulated parties, once they begin to act together, to resist the imposition of public civic accountings of their externalized social costs has now expanded into a juggernaut of broad concerted resistance to government regulation in general and environmental protection regulations in particular. The elaborate structure of environmental law built up by bipartisan efforts over almost 50 years since *Silent Spring*—common law, statutes, regulations, agency practice, and more—has suffered its most serious and debilitating attacks ever from a radical right-wing coalition that has imposed a regressive agenda across a broad front of civil governmental regulations.

Environmental protection has not been the sole target of the regressive movement, but the attack on environmentalism has been one of if not the most prominent regressive agendas, symbolic and symptomatic, and arguably the reaction against environmental regulations was one of the two primary resentments motivating this regressive movement. (Antipathy to labor union representation would be the other.) The responses that now must come from civic-minded environmentalists mirror progressive efforts that eventually will have to be made across the board to rehabilitate civil society in all its dimensions.

It started in the early 1970s when the leaders of American commerce and industry were reeling from the 1960s Goldwater debacle and the populist upwelling for consumer protection triggered by Ralph Nader that produced novel statutes regulating business.<sup>50</sup> Earth Day was something they had not seen coming,

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<sup>50</sup> For examples of provocative books by Mr. Nader showing the misdeeds of American industry, see RALPH NADER, *UNSAFE AT ANY SPEED* (1965); *CORPORATE POWER IN AMERICA* (Ralph Nader & Mark J. Green eds., 1973). There are two 1966 acts that are considered to have arisen from *UNSAFE AT ANY SPEED*. See Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (codified at 23 U.S.C.

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and now even more strenuous calls for controls of environmental pollution were avalanching down upon the Establishment. Responding to the verdict of political pollsters, even Richard Nixon was talking environmentalism:

“The 1970s must be the years when America pays its debts to the past by reclaiming the purity of its air, its water, and our living environment. It is literally now or never!”<sup>51</sup>

At this point, thousands of American industrialists, whose individual second-level externalizing actions had triggered Earth Day and its environmental protection initiatives, could have climbed on board, encouraging pollution control technology, seeking greater marketplace efficiencies, seizing an advantageous opportunity to clean up and modernize American industry for long-term competitive global advantage, supporting rather than resisting the new laws as applicable to all.

But instead, from the start, most industries instinctively chose to resist government regulations and, after a brief period of stolid ineffectiveness, banded together to pool their political investment programs into an increasingly effective movement bent on rolling back civic reform to maintain the old-economy’s modes of externalization. Environmentalism all too clearly represented a comprehensively threatening new way of thinking—an analytical conception of limited resources, inter-related effects, and consequential causations that would illuminate the tragic flaws of *laissez-faire*.

Looking back over the years since the 1970s, it seems clear that—organizationally and financially—the decisively important central core of the regressive New Right movement that has now crescendoed to take over government and set George W. Bush’s faction in power were the U.S. Chamber of Commerce and the National Association of Manufacturers (NAM), manipulating and fundamentally changing the Republican Party in the process.

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§§ 401-404 (2000)); National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified at 49 U.S.C. §§ 30101-30170 (2000)). Nader’s work also provided the impetus for passing the Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified at 15 U.S.C. §§ 2051-2058, 2060-2061, 2063-2085).

<sup>51</sup> Committee to Re-elect the President, Richard M. Nixon Campaign Poster (1973) (on file with author). Richard Nixon was impressed enough with the political pollsters’ reports of environmentalism’s popular appeal that he even tentatively proposed a Clean Air Act amendment setting a moratorium deadline on the production of internal combustion engine cars by 1984!

*The Continuing Mission of Citizen Environmentalism*

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In their resistance to civic-governmental regulation, the industrial-commercial coalition since the early 1970s has been thrice dumb.

*First*, as in second-level dumb behavior, they have ignored the real-world consequences of pollution and other externalizations upon their own society.

*Second*, however, they compounded and qualitatively raised the public detriment of their individual externalizations when they set out to build a collective counterforce that would be able to neuter government regulations across the board. In doing so they not only compounded the aggregate physical impacts of their externalizations, but also ignored the reality that, as one candid executive once said to me: Actually, we all need mandatory government regulations to give us a compelling reason to do the right thing and make sure our competitors do too; “Good fences make good neighbors.”<sup>52</sup> If instead marketplace players are able to stand together and build a potent defensive shield against government, or themselves take over government, then society loses the ameliorating protective function of government that lies at the heart of the social bargain. We traditionally have allowed powerful corporate enterprises to wield extraordinary powers—including limited liability, tax subsidies, and a dominant economic position—because government laws and agencies have been set in place to monitor and harness market excesses. A business takeover of government dangerously eliminates the basic systemic protections.

*Third*, at least at first, the marketplace blocs were dumb because they had little clue how to respond to popular movements that questioned the fundamental premises of their behavior. Faced with strident environmental criticism on the nightly news, local and neighborhood grapevines, and campuses across the nation, some corporations merely sent out their press relations flacks to give speeches repeating the mantra; “But, but, . . . we are good corporate citizens!” Such speechifying didn’t do much to meet and answer a host of technical criticisms of endemic pollution.<sup>53</sup>

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<sup>52</sup> ROBERT FROST, *Mending Wall*, in *NORTH OF BOSTON POEMS* 7, 7 (1977).

<sup>53</sup> Industry’s initial reaction to environmentalism reminds me of Virginia’s former senator, Harry F. Byrd, Jr., who the members of the Washington press corps voted, by a lopsided margin, in the late 1970s, to be the dumbest legislator in Congress. So how did he try to refute that verdict? He called a press conference and formally denied it.

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But, at least as regards industry's lack of populist sophistication, things started changing for the anti-regulatory movement soon enough after Earth Day.

Many people have never heard of the Powell Memorandum, but that document played a significant role in organizing the regressive counter-movement we enjoy today. In 1971, shortly before he was appointed to the Supreme Court, Judge Lewis Powell of the Fourth Circuit was asked by his neighbor, a high-ranking executive in the U.S. Chamber of Commerce, to write a memorandum for the Chamber on how America's industrial establishment could beat back the progressive policies that had taken over the nation. Powell produced a punchy diagnosis and prescription: "[B]usiness and the free enterprise system are in deep trouble, and the hour is late."<sup>54</sup>

The marketplace was facing, Judge Powell said, a "socialistic" popular clamor for civil rights, environmental regulation, labor rights, consumer protection, and attempts to roll back the military-industrial complex: "The time has come—indeed, it is long overdue—for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it . . . ."<sup>55</sup>

Independent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.<sup>56</sup>

Heeding Lewis Powell's call, industry started aggregating financial resources and, led by the National Association of Manufacturers and the U.S. Chamber of Commerce, launched a complex and coordinated long term counterattack. They created a sophisticated network of Washington political strategists, media specialists, and lobbyists selectively distributing bundles of campaign contributions to legislators. They set up the Heritage Foundation, a pro-business institute dedicated to producing

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<sup>54</sup> Memorandum from Lewis Powell to Eugene B. Snyder, Jr., Chairman, Education Committee, U.S. Chamber of Commerce, *Attack On American Free Enterprise System: Confidential Memorandum 4-5, 12* (1971), available at <http://www2.bc.edu/%7Eplater/Newpublicsite05/02.5.pdf> (last visited Jan. 16, 2006).

<sup>55</sup> *Id.* at 4.

<sup>56</sup> *Id.* at 12.

academically-credentialed studies and reports that supported anti-regulatory policy arguments, and re-energized the American Enterprise Institute.<sup>57</sup> With grants and other emoluments they cultivated a cadre of law school and other acquiescent academics that could be counted on to bring the pro-marketplace message to the universities.<sup>58</sup> They founded and lavishly funded “conservative” clubs on many campuses, and Federalist Society chapters at virtually all the nation’s law schools. They set up the Pacific Legal Foundation (PLF) and a dozen similar clones of PLF as self-described “public interest law firms” committed to representing a wide variety of industry positions against public interest laws and initiatives.<sup>59</sup> This industry effort launched in 1971 has changed the face of American politics.

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<sup>57</sup> JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION*, 78-80 (2004).

<sup>58</sup> It can even be argued that the radical right-wing created its own university. George Mason University in suburban Washington was transformed from a minor satellite campus of the University of Virginia into a freestanding institution with more than 40 right-wing “study centers” and a special mission to support the marketplace. The University has reportedly received over \$45 million from an array of Far Right foundations. See Media Transparency, George Mason University Aggregated Grants, <http://www.mediatransparency.org/georgemasonaggregate.php> (last visited Jan. 29, 2006) (546 grants between 1985 and 2003, for a total of \$46,098,814); see also Center for Media and Democracy, George Mason University - Source Watch, [http://www.sourcewatch.org/index.php?title=George\\_Mason\\_University](http://www.sourcewatch.org/index.php?title=George_Mason_University) (Aug. 22, 2005).

<sup>59</sup> Powell’s memorandum also foreshadowed business’s court-centered political strategies:

Other organizations . . . ranging in political orientation from “liberal” to the far left . . . have been far more astute in exploiting judicial action than American business . . . Labor unions, civil rights groups and now the public interest law firms are extremely active in the judicial arena. Their success, often at business expense, has not been inconsequential . . . [Business should copy the legal strategies of the American Civil Liberties Union.] It initiates or intervenes in scores of cases each year, and it files briefs *amicus curiae* in the Supreme Court in a number of cases during each term of that court . . . As with respect to scholars and speakers, the Chamber would need a highly competent staff of lawyers. In special situations it should be authorized to engage, to appear as counsel amicus in the Supreme Court, lawyers of national standing and reputation. The greatest care should be exercised in selecting the cases in which to participate or the suits to institute. But the opportunity merits the necessary effort.

Powell, *supra* note 54, at 10; see also Oliver A. Houck, *With Charity for All*, 93 *YALE L.J.* 1415 (1984) (a study of the so-called “public interest law firms”). The first millionaire businessman to heed Powell’s call, putting up the funding for the PLF, was John Simon Fluor, Jr., the scion of a transnational engineering firm with close ties to the oil and gas industry. See Jeffery Rosen, *The Unregulated Offensive*, *N.Y. TIMES*, April 17, 2005, at 46 (citing LEE EDWARDS, *BRINGING JUSTICE TO THE PEOPLE: THE STORY OF FREEDOM-BASED PUBLIC LAW MOVEMENT* (2004)).

Three strategic alliances were critical to building the structure and momentum of the regressive movement:

**A. *The GOP Shifts Away from Eastern Leadership toward an Alliance with a Lower Middle***

The first strategic alliance was a shift away from the traditional Northeast leadership of the Republican Party, with new linkages to anti-Eastern interests including the segregationist and Red-scare, anti-federal sectors of Southern, Midwestern, and Western politics. Racism and McCarthyite vigilantism had long been anathema to the traditional moderate leadership of the Party of Lincoln, typified by old-line Eastern industrialists and aristocratic Brahmins like William Scranton and Nelson Rockefeller. Richard Nixon's 1968 presidential campaign—like Barry Goldwater's failed 1964 run for the presidency, which many observers regard as the launching pad of the movement that finally took over the White House in 2000—reflected a shift away from the traditional Eastern center of the GOP. Nixon's barely-disguised Southern Strategy overtly appealed to white segregationists angered by federal civil rights and integration initiatives. His racially-tinged code words of "neighborhood schools," "welfare reform," and "states' rights" served to attract a stratum of disaffected lower income white voters throughout the nation, not just the South. Federal environmental regulations of mining, ranching, and timber in the West were seeding the ground for Western regional resentments that were incubating the Sagebrush Rebellion.

A major goal of the rising New Right was to pull the down-to-earth populist mantle away from the Democratic Party and, however incongruously, drape it around the shoulders of the party of Wall Street and big business. Nixon started making photo appearances in a construction worker's hardhat. Realizing that the environmental movement's mobilization of "people power" against pollution of the nation's air and waters had turned a large number of Americans, from all strata of society, against business interests, the New Right coalition began to cultivate wedges between the environmental citizen leadership and the "average American." Environmentalists increasingly began to be portrayed by industry media efforts as remote, effete, Eastern elitists, or as scruffy, dope-smoking, unpatriotic, free-loving, iconoclastic extremists. Either way, these image-frames were well

calculated to cause many residents of the heartland to hesitate and step back from a movement being portrayed as socially narrow at best, or dangerously at odds with traditional American values.

