BUILDING TRUST: CONSERVATIVES AND THE ENVIRONMENT

MARK ELIOT SHERE*

I. INTRODUCTION

Conservatives are on awkward terms with environmental protection, much like the relationship many people have with their in-laws. Conservatives have nothing against environmentalism *per se*, and those seeking public office even embrace the concept on appropriate occasions, such as Earth Day. Still, there is something forced about it all, something that

* Environmental Attorney, admitted in Indiana and Ohio; A.B., Princeton University, 1985; J.D., Harvard Law School, 1988. I am indebted to my wife, Colleen McNenny, and to my father, Barry Shere, for insights and encouragement. Particular thanks go to James and Vivian McNenny for their good humor regarding the opening simile in the text. Nancy Clark, Linda Jelf, and Kevin Ford provided valuable research assistance. The views in this article are my own, not those of any client.

suggests the relationship is not fully a matter of choice, but rather a duty assumed as part of courting the electorate.

This uneasy relationship arises at least in part from the difficulty of identifying any positive agenda or philosophy for the environment that is distinctly conservative. Conservatives in politics and academia have plenty of ideas relating to environmental regulation: protection of property rights, reliance on markets, privatization of mismanaged public lands, prohibition of unfunded mandates, and use of risk assessment or cost-benefit analysis, to name just a few. But these ideas tend to form a negative pattern and often sound like pretexts for reducing environmental standards.[1]

As a result, conservative politicians—who I equate loosely with Republicans—are, according to the polls, widely distrusted today on environmental issues, even by people who identify themselves as Republicans and even when the questions are asked by sympathetic pollsters.[2] This distrust did not escape the attention of the Democratic party in the 1996 presidential election. Destruction of the environment was one of the four horsemen of the apocalypse—together with conservative "cuts" in Medicare, Medicaid, and education—that President Clinton and Vice President Gore repeatedly invoked in the debates and in their campaign speeches.[3]

This article is an attempt to articulate a conservative

1. As one skeptical commentator puts it: "For me . . . the real objection is that this property rights legislation looks a lot like deception. It looks like a deceptive attempt to do something the majority does not want. It is a sneak attack on our nation's environmental laws." John A. Humbach, *Should Taxpayers Pay People to Obey Environmental Laws?*, 6 FORDHAM ENVTL. L.J. 423, 430 (1995).

2. A December 1995 poll, conducted by a Republican pollster and commissioned by businesses seeking to curb the costs of hazardous waste cleanup, showed that fifty-five percent of Republicans do not trust their own party on environmental issues, and that the Democratic Party enjoyed more than a two-to-one advantage in voter confidence in this area. *See* Reuters North American Wire, *Poll Boosts Dems on Environment Issues*, ROCKY MOUNTAIN NEWS (Denver), Jan. 28, 1996, at 5A.

3. President Clinton used the phrase "Medicare, Medicaid, education and the environment" five times in his two debates with Robert Dole. Presidential Debate (Oct. 6, 1996) (transcript available at 1996 WL 565446); Presidential Debate (Oct. 17, 1996) (transcript available at 1996 WL 594974). In his single debate with Jack Kemp, Vice President Gore used this phrase eight times. *See* vice-presidential Debate (Oct. 9, 1996) (transcript available at 1996 WL 579870). It was also prevalent in campaign speeches. *See, e.g.*, Television Address by President William J. Clinton (Oct. 18, 1996) (transcript available at 1996 WL 597781).

environmentalism that is positive and believable, not only for the general electorate but for conservatives themselves. It is environmentalism based on basic conservative beliefs in God, family, and community. Yes, it has a programmatic element, but this is secondary. Republicans have pushed particular environmental programs before—Nixon created the EPA by executive order, for example, and Bush supported a sweeping expansion of the Clean Air Act—without gaining much credit for the effort.[4] What is needed is not so much a particular program, as a distinctively conservative language to discuss the environment. I have no illusions of succeeding fully in this goal, but partial success will do. The goal is worthy, and my flaws in presentation will, I hope, not obscure the important truths.

II. A CONSERVATIVE LANGUAGE FOR THE ENVIRONMENT

For conservatives, the language of environmentalism should be no different than the language that applies to the other major issues of public and private life. Conservatives seek to meet God's expectations; they try to strengthen families; they strive to build and defend the nation; they are concerned that the law must be respected; they demand protection of personal liberty; and they expect accountability from individuals and from government. To have credibility on the environment, conservatives must speak from these same core principles.

To start, people did not create this world, and it is a matter of simple respect for the God who did to respect His creation. The "land is Mine," God tells us in Leviticus, and people are "but aliens and sojourners" upon it.[5] My faith is Judaism, and a lesson

4. Regarding Richard Nixon and his staff, Marc K. Landy, Marc J. Roberts, and Stephen R. Thomas conclude that "[i]ronically... the creation of a powerful environmental advocacy agency was a compromise for parties virtually none of whom was an environmental advocate." THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS, 32, 279 (1994). These authors are also explicit about George Bush's difficulties in translating his environmental positions into votes. *See id.* at 279.

5. *Leviticus* 25:23, *quoted in* TANAKH: THE HOLY SCRIPTURES (Jewish Publ. Society 1985). Traditional Jewish commentary on the Bible includes this elaboration:

> When God created Adam, He led him around
> the Garden of Eden and said to him:
> 'Behold my works! See how beautiful they
> are, how excellent! All that I have
> created, for your sake did I create it.

from Rabbi Johanan ben Zakkai, one of the great sages, provides a remarkable religious perspective on the environment. The Rabbi taught that, if a person is planting a tree and hears that, at long last, the Messiah has come, he should finish the planting. If the Messiah has really come, the new tree will make even His coming a little more wondrous. If the Messiah has not come after all, there will still be the tree.[6] In modern times, Jews have put these words into practice by planting millions of trees as part of their return to Israel.[7] Similar themes are developed from a Christian perspective in Chuck D. Barlow's recent article, *Why the Christian Right Must Protect the Environment: Theocentricity in the Political Workplace.*[8]

People are responsible for the natural world because this world has been entrusted to us by a higher Creator. This responsibility is virtually impossible to identify, by contrast, if nature is seen as the result of purely random Darwinian competition. From this latter perspective, the environment has no intrinsic *moral* claim on us—it should be respected to the extent that people find it aesthetically pleasing or useful to their health, but not beyond. A random perspective suggests, if anything, that people are foolhardy if they fail to exploit nature to the fullest extent their evolutionary abilities allow.[9] If, instead,

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See to it that you do not spoil and
destroy my world; for if you do, there
will be no one to repair it after you.'

Ecclesiastes Rabbah 7:13, *quoted in* RABBI JOSEPH TELUSHKIN, JEWISH WISDOM: ETHICAL, SPIRITUAL, AND HISTORICAL LESSONS FROM THE GREAT WORKS AND THINKERS 438 (William Morrow 1994).

6. *See* THE FATHERS ACCORDING TO RABBI NATHAN: VERSION B 182 (Anthony J. Saldarini trans., E. J. Brill 1975) (paraphrasing a saying of Rabbi Johanan ben Zakkai).

7. *See, e.g.*, 9 ENCYCLOPEDIA JUDIACA 787-790 (1972) (describing work of the Jewish National Fund).

8. 23 B.C. ENVTL. AFF. L. REV. 781 (1996).

9. A fascinating discussion on this theme is provided in Steven Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (1996). Wise condemns the Jewish tradition, and Western religion and legal practice generally, for establishing a hierarchy in which the natural world is seen as inferior to man. Mainstream Jewish theology agrees with this description but counters that it is precisely *because* of man's superiority to the natural world that he can recognize his obligations to it. *See, e.g.*, Rabbi Harold Kushner, TO LIFE! 59 (1993).

Wise argues that the law should extend legal "personhood" to animals on the basis that "humanity's place in Darwin's world" is one of equality with non-humans. Wise, *supra*, at 544. Wise does not explain, however, why equality "in Darwin's world" should carry with it any sort of moral obligation towards one's peers. As a matter of descriptive

we are obligated to respect the environment, it is because God expects it of us. Conservatives must affirm this truth if they are to be believed on environmental issues.

This religious perspective on the environment is distinctly conservative, if only by default. Contemporary liberalism insists, with metaphorical inevitability, on a wall of separation between religion and state to be enforced by the courts. Contemporary liberalism has also created a new wall, enforced by custom in the mainstream press and elite universities, in which God's name and God's expectations are rarely acknowledged as relevant to issues of public morality or popular culture. Conservatives do not speak for God, but they remain much more willing to say, in public, that God is the basis for any discussion of the right and the good.

Environmentalism also reflects our duties toward family and country. It is our children's birthright to find the world cleaner than the one we inherited, and it will be their duty to do better still. This promise of a brighter world is part of the optimism of conservatism, perhaps best conveyed by President Reagan, that our nation's proudest moments are yet to be.[10] Environmental degradation is incompatible with these conservative ideals for the world that our children will receive and for the role of our country in that world.

Similarly, conservatives are committed to protection of all that we as a nation hold in common. This commitment is at its strongest in the area of national defense, where conservatives have rightly demanded for decades that the United States maintain the military force, and the spiritual resolve, to prevent aggression by communist and other despotic regimes. Protection of the air, land, and water deserves a similar commitment from conservatives, as embodying a core function of government and a core expression of our national spirit. This does not mean that the EPA, or the Pentagon for that matter, should be allowed to squander money. What it does mean is that the environment and national defense are similar because, for each, the correct amount of spending is whatever it takes to get the job done—no

science, it appears that "Darwin's world" rewards survival, regardless of how obtained. As a matter of ethical norms, it appears that Darwin has nothing to say at all.

