

# Conservative Environmental Thought:

## The Bush Administration and Environmental Policy

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Republican Presidents over the last forty years have often produced environmental advances, although not always out of environmental sympathies.<sup>1</sup> Nudged by the prospect of a tough reelection battle with Senator George Muskie, the Nixon Administration helped usher in the era of federal environmental statutes with laws such as the National Environmental Policy Act of 1969, the Clean Air Act of 1970, and the

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1. Looking earlier in United States history, President Theodore Roosevelt was the first (and arguably still the most productive) environmental president. Roosevelt, however, was unusual among Republicans, both then and for the twentieth century as a whole. For discussion of Roosevelt's environmental contributions, see Curt Meine, *Roosevelt, Conservation, and the Revival of Democracy*, 15 *CONS. BIO.* 829 (2001).

Water Pollution Control Act of 1972.<sup>2</sup> Even after Nixon won reelection in 1972, his administration supported passage of the Endangered Species Act and contemplated national land-use legislation.<sup>3</sup> The Reagan Administration's fiscal conservatism led to the demise of economically unsound and environmentally detrimental water supply projects,<sup>4</sup> and his State Department helped negotiate the Montreal Protocol.<sup>5</sup> President George Herbert Walker Bush, claiming the mantle of the "environmental president," sought and obtained passage of the Clean Air Act Amendments of 1990, protected various areas off the coast of the United States from oil and gas development, and signed a number of important international environmental treaties.<sup>6</sup>

One could construct a reasonable thesis that Republican presidents should not only support environmental protection but bring valuable innovation to environmental policy, devising new ways to integrate economic concepts, flexibility, and federalism principles into environmental policy. Polls have shown that a majority of Republican voters support measures to protect the environment (although not in the same percentages, and not as strongly, as Democratic voters).<sup>7</sup> Moreover,

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2. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW 75-79* (2004) (discussing President Nixon's early support of environmental measures, in part "out of concern that the Democrats would be successful in their apparent effort to seize the environmental initiative"). For other interesting discussions of the Nixon Administration and environmental policy, see J. BROOKS FLIPPEN, *NIXON AND THE ENVIRONMENT* (2000); JOHN C. WHITAKER, *STRIKING A BALANCE: ENVIRONMENT AND NATURAL RESOURCES IN THE NIXON-FORD YEARS* (1976).

3. See LAZARUS, *supra* note 2, at 75, 78 (noting Nixon's signing of the Endangered Species Act and Nixon's last-minute abandonment of national land-use legislation).

4. See Daniel W. Bromley, *Choices, Prices, and Collective Action in U.S. Water Policy*, *WATER RES. UPDATE*, Autumn 1997, at 55, 56 (observing that Reagan's tax cuts spelled an end to most water projects). President Reagan succeeded in killing off projects that President Jimmy Carter had tried unsuccessfully to kill off during his administration. See Guy Martin, *Oahe: Winning One for the Locals*, 4 *GREAT PLAINS NAT. RES. J.* 11, 13-14 (1999) (noting that the Reagan Administration provided little funding for the projects that Carter had challenged).

5. See Stephen J. DeCanio, *Economic Analysis, Environmental Policy, and Intergenerational Justice in the Reagan Administration: The Case of the Montreal Protocol*, in 3 *INTERNATIONAL ENVIRONMENTAL AGREEMENTS: POLITICS, LAW AND ECONOMICS* 299 (2003).

6. See LAZARUS, *supra* note 2, at 126-27 (noting President Bush's support for various environmental efforts, including passage of the Clean Air Act Amendments of 1990, but also noting his shift away from environmental goals later in his administration). The first President Bush signed both the Global Convention on the Control of Transboundary Movements of Hazardous Wastes, Mar. 22, 1989, 28 I.L.M. 649, and the United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849, and his administration helped negotiate the Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874. President Bush, however, declined to sign the Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