The leadership of the Republican Party also shifted significantly, as upper class Ivy League business leaders were increasingly supplanted by a hard-driving self-made managerial class focused on results and less offended by racial politics and the civil liberties excesses of the McCarthy era. In the early 1970s, Richard Viguerie, the conservative King of direct-mail advertising,<sup>60</sup> brought his nationwide communications savvy to the growing New Right coalition. The core of his New Right mailing lists were the contact lists from George Wallace's segregation-oriented 1968 presidential campaign and the McCarthyite-Goldwater lists from the 1960s.<sup>61</sup> The New Right industry coalition persuaded Nixon to turn away from the East Coast traditional leadership of the GOP, distancing their new alignment from the Rockefeller wing of the party (which over the years had tended toward a noblesse oblige, Gifford Pinchot-like conservationist ethic, reflected in strong environmental positions espoused by Nelson and David Rockefeller and others in their family). Nixon was soon persuaded to back away from policies of environmental protection. In 1973, Nixon reportedly told his Cabinet: "*It's time to get off the environmental kick!*"<sup>62</sup>

The Nixon administration shortly thereafter moved to impound federal funds appropriated for enforcement of the Clean Water Act and other environmental regulatory programs.<sup>63</sup>

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<sup>60</sup> For an analysis of Richard Viguerie's direct mail political advertising empire, including many of the sources for his mailing lists, as well as other communications techniques used by the new right to propagate its message, see Philip Bishop et al., *The New Right and Media*, SOCIAL TEXT, Winter 1979, at 169.

<sup>61</sup> See generally, Michael Lienesch, *Right Wing Religion: Christian Conservatism as a Political Movement*, 97 POLITICAL SCI. QUARTERLY 408 (1982).

<sup>62</sup> RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 78 (2004); see also J. BROOKS FLIPPEN, NIXON AND THE ENVIRONMENT (2000).

<sup>63</sup> The New Federalism is ironically turning out to offer powerful opportunities for progressive state attorneys general to launch environmental protection efforts that the right wing currently reigning in Washington desperately opposes—a turning of tables much to the dismay of right-wing "Federalists" who now find themselves supporting federal preemption arguments to insulate business from regulation. See, e.g., *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (Nos. 03-1361—03-1368, D.C. Cir., filed 2003) (lawsuit based on the Clean Air Act filed by 12 state attorneys general, and others, seeking to force the federal agency to list CO<sub>2</sub> as a regulated criteria pollutant); *Connecticut v. Am. Elec. Power Co.*, 2005 U.S. Dist. LEXIS

***B. An Alliance of Industry's Brawn with Neoconservative Intellectual Brainpower***

The industry coalition's second major alliance was a marriage of industrial financial brawn with conservative intellectual brains. In the 1970s and '80s a broad scattering of conservative intellectuals of a variety of hues, from libertarian to imperial, began to be pulled together into a well-funded syncretic orbit, with lavish support from industry foundations (especially oil and gas, and timber) for the flourishing of think-tank institutes, lecture tours, new right-wing publications and media outlets. Names like William Buckley, Jr., Irving, William Bennett, and Ben Wattenberg now joined with Neoconservatives (Neocons) like William Kristol and Charles Krauthammer, forging a bloc of intellectual firepower that consistently glorified the industrial-commercial marketplace and opposed government regulation of business,<sup>64</sup> (although former scruples against government subsidies of business and public works projects have generally been soft-pedaled). Money poured in from businesses across the nation and from highrollers like Joseph Coors, John Simon Fluor, Jr., the Scaife Foundation, and many more from the oil and gas industry, timber, mining, ranching, and land development coalitions.<sup>65</sup>

The various New Right intellectuals thus made a Faustian bargain. In return for money and notoriety they would contribute their brainpower to provide intellectual cover and legitimacy for

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19964 (S.D.N.Y. Sept. 19, 2005) (a CO<sub>2</sub> lawsuit based on public nuisance, brought by eight states—California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, and the City of New York—against a number of large utility companies—American Electric Power, the Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corporation). Michael Greve, of the American Enterprise Institute is similarly angered by the lawsuit that 46 states successfully brought against the tobacco companies, and wants to reverse the settlement. *See Rosen, supra* note 59, at 43 (reinforcing the impression that these issues are being fought for pro-business motivations rather than consistent political principle).

<sup>64</sup> The signatories of the Statement of Principles for the Project for the New American Century, founded to promote neoconservative policy ideals, reads like a who's who of the Bush administration. The document, codified on June 3, 1997, urges the United States to increase military spending, challenge regimes hostile to our "interests and values," promote the cause of political and economic freedom abroad, and accept the unique role of the United States in preserving an order friendly to our principles. Signers include Dick Cheney, Donald Rumsfeld, Paul Wolfowitz, and Jeb Bush, to name of few. Project for New American Century, Statement of Principles (June 3, 1997), *available at* <http://www.newamericancentury.org/statementofprinciples.htm>.

<sup>65</sup> MICKLETHWAIT & WOOLDRIDGE, *supra* note 57, at 76-80.

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industry's lobbying and financing aimed at undercutting regulatory limitations on "free enterprise," supporting an assemblage of issues that was often at least in part inconsistent with their prior expressed principles.

To capture political momentum and the votes of lower and middle-income America, the marketplace coalition and its intellectual corps developed a number of seductive continuing themes.

*1. Some of the New Right Agenda's Anti-Environmental Themes*

Individualism, in a particular definition, became a ringing theme of the New Right. Consciously echoing the 1960s environmental movement's successful creation of a dichotomy between big business and the little guy, the New Right now strived to cultivate an image of little guys facing a monolithic juggernaut of Eastern elitists and an autocratic government bureaucracy enforcing un-American restrictions on private property. The Pacific Legal Foundation and its progeny were tasked with bringing regulatory takings challenges against local environmental and land-use restrictions on behalf of embattled little guys. Libertarian arguments and advocacy initiatives (minus their erstwhile anti-subsidy principles) were blended with a host of anti-federal tendencies, including the West's Sagebrush Rebellion and militia movements, to orchestrate a chorus of antagonism against the civic public interest regulatory systems, including environmental laws, that had developed in the 1960s and '70s.

The sleight-of-hand strategy was that these themes of individualism and defending the little guy could then be mobilized to benefit American industries and business, some of the largest power structures on earth. And so it has been, as a new "populist" suspiciousness of government authority serves to support efforts to relieve corporations from public regulation, to undermine the principles of cost internalization, and to cut millionaires' taxes, thereby widening even more the unprecedented current destabilizing gulf between rich and poor. As a corollary to its escalating doctrines of acquisitive individualism, the New Right zeitgeist de-emphasizes, at least as to business practices, themes of collective responsibility and traditional communitarianism that had characterized American democracy at least since

the days of Alexis de Tocqueville.<sup>66</sup> Thus the civic accountability principles of the environmental movement have repeatedly been characterized as alien socialistic and even communistic Soviet-style ideologies, seeking to import and impose pernicious foreign theories of social responsibility upon individual little people, and upon their defenders, the corporate representatives of American free enterprise.

## 2. *Cost-Benefit Prescriptions: Redefining Common Sense*

From the beginning, a major hallmark of the environmental movement's intellectual position and political success had been its emphasis upon identifying and forcing accounting for the marketplace economy's externalized social costs noted earlier. To large numbers of citizens it made intuitive sense to prevent industries and commerce from extending their profits at the expense of the lakes, rivers, air, and humans who would absorb the business economy's direct and indirect discharges of toxic wastes and other pollutants into the environment. A more realistic overall economic accounting of the societal costs as well as benefits of particular projects and programs would encourage better decisions, better choices of alternative technologies to optimize societal welfare.<sup>67</sup> Widespread support for general application of the polluter-pays principle represented a common-sense response to the marketplace's systemic inclinations to externalize costs and cut corners at societal expense.<sup>68</sup>

To counter the logical power of environmentalism's societal accounting and its constraints upon the marketplace economy, the industrial New Right coalitions over time have sought to co-opt and reframe the proposition, sponsoring the creation of a vast literature extolling cost-benefit accounting and risk assessment approaches that, in the name of societal "efficiency," emphasize direct measurable costs, ignore unmeasured costs, and tend to

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<sup>66</sup> De Tocqueville had noted a lively interplay between individual and community that characterized the American society's form of democracy on the frontier as well as in urban settings. De Tocqueville labeled those who left the east coast to head west adventurers "without traditions, family feeling, not the force of example to check their excesses." Alexis de Tocqueville, 1 *DEMOCRACY IN AMERICA* 376 (Vintage Classics 1990) (1838). He theorizes that strong communitarian norms developed, however, because the settlers found themselves in a position of individual weakness and were thus dependent on one another for survival. *See id.*

<sup>67</sup> *See* FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004).

<sup>68</sup> *See* ENVIRONMENTAL LAW & POLICY, *supra* note 13, at 140.

support marketplace decisions about what should and should not be regulated or forced to absorb social costs. Flush with a generous flow of money from industrial foundations, notably the Olin Foundation (agricultural chemicals industry), the Scaife and Koch Foundations (oil and gas), and the Coors Foundation (beer), a phalanx of very bright academics built a structure of cost-benefit-risk scholarship with high aspirations for prescribing government policy.<sup>69</sup> Cost-benefit-risk and alternatives analysis indeed makes common sense and is a potentially useful societal instrument. Environmentalism generally embodies that logic, despite the caricatures of narrow emotionalism often leveled against it. But cost-benefit analysis should be seen as an art, not a science, often instructive, but rarely determinative enough to become a proxy for legislative and administrative decisions.<sup>70</sup>

### 3. *Capitalizing on Insecurities*

As chronicled in portions of Thomas Frank's recent book, *What's the Matter with Kansas?*,<sup>71</sup> another theme successfully cultivated by the rising New Right has been to capitalize on white Middle America's pervasively growing fears of the unsettling big changes that have been causing turmoil in many citizens' daily life, including: the end of job security; the disruption of the obedient housewife model of marriage; young people's bad language and raucous music glorifying marijuana and sex; the social threats perceived in racial integration of the work force and neighborhoods,<sup>72</sup> and so on. By wrapping themselves in the cloak of "traditional family values" the latter day descendants of rapacious home-wrecking nineteenth century robber barons were able to split many disgruntled and desperate denizens of the

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<sup>69</sup> See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (1996).

<sup>70</sup> See ACKERMAN & HEINZERLING, *supra* note 67, at Ch. 9.

<sup>71</sup> THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA* 176-77 (2004).

<sup>72</sup> As noted, Richard Viguerie, the genius of direct-mail political solicitation, built the New Right's huge mailing lists upon George Wallace's anti-integrationist mailing lists. Wallace's candidacy had shown that resentment against African-Americans was not restricted to the South, giving him a strong showing in a tier of blue collar northern states as well. For example, in his 1972 campaign, Wallace won primaries in Michigan and Maryland on May 16, 1972, one day after being shot in Maryland by former busboy Arthur Bremer. Wallace had previously finished second in primaries in Wisconsin, Pennsylvania, and Indiana on May 6. See Bob Jansen, *A Campaign Moment; At This time in 1972*, STAR TRIB. (Minneapolis), May 18, 2000, at 22A.

heartland away from the progressive movements that had been the consistent defenders of their interests.<sup>73</sup>

#### 4. “Federalism” and Devolution to the States

Since the progressive values of the twentieth century, particularly in the New Deal but continuing strongly into the 1960s and 1970s, were typically consolidated and thrust into the legal system through federal regulatory structures, the gathering industrial coalition invested a great deal of academic and political effort to undercut the federal government’s authority relative to the states. Naturally building on the anti-integration legacy of the South, “states rights” became a major rallying cry for anti-regulatory efforts generally.<sup>74</sup> The central strategy of the major pollution control statutes had been to reverse the fractionalized “race to the bottom” by imposing a federal minimum standard on all the states, so that industry could not divide-and-conquer its way to laxer standards by playing one state against another. From the start, the industry-sponsored “federalism” theories—that is, arguments for increased autonomy to the federal states and against centralized power—emphasized the alleged desirability of states’ discretion to depart from national norms in order to accommodate to local conditions. Devolution of federal program authority to the states has been a major strategy to undercut effective regulation.<sup>75</sup>

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<sup>73</sup> As Thomas Frank argues in *What’s the Matter with Kansas?*, Republicans were able to combine Democratic ties to big government, mindless bureaucracy, and “God, gays, and guns” social wedge issues to convince the heartland that Democrats did not represent their values. FRANK, *supra* note 71, at 119-24, 132-37.