10. *See, e.g.*, Ronald Reagan, Transcript of Address to the Republican Convention (Aug. 17, 1992) (CNN transcript available in LEXIS, News Library, ARCNWS File).

more, but assuredly no less. National spending on the environment is already about half as great as military spending,[11] and the gap is shrinking.

Environmentalism is also a matter of law and order. The intentional violation of most environmental laws is a felony. Conservatives value swift and certain punishment for its practical deterrent effect, as well as to satisfy the moral imperatives of justice.[12] Conservatives must be as ready to apply this law enforcement philosophy to environmental laws as they are to drug laws and the remainder of the criminal code.

Environmentalism, in addition, is about basic issues of personal freedom and community. Clean air, clean land, and clean water are part of personal liberty in much the same way as the rights to contract, own property, and gain access to impartial courts. Each of these guarantees contributes to the framework of a free society, essential to the pursuit and realization of what is good. A clean environment is also basic to a shared sense of community (a value sometimes in tension with personal liberty), for a community requires a clean and healthy physical setting to nourish and sustain the dedication of its members.

It may help to contrast these themes with some common language about the environment that is *not* conservative. The more common explanation for environmentalism is a liberal paradigm positing that "everything is connected to everything else," a connection that supposedly extends to "every aspect of life."[13] A recurring component of this liberal paradigm is that the environment now faces unprecedented pressures from the demands of human population growth[14] and, especially, from

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11. *See* Robert W. Hahn, *United States Environmental Policy: Past, Present and Future*, 34 NAT. RESOURCES J. 305, 319 (1994).

12. *See, e.g.*, ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363-97 (1981).

13. Denis Hayes, *Environmental Law and Millennial Politics*, 25 ENVTL. L. 953, 963 (1995); *see also* Terence L. Thatcher, *Understanding Interdependence in the Natural Environment*, 20 ENVTL. L. 611, 637 (1990); Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2060 (1993) (noting this common view).

14. *See, e.g.*, ALBERT GORE, JR., EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 30-31, 311-12 (1992). Similarly, one of the leading treatises on environmental law informs law students that "every cause is a lost cause without reckoning with the relentless increase in human population," and that "the working premise must be that rapid population growth in the long run is incompatible with environmental quality and eventually with social progress." WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 2-3, 4-5

excessive consumption of goods by people who live in the United States and other market economies.[15] These pressures, we are told, have brought us to the brink of ecological catastrophe.[16]

The invitation from this kind of language is clear. Governmental authority must be sweeping because every part of life is potentially a matter of environmental consequence, and catastrophe is imminent. Moreover, the focus of this authority must be on curbing population growth (the policies of mainland China are sometimes cited as a good model)[17] and on fundamentally changing the materialism of the American public.[18]

The reluctance of conservatives to embrace environmentalism may stem, at least in part, from fear of giving implicit support to this sort of reasoning. The failure of conservatives to articulate their own positive basis for environmental protection, however, has left a vacuum, in which this liberal paradigm has become the dominant language of environmentalism by default. This dominance is undeserved. The claims of impending disaster over the past decades, and back to Malthus, keep running into a reality of rising living standards and improving environmental conditions.[19]

More basically, although most people support environmental protection, no popular support exists for the underlying

(2d ed. 1994).

15. *See* GORE, *supra* note 14, at 234.

16. *See id.* at 85.

17 *See* RODGERS, *supra* note 14, at 5.

18. Vice President Gore's proposals in this regard have been described as "nothing less than environmental socialism." Robert W. Hahn, *Toward a New Environmental Paradigm*, 102 YALE L.J. 1719, 1730 (1993).

19. To quote the opening of a best-selling book from the 1960s: "The battle to feed all of humanity is over. In the 1970s the world will undergo famines—hundreds of millions of people are going to starve to death in spite of any crash program embarked upon now." PAUL EHRLICH, THE POPULATION BOMB 5 (Illustrated ed., The Sierra Club 1969) (1968). Equally telling is a law school environmental textbook from the early 1990s, which opens with predictions that "by the year 2000 the surface temperature will have increased approximately 4°F.... caus[ing] an increase of 60 feet in the level of the oceans." AIR POLLUTION 4 (Mark Squillace ed., 1992).

Substantial literature now exists debunking the environmental scares that have characterized recent decades. *See, e.g.*, BUT IS IT TRUE? A CITIZEN'S GUIDE TO ENVIRONMENTAL HEALTH AND SAFETY ISSUES (Aaron Wildavsky ed., 1995); DIXY LEE RAY & LOU GUZZO, TRASHING THE PLANET (1990); THE TRUE STATE OF THE PLANET (Ronald Bailey ed., 1995).

postulates of the liberal paradigm: that government should be released from limits on its authority, that the prosperity of the American people is itself an environmental hazard, and that other people's children are essentially another form of pollution. In sum, the national consensus in favor of the environment needs the kind of supporting language and philosophy that conservatives can offer.

My comments to this point have been broad, and I realize that many people, even many conservatives, will disagree with the particular understanding of God, family, and country that I have sketched. What is striking, however, is how rarely conservatives apply these themes *at all* in an environmental context. As a result, people may suspect fairly that conservatives are not committed to protecting the environment in the same way that they are committed to other core principles. To build and deserve trust, conservatives must talk about the environment in the same terms that they talk about everything else that really matters.

III. ELEVEN CONSERVATIVE IDEAS FOR ENVIRONMENTAL REFORM

For anyone who views environmental protection as a religious obligation, as a core governmental function, or as a basic duty to family and community, an agenda of de-regulation is, in itself, inadequate. To build and deserve trust in their environmental policies, conservatives must translate their core principles into a positive program for action.

In this section, I suggest a series of more specific steps that can help craft a conservative environmental policy. Some of these will sound familiar—simplifying the rules, devolving greater authority to the states, and increasing reliance on markets. Other suggestions, however, would entail a decided shift in tone for conservatives. These include establishing a clear baseline for environmental quality, stepping-up enforcement, and shifting to a pro-active role for government in creating clean, open spaces, especially in the poorest neighborhoods.

But the biggest shift would be in re-casting the moral terms of debate. This moral debate is precisely the battle that conservatives have been winning on so many other political issues. The conservative case against welfare, for example, is not

that it costs too much. Rather, it is that welfare has undermined the virtue of personal responsibility, and so has dramatically worsened the very problems it was supposed to solve.[20] Similarly, conservatives do not argue that quotas and other forms of racial set-asides are too costly to implement. Instead, the conservative claim is that these programs fail to respect individual worth, while perpetuating the racial acrimony they were designed to alleviate.[21]

Yet conservatives have typically been content to talk about the environment almost exclusively in terms of monetary cost. Through "cost-benefit" analysis and its offshoots, conservatives seem determined to put a price on health and safety. I suggest that a more productive and ethically sound approach would be for conservatives to affirm the obvious—that every life is priceless, that no level of risk is "acceptable" for our children. The difference between the conservative and liberal paradigms must not be over the value of life. The difference must be that conservatives recognize the danger that the regulatory state will diminish health and safety in the name of protecting them. The conservative perspective on the environment should thus compare moral equivalents, life-to-life, risk-to-risk. Not surprisingly, much of current environmental regulation fares poorly under this comparison.

Finally, when conservatives begin to re-cast the debate, they will be able to put the environment into a broader moral context, in which social pollution is regarded as seriously as chemical pollution, and in which respect for life applies to the human world at least as much as to the natural one.

A. *Prohibit Backsliding*

Do conservatives have an environmental bottom line? Currently, it is hard to tell. The conservative proposals to reign in the EPA seem to stop short of identifying how to tell when the agency has been reigned in enough. To be credible on the

20. *See, e.g.*, Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14.

21. *See, e.g.*, Ruth Shalit, *Race in the Newsroom: The Washington Post in Black and White*, NEW REPUBLIC, Oct. 2, 1995, at 20 (detailing racial tensions produced at the *Washington Post* as a result of race-based hiring, training, and article selection).

environment, conservatives must draw a firm line that the quality of the environment will not be allowed to deteriorate from current levels. This rule against backsliding, when paired with a requirement that tangible improvements be made in environmental quality over time, is at the heart of a practical approach to environmental problems.

This rule goes under various names. In air regulation, the principle is called "prevention of significant deterioration."[22] A similar principle, under the name of "antidegradation" or "antibacksliding," has been applied under the Clean Water Act to protect pristine water bodies and to ensure that progress in other water bodies is not lost.[23] In wetlands protection, the principle is called "no net loss."[24]

The antidegradation rule, in its various forms, embodies the best of current environmental law and regulation. It firmly supports our moral obligation to provide the next generation with a world at least as clean as the one ours inherited. Moreover, unlike much of the current legal regime, the antidegradation rule is easy to understand. Do you see and smell more environmental problems today than you did in past years? The answer that any particular person gives is a good indication of whether antidegradation is working.

Antidegradation also allows idealism and pragmatism to reinforce each other. When combined with steady improvement, even at a slow pace, antidegradation charts a course in which the highest standards of environmental purity can be obtained over time. Time is one area where the earth and its environment have people at a disadvantage. To us, a lifetime may be a long time to wait. To the environment, a millennium here or there is pocket change. (Consider that the EPA already includes environmental effects over a 10,000-year time frame in its regulatory analyses.)[25]

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22. 42 U.S.C. § 7470-7492 (1996).

23. 33 U.S.C. § 1342(o) (1996).