7. According to a poll by the Pew Research Center for the People and the Press conducted in 1996, approximately two thirds of Republican voters believed that the nation should "do whatever it takes" to protect the environment (versus 84 percent of Democrats); 30 percent of Republican voters (versus 14 percent of Democrats) believed that we had "gone too

because of their interest in effective markets, Republicans have a particular focus on achieving environmental goals as efficiently as possible and may feel freer than Democratic administrations to experiment with tools that engender the suspicion of some environmental interest groups. The records of some Republican administrations support the hypothesis that Republicans bring greater innovation to environmental protection. For instance, although both Republican and Democratic administrations have helped develop market approaches to environmental protection, the SO<sub>2</sub> trading program that the first Bush Administration incorporated into the 1990 Clean Air Act Amendments remains the most significant, sophisticated, and successful example of market-based regulation in current federal environmental law.<sup>8</sup>

There also are several reasons, however, why Republican administrations often may not adopt innovative environmental policies. First, conservatives are not all of one view on the environment or on what constitutes beneficial environmental innovation. As discussed below, policy “conservatives” in the United States are often an uneasy amalgam of libertarians, advocates of efficiency, proponents of greater state and local authority, and more traditional conservatives in the style of Edmund Burke, on the one hand, or Alexander Hamilton, on the other. While some conservatives might favor the fostering of environmental markets or the delegation of environmental authority to the states, other conservatives might be quite troubled by such approaches in specific settings. Internal splits within the “conservative” movement, in short, may stifle creative approaches to environmental problems.

A second reason Republican administrations may find it difficult to promote environmental innovation, is that, while Republican voters remain supportive of environmental measures,<sup>9</sup> Republican politicians in general have grown increasingly hostile towards new environmental

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far.” More than half of Republican voters also said that stricter environmental regulations were “worth the cost,” compared to 43 percent of Republican voters who believed that stricter regulations would cost too many jobs or hurt the economy. Pew Research Center for the People & the Press, *Republicans: A Demographic and Attitudinal Survey*, tbl. C (Aug. 7, 1996), at <http://people-press.org/reports/print.php3?PageID=465>. For more recent polling information on environmental attitudes, see PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *TRENDS 2005 19* (2005) (showing that 49 percent of conservative Republicans believe that “tough environmental laws are worth the cost” versus 41 percent who report that “such laws cost too many jobs and hurt the economy”), available at <http://pewresearch.org/trends/trends2005-public.pdf>.

8. See NATIONAL ACADEMY OF SCIENCES, *LINKING SCIENCE AND TECHNOLOGY TO SOCIETY’S ENVIRONMENTAL GOALS* 28-31 (1996) (discussing market approaches and noting that the “best example to date” of the benefits of market approaches is the SO<sub>2</sub> trading system); Paul L. Joskow & Paul Schmalensee, *The Political Economy of Market-Based Environmental Policy: The U.S. Acid Rain Program*, 41 J. L. & ECON. 37 (1998) (discussing the adoption of the SO<sub>2</sub> trading program and its advantages).

9. See *supra* note 7 and accompanying text.

protection measures of any type. Today's Republican politicians are far less supportive of environmental measures, on average, than are Democratic politicians.<sup>10</sup> Republican politicians' weak support for environmental measures might be explained by their electorate, who, while saying that they support environmental measures, seldom cast their vote based on environmental positions.<sup>11</sup> In addition, Republican political candidates receive a higher percentage of corporate financial support than Democratic candidates get<sup>12</sup> and thus might be more receptive to corporate complaints about strict environmental regulations and policies. Given the choice of using market or other flexible methods to achieve environmental goals or relaxing those goals, corporations often may find the latter option more attractive. Even efficient regulations can impose significant costs on corporations. How corporate pressure will influence a Republican administration may depend on the administration's underlying interest in the environment. When a Republican administration wants to protect the environment, or feels pressure from Congress or the public to do so, business concerns may lead the administration to look for valuable innovations that can reduce the cost and other burdens of protection. But if a Republican administration sees no political need to protect the environment and is not ideologically