<sup>74</sup> “The fight against adequate government control and supervision of . . . corporate wealth engaged in interstate business is chiefly done under cover, and especially under the cover of an appeal to state’s rights.” ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* 243 (1986) (quoting President Theodore Roosevelt).

<sup>75</sup> A subtle change has recently characterized the New Right stance on federalism, however. Whereas until the millennium the regressive coalition was firmly against federal authority and in favor of state autonomy, in the new century, given their recent ascendancy in the nation’s capitol, its members now are often strongly in favor of pre-emptive federal authority which can be used to lessen environmental regulatory standards, and strongly oppose state efforts to apply stricter regulatory levels. This change deserves wry monitoring. John Heilprin, *States Ask Court to Force EPA Action on Greenhouse Gases*, ASSOCIATED PRESS STATE & LOCAL WIRE, April 8, 2005.

### 5. *Play Games with Science*

From the moment that Rachel Carson published her revelations about persistent pesticides in the environment, regulated industries realized that their resistance to environmental regulation would have to include attempts to discredit the scientific observations that fueled environmental analysis. Carson's science was subjected to a chemical industry taskforce campaign of disinformation as well as by collateral attacks on her character.<sup>76</sup> Over the years since Carson, a seemingly inexhaustible flow of scientifically credentialed professionals—researchers and “experts” on a host of issues including tobacco, lead, mercury, ozone-layer CFCs, endangered species, oil pollution, hormone disruption, and global warming—have been willing to testify that various significant environmental science reports are scientifically incorrect, or at least require further extended study.<sup>77</sup> Calls for “best science” in regulating have been proposed as legislation, in their effect and intent typically not seeking better regulation, but no regulation.<sup>78</sup> As with the New Right's antiregulatory cost-benefit strategies, the scientific discreditation tactic has been supplemented by legislative and administrative initiatives attempting to impose “paralysis by analysis,” requiring debilitating attenuated reviews and second reviews of scientific data that reaches conclusions that support regulations limiting business.<sup>79</sup>

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<sup>76</sup> For a detailed explanation of Rachel Carson's environmental philosophy and its applications to environmental law, see Peter Manus, *Natural Resource Damages from Rachel Carson's Perspective: A Rite of Spring in American Environmentalism*, 37 WM. & MARY L. REV. 381 (1996).

<sup>77</sup> The author, for instance, was once astonished to hear an eminent biologist testifying about how loss of critical habitat did not endanger a species, until a scientist colleague leaned over and said, “We call those guys ‘biostitutes.’ That one there is the only ichthyologist ever to become a millionaire doing ichthyology.” Interview with Dr. David Etnier, (Feb. 1976). Or, as Garrett Hardin once said, such people are personifications of the mantra: “Whose bread I eat, his song I sing.” GARRETT HARDIN, *EXPLORING NEW ETHICS FOR SURVIVAL; THE VOYAGE OF THE SPACESHIP BEAGLE 71-77* (1972).

<sup>78</sup> See Sound Science for Endangered Species Planning Act of 2002 H.R. 4840, 107th Cong. (2002); see also James K. Hein, *The Sound Science Amendment to the Endangered Species Act: Why It Fails to Resolve the Klamath Basin Conflict*, 32 B.C. ENVTL. AFF. L. REV. 207 (2005) (analyzing the Sound Science Amendment).

<sup>79</sup> Thus various cost-benefit analysis bills have been accused of cynically seeking paralysis by analysis. See, e.g., Exec. Order No. 12,291, 3 C.F.R. § 127 (1982), reprinted in 5 U.S.C. § 601 app. at 431-34 (1982); Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243 (1987); ZYGMUNT J. B. PLATER ET AL., *ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY* 110-13 (2d edition 1998). The Data Quality Act was enacted in December 2000 as part of

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Contradictorily, the current administration simultaneously accommodates some of its educational and funding programs to the markedly anti-scientific positions of the coalition's evangelical bloc, most particularly in attempted elevation of unreplicable "creation science" theories, but extending to the imposition of restrictions on birth control and genetic research.<sup>80</sup>

6. *Capture the Media*

The Powell Memorandum had noted that much of the media—for varying motives and in varying degrees—either voluntarily accords unique publicity to these 'attackers [of business]' or at least allows them to exploit the media for their purposes. This is especially true of television, which now plays such a predominant role in shaping the thinking, attitudes and emotions of our people . . . . The national television networks should be monitored in the same way that textbooks should be kept under constant surveillance. This applies . . . to the daily

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the Treasury and General Government Appropriation Act for Fiscal Year 2001. *See Consolidated Appropriations for Fiscal Year 2001*, Pub. L. No. 106-554, §515 Appendix C, 114 Stat. 2763A-153 (2000). Although defenders of the data amendments claim they merely require agencies such as the EPA to look only to "good science" in promulgating standards, experience has shown that backers have shifted what good science is if it fails to benefit industry. In *Am. Trucking Ass'n. v. EPA*, 283 F.3d 355 (D.C. Cir. 2002), the court upheld EPA NAAQ standards under the Clean Air Act partially because the EPA relied on peer-reviewed epidemiological studies showing 15,000 to 20,000 excess deaths occurred every year under existing standards. *Id.* at 379. Advocates of "good science" now question the usefulness of peer review and have moved on to other delaying tactics. *See* Donald T. Hornstein, *Accounting for Science: The Independence of Public Research in the new Subterranean Administrative Law*, 66 *LAW & CONTEMP. PROBS.* 227, 237-40 (2003). As to global warming, note the tone and purpose of the right-wing "Luntz Memorandum," prepared for the administration and its congressional allies by Frank Luntz, the political operative who had invented the 1994 Contract With America:

The most important principle in any discussion of global warming is [our] commitment to sound science . . . . The scientific debate is closing against us but not yet closed. There is still a window of opportunity to challenge the science [of global warming] . . . . [Tell voters that] scientists can extrapolate all kinds of things from today's data, but that doesn't tell us anything about tomorrow's world. You can't look back a million years and say that proves that we're heating the globe now hotter than it's ever been. After all, just 20 years ago scientists were worried about a new Ice Age.

Press Release, Environmental Working Group, Briefing: Luntz Memorandum on the Environment (hereinafter Luntz Memorandum), available at [http://www.ewg.org/briefings/luntzmemo/pdf/LuntzResearch\\_environment.pdf](http://www.ewg.org/briefings/luntzmemo/pdf/LuntzResearch_environment.pdf) (last visited Feb. 1, 2006).

<sup>80</sup> *See* Editorial, *A Creationist Lesson*, *WASH. POST*, Aug. 4, 2000, at A28; Sheryl Gay Stolberg, *Bush's Science Advisers Drawing Criticism*, *N.Y. TIMES*, Oct. 10, 2002, at A28; Editorial, *The President's Stem Cell Theology*, *N.Y. TIMES*, May 26, 2005, at A28.

'news analysis' which so often includes the most insidious type of criticism of the enterprise system [which has caused] the gradual erosion of confidence in "business" and free enterprise. This monitoring, to be effective, would require constant examination of the texts . . . of programs. Complaints—to the media and to the Federal Communications Commission—should be made promptly and strongly when programs are unfair or inaccurate. Equal time should be demanded when appropriate. Effort should be made to see that the forum-type programs (the Today Show, Meet the Press, etc.) afford at least as much opportunity for supporters of the American system to participate as these programs do for those who attack it.

Most of the media, including the national TV systems, are owned and theoretically controlled by corporations which depend upon profits and the enterprise system to survive. If American business devoted only ten percent of its total annual advertising budget to this overall purpose, it would be a statesman-like expenditure.<sup>81</sup>

In the years after the Powell Memorandum, business interests successfully implanted a widespread suspicion about a "liberal media" that required neutralization, an allegation that hardly fits the experience of many of us environmentalists who long have bemoaned the low level of civic reporting.<sup>82</sup> Reed Irvine and his bemusingly-named Accuracy in Media organization applied pressure to publishers, and terrorized reporters who were focusing on industrial and business excesses.<sup>83</sup> Conservative press tycoons took over increasingly large blocks of national media, a consolidation that has reduced the number of voices and severely narrowed the information they convey. News reporting has been put into competition with entertainment, political and policy coverage reduced to ever smaller sound bites, and much reporting has begun to resemble an echo-chamber of rehashed press releases from business and compliant agencies. Talk radio and other low-brow media have been encouraged to turn the airwaves into a format of hormone-charged superficiality that caricatures public-

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<sup>81</sup> Powell, *supra* note 54, at 4, 9, 10.

<sup>82</sup> See ERIC ALTERMAN, *WHAT LIBERAL MEDIA?: THE TRUTH ABOUT BIAS AND THE NEWS* (2003).

<sup>83</sup> Accuracy in Media is perhaps most notorious for lambasting a widely acclaimed PBS series chronicling the Vietnam War as "anti-American." See Arthur Unger, *Media Watchdog Group Takes Aim at Vietnam Series: More Politicizing of PBS?*, CHRISTIAN SCIENCE MONITOR, June 3, 1985 at 33; INTO THE BUZZSAW: LEADING JOURNALISTS EXPOSE THE MYTH OF A FREE PRESS (Kristina Borjesson, ed., 2002).

interest advocates as commies, feminazis, parasites, autocratic elitists, unwelcome immigrants, and welfare queens.

### 7. *Capture Language and Meaning*

Capturing language, too, has been a brilliant part of the strategy. Professor George Lakoff has described how the manner in which an issue is “framed” by the Right produces serious political outcomes.<sup>84</sup> These national semantic tactics were vividly illustrated by the mistakenly-leaked Luntz Memo telling administration operatives how to camouflage the regressive agenda behind a curtain of misleading words—hence the naming of the “Clear Skies Initiative,” “Healthy Forests Initiative,” “Data Quality Act,” and the like—and how to confuse and block public recognition of significant environmental threats like acid rain and global warming so that industry would not have to face mandatory regulation of sulfur and carbon emissions.<sup>85</sup> The use of language is Orwellian not only in its double-speak, but also in the conscious, institutionalized manner in which it is deployed.<sup>86</sup>

The redefinition of “environmentalism” was likewise a major strategy. After the popular and media environmental upwelling that arose in the 1960s, the initially reigning image of environmentalists was of people from all walks of life identifying and

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<sup>84</sup> See GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004); see also George Lakoff, Simple Framing, [http://www.rockridgeinstitute.org/projects/strategic/simple\\_framing](http://www.rockridgeinstitute.org/projects/strategic/simple_framing). A recent success from the progressive side was to brand Senator Ted Stevens' appropriations rider funding a quite-unnecessary Ketchikan bridge as a multimillion-dollar porkbarrel “Bridge to Nowhere.” See Liz Ruskin, “*Nowhere*” Label was Winner for Bridge Foe, ANCHORAGE DAILY NEWS, Jan. 8, 2006, at A1; Editorial: What's More Helpful Than a Useless Bridge?, CHICAGO SUN TIMES, Jan. 11, 2006 at 41.

<sup>85</sup> Luntz Memorandum, *supra* note 79, at 131, 134-138, 140-142.

<sup>86</sup> See H.D.S. Greenway, *The Return of “1984,”* BOSTON GLOBE, June 24, 2005, at A18. The anti-environmental private sector likewise has been learning its semantic lessons. The Chemical Manufacturers' Association, one of the most powerful industrial groups lobbying against environmental protection regulations, realized that its name was hampering its connection with the public. After focus-group polling

[a]t their annual meeting at The Greenbrier resort, the CMA voted to change its name to the “American Chemistry Council” (ACC). The new name reflects . . . the desire for a more positive reputation . . . . The public still reacts with fear and negative feelings to the word “chemical” . . . . For some reason, the word “chemistry” generates milder, even favorable responses.