24. Virginia C. Veltman, *Banking on the Future of Wetlands Using Federal Law*, 89 NW. U. L. REV. 654, 657 (1995) ("For the past five years, the thrust of federal wetlands policy has been the attainment of 'no net loss.'").

25. *See, e.g.*, Notice of Final Decision to Grant Chemical Waste Management, Inc. a Modification of an Exemption from the Land Disposal Restrictions, 61 Fed. Reg. 36,880 (1996) (employing a 10,000-year time frame to evaluate effectiveness of deep injection wells); *see also* Identification and Listing of Hazardous Waste: Hazardous Waste Identification Rule, 60 Fed. Reg. 66,344, 66,369 (1995) (using 10,000-year time frame in

Antidegradation and steady improvement thus form a policy on which environmental utopians and pragmatists can both agree—none of us is obligated to finish the task of building a better world, but neither may we desist from working towards it.[26]

I do not mean to suggest that antidegradation poses no difficult questions. For example, should local deterioration of environmental quality be tolerated so long as the state or national average is improving? Should it count as "degradation" if a new chemical is widely used in place of an older one that may, but may not, be more dangerous? The answers depend on the specific context in which the questions are asked. Conservatives can be effective in shaping solutions to these questions, but only if they are first seen as having made a commitment to the broader antidegradation principle.

B. *Step-Up Enforcement*

A further shift in emphasis for conservatives should be a new perspective regarding environmental enforcement. The EPA referred 430 civil enforcement cases to the Department of Justice (DOJ) in fiscal year 1994.[27] In 1995, the level of enforcement dropped by more than half, to 214 cases.[28] And in 1996, only 257 cases were referred.[29] Had these numbers been posted under a Republican administration, they would have prompted strident accusations of lax enforcement. In the November 1996 election, by contrast, this record was never an issue, even as President Clinton and Vice President Gore repeatedly invoked environmental themes.[30]

groundwater modeling).

26. *See* RABBI MOSHE LIEBER, "THE PIRKEI AVOS TREASURY": ETHICS OF THE FATHERS 125 (1995).

27. *See EPA Regulatory Enforcement Program Bounces Back in FY96,* INSIDE EPA WEEKLY REPORT, Nov. 1, 1996, at 1, 8-9.

28. *See id.*

29. *See id.* Although the EPA attributes these numbers to quality improvements in the cases referred, as well as to budget cuts and the partial shutdown of the agency for a handful of days, no tangible measurement has been taken to document an increase in case quality. Moreover, the agency's number of employee work years has continued to increase throughout this period. *See* OFFICE OF THE CHIEF FINANCIAL OFFICER, ENVIRONMENTAL PROTECTION AGENCY, SUMMARY OF EPA'S FY 1997 PRESIDENT'S BUDGET 7 (last modified Feb. 5, 1997) <http://www.epa.gov/ocfopage/budget.htm> (identifying actual ceilings of 17,508 work years in 1995, and 18,140 work years in the 1996 budget, each a record high).

30. *See supra* text accompanying note 3.

More generally, current environmental enforcement is largely a paperwork exercise, in which the EPA and state agencies mostly follow up on self-reported violations of the environmental laws. This occurs, for example, through monthly discharge reports that industries must file under the Clean Water Act. The enforcement offices also follow-up on tips from current and former employees, as well as from business competitors. These latter cases are of mixed quality, reflecting the often varied motives of the sources. My experience in private practice has been that relatively few matters, especially among the more serious, are the result of inspections of responsible businesses. Indeed, true surprise inspections are rare. The EPA as well as most state agencies will generally schedule inspections several days in advance with plant employees. Even when inspectors show up unannounced, delays are common between the point that they arrive at the gate and the time that they see any operations.

Missing is the kind of traditional enforcement that has been employed in other areas of the law. Together, the EPA and Federal Bureau of Investigation employ about 300 "special agents" for environmental crimes;[31] yet few if any "sting" operations, such as those commonly used in drug enforcement, occur. Will laboratories falsify data if the right price is offered by undercover agents? Can trucking companies be bribed to accept hazardous wastes without the required manifests? These kinds of investigations, which would target truly criminal activity, have had no significant role in environmental protection.

The EPA's enforcement record should come as no surprise. Out of $7.02 billion in total budgetary authority for 1997, the EPA's civil enforcement allotment was little more than $69 million, and its criminal enforcement earmark was only slightly over $23 million.[32] It stands to reason that the EPA does little real investigating when scarcely one percent of its budget goes to enforcement.

Nor is the EPA achieving a high yield per enforcement dollar.

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31. *Cf., e.g.*, Jason M. Lemkin, *Deterring Environmental Crime Through Flexible Sentencing*, 84 CAL. L. REV. 307, 346-47 (1996).

32. *See* OFFICE OF THE CHIEF FINANCIAL OFFICER, ENVIRONMENTAL PROTECTION AGENCY, 1998 BUDGET ESTIMATE tbls.2-83, 2-97 to 2-113 (last modified Feb. 5, 1997) <http://www.epa.gov/ocfopage/toc.htm>; *see also supra* note 29.

The agency reports that, in 1996, it obtained judgments for $173 million in total penalties from civil, criminal, and administrative proceedings.[33] The agency thus spent more than fifty cents for every penalty dollar it collected, even excluding the millions of dollars in enforcement assistance that the EPA received from the Department of Justice and FBI. (Contrast this record with that of the Securities and Exchange Commission, which had a *total* agency budget of about $300 million and reported $1 billion in court judgments in 1995.)[34] In addition, the EPA projects that an average of only 1.5 criminal cases will be referred to the DOJ by each of the agency's special agents in the coming year—again, a yield that is hardly impressive.[35]

The conservative position on enforcement, I believe, is simple. Respect for the law requires a much more credible effort from the federal government than is reflected in its current enforcement record or recent budget figures. This emphasis on enforcement, by the way, is both a call for government to do more and for it to do less. The EPA needs to demonstrate its ability to enforce existing laws and regulations before it takes on new responsibilities.

C. *Plant Trees. Create Parks. Build Playgrounds.*

A commitment to the environment should also cause conservatives to shift their emphasis to *positive* steps that EPA can undertake. To take a prime example, when is the last time you heard of the EPA planting a tree? The answer is never. It is not part of the "environmental" agency's mission. The EPA similarly spends nothing to create urban parks, or to put playgrounds in existing parks to attract children and families. This is a tragic misallocation of priorities. The EPA must cease to be an agency of negativism that views its mission solely in terms of restricting the activities of industry. The positive creation of healthy,

33. *See Record $76.7 Million in Criminal Fines Assessed by Agency During Fiscal 1996*, 27 ENVTL. REP. (Bureau of National Affairs, Washington, D.C.), Feb. 28, 1997, at 2174-75.

34. *See* OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1998, 1111 (Feb. 1997) (identifying actual budget outlays of $285 million to the SEC in 1996); SECURITIES & EXCHANGE COMM'N, 1995 SEC ANN. REP. (last modified Oct. 17, 1996) <http://www.sec.gov/asec/annrep95/enforcer.htm> (identifying $1 billion in judgments).

35. *See supra* note 32, at tbl. 2-103.

beautiful spaces, especially in poorer areas, would do far more to help people and other living creatures than any new round of regulatory controls.

This positive agenda would also reinvigorate other conservative themes. Trees, parks, and playgrounds bring people out of their homes, an essential step in building neighborhoods and communities. It does not take a degree in urban planning to recognize that a small park with benches is better for a neighborhood's health than a boarded-up gas station, or that the frequent presence of crowds and families, much more than an occasional patrol by police, drives away drug dealing and other public vices.

These steps are also important because they can be reliably measured, bringing needed accountability to government. We can count how many trees are planted, how many parks and playgrounds are built, how many abandoned properties are returned to productive use, and how much this all costs. If the EPA takes these positive steps, it can be required to show tangible results.

I recognize that many conservatives may balk. Urban parks are a local issue not a national one, they can contend with some force, regardless of the desirability of such projects. This criticism is fair enough and could be accommodated, at least in part, if the EPA's role was limited to providing matching or block grants for such projects (see section G below) and helping to clear the regulatory hurdles that currently hinder state and local governments that might want to pursue this course. But even conservative purists might do well to consider the facts on the ground. The EPA has thousands of employees working with billions of dollars per year, all in pursuit of an ill-defined mission that often consists of no more than taking the regulatory actions "necessary to protect human health and the environment."[36] The reality is that those thousands of EPA employees—almost all talented and well meaning—will be doing their best to develop and carry out environmental policy for decades to come. Conservatives can carp about the agency's efforts in the coming years, or they can work to channel the agency's efforts to

36. *See, e.g.*, 42 U.S.C § 6924(v) (provision for "corrective action" clean-ups at hazardous waste facilities); 40 C.F.R. § 264.101 (parallel regulatory standard).

missions that will produce tangible accomplishments. Urban parks and playgrounds can be an important component in such a positive mission and may go a long way towards building the trust that conservatives have lacked for so long on environmental issues.

D. *Restore Common Sense: The Example of "Hazardous Waste"*

As conservatives begin to build confidence in their environmental policies, other traditional conservative themes will become more effective in gaining public support. One such theme is that common sense and simplicity need to be restored to our legal rules. Environmental regulations, which now span more than 12,000 pages just at the federal level, provide fertile ground for conservatives to apply this theme.