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10. See LAZARUS, *supra* note 2, at 237-50 (discussing the Republican opposition to environmental regulation); Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 97 MINN. L. REV. 999 (2003) (discussing Republican voting records on environmental measures). According to Professor Lazarus, the average League of Conservation Voters (LCV) rating for House Republicans in 2000 was only 19 (out of a potential score of 100), versus 77 for the House Democrats; in the Senate, the average LCV rating for Republicans in 2000 was 10, compared to 81 for Democrats. *Id.* at 1013. There are notable exceptions to the general anti-environmental record of current Republicans, of course, at both the national and state levels, such as Senator John McCain of Arizona (who in 2003-04 earned a 56 voting rating from the LCV), Senator Lincoln Chafee of Rhode Island (72 LCV rating), and California Governor Arnold Schwarzenegger (who earned a 58 LCV rating from the California League of Conservation Voters for his record on state legislation in 2004). See Project Vote Smart, League of Conservation Voters Ratings, at [http://www.vote-smart.org/issue\\_rating\\_detail.php?sig\\_id=003419M&sort=party](http://www.vote-smart.org/issue_rating_detail.php?sig_id=003419M&sort=party) (last visited April 27, 2005); California League of Conservation Voters, 2004 California Environmental Scorecard, at <http://www.ecovote.org/scorecards/2004/snapshot.html> (last visited April 27, 2005).

11. In 2004, only two percent of voters reported that the environment had exerted "the greatest effect on [their] vote in the election for President." The environment ranked dead last in the list of eight issues listed. (Not surprisingly, terrorism and the war in Iraq ranked first and second, but jobs/economy, education, taxes, health care, and moral values all also outpolled the environment.) Ayres, McHenry & Associates, 2004 Post-Election Survey Regarding Health Care Issues, Nov. 3-4, 2004, available at <http://www.ayresmchenry.com/default.asp?pt=newsdescr&RI=540>.

12. See Thomas B. Edsall, *Big Business's Funding Shift Boosts GOP*, WASH. POST, Nov. 27, 2002, at A1 (describing shift of corporate funding to GOP, "which now enjoys advantages exceeding 5 to 1 in some" industry sectors); Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, *supra* note 10, at 1020 (noting that total monetary contributions to Republican political candidates from the energy and natural resource industry increased between 1990 and 2002, while contributions to Democratic candidates declined).

committed to such protection, corporate influences may lead instead to a loosening of environmental standards.

History suggests that recent Republican administrations often have been less environmentally friendly than Democratic administrations. The Carter and Clinton administrations proved themselves more receptive than the Ford and Reagan administrations to new environmental initiatives (and far less hostile to existing initiatives).<sup>13</sup> Even the George Herbert Walker Bush administration was reticent to pursue some significant environmental initiatives (particularly in the international and natural resources field).<sup>14</sup> Although these differences in environmental policy between Republican and Democratic administrations may have stemmed from principled disagreements over the appropriate determinants of environmental policy (e.g., whether environmental policies should be pursued if the policies' costs outweigh demonstrated and monetized benefits), Republican presidents appear simply not to have seen environmental protection as politically beneficial to them as Democratic presidents have viewed the environment.<sup>15</sup>

This Article has two purposes. The first, more straightforward purpose is to examine the degree to which the current George W. Bush Administration has pursued and adopted environmental policy innovations often favored and discussed by environmental conservatives. Even if the current Bush Administration has not vigorously supported additional environmental measures, has the administration actively sought out opportunities to try new approaches? The second purpose is to use this inquiry into the Bush Administration's environmental record to examine the varied and conflicting strands of "conservative" environmental thought. Part I therefore begins by identifying and describing five different schools of conservative environmental thought, highlighting the innovations that each school favors and the tensions among the various schools. Part II examines the Bush Administration's record concerning a variety of alternative environmental approaches that at least some conservatives might be expected to promote, including the

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13. See LAZARUS, *supra* note 2, at 98-128 (comparing the environmental positions of Republican and Democratic Presidents during the latter part of the twentieth century).

14. See *id.* at 127 (discussing President Bush's positions at the Rio de Janeiro "Earth Summit," where he "declined to have the United States sign the Biodiversity Convention and insisted on a weakened version of an agreement on global climate change").