Powell, *supra* note 54, at 10 (citing the Association of Consulting Chemists & Chemical Engineers, 12 CHEMICAL CONSULTANT NEWSLETTER, Number 5-6, May-June 2000).

reacting against widespread threats to their health, safety, natural resources, and neighborhoods, as well as global conditions. The strategy of regression soon became a strategy of marginalization—divide and conquer. If environmentalism could be characterized as a collection of narrow hippie niche issues, espoused by scruffy, unpatriotic libertines and elitist eggheads, instead of as a comprehensive mode of rational analysis of systemic causes and effects, then environmental issues and environmentalists could be strategically marginalized. We who brought the snail darter litigation against the TVA dam played directly into this trap. Instead of being identified as an important exemplar of environmentalism's systemic rationality—enforcing realistic economic accounting, consideration of real costs, benefits, and alternatives, and providing a mechanism for transparent review of corrupted political maneuvers—we were quickly and dismissively boxed into a frame of “irrational extremism,” and the little fish was turned into the precise opposite of its reality, as one of the favorite iconic symbols of environmental law's purported fractionalized irrationalities.

#### 8. *Capture the Courts*

The right-wing radicals have always understood the strategic importance of the federal judiciary. As citizens and civic actions became more frequently involved in litigation, the Right moved beyond its early impotent crusades aimed at impeaching integrationist judges to much more sophisticated strategies. The Powell Memorandum had said:

Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change . . . . This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds.<sup>87</sup>

From this recognition came not only the “public interest law firms,” fronting for industry, but also a highly organized initiative to end the traditional objectively-neutral “Missouri Plan” process for nominating candidates for judgeships.<sup>88</sup> With the Nixon ad-

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<sup>87</sup> Powell, *supra* note 54, at 10.

<sup>88</sup> Under the “Missouri Plan” format for judicial selections, which has been adopted in some form in 34 states, a state's governor is required to select and nominate judges from a list of candidates screened for their quality by a nonpartisan nominating commission composed of lawyers and citizens. See Robert L.

ministration, judicial candidates began to be selected with specific political outcomes in mind, in disregard of the traditionally respected recommendation evaluations of the American Bar Association.<sup>89</sup> In the 1980s, the process was permanently altered under the guidance of White House advisors.

Edwin Meese and John Sununu, with judges being specifically recruited and presented, often despite low ABA ratings, to shift judicial holdings in favor of business and against citizen activism.<sup>90</sup> In recent years the process is not even camouflaged, as the current administration has openly refused to consider ABA evaluations and has appointed a series of overtly politicized judges to lifetime tenure.<sup>91</sup>

### 9. *Capture the Flag, and Jingoism*

Building on the ferment and internal domestic debates of the Vietnam era, which had provided many environmentalists with their first active engagement in politics, the New Right movement built middle-American appeal by wrapping itself in patriotism. An American flag pin became a sign of support not only for soldiers who defended their country, but also began to denote a skepticism about dissent, and a rejection of internationalism. The intellectual threads in the New Right held contradictory views on global affairs. Some self-described conservatives espoused isolationism. Others looked forward to active U.S. engagement and dominance in international affairs. Both agreed, however, that the internationalism implicit in environmentalism—a collective responsibility for the stewardship of the planet, with a de-emphasis on theories of national sovereignty and a du-

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Brown, *From Whence Cometh Our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L.J. 313 (1998).

<sup>89</sup> The Nixon nomination of the lightly gifted Judge G. Harold Carswell to the Supreme Court drew such public criticism that the nomination was ultimately withdrawn. Actions taken in opposition to the nomination became a campaign issue used against mainly southern Democrats who opposed the nomination. For more on Carswell's failed nomination, see JOHN MASSARO, *THE ROLE OF IDEOLOGY IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* (1990).

<sup>90</sup> See HERMAN SCHWARTZ, *RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS* 52-53 (2004).

<sup>91</sup> See Neil A. Lewis, *White House Ends Bar Association's Role in Screening Federal Judges*, N.Y. TIMES, March 23, 2001, at A13. At the state level, the regressive trend has been to jettison the "Missouri Plan" process that ranked judicial candidates according to neutral principles of competency and unbiased judgment. On the Right's current judicial-appointment strategy, see Rosen, *supra* note 59, at 46-49, 66, 128-29.

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biousness about according dispositive authority to global trade—was dangerously un-American. Patriotism was linked with defense of the corporate economy and military adventurism overseas: if you love America you have to tolerate Agent Orange. To the Vulcans<sup>92</sup> as well as the evangelicals, internationalism is suspicious, and America's interests without regard to international repercussions are thought to be determinative.<sup>93</sup>

**C. Capturing Christianity: The Third and Most Important Alliance**

But the biggest tactical coup in building the New Right electoral movement was its third major alliance: The New Right captured Christianity. Or, more accurately, the New Right forged a link with some of Christianity's most vocal representatives in the United States, in order to gain evangelical voters by the millions. 1972 is a milestone in that history. In 1972, the Rev. Jerry Falwell met with William Buckley and Richard Viguerie and offered, in effect, "If you agree to meet us on our terms, we can bring evangelicals out of their current apolitical passivity, into the Republican Party."<sup>94</sup> Falwell was thereafter joined by Phyllis Schlafly (a hard-right Roman Catholic who had founded the

<sup>92</sup> "Vulcans" is the name a group of advisors gave themselves when they came together to teach George W. Bush enough about foreign affairs to cope with the 2000 presidential campaign, thereafter dominating the Bush Administration's foreign policy. The core Vulcans with government experience were Donald Rumsfeld, Dick Cheney, Paul Wolfowitz, Richard Armitage, Condoleezza Rice, and Colin Powell. They were backed by neo-con supporters outside government like William Kristol, Charles Krauthammer, and Robert Kagan. Virtually all the Vulcans, with the exception of Colin Powell, favored "a new American empire" through demonstrative application of America's preeminent military power, especially in the oil-rich Middle East. None of them except Powell had served in the military. See JAMES MANN, *THE RISE OF THE VULCANS: THE HISTORY OF BUSH'S WAR CABINET* (2004).

<sup>93</sup> John Micklethwait and Adrian Wooldridge, in *THE RIGHT NATION*, show how September 11, 2001, fully cemented the transformation of neoconservative foreign policy, advocating the use of military might to transform the global order according to American principles, into conservative foreign policy, which early in the Bush administration had focused on American national strength, relations amongst the great powers and withdrawal from international affairs. Evangelicals readily accepted the neoconservative agenda after September 11, in part because it was framed as a moral absolute, a battle of good and evil, in which you were either for justice or for terrorism. MICKLETHWAIT & WOOLDRIDGE, *supra* note 57, at 214-15; see also Lewis H. Lapham, *Tentacles of Rage: The Republican Propoganda Mill, a Brief History*, *HARPER'S MAG.*, Sept. 1, 2004, at 31 (showing the brief history of the rise and financing of the anti-progressive movement).

<sup>94</sup> See Michael Lienesch, *Right Wing Religion: Christian Conservatism as a Political Movement*, 97 *POLITICAL SCI. QUARTERLY* 408 (1982).

Goldwater-era Eagle Forum), Pat Robertson, the young Ralph Reed, and a number of other fundamentalist Christians. The concessions required of the business bloc focused on social policy. Federal educational policy should back away from sex education and other “secular humanist” departures from Christian fundamentalism, contraception and abortion rights should be curtailed, the separation of Church and State bridged, and the Godless objectivity of modern science tempered with official tolerance of “creation science” and other fundamental Bible literalisms.<sup>95</sup>

Accommodating the evangelicals required some judiciously opportunistic shifts. The nation’s business leadership generally reflects an openness to science and objective analysis. Many of the industrialist leaders and old-line Republicans like President George Herbert Walker Bush were cosmopolitan Episcopalians, strong on civil rights and pro-choice by libertarian bent. Some of these leaders now found new spiritual dimensions, reversing their tolerance of abortion, some even declaring that they had been born again. The New Right intellectual class included a number of secular Jews and many Straussians,<sup>96</sup> but now the prospect of winning elections proved attractive, and fundamentalist Christian issues were quickly woven into their national policy platforms. Straussians, like their arch-enemy Karl Marx, generally have considered religion to be a mindless opiate of the people. But that could be acceptable if the opiate could pull in evangelical voters to support the business agenda.<sup>97</sup> Abortion would become the prime mass motivator, the satanic recruiter for popular support. In the years that I spent pounding the corridors of Capitol Hill trying to collect votes for the Endangered Species Act or Alaska wild lands, I often bumped into down-home Christian activists who had been recruited to come to Washington to carry a collection of ardent messages. Abortion was always first, but then followed literature and pitches to legislators on a list of other New Right issues. Jesus, it appeared, wanted the Department of Edu-

<sup>95</sup> See MICHAEL NORTHCOTT, *AN ANGEL DIRECTS THE STORM: APOCALYPTIC RELIGION AND AMERICAN EMPIRE* (2004).

<sup>96</sup> Followers of the late Leo Strauss’s philosophy find themselves in more positions of power in the current Bush administration than ever before. See Jeet Heer, *The Mind of the Administration, Part 1 of a Series on the Thinkers Who Have Shaped the Bush Administration’s View of the World*, BOSTON GLOBE, May 11, 2003, at H1.

<sup>97</sup> “Strauss wanted a regime where the elite lived by a code of stoic fortitude while governing over a population that subscribes to superstitious religious beliefs. ‘He agreed with Marx that religion was the opium of the masses,’ says Shadia Drury. ‘But he believed that the masses need their opium.’” *Id.*

cation disbanded because of its secularist humanism, wanted the Panama Canal to stay in US hands, wanted the federal government to back off its atheistic regulation of American life, and environmentalism was a suspect doctrine. We activists who worked for the environment were idolaters worshipping trees and animals and ignoring humans.<sup>98</sup> It is difficult to overestimate the force of these enlisted troops in the corridors of Washington and the state capitols, and on talk radio, etc. Thomas Frank's *What's the Matter with Kansas?*<sup>99</sup> brilliantly describes how the evangelical code and regressive politics spread through sectors of the society that had long been suspicious of the power of big business. Two British observers, in *The Right Nation*,<sup>100</sup> likewise describe the dramatic shift in American electoral politics produced by the business-religious alliance launched in the 1970s.

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<sup>98</sup> Some Christian fundamentalists appear to believe that "environmental destruction is not only to be disregarded but actually welcomed—even hastened—as a sign of the coming apocalypse," in the same way that war with Islam in the Middle East is not something to be feared but welcomed: "Once Israel has occupied the rest of its 'biblical lands,' legions of the Antichrist will attack it, triggering a final showdown in the valley of Armageddon. True believers will be lifted out of their clothes and transported to heaven." To such believers, environmental degradation, like a war with Islam, "is not something to be feared but welcomed, an essential conflagration on the road to redemption. Bill Moyers, *What the Religious Right Has to Do with the Environment*, EVERGREEN NEWS, Jan. 2005, available at <http://seattle.consciouschoice.com/2005/em2101/news2101.html>; see also Glenn Scherer, *The Godly Must Be Crazy: Christian-Right Views Are Swaying Politicians and Threatening the Environment*, GRIST MAG., Oct. 27, 2004, available at <http://www.grist.org/news/maindish/2004/10/27/scherer-christian/>.

<sup>99</sup> Frank contrasts the populist awakening in Kansas with its present political complexion. In the old days, hard times brought on by the vicissitudes of the market led to a farmer's uprising under the directive of Elizabeth Lease to "raise less corn and more hell." WILLIAM COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS* 281 (1979). These farmers went on to sweep the plutocracy out of the legislature and gain legitimate power. See FRANK, *supra* note 71, at 32-34. As Frank notes, in the Republican revolution of 1994, the same class of people, facing similar economic problems, swept through the legislature to enact an agenda calling for an end of progressive era reforms. *Id.* For example, the Kansas Republican party platform of 1998 called for the abolition of the estate, capital gains, and sales taxes, social security privatization, deregulation across the board, and opposition to national health care and public financing of elections. See *Id.* at 76-85.