Consider, for example, the EPA's odyssey over the past twenty years in defining the key legal term "hazardous waste." The scope of this definition can make a difference of billions of dollars a year spent on waste disposal in special landfills and compliance with special tracking and handling requirements.[37] "Hazardous waste" is defined by statute as a material that may "cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."[38] This is a rigorous standard. Even a waste that causes "serious" illness does not qualify, unless the serious illness is also "irreversible." This statutory definition is consistent with common sense—a waste is "hazardous" only if it poses a real risk of causing severe harm.

The EPA has taken this statutory definition and run with it, to the point that it is barely recognizable. In 1978, the EPA proposed a series of laboratory tests to determine whether a

37. *See, e.g.*, Identification and Listing of Hazardous Waste, 57 Fed. Reg. 21,450, 21,500 (proposed 1992) (estimating that up to $1.8 billion per year could be saved by exempting a fraction of the current volume of wastes from the hazardous waste regulations).

38. 42 U.S.C. § 6903(5) (1996). The EPA seldom quotes this language, relying instead on the next paragraph of the statutory definition, which refers to material that may "pose a substantial present or potential hazard to human health or the environment when improperly . . . managed." *Id.* Defining "hazardous" waste in terms of a "present or potential hazard" is, however, circular. It is the language quoted in the text, regarding death and serious illness, that gives meaningful content to the terms "hazard" and "hazardous."

waste has chemical and physical characteristics that might make it "hazardous" under the statutory definition.[39] With some revisions in 1980, EPA incorporated the laboratory tests into final rules. Under these rules, which have been modified only slightly to date, a waste is considered "characteristically" hazardous if laboratory tests identify it as toxic, ignitable, corrosive, or chemically reactive.[40] The regulations incorporate a series of detailed manuals describing precisely how each laboratory test is to be conducted,[41] and specifying numeric pass-fail thresholds.[42]

These laboratory tests are far from perfect, but they do have two important virtues. First, the basic approach is a matter of common sense. Through the tests, the EPA uses the measurable physical and chemical characteristics of wastes to determine whether or not they are dangerous. This scientific evaluation seems to be the sort of process the public imagines when it hears that a waste has been found to be "hazardous." The second point in favor of the laboratory tests is that their quantifiable thresholds provide a simple, bright-line standard.

When it issued its final rules in 1980, the EPA also presumed that some wastes should be considered legally "hazardous" *regardless* of test results. This presumption applies to wastes that appear on lists that the EPA has published in its regulations. These lists include materials such as "slop oil emulsion solids from the petroleum refining industry" (waste code "K049")[43] and to various "spent halogenated solvents" and "spent nonhalogenated solvents" (waste codes "F001" to "F005").[44] In all, the EPA has listed about 800 separate wastes as hazardous.

The waste lists possess neither of the advantages of the laboratory tests. First, the lists lack a common-sense rationale. If a waste does not exhibit any dangerous physical or chemical characteristic, it is difficult to see why it should nonetheless be

39. *See* Proposed Guidelines and Regulations and Proposal on Identification and Listing, 43 Fed. Reg. 58,945 (1978); *see also* Shell Oil Co. v. EPA, 950 F.2d 741, 746 (D.C. Cir. 1991).

40. 40 C.F.R. §§ 261.20-261.24 (1996).

41. *See, e.g.*, 40 C.F.R. pt. 261, app. II (1996).

42. *See, e.g.*, 40 C.F.R. § 261.24, tbl. 1 (1996).

43. 40 C.F.R. § 261.32 (table).

44. 40 C.F.R. § 261.31 (table).

labeled "hazardous" simply because it appears on a regulatory list.[45] In addition, the lists are not as clear-cut as the laboratory tests. Instead of a pass-fail threshold, the listings provide short, narrative language that is open to conflicting interpretation. For example, is "chemical etching" a form of "electroplating" for purposes of the F006 listing?[46]

These problems would be serious enough, but EPA chose to extend the meaning of "hazardous waste" even further through two additional rules. Under the "derived-from" and "mixture" rules, hazardous wastes are assumed to be eternally tainted and radically contagious. Eternal taint is decreed by the derived-from rule, which provides that any treatment of a listed hazardous waste is presumed to create only more hazardous waste, no matter how effective the treatment system may be in removing contaminants. Radical contagion stems from the mixture rule, which provides that an ocean is presumed to consist entirely of hazardous waste if it becomes mixed with a single drop of listed material. A single drop from this ocean could then make another ocean legally "hazardous," and so on.

This piling of presumption upon presumption builds an elaborate regulatory trap, far removed from the original statutory definition of hazardous waste. Through these presumptions, millions of tons of material are classified as "hazardous" each year, even in the absence of any real risk of harm.[47]

For a brief moment, it looked as though a common sense meaning of "hazardous waste" might be restored. Twelve years after their original promulgation in 1980, the derived-from and mixture rules were invalidated by the U.S. Court of Appeals for the D.C. Circuit because the EPA "entirely failed to comply with notice-and-comment requirements" in issuing them.[48] In dicta,

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45. The EPA vaguely states that it uses a "flexible, multiple factor approach to listing wastes . . . to be better able to accommodate itself to complex determinations of hazard." *1980 Final Rule*, 45 Fed. Reg. at 33,107 (1980).

46. The EPA's internal "background document" said yes, but an administrative law judge disagreed. *See* Brown Wood Preserving Co., No. RCRA-84-16-R, RCRA (3008) Appeal No. 86-4, 1989 WL 253215 (May 3, 1989).

47. *See* Identification and Listing of Hazardous Waste, 57 Fed. Reg. 21,450, 21,451 (1992) (to be codified at 40 C.F.R. pts. 260, 261, 262, 264, & 268) (proposed May 20, 1992).

48. Shell Oil Co. v. EPA, 950 F.2d 741, 752 (D.C. Cir. 1991).

the court noted the "counter-intuitive" nature of the derived-from rule. The EPA reissued the derived-from and mixture rules on an "interim final" basis on February 18, 1992,[49] the same day that the court's decision took effect, but Congress quickly ordered the EPA by statute to "promulgate revisions" to the rules "by October 1, 1994."[50] This deadline passed without agency compliance. The EPA now states that it does not anticipate issuing a revised rule until at least 2001.[51]

The EPA's name for one of its current administrative reform efforts is the "Common Sense Initiative." Conservatives can and should hold the agency to its word on common sense. In the case of hazardous waste regulation, this would means restoring honesty to the "hazardous waste" label, as applying to materials that pose a real danger of serious harm. Establishing simple, common sense legal rules is a conservative theme that resonates with most people. In the context of a positive environmental agenda, this theme should be at the forefront.

E. *Ensure Consistency: The Threat from Deference*

As indicated above, environmental laws and regulations form a massive body of authority. The federal statutes span more than 1,700 pages, as reprinted in a popular compilation,[52] and the regulations extend to more than 12,000 pages in the Code of Federal Regulations.[53] State statutes and administrative codes produce further volumes of requirements. And the air, water, and waste permits for a specific industrial plant can add hundreds more pages of detailed provisions.

Keeping track of all these requirements would be difficult even if they were written in clear language. Yet, many of them are stated in a strange and counter-intuitive dialect. The statutory phrase "solid waste," for example, includes liquids and gases.[54] Similarly, the regulatory term "discarded material"

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49. Definition of Hazardous Waste, "Mixture" and "Derived-From" Rules, 57 Fed. Reg. 7,628 (1992).

50. Act of Oct. 6, 1992, Pub. L. No. 102-389, 106 Stat. 1571, 1602 (1992).

51. *See EPA Strikes Deal to Delay Hazardous Exemptions Until 2001*, INSIDE EPA WEEKLY REPORT, Mar. 14, 1997, at 1, 14.

52. *See* FEDERAL ENVIRONMENTAL LAWS 1996 (West 1996).

53. *See* 40 C.F.R. pts. 1-1517.

54. 42 U.S.C. § 6903(27) (1994).

applies not only to trash dumped in landfills, but also to useful items sold for recycling.[55] Even judges and senior EPA officials complain that they are trapped in a linguistic "cuckoo land."[56]

There are two ways for the legal system to respond to this problem. One is for judges to declare the process of applying the environmental laws a political exercise and to defer to the "interpretations" that the EPA may offer. This has been the predominant judicial approach since Justice Stevens's opinion for the Supreme Court in *Chevron v. Natural Resources Defense Council*.[57] Justice Stevens's reasoning in that opinion sounds distinctly conservative, at least in the sense of encouraging judicial restraint. He correctly observed that the ambiguous, open-ended statutes that authorize administrative rulemaking constitute a delegation of policymaking authority from the elected branches of government.[58] Assuming that delegation to be valid,[59] he found it appropriate for courts to defer to the policy decisions of the responsible agency.[60]

The *Chevron* decision has grown far beyond its original meaning, however, so that courts commonly give deference even to internal agency memoranda, not just the published regulations that were the subject of the decision.[61] This step, by

55. 40 C.F.R. § 261.2 (1996).

56. The EPA's former chief official of hazardous waste regulation, Donald Clay, has stated: "RCRA [Resource Conservation and Recovery Act of 1976] is a regulatory cuckoo land of definition . . . . I believe we have five people in the agency who understand what 'hazardous waste' is." United States v. White, 766 F. Supp. 873, 882 (E.D. Wash. 1991) (quoting the lower court record). *See also* Inland Steel Co. v. EPA, 901 F.2d 1419, 1421 (7th Cir. 1990) (describing RCRA as "a statutory Cloud Cuckoo Land"); American Mining Congress v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987) (recounting a "mind-numbing" journey through the RCRA regulations); Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) (describing hazardous waste regulations as "dense, turgid, and circuitous").