15. According to Richard Lazarus' fascinating history of environmental policy in the United States, President Nixon ultimately chose not to be a strong supporter of environmental protection because he concluded "that the political rewards were too few and the political opportunities in developing alliances with powerful business interests were too great." *Id.* at 126. President George H.W. Bush similarly backed away from early environmental support because, in Lazarus' view, he apparently "concluded that he was unable to capture sufficient political advantages for his efforts to justify the costs to his core constituency in the business community. No matter what he did, the environmental community seemed only to criticize his administration for not doing enough." *Id.* at 126-27.

establishment of information disclosure requirements, economic incentive programs, and environmental market mechanisms; the elimination of perverse governmental subsidies; and increased delegation of responsibilities and authority to state and local governments. This analysis allows a deeper reflection upon the tensions within conservative environmental philosophy, as well as an examination of whether the current Bush Administration is interested in pursuing significant environmental innovations – particularly innovations that might actually increase the degree of environmental protection in the United States. Part III provides a brief conclusion.

#### I. CONSERVATIVE PERSPECTIVES ON ENVIRONMENTAL POLICY

Conservatives, in the modern American political sense of the term, do not subscribe to a uniform philosophical creed. Political conservatives follow various strands of normative thinking, each of which can lead to very different approaches to governmental policies in specific fields. In this Article, I will discuss five general philosophies, each of which plays a major role in conservative thinking about environmental policy.<sup>16</sup> Libertarians emphasize individual liberty from governmental interference and from pollution and other forms of nonconsensual harm.<sup>17</sup> Economic conservatives, whom I playfully will call “Pareto Optimists,” believe that government should pursue those policies, including environmental policies, that are efficient in maximizing the overall economic welfare of society.<sup>18</sup> “Jeffersonian Conservatives” endorse the devolution of governmental authority, including environmental regulation, to state and local governments.<sup>19</sup> “Hamiltonian Conservatives,” by contrast, advocate

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16. The examined philosophies are not exhaustive of conservative perspectives on the environment. In particular, I do not discuss religious conservatives. The views of the “religious right” toward the environment could be very influential in shaping future Republican positions on environmental issues, and some observers believe that religious conservatives are strong candidates for environmental conversion. See, e.g., William T. Johnson, *Improving the Environment in a Conservative Political Climate*, ELEC. GREEN J. (Spring 2004), at <http://egj.lib.uidaho.edu/egj20/johnson1.html>. I do not discuss religious conservatives, however, because their existing attitudes toward the environment are not clear and because their religious views do not translate as readily into specific suggestions for policy reforms as do those philosophies that I discuss.

17. For an example of a libertarian perspective on environmental issues, see Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2 CATO J. 55 (1982).

18. Books providing insights into the approaches that Pareto Optimists would apply to environmental issues include RICHARD L. STROUP, *ECO-NOMICS: WHAT EVERYONE SHOULD KNOW ABOUT ECONOMICS AND THE ENVIRONMENT* (2003) and the classic forerunner in this field, WILLIAM F. BAXTER, *PEOPLE OR PENGUINS, THE CASE FOR OPTIMAL POLLUTION* (1974). See also Barton H. Thompson, Jr., *What Good Is Economics?*, 37 U.C. DAVIS L. REV. 175 (2003) (describing the ways in which economics can be used to address environmental issues).

19. For examples of writings in the tradition of Jeffersonian Conservatives, see ENVIRONMENTAL FEDERALISM (Terry L. Anderson & Peter J. Hill eds., 1997) [hereinafter ENVIRONMENTAL FEDERALISM] (a collection of essays on the potential advantages of having

national authority, used to support economic development and growth, and thus may disfavor environmental regulation that impedes economic markets.<sup>20</sup> Finally, “Burkean Conservatives” may favor environmental protection but insist upon firm scientific support for new regulations and distrust dramatic shifts in policy.<sup>21</sup>

These five strands of conservatism are sufficiently disparate in their underlying philosophies that it may seem odd at first to group them together in the single political category of “conservatives.” Yet these otherwise diverse groups form a “conservative” coalition that has been instrumental in the election of recent Republican administrations and in the formulation of administrative thought and policies. Moreover, the five strands are closely enough affiliated today that they are often difficult to disentangle. Republican and conservative rhetoric frequently embodies multiple strands, with the emphasis among the strands varying from speech to speech, politician to politician, and policy debate to policy debate.<sup>22</sup> Many people who describe themselves as politically

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states play a greater role in environmental policy); Jonathan H. Adler, *A New Environmental Federalism*, FORUM FOR APP. RESEARCH & PUB. POL’Y, Winter 1998, at 55 (arguing in favor of the devolution of environmental regulation to state governments).