<sup>100</sup> MICKLETHWAIT & WOOLDRIDGE, *supra* note 57, at 200-03, 214-15.

1. *After a 1976 Speed Bump, Marketplace Momentum Builds Up for Three Major Assaults on Environmental Protection*

At first the incipient anti-regulatory alliance encountered a momentary hitch in 1976. The Religious Right's Christian coalitions did indeed bring a flood of evangelical voters into the political process in 1976, but though they did make some difference in the congressional elections, that year they did not vote for Gerald Ford, the Republican presidential candidate. Then Governor Jimmy Carter, a genuine born-again Christian and a real environmentalist, got the Democratic nomination and the newly-energized evangelicals voted for him. As president, Carter supported a wide range of progressive policies, including the enforcement of federal environmental regulations on business.

The regressive Right, however, soon found an answer, based on the abortion issue. Jimmy Carter, though he personally hated abortion, had declined to push his personal faith onto the law books and refused the fundamentalists' calls for a ban on abortion. The New Right therefore seized upon Governor Ronald Reagan, and carefully cultivated a fundamentalist anti-abortion Christian image for him. Reagan—who had previously been a committed adherent of astrologers Jean Quigley and Carroll Righter, rarely inclined to church-going, and a pro-choice candidate—was persuaded to distance himself from astrology, and announce that he was a born-again Christian strongly opposed to abortion.<sup>101</sup>

2. *Three Assaults upon Environmental Protection Laws: 1981-87, 1994-95, and 2001-to-the-Present*

With the election of 1980, the pieces fell into place for the nation to experience its first comprehensive assault on environmen-

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<sup>101</sup> See Steven V. Roberts, *Not a Slave to the Zodiac, Reagan Says*, N.Y. TIMES, May 17, 1987, at A22. Although Reagan would never publicly admit to being an adherent of astrology, he did disclose in his autobiography that Mr. Righter was a "good friend" who provided advice he used in a business deal. *Id.* Former Reagan Chief of Staff Donald Regan claimed in his memoirs that President Reagan would remind him that "certain days were not good days" for travel or other official business, and astrologist Carroll Righter took credit for convincing Governor-elect Reagan to schedule his 1967 inauguration in the midnight hours because heavenly signs favored it. See Steven V. Roberts, *Reverberations Felt as Regan Book Hits Market*, N.Y. TIMES, May 9, 1987, at A24; see also CHIP BERLET & MATTHEW N. LYONS, RIGHT-WING POPULISM IN AMERICA: TOO CLOSE FOR COMFORT (2000).

tal protection law. With Ronald Reagan as its cheerful image, and with a substantial anti-abortion evangelical vote, the pragmatic rightist alliance swept Carter from office and launched a broad series of initiatives to retreat from progressive legislation, many of these initiatives targeting environmental protection. The Reagan era environmental agenda included attempts to turn the federal pollution statutes back to the states, turn portions of the national park system over to private ownership, and pull back from the growing international environmental policies represented at the Stockholm Conference on the Environment.<sup>102</sup> This first major attack on environmental protection law ultimately failed, however, thanks to an aroused media, the ventry of some of its corporate Christian appointees like James Watt, Earl Butz, and the indicted EPA administrators, and because of the courage of some progressive legislators in Congress. As a result, to win election in 1988, George Herbert Walker Bush had to cast himself as an environmental protector and his Democratic opponent Governor Michael Dukakis as soft on water pollution.<sup>103</sup>

In 1994, in the second major assault on environmental law, the New Right under the leadership of Newt Gingrich was able to launch its "Contract with America," winning majorities in the congressional election shifting both houses to the Republican Party. A phalanx of regressive bills won passage in the House of Representatives. Most of the contract assaults on progressive legislation, however, failed in the Senate thanks to a number of very courageous legislators, of whom Senator John Chafee, Republican of Rhode Island, ranked as perhaps the bravest of a dozen defenders of environmental protection laws.

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<sup>102</sup> See THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (Gro Brundtland, ed. 1987); Report of the United Nations Conference on the Human Environment, Stockholm, June 5-16, 1972, 27th Sess., U.N. Doc. A/Conf. 48/14 (1972).

<sup>103</sup> In a brilliant piece of political theater, then-Vice President Bush Sr. cruised Boston Harbor on September 1, 1988, proclaiming that the volume of sewage dumped into the harbor in 1986 "would cover all of metropolitan Boston up to a depth of 17 feet." Robin Toner, *Bush, in Enemy Waters, Says Rival Hindered Cleanup of Boston Harbor*, N.Y. TIMES, Sept. 2, 1988 at A16. For Bush, Mr. Dukakis' solution was to "delay, fight, anything but clean up." *Id.* Although Dukakis allies pointed out that the Reagan/Bush administration twice vetoed the Clean Water Act and earmarked Waste Water Treatment Grants Program for termination, and claimed Governor Dukakis's administration was the first in Massachusetts to take affirmative steps to clean up the harbor, Bush's attacks undermined Dukakis's ability to take the administration to task for its environmental record. *Id.*

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But then came the third major assault on environmental protection laws with the election of 2000, as the battle-hardened right wing coalition successfully overtook American government. As in 1980, the regressive campaign in 2000 successfully put up a presidential candidate who cultivated a down-home common touch while closely linked to big business, who presented himself as a stubborn, uncomplicated defender of traditional American values, and who had no facility or interest himself in directing the complex daily details of national governance. The group of administrators who took over the federal leadership brought a superb political machine into the corridors of Washington, and extended their control to all three branches of government.

The current administration has shown itself to be more radical than any at least since the 1930s, systematically setting out to dismantle multiple structures of civil laws that had been established over more than half a century of bipartisan legislative and administrative efforts. The range of environmental rollbacks has been initiated comprehensively, across the board, not the piecemeal selective targeting process of the prior regressions.<sup>104</sup> Virtually every area of environmental protection law has been targeted for dilution through lessening of regulatory standards, or of enforcement, or both.<sup>105</sup> Unlike the New Deal and 1960s Democratic eras, moreover, the coalition interests directing policy in the Bush Administration have been able to disable the traditional governing system's internal constraints—no checks, no balances.

What explains the success of the current radical ascendancy in the environmental area? In part it is that, unlike the settings of the prior two major assaults on environmental protection, the regressive bloc now holds both Congress and the White House, so

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<sup>104</sup> In the environmental field virtually no program has gone unscathed, with the possible exception of the federal environmental justice programs launched by the Clinton administration, an exception which demonstrates, as one advocate dourly noted, how toothless the EJ programs are. It used to be that the University of Oregon's annual Public Interest Environmental Law Conference would feature three or four regulatory programs under imminent assault in the Washington political process. Today a list here of the ongoing rollback initiatives would total in the dozens. See Naomi Melver, *Welcome Speech to the Twenty-Second Annual Public Interest Environmental Law Conference*, 19 J. ENVTL. L. & LITIG. 1 (2004).

<sup>105</sup> The Natural Resources Defense Council (NRDC) estimates that the Bush administration took 150 actions that adversely affected the environment in 2004 alone. The NRDC provides a comprehensive analysis of the Bush environmental record in Gregory Wetstone et al., *Rewriting the Rules, Special Edition: The Bush Administration's First-Term Environmental Record*, available at <http://www.nrdc.org/legislation/rollbacks/rr2005.pdf>.

the check of one chamber or branch upon the others is absent. The Senate filibuster procedure, the threat of which had allowed progressive legislators to blunt prior assaults, is being undercut.<sup>106</sup> Senator John Chafee is gone now, may he rest in peace, and there has been a tactical shift toward initiatives that avoid the media-visible floor of Congress. The current coalition campaign against progressive governmental programs, unlike the prior two, operates primarily out of sight—not via congressional bills, but rather by administrative sleight-of-hand. The Bush administration has on occasion made large inroads with seemingly small changes in regulatory definitions,<sup>107</sup> or by eagerly capitulating to industry court assaults on progressive regulations by refusing to defend the challenged regulations,<sup>108</sup> or by acceding to industry indulgent out-of-court settlement agreements which are then applied nationwide.<sup>109</sup> The media, too, have been rendered quiescent, a deeply significant loss of a forum for public awareness and accountability.<sup>110</sup> The profile and tone of the federal courts have been changed dramatically as the federal judicial nomination process, which had been held hostage during the Clinton years, now has become a conveyor for agenda-dominated appointments. The pro-market justices of the Supreme Court have erected increased hurdles for citizen enforcement of

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<sup>106</sup> See Richard W. Stevenson, *For This President, Power Is There for the Taking*, N.Y. TIMES, May 15, 2005, at A3.

<sup>107</sup> One of the most obvious examples of definitional sleight-of-hand is the change in definition of the word “maintenance” to allow major air polluters to make substantial modifications in plants without having to comply with the best-technology requirements for new source construction. See *Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion*, 68 Fed. Reg. 61,248 (Oct. 27, 2003).

<sup>108</sup> In *Kootenai Tribe of Idaho v. Veneman*, the Ninth Circuit Court of Appeals upheld federal roadless area wilderness protection rules against a timber industry challenge that the Forest Service had failed to prepare an environmental impact statement in promulgating the rule. 313 F.3d 1094 (9th Cir. 2002). The Administration had refused to defend the regulation, so Professor Patrick Parenteau, for the citizen environmentalist interveners, had to take on the task, successfully, of defending the federal government. See *id.*

<sup>109</sup> See, e.g., Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy*, 34 ENVTL. L. REP. 10397 (2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=539302](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=539302).

<sup>110</sup> See Jessica Clark & Tracy Van Slyke, *Making Connections, Why is the News So Bad? What Can Progressives Do to Fix it?*, IN THESE TIMES, May 9, 2005, at 17, available at <http://www.inthesetimes.com/site/main/article/2069/>.

environmental laws.<sup>111</sup> In the federal judiciary, as a whole, the environmental decisions of judges appointed by Republican administrations have tended to be substantially less protective of the environment than those of judges appointed by Democrats.<sup>112</sup>

#### *D. Lessons from the Third Circle of Dumb*

- While it may ultimately be dumb in both societal and individual terms to fail to plan and account for the negative as well as positive consequences of major actions, projects, and programs, civic-minded regulation nevertheless triggers a strong instinctive resistance in individual regulated corporations that is shared generally by economic actors throughout the society.
- While we may all need an effective societal government to draw lines that private actors cannot or will not draw for themselves, the power of resistant market forces, if they organize their

<sup>111</sup> The Rehnquist Court has been notable for repeatedly cutting back on citizens' ability to go to court to enforce federal laws. See John Echeverria & Jon T. Zeidler, *BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE AND ENFORCE ENVIRONMENTAL LAW* (Envtl. Policy Project, Georgetown Univ. Law Ctr. June 1999). Justice Scalia famously argued that citizens should be squeezed out of the regulatory enforcement process, leaving the field to regulated industries and their government agencies. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK U. L. REV.* 881, 897 (1983). Only recently, with the *Laidlaw* case, has a bare majority begun to reassert some elements of citizen standing, halting the erosion of the pluralistic multi-centrist democracy that had arisen in the 1960s. See *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167 (2000); John D. Echeverria, *Standing and Mootness Decisions in the Wake of Laidlaw*, 10 *WIDENER L. SYMP. J.* 183 (2003); Bruce J. Terris, *Standing on Weak Ground*, 10 *WIDENER L. SYMP. J.* 173 (2003); see also Hope Babcock, *The Effect of the Supreme Court's Eleventh Amendment Jurisprudence on Environmental Citizen Suits: Gotcha!* 10 *WIDENER L. SYMP. J.* 205 (2003).