57. 467 U.S. 837 (1984).

58. *See id.* at 865.

59. The legitimacy of broad grants of legislative power to administrative agencies raises a host of issues from both conservative and democratic perspectives. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 131-34 (1980); *see also* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 672-88 (1980) (Rehnquist, J., concurring) (concluding that the grant of rulemaking authority to OSHA, without meaningful standards, should be held unconstitutional); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237-41 (1994) (suggesting that Congress has created a series of administrative "Goodness and Niceness Commissions" with essentially standardless authority).

60. *See Chevron*, 467 U.S. at 865-66.

61. *See* Wagner Seed Co. v. Bush, 946 F.2d 918, 921-23 (D.C. Cir. 1991) (applying

itself, has wrought a minor revolution. In the environmental field, the EPA has issued literally hundreds of these internal memoranda, and they dominate the application of multi-billion-dollar programs.[62] Moreover, deference has been applied, by some of the most conservative jurists, even where the agency's position appears to swing 180 degrees depending on the "interpretation" of the law that appears most convenient at a given moment.[63]

When carried this far, deference undermines not only the cause of environmentalism, but also the separation of powers principles that justify it in the first instance. The conservative argument for restraint is that courts must respect an explicit delegation of authority by the legislature. But what has been delegated? In the environmental field, the clearest aspect of this delegation is that Congress has charged the EPA to develop a regulatory *code* of sweeping scope and detail. This code promises to endure as a framework for responsible personal and business activity, much like the tax code or the Uniform Commercial Code, if applied in a serious and consistent manner. This promise will be lost, however, if strained and shifting interpretations are allowed to turn the code into regulatory porridge, and if the codification of published regulations devolves into an *ad hoc* assortment of internal memoranda.

In its current form, deference makes the development of a meaningful code impossible and, indeed, threatens the rule of law. Especially in the environmental field, with its dense regulations and quixotic definitions, almost any result can be justified through creative interpretation. Thus, the statutory

Chevron deference to a "decision letter" issued by EPA staff); *see also* Reno v. Koray, 115 S. Ct. 2021, 2026-27 (1995) (applying *Chevron* deference to "an internal agency guideline" appearing "only in a 'Program Statement'").

62. For example, in the thirteen years since the Hazardous and Solid Waste Amendments of 1984 established a requirement for "corrective action" clean-ups at active industrial sites the EPA has yet to issue governing regulations. *See* Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, 55 Fed. Reg. 30,798, 30,861 (1990) (proposed July 27, 1990). The agency has, however, issued volumes of internal memoranda on the subject. *See, e.g.*, OFFICE OF SOLID WASTE, ENVIRONMENTAL PROTECTION AGENCY, RCRA CORRECTIVE ACTION PLAN (May 1994); ENVIRONMENTAL PROTECTION AGENCY, RCRA FACILITY INVESTIGATIONS GUIDANCE (May 1989); ENVIRONMENTAL PROTECTION AGENCY, RCRA FACILITY INVESTIGATION (RFI) GUIDANCE (May 1989).

63. *See, e.g.*, Inland Steel Co. v. EPA, 901 F.2d 1419, 1423 (7th Cir. 1990) (opinion by Judge Posner acknowledging the EPA's changing views regarding which permits apply to deep injection wells at steel mills, but applying deference nonetheless).

phrase, "navigable waters of the United States," comes to mean a patch of dirt that is occasionally soggy—even when prison sentences hang in the balance.[64]

In short, the EPA ceases to be bound by the law in any meaningful sense when it has a good chance of being able to rewrite the rules via staff memoranda.[65] Conservatives will serve the cause of environmentalism, and the cause of accountable government, by holding the agency responsible for implementing a consistent environmental code.

F. *Control the Consultants*

The need for accountability also provides the basis for a conservative critique of the current role of outside "consulting" firms in the administration of the environmental laws. These consultants are not employees of the EPA. They nonetheless consume a major portion of the agency's spending; in the Superfund program, they have historically received 80 to 90 percent of the agency's total budget.[66] Their current role is unjustified.

Much of the work that the consultants do is harmless enough. For example, consultants are hired to write extensive background reports that purport to explain the basis for various actions by the agency. These reports are almost always done on a *post hoc* basis. First the agency's staff decide what they want to do, and then the consultants assemble a supporting document.

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64. In U.S. v. Mills, 817 F. Supp. 1546 (N.D. Fla. 1993), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1966 (1995), the district court declined to set aside criminal convictions. The court observed, however, that the current state of wetlands law "is enough to make any judge pause and question what has happened," and, "call[s] into question the nexus that must exist between the law so applied and . . . common sense." *Id.* at 1555. With obvious reluctance, the court concluded that this "seems to be the state of the law . . . there is nothing further that can be done at this level." *Id.*

65. Indeed, the EPA has expanded this practice in recent years so that it is now possible to speak about agency "nullification" of judicial decisions. *See, e.g., Enforcement*, 24 ENVTL. L. REP. 10,686 (1994) (describing EPA internal "guidance" to apply narrowly an adverse statute of limitations decision by the D.C. Circuit); *see also* EPA memorandum, *Interpretation of the Seventh Circuit's Decision in* United States v. Bethlehem Steel Corp. *Regarding the Scope of the F006 Listing* (Nov. 21, 1994) (asserting that the hazardous waste regulations were "incorrectly interpreted" in a recent Seventh Circuit opinion).

66. *See* Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L.J. 34, 61 (1993).

Typically, no one from the consulting firm or from the agency is identified as even a contributing author for the report.[67]

Other work that consultants do is less benign. "Dozens of critical EPA activities have been turned over to contractors." In particular, contractors dominate the process for issuing regulations, an area in which they "prepare options, draft rules, review public comments, prepare the final drafts . . . , and provide interpretive guidance to the public once those regulations are published."[68] Similarly, consultants are often called upon by the agency to draft detailed requirements in permits 100 or more pages in length, or to review environmental compliance reports submitted by industries. In important areas, one commentator has suggested that the influence of contractors over the agency is greater than that of "Congress, the public, environmental groups, [or] the news media."[69]

This role of consultants undermines the already weak threads of accountability that constrain the agency. No one within the EPA needs to take responsibility for the political choices that are inherent in much of the consultants' work. Meanwhile, the consultants' have full deniability. Their managers can say, with some force, that they would not have proceeded as they did if the matter were up to them, but they had to follow the assignments they received from the agency.

Then there is the matter of cost. Predictably, anecdotes abound of contractors using public money for such things as football tickets, alcohol, beach houses, and corporate jets.[70] More telling is the suggestion that clean-ups by government contractors are typically at least double the cost of private sector work, and that this kind of mark-up extends even to basic tasks,

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67. For example, the EPA commissioned several background documents that it used to support a computer model used in the hazardous waste context, including: DRPA, INC., PARAMETER VALUES FOR EPA'S COMPOSITE MODEL FOR LANDFILLS (Dec. 1993); WOODWARD-CLYDE CONSULTANTS, BACKGROUND DOCUMENT FOR EPA'S COMPOSITE MODEL FOR LANDFILLS (Feb. 1990); WESTAT, INC., DRAFT REPORT ON NATIONAL SURVEY OF SOLID WASTE (MUNICIPAL) LANDFILL FACILITIES (Sept. 1988).

68. Letter to Hon. William Reilly, Administrator, EPA, from Sen. David Pryor (February 13, 1990), *quoted in* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, § 8.9 n.139 (1992).

69. Mank, *supra* note 62, at 10 (quoting OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, OTA-BP-ITE-51, ASSESSING CONTRACTOR USE IN SUPERFUND 21 (1989).

70. *Id.* at 58.

such as rental of equipment.[71] In sum, the current role of contractors ensures a slow, costly process, in which no one takes responsibility for the result.

G. *Use Block Grants*

More than forty percent of EPA's budget ($2.9 billion) is devoted to funding of treatment facilities and regulatory programs for state and local agencies.[72] The EPA disburses these funds, however, only to "approved" state programs and projects, which means that the agency provides detailed specifications for the states' regulations, permitting programs, and enforcement decisions. Moreover, a noncompliant state risks losing highway and sewage treatment funds as well.[73] Through these conditional grants, the EPA has significantly federalized state environmental policy.

This process raises serious accountability problems. State agencies can claim they are not responsible for their actions, such as adopting unpopular (and arguably unproven) programs for automobile emissions testing because they are only following the EPA's funding dictates.[74] For their part, EPA staff and administrators can deflect criticism by contending that the state has failed to implement their guidelines properly.

This framework has so far been undisturbed by increasing public attention to issues of local flexibility, and the declining status of prescriptive federal mandates. An environmental block grant program would enjoy the same advantages as use of block grants more generally by providing states with the ability to set their own priorities, reducing the staff necessary on both the state and federal levels for implementation, and encouraging a healthier state-federal relationship.

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71. *Id.* at 43, 55.

72. *See* OFFICE OF THE CHIEF FINANCIAL OFFICER, EPA, 1998 BUDGET ESTIMATE tbl. 1-1.

73. *See, e.g.*, John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1184-85, 1197-98 (1995).

74. *See, e.g.*, *Legislators Begin Assault on E-Check*, CLEV. PLAIN DEALER, Mar. 22, 1996, at 5B (recounting efforts by state legislators to distance themselves from the vehicle emissions test program in Cleveland, which is implemented by the state but mandated by the EPA).