<sup>112</sup> ENVIRONMENTAL LAW INSTITUTE, *JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT* (2004). The ELI made several findings. For example, federal district judges appointed by Democratic Presidents ruled in favor of environmental protection 60 percent of the time. Judges appointed by Republican Presidents ruled in favor of environmental protection 28 percent of the time. District judges appointed by President George W. Bush ruled in favor of environmental plaintiffs only 17 percent of the time. When industry or pro-development interests sue under NEPA, the results are almost completely reversed. Democratic appointees rule in favor of such plaintiffs 14 percent of the time, while Republican appointees rule in favor almost 60 percent of the time. At the three-judge circuit court level, panels with two or more judges appointed by a Democrat ruled in favor of environmental plaintiffs 58 percent of the time. Panels with a majority of Republican appointees ruled in favor of environmental plaintiffs in only ten percent of cases. When all three judges were Democratic appointees, the panel ruled in favor of environmental plaintiffs 75 percent of the time, compared to 11 percent for entirely Republican-appointed panels.

efforts and resources, can neutralize and dominate civic regulation to the ultimate risk of all.

- Social policy shifts can be the result of opportunistic and pragmatic alliances and tactics. The fact that an edifice of laws and precedent has been built by bipartisan effort and public support over 50 years—as embodied by environmental protection law in 1999—is no guarantee that it cannot be subverted by a well-planned and executed erosive campaign.

#### IV

#### THE FOURTH CIRCLE OF DUMB: BAMBOOZLED AMERICAN VOTERS

I suggest that the fourth circle be reserved for voters of any partisan persuasion who have allowed their level of political consciousness to be defined by ten-second sound bites, and who allow themselves to be manipulated and herded into voting for candidates flying under false colors. From my dour point of view it is an aggregation of such voters who narrowly gave the current regressive coalition its path into office. My proposition is that, by and large— with the important exception of wealthy voters who well understood the issues and voted their own class interests—the less voters knew about the details of national affairs, the less they knew about international affairs, the less they knew about science, the more likely they were to vote for the cohort currently assailing environmental protection law.

Thomas Frank's deep probing of how Kansas, previously a markedly progressive blue-collar state electorate, found itself transmogrified into an electoral bastion of pro-corporate regressive government policies, tracks the effects of the third-circle campaign launched by the New Right in response to the progressive populist surge of the 1960s, with religion and family values leading the way.<sup>113</sup> The insecurities and fears engendered by economic and social instability were successfully focused on the image of an allegedly powerful and conspiratorial Eastern liberal elite dominating the media and national government and holding suspicious internationalist principles in a time of global terror threats to the American heartland.<sup>114</sup> To this is added the theme

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<sup>113</sup> See FRANK, *supra* note 71, at 76-85.

<sup>114</sup> As Frank shows, the right-wing's talk radio, cable news, and Internet media network is adept at deflecting blame for the results of their own policies onto a "liberal elite" portrayed as completely out of touch with mainstream America.

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of the elite's "secular humanist" principles destabilizing traditional Christian family values and undercutting the paradigm of a homogeneous Anglo-European America in the name of heterogeneous diversity.<sup>115</sup> The successful coalition generally captured its majorities in rural and suburban areas. Urban areas, often deeply distrusted by new blue-collar conservatives, tended to vote progressive.<sup>116</sup> Frank and other observers do not discern much specifically anti-environmental animus within the newly-minted blue-collar electorate, other than a vague antagonism to elitist highhandedness.<sup>117</sup> Instead, the elements of the "conservative" agenda that seem to have swayed blue-collar voters were the religious fervors of anti-abortionism, and military preparedness against the fears of foreign terrorist threats to America. But the "conservative" media constantly stoke popular suspiciousness about environmental science, denying the validity of acid rain research, global warming, human metabolic chemical sensitivities, and the like. And as to the people they elect, anti-environmentalism has consistently been a significant theme in the

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Frank cites Anne Coulter's assertion that media coverage of the Enron debacle, which for a brief moment was the largest corporate bankruptcy in history amidst clear evidence of fraud, proves that the media has a liberal bias. *See id.* at 128. Environmentalists are pervasively caricatured by Rush Limbaugh and his cohorts as "environmentalist wackos."

<sup>115</sup> Micklethwait and Woodridge note how an evangelical creed antagonistic to secular humanism pervades the Bush White House. They note the experience of a Bush speech-writer, whose first words heard upon entering the White House were "Missed you at Bible Study." Bush has appointed members of the Christian Right to numerous important positions, most notoriously Attorney General John Ashcroft, who placed tarpaulins over the semi-nude statues of Justice in the Department of Justice hallways, held daily prayer sessions in his office, and banned staff members from having personal gay pride celebrations. *See* MICKLETHWAIT & WOOLDRIDGE, *supra* note 57, at 145-150.

<sup>116</sup> The famous red-blue maps that followed the elections of 2000 and 2004 sharply exaggerate the spatial polarization of the United States. A more nuanced county electoral "cartogram" adjusted for actual voter density reveals a more realistic and less daunting profile. *See* MICHAEL GASTNER, COSMA SHALIZI, & MARK NEWMAN, UNIV. OF MICH., MAPS AND CARTOGRAMS OF THE 2004 U.S. PRESIDENTIAL ELECTION RESULTS (2004), <http://www-personal.umich.edu/~mejn/election/>.

<sup>117</sup> Over the years we have realized that the litigation efforts my students and I made to protect the snail darter and the valley of the Little Tennessee River played into the fabrication of this notion of environmental protection elitism because we were never successful in getting across the true merits of the case. As relentlessly characterized by the media, ours was never the case of a runaway pork-barrel agency eliminating public resources, an endangered species, and hundreds of family farms for an illogical land-sale scheme. Instead the story was widely disseminated as a tale of narrow-minded environmentalists trying to block human technological progress in defiance of common sense, the most extreme environmental case ever.

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practical political agenda of most of the coalition candidates who rode these passions into political office.

Is it fair to call the voters of the fourth circle “dumb?” It is perhaps better to say “ignorant.” A distressingly large portion of the electorate’s voters resemble Springfield, Oregon’s own Homer Simpson, not knowing much about what is going on in the world and in their society’s governance, and is easily satisfied with sound bite superficiality. Compared to European voters, average American voters appear to know relatively little about their own government’s policies and actions, and virtually nothing about the rest of the world’s.<sup>118</sup>

In the eyes of the rest of the educated world, and of those who hope to see the United States as a force for global peace and quality of life, there is something quaint but also greatly disturbing about a block of voters who can deny the scientific credibility of the evolutionary principle, acid rain, global warming, and so forth, and swallow the fig leaves of “Clear Skies,” “Healthy Forests,” “No Net Loss of Wetlands,” and their ilk.<sup>119</sup>

To some extent, such a lack of civic information may be blamed on the manipulation of the nation’s political debates and the media’s infotainment deterioration noted earlier. But to a significant extent many of us share the blame for suburban insulationism, a dumbing-down of public education, popular anti-in-

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<sup>118</sup> A University of Pennsylvania study during the 2004 election found that many adults in the U.S. did not know where the presidential candidates stood on important public policy issues. Press Release, Annenberg Public Policy Center, Voters Have Much to Learn from Debates, National Anneberg Election Survey Shows, available at [http://www.annenbergpublicpolicycenter.org/naes/2004\\_03\\_voter-have-much-to-learn\\_09\\_29\\_pr.pdf](http://www.annenbergpublicpolicycenter.org/naes/2004_03_voter-have-much-to-learn_09_29_pr.pdf) (Sept. 29, 2004). Likewise Americans lagged in the international realm. See NAT’L GEOGRAPHIC SOC’Y, SURVEY RESULTS: U.S. YOUNG ADULTS ARE LAGGING (2003), available at <http://geosurvey.nationalgeographic.com/geosurvey/highlights.html> (“Despite the daily bombardment of news from the Middle East, Central Asia, and other world trouble spots, roughly 85 percent of young Americans could not find Afghanistan, Iraq, or Israel on a map . . . . Americans ages 18 to 24 came in next to last among nine countries.”). “More young U.S. citizens in the study knew that the island featured in last season’s TV show “Survivor” is in the South Pacific than could find Israel.” Bijal P. Trivedi, *Survey Reveals Geographic Illiteracy*, NAT’L GEOGRAPHIC TODAY, Nov. 20, 2002, available at [http://news.nationalgeographic.com/news/2002/11/1120\\_021120\\_GeoRoperSurvey.html](http://news.nationalgeographic.com/news/2002/11/1120_021120_GeoRoperSurvey.html) (interviewing more than 3,000 young adults in Canada, France, Germany, Great Britain, Italy, Japan, Mexico, Sweden, and the United States).

<sup>119</sup> See, e.g., Luntz Memorandum, *supra* note 79. Not to mention many citizens’ manifestly inaccurate premise of Iraqi terrorism striking the World Trade Center, and a child-like faith in the funding-starved “No Child Left Behind” policy and the civic and personal wisdom of a quite radical right wing.

tellectualism, a de-emphasis of civic engagement, and familial retreat to Homeric couch-potatoism (traits justifiably decried by social critics of both left and right). As a result, in a world becoming ever more complex and demanding, many citizens seem to have become more simplistic and less demanding of their leadership and of themselves—not a great prescription for democracy or a better national future.

#### ***A. Lessons from the Fourth Circle of Dumb***

- In the complexity of modern times, possessed of the most rapid and sophisticated global information technology in human history, it is sobering to see what kind and amount of communication is and is not being demanded by the national electorate.
- Gulled voters, masterfully manipulated, have arguably characterized the narrow electoral majority that has supported the current administration.

### **V**

#### **THE FIFTH AND FINAL CIRCLE OF DUMB: WHO?**

For whom should the fifth and final circle of dumb be reserved? Here's my vote: us.

Looking at where environmental protection law now finds itself, and considering how it got here, I would argue that in retrospect we environmentalists have indeed been naïvely dumb, and now belatedly have a societal obligation to fix things up.

Maybe our most significant dumbness has been the naïve assumption that the merits of our positions—backed by science, rational logic over time, and a holistic overview that is a basic necessity in any complex society—would somehow inevitably find legs of their own. Like many environmentalists I think I subconsciously presumed that over time the mechanisms of our society's political life would ultimately consolidate the factual realities of our progressive positions—from food safety to global climate change, from civil rights to nuclear proliferation—refuting the self-interested imbalance of the radical right wing. Many of us thought there was a sort of “invisible hand” that would guide the American electorate, avoiding extremes of right or left, seeking a central balance and seeing to it that a presidential administration so lacking in policy integrity and factual objective merit would inevitably fail to win enough votes. “The American

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populace,” I thought, “instinctively seeks a balance, automatically reacting toward the middle to counter-balance the possibility of any single bloc of the Left or the Right, or any branch of government, gaining a despotic power.”

We were wrong. Our society, in the mechanisms of its political life at election time can get just as entangled in manipulative superficiality as it does in its short term sagas of celebrity marriage or murder, or sales campaigns for SUVs or room air fresheners. The regressive movement has the money and mastery to weave tapestries of sound-bite spells, gilding their dirty coal.<sup>120</sup> Unless environmentalists begin defining and communicating their broad societal role in more politically sophisticated formats that make an impact on governing policy, we will continue to be seers on the sidelines, and that would be a sad shame.

An acerbic little bombshell on the *Death of Environmentalism* was recently lobbed into the midst of the citizen environmental movement by two guys on the periphery.<sup>121</sup> Michael Shellenberger and Ted Nordhaus, using global warming<sup>122</sup> as an example, ask why our public interest environmental agenda has been

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<sup>120</sup> During the 2004 election campaign, for example, a mindlessly effective, ostensibly nonpartisan advertisement ran repeatedly on prime-time television, showing an American bald eagle that previously had been choking on pollution in 1970, now flying high on crystal-clean air. “Thanks in part to clean coal technologies, our air quality has been improving,” intones the corporate voice. “By 2015 emissions from coal-based power plants will be 75% less than they were in 1970.” “Very nice,” says the eagle. Produced by “Americans for Balanced Energy Choices,” a trade group funded by the coal, rail, and power industries whose campaign contributions tilt heavily GOP, the ad implies that here in the Bush era, environmental protection enjoys sterling successes. The ad does not note that much of the Clean Air Act’s regulatory successes have come over the bitter opposition of the ad’s sponsors, many of whom have sought to keep old marginal energy units on line instead of shifting to new source upgrades and clean coal technologies, and strenuously oppose greenhouse gas restrictions. See Katherine Mieszkowski, *Coal: Clean, Green Power Machine?*, SALON.COM, Oct. 5, 2004, [http://salon.com/tech/feature/2004/10/05/clean\\_coal/index\\_np.html](http://salon.com/tech/feature/2004/10/05/clean_coal/index_np.html).