H. *Create Markets. Respect Private Property*

No discussion of a conservative approach to the environment would be complete if it omitted the use of market systems, in place of command-and-control regulations, to promote environmental goals. My brief discussion will not do the subject justice and will only summarize arguments that have been developed powerfully by others.[75] Because of this brevity, it may be appropriate to emphasize the point that respect for markets and property rights *must* be an integral part of the conservative environmental agenda. My discussion in the other sections has tried to show that a dedication to markets is not *sufficient*, by itself, to establish a positive environmental perspective, but it is certainly a necessary and substantial part of the overall package.

Under the Clean Water Act, for example, the EPA and the states issue permits authorizing industries to discharge certain amounts of pollutants into lakes, rivers, and other public water bodies. The discharge limits contained in these permits establish a fixed ceiling, which is commonly based on the EPA's estimate of an industry's technically-achievable level of control.

Permit limitations are subject to two types of recurring problems. First, the limits may be too high. In this situation, industries can be expected to take full advantage of the lax discharge limit because they will receive no tangible credit for self-imposed austerity. The other problem is that maximum levels may be too restrictive for a given industry, no matter how diligent it is in seeking reasonable methods to comply. The EPA and state environmental agencies have not been able to distinguish these situations effectively.

Markets can cut through this problem. In principle, all that is necessary is to allow each industrial site to buy and sell the emission allowances currently authorized under its permits. This system provides an incentive for a site to do better if it possibly can, because each incremental improvement in performance provides valuable credits that can be sold. Meanwhile, sites that truly cannot improve their performance can compensate by purchasing additional emission credits. Every five or ten years,

75. *See generally* Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

the amount of contaminants authorized under each emission credit can be reduced slightly, thus forcing steady improvement.[76]

Under the Clean Air Act Amendments of 1990, a version of this kind of market system has been put in place for utility emissions trading.[77] The principle of market-based controls has thus been formally recognized as a promising and practical tool for improving environmental quality.

The power of markets also applies outside of emissions trading. Limited markets in ivory, it turns out, can be effective in saving endangered elephants, by making their protection a profitable activity.[78] Similarly, the use of private funds to purchase and preserve ecologically sensitive land, as by organizations such as the Nature Conservancy, can produce better results than (sometimes disastrous) federal ownership.[79]

An analogy to national defense may illustrate the potential of a market approach. For the past two decades, the U.S. military has been strengthened by employing a volunteer force. In contrast, the U.S. environment has been defended via conscription. Anyone can be "drafted" at any time if, for example, wetlands or an endangered species are found on his property. The costs of this approach are real, in terms of idled property and, in some cases, the broken dreams of people who have worked a lifetime for their property. Thus far, comparatively little has been done to provide incentives for building a volunteer force for the environment, which might do an even better job of preservation at a cheaper social cost.

The limits of this approach should also be clear. Incentives cost money, just as a volunteer army costs money that could have been saved (in the sense that it would not show up as a budget expense) through conscription. Moreover, the resulting "market" is limited. Military defense is still implemented

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76. *Cf. id.* at 1346-47.

77. *See generally* Deborah Mostaghel, *State Reactions to the Trading of Emissions Allowances Under Title IV of the Clean Air Act Amendments of 1990*, 22 B.C. ENVTL. AFF. L. REV. 201 (1995).

78. *See, e.g.*, Jonathan Scott Mile, *Doing the Right Thing for Profit: Markets, Trade, and Advancing Environmental Protection*, 44 DRAKE L. REV. 611, 628-29 (1996).

79. *See generally, e.g.*, Dale A. Oesterle, *Public Land: How Much Is Enough?*, 23 ECOLOGY L.Q. 521 (1996) (describing environmental problems that have been caused by the federal government's stewardship of twenty-nine percent of the U.S. land area).

through a massive governmental bureaucracy, even though that bureaucracy now competes with the private market for labor. Nor does the use of a volunteer army alter the fact that military defense requires a huge financial commitment. An incentive system for protecting sensitive environmental resources would certainly increase the size of the EPA's budget by shifting mandated private spending into budgeted public incentives.

For conservatives, the broader point is not just that markets can bring greater efficiency in many areas. Rather, it is that markets work in a manner that is superior, even if the same result could theoretically be achieved through central regulatory planning. Markets are preferable to social engineering because they respect the worth of individual people and individual choices. Additionally, markets encourage individuals to improve themselves, through self-reliance, personal initiative, and creativity. This *moral* dimension of markets reflects much of what is most compelling about modern conservatism.

I. *Compare Risk to Risk, Not Cost to Benefit*

Conservatives have a compelling moral perspective that they have brought to much of modern politics, but this perspective has not been evident so far in the area of environmental protection. The most important step for conservatives is to shift the moral terms of the environmental debate.

One of the key assumptions of the liberal regulatory paradigm is that industrial chemicals pose serious long-term health risks, *and that nothing else does.* For example, it took a court decision to tell the EPA that, before banning the use of asbestos in automobile brake linings to prevent possible cases of cancer, the agency had to take account of the fact that substitute materials might fail more often and kill even more people in the resulting accidents.[80] This tunnel vision, in which only some risks get counted, is endemic to current environmental regulation. What is sorely lacking is risk-risk analysis, a comparison of the *existing* risks to be remedied with the *new* risks created by the remedy itself. The principle is simply that government must not impose

80. *See* Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991).

regulatory controls that cause an overall loss in health and safety.

Risk-risk comparison should not be confused with risk assessment or cost-benefit analysis, which are controversial methods of regulatory reform that have been high on the conservative agenda of late. Under risk assessment, government regulators identify a threshold of "acceptable" risk, and then perform a series of calculations (inevitably incorporating debatable and even silly assumptions) to estimate whether a given situation poses risks above that threshold.[81] Risk assessments typically follow an elaborate procedure that makes them malleable, expensive, and time consuming. Under cost-benefit analysis, the approach is similar, except that the risks to life and health must be translated into monetary terms,[82] a step that many non-economists find repugnant.

Risk-risk comparison differs from these methods in important respects. Risk-risk comparison does not require the regulatory agency to follow any particular methodology in its analysis. An agency can use whatever approach it finds most appropriate, so long as its methods are applied consistently to the existing risks *and* the new risks created by the proposed regulation. Nor does risk-risk comparison demand that monetary values be placed on life, or require the government to set levels of "acceptable" risk. Risk-risk comparisons are similar to cost-benefit analysis, however, in recognizing that every regulatory decision involves a trade-off of scarce resources.

A few examples may show the differences and similarities. At the time of this Article, the EPA has proposed new national ambient air-quality standards that will apply to ozone and small airborne particulates.[83] The agency says that these new controls are necessary because current levels are unsafe or even lethal. The regulatory docket in support of these proposals spans tens

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81. *See generally, e.g.*, Alon Rosenthal et al., *Legislating Acceptable Cancer Risk from Exposure to Toxic Chemicals*, 19 ECOLOGY L.Q. 269 (1992).

82. *See, e.g.*, Richard S. Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169, 1173 (1984) (describing cost-benefit analysis as a process that "measures all gains and losses in monetary terms," and in which analysts must "determine 'equivalent' dollar values for nonmonetary" values).

83. *See* National Ambient Air Quality Standards for Ozone, 61 Fed. Reg. 65,716 (proposed Dec. 13, 1996); *see also* National Ambient Air Quality Standards for Particulate Matter, 61 Fed. Reg. 65,638 (proposed Dec. 13, 1996).

of thousands of pages. One of the key elements of this docket, with respect to particulates, is the "Six Cities" study by Professors Joel Schwartz and Douglas Dockery of Harvard University.[84] This study finds a significant correlation between particulate levels and serious health problems. The proposed regulations, however, are among the most expensive in the EPA's history.

Most conservatives (let's be honest) have a gut reaction that these regulatory proposals are bad government, even before they know much about the specifics. Yet, the particulate study is essentially impossible to criticize on the basis of "cost-benefit" analysis. The EPA claims that it *did* an elaborate cost-benefit analysis, which shows benefits exceed the costs by ten times.[85]

The results of the agency's analysis should not be surprising. Especially in the environmental area, it is a fairly simple matter to generate essentially any cost-benefit numbers that the policymakers desire.[86] To take an extreme, no one would maintain that the efficiency of the food distribution system in the former Soviet Union would have increased markedly if only the central planners had adopted cost-benefit analysis to guide

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84. "More recently, epidemiological studies of a prospective-cohort design have been conducted, including in particular the Six City study...." National Ambient Air Quality Standards for Particulate Matter, 61 Fed. Reg. at 65,642.

85. *See id.* at 65,668. For the sake of simplicity, I have fudged a point here that bears more complete explanation. The agency's cost-benefit analysis of its *ozone* proposal shows the costs exceeding the benefits. *See* National Ambient Air Quality Standards for Ozone, 61 Fed. Reg. at 65,746. Notwithstanding its cost-benefit analysis, the EPA nonetheless proceeded with the ozone proposal based on case law prohibiting the agency from basing air standards on "economic considerations" or "technological feasibility." *Id.* at 65,735 (quoting Lead Industries Ass'n., Inc. v. EPA, 647 F.2d 1130, 1148 (D.C. Cir. 1980)).

This point strongly suggests that risk-risk comparison provides a more natural fit with existing law than does cost-benefit analysis. Where, as here, current law "speaks only of protecting the public health and welfare" (*Lead Industries*, 647 F.2d at 1148), cost-benefit analysis provides an insufficient legal basis for challenging a proposal even where the administrative agency agrees that costs exceed benefits. Where the administrative agency is less obliging in its calculations, the difficulties of challenging a regulation are only compounded when the agency's conclusions are wrapped in cost-benefit calculations.

86. I have written at length about the ease with which risk assessment and cost-benefit numbers can be manipulated by the regulatory agencies. *See generally* Mark Eliot Shere, *The Myth of Meaningful Environmental Risk Assessment*, 19 HARV. ENVTL. L. REV. 409 (1995); *see also* Lester B. Lave, *Benefit-Cost Analysis: Do the Benefits Exceed the Costs?*, *in* RISKS, COSTS, AND LIVES SAVED 128-29 (Robert W. Hahn ed., 1996) ("[B]enefit-cost analysis is helpful for only a fraction of social issues.... We need to admit that many benefit-cost analyses are biased; some are simply worthless.").

their decisions. The problem is central planning itself, not the particular methods used by the planners.[87]

In its current proposals, the crux of the EPA's analysis is that the new standards will save many lives. To criticize the cost-benefit analysis, it is necessary to attack this starting point, which means arguing with the scientific validity of Professors Schwartz and Dockery's conclusions. The cost-benefit issue quickly degenerates into a battle of health experts, in which the EPA can be accused only of erring on the side of caution. Not surprisingly, courts will be extremely reluctant to find that the EPA weighed the costs and benefits incorrectly. Moreover, in the court of public opinion, the advantage is usually on the side of those claiming we must do everything possible to protect the public health.

Risk-risk analysis, by contrast, shifts the debate in important ways. Under risk-risk analysis, conservatives can assume that the EPA has properly identified the potential health concerns arising from current ozone and particulate levels. But this analysis goes on to ask whether the agency used similar methods to identify the *new* risks created by regulation. On ozone, for example, the U.S. Department of Energy provided estimates to the EPA that reduced ozone levels would cause between 130 and 260 melanoma skin cancers per year, and thousands of cases of non-melanoma cancer and of cataracts. The EPA declined to evaluate those risks, however, claiming that the level of effort would be too great.[88] But no particular level of effort would be compelled under risk-risk analysis, only a *consistency* of effort on each side of the issue. Whatever kind of analysis the agency performed to determine the risks of current ozone levels, a qualitatively similar kind of analysis should be performed to evaluate the new risks generated under the proposed regulatory standard.

This kind of critique is different from conventional conservative attacks in several respects. First, it compares moral equivalents: lives lost under the current standard with lives lost

87. *See generally, e.g.*, Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533 (1996).

88. *See* Transcript of Proceedings, Clean Air Scientific Advisory Committee Ozone Review Panel, 205-17 (March 21, 1995) (written statement of Dr. Martin Frazier, Dept. of Energy).

under the new proposal.[89] Second, it tends to neutralize the advantage that the media gives to the side making the most alarming health claims, as well as the related argument that government must "err on the side of caution." This analysis legitimately throws into doubt on which side caution lies.

Third, risk-risk analysis is something that judges can understand and meaningfully apply. In the case of asbestos brake linings, discussed above, the court neither questioned the EPA's asbestos studies, nor found that more lives would be lost from brake failure than saved from reduced asbestos exposure. Instead, the court simply concluded that EPA must use consistent methods to evaluate these risks. Review of agency decisions to ensure this kind of consistency is reasonable to expect from judges and pays proper heed to the institutional role of the courts.

Risk-risk analysis can also be developed with much greater sophistication. For example, economist Ralph Keeney has estimated that every three to seven million dollars of regulatory costs imposed can be expected to lead to one premature death.[90] This estimate appears reasonable. With health care costs above twelve percent of GNP,[91] a regulation that takes seven million dollars from the total economy would reduce health care resources by about one million dollars on a straight percentage basis. One million dollars buys quite a few medical exams, which could well result in one premature death if these resources were consumed instead by regulatory costs. The more general principle, that being poorer has serious health consequences, is supported by ample experience[92]

This analysis, it bears repeating, does not suggest that one life is *worth* three to seven million dollars. I take it as obvious that

89. It is not necessary to adopt a strict utilitarian calculus in which each life is valued exactly the same. "Moral equivalency," though, is required. Each life raises the same *kinds* of moral concerns, even if the precise weight of these concerns differs in particular cases.

90. *See* Ralph L. Keeney, *Mortality Risks Induced by Economic Expenditures*, 10 RISK ANALYSIS 147, 154 tbl. VI (1990).

91. *See, e.g.*, Andrew H. Smith & John Rother, *Older Americans and the Rationing of Health Care*, 140 U. PA. L. REV. 1847, 1847 (1992) (1990 figure).

92. *Cf., e.g.*, 140 CONG. REC. H7491 (daily ed. Aug. 10, 1994) (statement of Rep. Bereuter) (describing evidence that "by being poor, out of a job, and in the bottom 20% of our Nation's social structure, an American's life will be shortened by seven to ten years").

every life is priceless. Rather, the analysis is descriptive. For every three to seven million dollars of regulatory costs, the *fact* is that we can expect one premature death. The invitation is not to engage in cost-benefit analysis, but in life-life analysis.

The conclusion that regulatory costs create public-health risks is not necessarily correct, of course. It may be that people pay for regulatory costs by cutting down on unnecessary luxuries or that, in an economy with less than full employment, regulatory costs are mitigated by putting more people to work. Any number of things *might* be true.[93] At the same time, it is clear that a reasonable causation theory exists, and it is supported by clear mortality data. Indeed, the evidence behind the health risks posed by regulatory costs appears to be at least as strong, and possibly a good deal stronger, than the evidence in support of the Six Cities study. From this perspective, conservatives do not need to attack the underlying soundness of the Six Cities study to raise basic questions about whether the EPA's new air standards will save lives or actually cause a net decrease in health.

Risk-risk analysis is still a new initiative, but it is catching on. Professor Sunstein, one of the leading voices in administrative law, has recently written at length on the subject;[94] the approach figures prominently in two recent books[95] and several other articles;[96] and it has been cited by Judge Williams in a concurring opinion and by Justice Breyer before his appointment to the Supreme Court.[97] Risk-risk analysis would also have been

93. What is especially wrenching is that the health impact of regulatory costs may grow dramatically over time. If real growth in goods and technology in the nation is reduced by one percent per year because of regulatory burdens, the world of our children and grandchildren will be dramatically different that it otherwise could have been. It will never be known what vaccines went undeveloped, what inventions undiscovered, or what wealth untapped because of the overextension of the regulatory state.

94. *See* Sunstein, *supra* note 87.

95. *See* RISKS, COSTS, AND LIVES SAVED (Robert W. Hahn ed., 1996); *see also* RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham & Jonathan Baert Wiener eds., 1995) [hereinafter RISK VERSUS RISK].

96. *See, e.g.*, Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851 (1996); *see also* Albert Nichols & Richard Zeckhauser, *The Perils of Prudence: How Conservative Risk Assessments Distort Regulation*, 8 REG. TOXICOLOGY AND PHARMACOLOGY 61, 66 (1988).

97. *See* International Union, UAW v. OSHA, 938 F.2d 1310, 1326 (D.C. Cir. 1991) (Williams, J., concurring) (reporting recent studies that predict "each $7.5 million of costs generated by regulation may . . . induce one [premature] fatality" through reduced

required (though in conjunction with cost-benefit analysis) under Congress's principal regulatory reform bill in 1995.[98]

Increasingly, there has been recognition that "risk tradeoffs are a pervasive feature of decisions people make to protect human health and the environment."[99] Such tradeoffs are notably inherent in Superfund clean-ups, where the EPA commonly requires that chemical contaminants be reduced to levels causing no more than a one in one-million lifetime risk of cancer. This is an extremely aggressive ceiling. It is a lower level, for example, than the lifetime risk of being killed by a crashing airplane *while on the ground.*[100]

The point is not that this level of risk should be considered "acceptable" because it is so low. Rather, the point is that it is almost impossible to do anything in response to these sorts of risks that does not create new and greater risks. Ironically, and at times tragically, the EPA's response is to order trucks and heavy machinery onto sites with these levels of contaminants, creating accident risks to workers and the public that are much greater than the chemical risks being treated.[101]

Indeed, through risk-risk analysis, even environmental "success" stories become open to serious debate. The EPA's ban on DDT, for instance, is widely considered today one of the agency's leading achievements.[102] This ban looks quite different, however, in light of evidence that hundreds of American farm

medical care and safety resources); *see also* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 23 (1993) (citing studies suggesting that a one-percent increase in unemployment, sustained over five years, would cause an additional 19,000 heart attacks and 1,100 suicides during that period).

98. *See* H.R. 1022, 104th Cong. § 105(4) (1995).

99. John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs, in* RISK VERSUS RISK, *supra* note 95, at 2.

100. *See* Bernard D. Goldstein et al., *Risk to Groundlings of Death Due to Airplane Accidents: A Risk Communication Tool,* 12 RISK ANALYSIS 339, 340 (1992).

101. *See* Alan F. Hoskin, J. Paul Leigh, & Thomas W. Planek, *Estimated Risk of Occupational Fatalities Associated with Hazardous Waste Site Remediation,* 14 RISK ANALYSIS 1011, 1016 (1994) (concluding that "fatality risks to workers engaged in remediation . . . are orders of magnitude greater than the . . . human cancer risk criterion often used" to determine the supposed need for environmental remediation projects); *see also* Thomas Mar et al., *Physical Injury Risk Versus Risk from Hazardous Waste Remediation: A Case History,* 17 REG. TOXICOLOGY & PHARMACOLOGY 130, 133-34 (1993) (finding that the extensive excavation of hazardous materials at a specific waste site could cause 28 vehicle-related injuries in hopes of preventing two non-melanoma skin cancers).