<sup>121</sup> Shellenberger & Nordhaus, *supra* note 3.

<sup>122</sup> Global climate change is indeed the defining environmental problem of the current era, reflecting the complexity of natural systems, anthropogenic causes-and-effects, and political-economic resistance, as well as a broad scope of necessary societal responses far beyond the realm popularly perceived as “environmental.” As Ross Gelbspan says, the public will inevitably come to realize, as the Pentagon, Business Week, and other non-progressives have started to see, that global warming raises serious issues of national security, public health, and economic survival as well. See generally ROSS GELBSPAN, *THE HEAT IS ON: THE HIGH STAKES BATTLE OVER EARTH’S THREATENED CLIMATE* (1997); ROSS GELBSPAN, *BOILING POINT: HOW POLITICIANS, BIG OIL AND COAL, JOURNALISTS AND ACTIVISTS ARE FUELING THE CLIMATE CRISIS* (2004).

drowned by a reactionary political wave. It would be nice to be able to dismiss this *Death* as just the iconoclasm of a couple of bright people who wanted to be noticed and are seeking support for their own polling and entrepreneurial investment proposals.<sup>123</sup> Several of their criticisms are partly true, however, and can usefully serve to define and guide what must be done.

Shellenberger and Nordhaus don't acknowledge it, but the environmental movement's current political failures, of course, are in substantial part attributable to the extraordinary and one could say unfair advantages that industry has been able to mobilize, at taxpayer expense, to overwhelm the environmental media and the political process. The energy industries, in particular, have devoted millions of dollars to prevent the American press, public, and politics from acknowledging the reality of global warming.<sup>124</sup> Shellenberger and Nordhaus almost totally ignore the force and mass of the regressive opposition that has steamrollered American politics. They focus almost entirely on shortcomings of the dozen or so national citizen groups in Washington and their recent political losses, ignoring their continuing efforts, the existence of myriad environmental organizations at the grass roots level, not to mention almost totally ignoring the international sphere, the global scope and efforts of modern citizen environmentalism.

But Shellenberger and Nordhaus are not completely wrong when they picture many environmental groups, including the dozens of somewhat competing national environmental citizens' organizations, as narrow in focus, politically amateurish, and standoffish from average Americans, even arrogant. The national citizens' groups, they said, don't know how to build wide-winning coalitions on environmental issues with labor unions and other blocs, and were surprised, but shouldn't have been, when Al Gore and John Kerry were almost totally unable to raise the environment as an electoral issue.

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<sup>123</sup> Shellenberger and Nordhaus, "resisting the exhortations" of reviewers to propose some solutions, offered few suggestions for remedying environmentalism's political shortcomings other than a commitment to opinion research and targeted investment, plus alliances with labor unions, not exactly a formula for political and electoral strength. Shellenberger & Nordhaus, *supra* note 3.

<sup>124</sup> See Christopher Mooney, *Some Like It Hot*, MOTHER JONES, May/June 2005, available at [www.motherjones.com/news/feature/2005/05/some\\_like\\_it\\_hot.html](http://www.motherjones.com/news/feature/2005/05/some_like_it_hot.html) (detailing how just one oil company, ExxonMobil, has spent more than \$8 million since 2000 on media and PR efforts to combat the contemporary science on global warming).

Shellenberger and Nordhaus mordantly note how environmentalists so often indeed do focus on gloom-and-doom, presenting drearily pessimistic warnings of impending disasters:

Martin Luther King, Jr.'s "I have a dream speech" is famous because it put forward an inspiring, positive vision that carried a critique of the current moment within it. *Imagine how history would have turned out had King given an "I have a nightmare" speech instead.*

In the absence of a bold vision and a reconsideration of the problem, environmental leaders are effectively giving the "I have a nightmare" speech, not just in . . . press interviews but also in the way that [they] make . . . proposals.<sup>125</sup>

There's some truth to this. Environmentalists often use fears of toxicity or endangerment to catalyze political support. But how easy is it to present affirmative, uplifting messages about global warming? When threats are real, and illuminating—and one doesn't have a multi-million dollar public relations lobbying budget to present a cheery, deftly-targeted, mass media campaign—putting an emphasis upon real imminent threats is necessary and makes good sense. Many if not most of our common sense policy initiatives are prompted by the negative externalizations of narrow entrepreneurial systems. If you don't target the negatives, the potential nightmares, in making these cases, what do you target and why would you expect substantial numbers of people to listen?

Short term public attention, like the six o'clock news, seems to be most energized and mobilized not by good news but by vivid portents of bad—past, present, and potential future risks and harms. But unmitigated gloom-and-doom ultimately is self-defeating. Who wants to listen to that depressing downward-spiral stuff day after day, especially if there appears to be no way out? Environmentalists must tell the public not only about problems but also about the solutions that are increasingly available if our politicians and industries can be turned to policies of sustainability. And it wouldn't hurt to deploy a zesty sense of humor whenever possible.<sup>126</sup>

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<sup>125</sup> Shellenberger & Nordaus, *supra* note 3, at 23-24.

<sup>126</sup> "In his biggest decision ever on the environment, President Bush has moved to open up one-third of all remote national forest lands to road building, logging, and other commercial adventures. This is part of the No Tree Left Behind program. In fact, if you'd like to see any one of our giant Redwoods they'll be at Home Depot next weekend." *The Tonight Show with Jay Leno*, (NBC television broadcast May 9, 2005).

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As to narrowness, we environmentalists often do allow ourselves and others to think of “environmentalism” in narrow, compartmentalized terms. We don’t show the American public that environmentalism is a lot more than a collection of niche issues, and does not just deal with things that are labeled “environmental.” Environmentalism incorporates an important wide-ranging fundamental logic of how a society should govern itself in its natural planetary context. Environmentalism deserves to be perceived and presented in these broader terms.<sup>127</sup> Shellenberger and Nordhaus don’t acknowledge it, but modern environmentalists have learned, in the science and experience of many battles over the years, that environmentalism is fundamentally a governance process by which a society tries to make sensible decisions in defining its relationship to land, air, water, and our fellow human and non-human ecosystems. We are taught to look for inter-relationships, considering all the significant consequences that may follow from our actions, good and bad, and to assess these interacting consequences over time, not just seeing the short-term profit and production that are the particular objective of individual actions. But Shellenberger and Nordhaus are right that we do not communicate this very well.

Amateurish? Yes, the national groups often are bogged down, as Shellenberger & Nordhaus argue, in ineffective Potomac incrementalism, attacking global warming by seeking minor increases in CAFE fuel efficiency standards, without a major vision and ultimately without even incremental success.<sup>128</sup> The national environmental citizens groups must indeed raise the level, scope, and coherence of their major initiatives. And many environmental initiatives, especially at the grass roots level, are often undertaken with primitive political and media skills. Clearly modern environmentalists at every level need to become more savvy and skillful at motivating media and politics. There are advantages as well as disadvantages in organizing at the grass roots level, as the

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<sup>127</sup> Environmental law, for instance, is probably the only major area of civil governance that consistently bases its present prescriptive regulatory standards on the long-term requirements of the society as well as short-term contemporaneously felt needs.

<sup>128</sup> See Shellenberger & Nordhaus, *supra* note 3, at 10. CAFE standards are Corporate Average Fuel Economy standards for passenger cars and light trucks established by the Energy Policy and Conservation Act. Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (fuel economy standards are codified as amended at 49 U.S.C. §§ 32,901-32,919).

evangelicals have shown. And as modern technologies of communication and coordination become more available, environmentalists are availing themselves of them more sagely.

Standoffish? Yes. We tend to be mostly white, well-educated, and financially not desperate. Many of the nation's environmental groups avoid joining broad political coalitions, and others just do not know how to do coalitions very well, not to mention that they may not know how to talk to trade unionists. But environmentalists do know how to track important issues through other fields, and many environmental organizations have long established good working relationships with unions, medical and health groups, religious organizations, and the like, as well as little by little implementing environmental justice principles in their staffing as well as in the legal initiatives that they take on.<sup>129</sup>

#### ***A. Lessons from the Fifth Circle of Dumb: an Anticipatory Retrospective View***

Surveying where we are today in light of what we have accomplished, lost, and learned over past decades, I propose that when we look back in years hence upon the present day we will see that environmentalism today has a bright and abiding societal role.<sup>130</sup>

All right, it is not that simple. But based on an informed review of current context—and admitting that citizen environ-

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<sup>129</sup> “Based on information from a number of sources, the environmental justice movement continues to grow rapidly. Over 500 national and local organizations have been established within the past 25 years. These organizations represent a wide cross-section of the American public and deal with environmental concerns at the local, regional and national levels.” ROBERT G. STANTON, ENVIRONMENTAL STEWARDSHIP FOR THE 21ST CENTURY: OPPORTUNITIES AND ACTIONS FOR IMPROVING CULTURAL DIVERSITY IN CONSERVATION ORGANIZATIONS AND PROGRAMS, A REPORT PREPARED FOR THE NATURAL RESOURCES COUNCIL OF AMERICA 32 (2002), available at [www.naturalresourcescouncil.org/ewebeditpro/items/O89F3675.pdf](http://www.naturalresourcescouncil.org/ewebeditpro/items/O89F3675.pdf); see also Robert D. Bullard, ENVIRONMENTAL JUSTICE RESOURCE CENTER 2000 DIRECTORY: PEOPLE OF COLOR ENVIRONMENTAL GROUPS (2002) [www.ejrc.cau.edu/poc2000.htm](http://www.ejrc.cau.edu/poc2000.htm); African American Environmentalist Association, *Environmental Group Diversity Report Card 2003-2004*, <http://www.aaenvironment.com/EnviroGroupReportCard.htm> (showing a recent survey of major environmental organizations with respect to hiring, projects, etc. and also including the National Resources Defense Council survey response therein, at <http://www.aaenvironment.com/GreenGroup/NRDCDiversityReport.htm>).

<sup>130</sup> It is important, I tell my students, to develop the fine art of *anticipatory retrospective*: We must always try to figure out exactly what—if we were to look back at the present moment from some future time—we should be seeing and doing right now. It's that simple.

mentalism continually needs to improve its sophistication and performance if it is to fulfill its societal role in a setting where so much institutional power is arrayed against the public's true interests—here is why I believe we will flourish and prevail:

- We are right. If in fact acid precipitation falls down from the sky, if there is an ozone hole, if to sit watching a sunrise and breathing crisp clean air is a deeply fulfilling experience for both rich and poor, if toxins pass into babies' hormonal systems, if global warming is happening, if half the things we study to determine interconnections and value and risk turn out to be significant—then the facts, science, and logic of environmentalism is right, and the rampant near-sighted regressive elements are blindly, denyingly, dead-endedly wrong. Science and logic are on our side.<sup>131</sup>

The split between modern environmentalism and its opponents reflects two completely different ways of conceptualizing the world. Environmentalists operate in an analytical framework where everything ultimately is interconnected in a unitary system. Actions have interconnected consequences, direct and indirect, immediate and over time. As John Donne might have said, “No man, no fish, no bug, no bacterium, no acre is an Islande, entire of Itselfe . . . .”<sup>132</sup> Planning that does not consider the broad range of real consequences is ultimately unrealistic. The alternative position is the atomistic, compartmented, near-sighted perspective that focuses only on the immediate benefits to an individual actor of particular actions that bring profit or

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<sup>131</sup> And God, too, if He or She is part of your personal spiritual landscape, is surely on our side as well: It is unreasonable to believe that a God would reject the rich scientific knowledge and societal communal ethics developed by centuries of endeavors of some of His/Her finest thinking and feeling human creatures.

<sup>132</sup> The paraphrase is an update to John Donne's Meditation XVII:

All mankind is of one author, and is one volume; when one man dies, one chapter is not torn out of the book, but translated into a better language; and every chapter must be so translated . . . . As therefore the bell that rings to a sermon calls not upon the preacher only, but upon the congregation to come: so this bell calls us all: but how much more me, who am brought so near the door by this sickness . . . . No man is an island, entire of itself . . . any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.

JOHN DONNE, *Meditation XVII: DEVOTIONS UPON EMERGENT OCCASIONS, in SELECTIONS FROM DIVINE POEMS, SERMONS, DEVOTIONS, AND PRAYERS* (J. Booty ed., 1990). Of course, to an environmentalist, even an island isn't an island “entire of itself.”

pleasure. This “Promethean” view<sup>133</sup> capitalizes upon the premise of non-connectedness, which can vastly reward individual enterprises in the short run but is dysfunctionally shortsighted overall. And physics and life experience both affirm the reality of the former rather than the latter conception of reality. Forty years of modern science and the logic of interconnectedness say that you cannot build a healthy long term society on a working premise of atomistic externalizing actions, disregarding significant predictable consequences across the board.

- Rachel Carson taught us well, in focusing environmentalism not on things alone but also upon interconnected processes. Rachel Carson had begun her career as a scientist of small things viewed under a microscope in isolation. But when she started studying the sea, and then realized the post-war world’s new global capabilities for nuclear and chemical impacts, she began to think and teach in terms of broad interconnected systems over time. Following in her path, most modern environmentalists cannot be quaintly pigeonholed as treehuggers or bugwatchers. Each of our concerns is eventually tied into broad systems of life and civic governance. We do understand that humans are a primary though not solitary consideration in how the future is to be experienced. We have to show people why they should care and why we care about the jobs, health, personal security, and quality of life of billions of humans and ecosystems on the planet.

- In “sustainability” we have a compelling philosophical concept to fight back against regressive circles of official dumb and mindless individualistic greed. Sustainability is a concept defined and elevated as an important global aspiration and norm over the years since Stockholm 1972.<sup>134</sup> It currently has the potential to carry far broader logic and appeal than the narrowed popular caricature of “environmentalism” we suffer in some circles.

Polarized is a polite word for what America has become, but the concept of sustainability offers a compelling meeting ground for Americans to gather together again, out and away from the radical rightwing fog. Sustainability is a broad term, not as yet sufficiently specific and prescriptive, but its high implications and

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<sup>133</sup> See JOHN S. DRYZEK, *THE POLITICS OF THE EARTH: ENVIRONMENTAL DISCOURSES* (1997).

<sup>134</sup> Gro Harlem Brundtland, et al., *Our Common Future: World Commission on Environment and Development* (1987) (the Brundtland Report, with its call for an international conference on a sustainable environment, was the catalyst for the UN Conference on the Environment held at Rio in 1990).

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solid common sense<sup>135</sup> make it a potentially powerful popular theme, capable of enlisting broad future support from insulated citizens in the suburbs, as well as thinking progressives, attracting the hip younger demographic bloc as well.<sup>136</sup>

Sustainability gives form and respect to societal goals of maintaining the quality of human life in a context of other planetary systems over time, and resonates with conservative as well as progressive principles. We can, and should, continue to build education for sustainability into our schools and communities. As a principle of governmental policymaking, thoughtful sustainability is not only a good description of how a successful society should

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<sup>135</sup> Professor Alyson Flournoy has written thoughtfully on sustainability as a perceptive and unifying theme. “[S]ustainability, while not a coherent environmental ethic, shows promise as a stepping stone.” Alyson C. Flournoy, *Building an Environmental Ethic from the Ground Up*, 37 U.C. DAVIS L. REV. 53, 55 (2003). She describes six attributes of the sustainability concept, and explores their potential relevance in shaping law and policy. *Id.* at 72-79.

<sup>136</sup> As Chip Giller, a contemporary zeitgeist observer, notes:

In cities nationwide, young professionals are giving environmentalism a new cultural cachet . . . . They’re finding that many of the hippest products, clothes, accessories, home furnishings, appliances are made with environmental concerns in mind.

Sustainability is the new bling . . . . In rural America, residents are recognizing the potential of wind power, solar energy, biodiesel, and other green industries to revitalize their communities. Farmers are discovering the advantages of precision agriculture. Communities are fighting the stench, pollution, and economic ravages of factory farms.

Sustainability is the new self-reliance. In churches, mosques, and temples, religious leaders are taking seriously their responsibility as stewards of God’s creation. They are retrofitting their places of worship for energy efficiency, spreading the word to their congregations, banding together to pressure politicians, and asking, “What would Jesus drive?”

Sustainability is the new grace. In minority and low-income communities all over the country, civil rights activists are linking disparate struggles—poverty, criminal justice, transportation, climate change, health—to continue the path-breaking work of the environmental-justice movement.

Sustainability is the new dream. In the marketplace, green technologies and industries are among the fastest growing and most innovative developments. The Toyota Prius has defied every prediction to become the must-have car. The organic food business doubles every time you blink. Green architecture is taking off. Renewable energy, emissions trading, environmentally conscious investing: Many of the most exciting advances in environmental thinking are happening in the private sector.

Sustainability is the new bottom line. Business people, religious leaders, farmers, activists, urban hipsters—you can’t kill a hydra with that many heads. Environmentalism as a narrowly focused D.C. lobby might be struggling, but a common-sense conviction that sustainability is integral to our quality of life and our economic competitiveness is on the rise.

Chip Giller, *The Environment’s New Bling*, BOSTON GLOBE, April 21, 2005 at A-21.

govern itself, but also emphasizes that environmentalism extends far beyond concerns with particular critters, places, and things. As a touchstone of good policy it combines nicely with democratic theory and transparency, and can carry us far.

- Instead of despairing about a bamboozled electorate we should seek to follow the democratic lead of Thomas Jefferson in order to reach the swing American voter, who is not so much dumb as ill-informed.<sup>137</sup> As Jefferson once wrote, anticipating environmentalists' reaction to the 2004 presidential election:

I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion

. . . .<sup>138</sup>

Learning to frame our issues so that they come across to the public and the media as comprehensible and compelling, finding and working with intelligent journalists, and learning to maintain the continuing news climate of our issues, are all necessary to accomplish the societal role we must play. The press, our governmental information system, needs citizen-oriented rehabilitation—with improved citizen media sophistication, use of the Internet, humor, energized public testimony presented with vivid images and sound logic, better journalism, better journalists, better public information supplied by the public-interest community.<sup>139</sup>

- We lack, and need, intellectual and political centers of gravity. Progressive principles lead off into so many different areas of challenge that progressive policies inevitably tend to lack organization and coherence. The regressive movement, with its Heri-

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<sup>137</sup> And it turns out that Homer Simpson may not be as close-minded as we had thought. Recent episodes of *The Simpsons* seem to indicate that Homer is slowly coming to recognize the validity of various characters who do not look and sound exactly like him. See generally, *The Simpsons* (Fox Entertainment Group).

<sup>138</sup> Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in *THE WRITINGS OF THOMAS JEFFERSON VOL. XV 278* (Andrew A. Lipscomb et al. eds., 1903).

<sup>139</sup> It would be a significant innovation in modern democratic governance for a civic foundation to create a public interest Internet e-cyclopedia framing issues and providing straight credible scientific and statistical facts, with quotable experts and graphic archives, to counter the current flood of marketplace-dominated spin that obscures so many current political debates. See Zygmunt J. B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 ENVTL. L. 1, 35-36 (2002).

tage Foundation and American Enterprise Institute, has demonstrated to the world the utility of having strategic coordinating centers of intellectual and political research and communication. It is high time for the public interest and the efforts of citizen progressives generally to be served by a similarly designed and mobilized “Sustainability Policy Institute” or some such public interest civic informational institution.

- Intelligent economics supports rather than threatens sound environmental protection policy. The more we learn about economics, the more we learn that we were right all along. Modern economists have developed skillful tools that echo environmentalists’ traditional calls for comprehensive, realistic cost-benefit-alternatives analyses. Their economic algorithms can be helpful so long as they do not purport to become prescriptive dogma.<sup>140</sup> Credible modern resource economics are remaking that profession. Today, as argued in our rubric of “The Three Economies,”<sup>141</sup> any economist who wishes to speak authoritatively on national policy, and isn’t naïve or a prostitute, must take account of real values and real costs, direct and indirect, external to as well as within the cash-register marketplace economy.

- Internationalism is compellingly right and inevitable. Carbon dioxide, hormone disruptors, innovative green technologies, information communication systems, AIDS and the social effects of poverty, a reliance on natural systems for pleasure and survival—none of these stop at political boundaries. From Adlai Stevenson and Edvard Shevarnadze to Tony Blair and Jacques Chirac,<sup>142</sup> our brighter international leaders have recognized that the serious challenges of environmental sustainability require a

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<sup>140</sup> See ACKERMAN & HEINZERLING, *supra* note 67.

<sup>141</sup> See ENVIRONMENTAL LAW & POLICY, *supra* note 13, at 58-59. In the three-circled image there presented, the inside circle represents the marketplace economy; the middle ring represents values and effects upon humans and civil society; the largest ring that holds us all represents the economy of Nature. Regulatory government resides in the band between the marketplace and the other two economies, attempting to mediate and control the excesses of the marketplace for the long term good of society.

<sup>142</sup> See Adlai Stevenson’s vivid 1965 call for stewardship of “Spaceship Earth,” ENVIRONMENTAL LAW & POLICY, *supra* note 13, at xxix. Edvard Shevarnadze, then Foreign Minister of the crumbling USSR, made an appeal for international environmental concern a central theme of his 1988 United Nations speech advocating cooperative global perestroika. Prime Minister Blair persistently tries, despite rebuffs, to awaken George Bush Jr. to the real threats of global warming. See Reuters, *Debate Over Global Warming May Heat Up*, L.A. TIMES, June 20, 2005 at C-3. President Chirac, for his part, despite his “conservative” label, has had his consciousness raised

new, coordinated, global effort if the societal quality of life some of us currently enjoy is to continue and spread wider. *The Death of Environmentalism* is a U.S.-narrowed argument, but we live in a global reality, and the rest of the world, especially the European Community with its rising euro economy, knows that the current American administration is behind the times.

- Citizen environmentalism embodies a remarkable history that predicates an important future. Citizen lawsuits built the modern edifice of environmental law, and will continue to play a role in enforcing the seriousness of environmental protection. Citizen networking and political pressure will continue to be significantly important in shaping future policy and blunting regressive initiatives. We made the world better by making environmental law. The challenge now is to elevate our hard learned principles of environmental logic to the level of thoughtful, broad, societal acceptance and governance that they and our society deserve. Over the years it has been true, and will probably continue to be true: scratch away at almost any environmental issue and pretty soon we find ourselves dealing with some of the most important challenges of modern democracy.

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to such a point that he shocked the delegates to the Johannesburg summit by his implicit attack on their complacency:

Ladies and Gentlemen: Our house is burning down and we're blind to it. Nature, mutilated and overexploited, can no longer regenerate and we refuse to admit it. Humanity is suffering. It is suffering from poor development, in both the North and the South, and we stand indifferent. The earth and humankind are in danger and we are all responsible.

It is time to open our eyes . . . . Alarms are sounding across all the continents. Europe is beset by natural disasters and health crises. The American economy, with its often-ravenous appetite for natural resources, seems to be hit by a crisis of confidence in the way it is managed. Latin America is again shaken by a financial, and hence social, crisis. In Asia, rising pollution evidenced by a brown cloud is spreading and threatening to poison an entire continent. Africa is plagued by conflicts, AIDS, desertification and famine. Some island countries are seeing their very existence threatened by climate warming . . . . We cannot say that we did not know . . . . The time has come for humankind, in all its cultures and civilizations, to build a new relationship with nature, a relationship of respect and harmony, and hence to learn to control its power and appetite.

His Excellency Jacques Chirac, President of The French Republic, *Statement at the World Summit on Sustainable Development, Johannesburg, South Africa* (September 2, 2002), available at [www.un.org/events/wssd/statements/franceE.htm](http://www.un.org/events/wssd/statements/franceE.htm).