102. "The allegations against DDT were repeated so often and stated with such passion that the public remains convinced of their validity." WILDAVSKY, *supra* note 19, at 55.

workers were killed because of the substitution of parathion, which has a lethal dose of less than a gram.[103] On a global scale, the death toll may have been in the millions, as dramatic progress against malaria was reversed in the wake of the ban and the resurgence of mosquito populations.[104]

These examples, I hope, suggest the shift in moral perspective that risk-risk analysis provides. At its best, risk-risk analysis can save lives. It also provides a path for conservatives to the moral high ground on environmental issues. Conservatives have too often let themselves be portrayed as cold-hearted, as favoring economic growth at the cost of exposing people, and especially children, to increased chemical risk. Cost-benefit analysis feeds this stereotype by putting a monetary value on (other) people's lives. Risk-risk analysis tells a very different story. It suggests that it is liberals who are unfeeling, who are so devoted to an expanded regulatory state that they are unwilling even to ask whether that state may be killing the people it purports to protect. Risk-risk analysis provides a formal framework for saying what many conservatives feel intuitively, that government is commonly bad for our health.

J. *Engage the Cultural Battle*

Captain Planet and the Planeteers, a Hanna-Barbera Production®, is a cartoon about a group of ethnically diverse teens who, when they combine their powers, can call upon a caped environmental crusader. A few Sundays ago, I watched this program with my six-year-old son.

We witnessed cartoon factories and ships pouring untreated sewage into a river and twice onto the heads of the teens. "We treat our rivers as if they were toilets," the teens told us. For their part, the teens learned from a barefoot woman hanging laundry that "this stretch of river is called Cancer Alley" because of the disease the pollution causes. We were also treated to scenes of corporate security guards behaving thuggishly, and to Captain Planet lamenting the placement of open garbage dumps next to rivers. The Planeteers then appeared in two "public-service"

103. *See id.* at 72-73, 80.

104. *See* Cross, *supra* note 96, at 890-91.

commercials, urging us to write our elected representatives to enact tougher anti-pollution laws. They also encouraged us to vote or, if by chance we were not yet old enough, to canvas door-to-door.

Similar themes are common on children's programs. If Barney the dinosaur has his way, every child in America will know how to say "please," "thank you," and "save our planet," not necessarily in that order. Even the Mighty Morphin' Power Rangers have joined this bandwagon. The Rangers are about as politically correct as Rush Limbaugh. Their idea of "alternative dispute resolution" is a kick to the midriff, and the girl Rangers are fond of skimpy outfits in pink or yellow. Yet, they still take time out from martial arts to deliver frequent anti-pollution messages.

The one-sided messages from television might be cause for serious concern, except that what is taught in schools may be even worse. The curriculum guide for environmental education in Arizona suggests that "second graders dance to wolf howls and whale songs."[105] More typically, in textbooks on the environment, the words "menace, catastrophe, collapse, shortage, disaster, breakdown, alarm, degradation, and deadly are ubiquitous."[106] Even some math books are replete with "word problems and boxes about deforestation in developing countries, the role of zoos in society, and the drawbacks of fossil fuels."[107]

There is a point where education becomes political indoctrination, and that point appears to have passed long ago.

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105. Michael Satchell, *Dangerous Waters? Why Environmental Education is Under Attack in the Nation's Schools*, U.S. NEWS AND WORLD REP., June 10, 1996, at 63.

106. Michael Sanera & Jane S. Shaw, *The ABCs of Environmental Myths*, WALL ST. J., Sept. 4, 1996, at A14.

107. Karen F. Schmidt, *Green Education Under Fire*, 274 SCI. 1828 (1996). A few years ago, I had the opportunity to represent a landfill at a permit hearing. The local school teachers decided to use this hearing as an educational exercise, bringing several hundred students with anti-landfill signs and petitions. I do not pretend that the side I represented was 100 percent in the right, but the landfill did have a few points in its favor. It included all of the latest protective features; it was owned by a local family that had worked for a decade to obtain regulatory approvals; and it had received the endorsement of the state environmental agency. Judging by the signs and the student applause, however, not one of them believed the landfill's operating permit should be issued. As this uniformity of opinion suggests, current environmental education may be directed towards teaching children to think, but it falls far short of teaching them to think for *themselves*.

Millions of children who do not take responsibility for cleaning up their own rooms are now convinced that they have an urgent mission to clean up the world. With the odds stacked against conservatives in the media and the classrooms, the cultural battle for the soul of the next generation may seem unwinnable.

But conservatives do have a key advantage. Because of its emphasis on the disaster around the corner, the liberal environmental paradigm takes itself very, very seriously. To respond, conservatives often need only report the unintentionally funny things that people say and do in service of the liberal paradigm. I could never have made up something like Captain Planet.

A similar story is provided in "Recycling is Garbage," an article by John Tierney that appeared in the New York Times Sunday Magazine. The article describes a group of students gathered for a lesson in recycling at a public school in Manhattan.[108] The students first collected trash from around the grounds and reviewed the results with their teacher.

> "Do you see any pattern as I'm emptying it?" Miss Aponte asked.
>
> "Yeah it stinks."
>
> "Everybody's chewing Winterfresh."
>
> "A lot of paper napkins."
>
> "It's disgusting."
>
> "They're throwing away a folder. That's a perfectly good folder!"
>
> "It's only half a folder."
>
> "Well, they could find the other half and attach them together."[109]

The article continues by explaining that the students used a dozen plastic bags and two dozen pairs of plastic gloves to pick up the trash, thus generating more new garbage than they

108. *See* John Tierney, *Recycling is Garbage*, N.Y. TIMES, June 30, 1996, § 6, at 24.
109. *Id.*

collected in recyclables. The article then details how this student exercise parallels the results from many of the recycling policies pursued by grown-ups. My son thought this was a great story, and he now distinguishes between "good" recycling and "bad."

Many of the past predictions of the liberal paradigm provide similar illustrations. Today's claims of global warming, for instance, directly contradict the global *cooling* warnings that were common during the 1970s energy crisis: "Meteorologists disagree about the cause and extent of the cooling trend.... But they are almost unanimous in the view that the trend will reduce agricultural productivity for the rest of the century," wrote Newsweek.[110] P.J. O'Rourke described similar kinds of warnings from liberal environmentalists in his book, *Parliament of Whores*:

> On the original Earth Day in 1970 ... the best-selling author of The Population Bomb, Dr. Paul Ehrlich, was making dire predictions as fast as his earnestly frowning mouth could move. Dr. Ehrlich predicted that America would have water rationing by 1974 and food rationing by 1980, that hepatitis and dysentery rates in the U.S. would increase 500 percent due to population density, and that the oceans could be as dead as Lake Erie by 1979. Today Lake Erie is palatable, and Dr. Ehrlich still is not.[111]

In a subsequent book based on his world travels, O'Rourke concluded that people everywhere have the same basically likable character, except in Somalia and the environmental movement.[112] His version of the Earth summit in Rio lampoons both liberal environmentalism and the United Nations bureaucracy—from the adoring welcome of Fidel Castro, to the dense policy proclamations, to the thousands of delegates armed with cellular phones.[113]

In sum, because conservatives do not believe that the end of the world is nigh, they are able to retain a sense of humor about environmental issues. The conservative view of the environment not only protects core values, but also is more fun.

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110. Peter Gwynne, *The Cooling World*, NEWSWEEK, Apr. 28, 1975, at 64.
111. P.J. O'ROURKE, PARLIAMENT OF WHORES 197-98 (1991).
112. *See* P.J. O'ROURKE, ALL THE TROUBLE IN THE WORLD 314 (1994).
113. *See id.* at 211-23.

K. *Draw the Broader Moral Comparisons*

I wish this last part was funny, but it's not. A van that parks in the garage where I work is adorned by a series of bumper stickers espousing traditional liberal causes. One of these supports the status quo on abortion. Immediately below it, apparently with no irony intended, is another sticker that decries, "Pennsylvania's Shame: Live Pigeon Shoots."

Something is wrong when people who think of themselves as ethical and high-minded perceive a developing human life to be less worthy than a pigeon. This is even more disturbing when those who perceive the abortion of about one-and-a-half million developing human lives each year[114] as considerably less significant than the death of several dozen pigeons. One of the main premises of environmentalism is that all life has intrinsic worth. The more credible conservatives become in protecting the environment, the more persuasive they will be that this principle applies to a human fetus with even more force that it does to the pigeons and snail darters of the world.

Environmentalism can build purity in the human spirit as it protects the purity in nature. A similar concern with the human spirit underlies the conservative emphasis on the pollution of our society through social toxins that include drugs, gambling, pornography, divorce, and illegitimacy. The "pollution within is much more serious than the pollution without, the sickness of the human heart is by far more obdurate than the sickness of the human environment."[115] The conservative commitment against chemical pollution of the natural environment should be used to focus attention that much more crisply on the moral pollution that poses the far greater threat to our children's world.

IV. CONCLUSION

Since 1980, conservatives have transformed the national debate on many of the most pressing issues of our time. This influence does not extend to the environment, however, where

114. *See, e.g.*, Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 752 (1995).

115. ELIEZER BERKOVITS, FAITH AFTER THE HOLOCAUST 86 (1973).

conservatives are widely distrusted, and the language of liberalism remains dominant. This distrust can be changed if conservatives apply the same basic themes to the environment that they apply to protection of other core values. Through these themes, conservatives can develop a positive, effective agenda for environmental protection. Environmental protection is too important to settle for anything less.