20. Business groups, for example, sometimes favor national environmental legislation to the degree that it preempts stricter or more varied state regulation. The automobile industry “began to promote federal clean air legislation for the purpose of precluding the possibility of each of the fifty states’ insisting on their own separate emissions controls and thereby complicating manufacturing standards.” LAZARUS, *supra* note 2, at 91.

No one in the Bush Administration explicitly has identified himself or herself as a Hamiltonian Conservative, but this philosophy, as we will see, could be the defining characteristic of the Administration as a whole. See Adam Teiichi Yoshida, *The Rise of Hamiltonian Conservatism*, THEREALITYCHECK.ORG, (Apr. 1, 2005), at <http://therealitycheck.org/GuestColumnist/ayoshida090904.htm> (labeling the conservative approach of the Bush Administration “Hamiltonian Conservatism,” in honor of the man...whose ideas, in which a strong and effective central government was to be used to make the nation stronger, are seemingly the basis of this new (and old) ideology”). Vice President Dick Cheney, in his efforts to use national powers to promote an industry-oriented energy policy, typifies the Hamiltonian Conservative. See Jeffrey P. Carlin, *Walker v. Cheney: Politics, Posturing, and Executive Privilege*, 76 S. CAL. L. REV. 235 (2002) (discussing Vice President Cheney’s National Energy Policy Development Group, its claims to executive privilege, and Alexander Hamilton’s belief in broad executive powers and secrecy).

21. For a period of time, a number of conservative skeptics within the federal Environmental Protection Agency explicitly convened as an Edmund Burke Society. See, e.g., Comments of the Edmund Burke Society on the Proposed Rule to Require Community Water Systems to Provide Customers with Water Quality Reports, at <http://www.junkscience.com/news3/burke2.htm> (last visited April 28, 2005) (noting that the society members “believe strongly in protecting human health and the environment and [believe] that ideological extremism within and outside the government often clouds issues and misplaces priorities”).

22. In describing the Bush Administration’s environmental philosophy, for example, the White House draws in part on Jeffersonian Conservatism. “Opportunities for environmental improvements are not limited to Federal Government actions—States, tribes, local communities, and individuals must be included.” The White House, *Protecting Our Nation’s Environment*, at <http://www.whitehouse.gov/infocus/environment> (last visited April 28, 2005). In describing the

“conservative,” including conservative academics, combine two or more of these strands in their own personal philosophical views. The same is true of conservative organizations.<sup>23</sup>

The differences among these five strands can lead to internal tensions both within conservative administrations and organizations and in the thinking of individual conservatives. To take one obvious example, Jeffersonian Conservatives and Hamiltonian Conservatives may disagree strongly over the appropriate locus of environmental regulation in our federal system of government. Jeffersonian Conservatives may want to let local governments set higher levels of environmental protection, while Hamiltonian Conservatives may want to protect national industry by preempting burdensome local regulation. These tensions often lead to difficult political decisions<sup>24</sup> and can increase the challenge of pursuing conservative innovations within environmental policy. Innovations that please one category of conservative can frighten others.

The remainder of Part I of this Article looks in more detail at the views of each type of conservative, the forms of environmental innovations that each is likely to promote, and the tensions and disagreements among the various views. The descriptions of conservative environmental thinking set out below inevitably are broad caricatures. The thinking of few individuals fits exactly into one or another caricature. As noted, many conservatives draw from two or more of the various strands of thinking. The caricatures, however, are helpful in highlighting the wide variety of philosophical principles that underlie modern conservative thought and the internal tensions that they create as Republican administrations formulate environmental policy.

### A. *Libertarians*

Libertarians can be among the strongest conservative supporters of environmental protections of human health and property. Most Libertarians believe that individuals have a right to be free from physical interference by others. Thus, under Libertarian theory, no one has an

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Administration's energy policy, however, the White House speaks in terms of market mechanisms and strong national policies. The White House, *Energy for America's Future*, at <http://www.whitehouse.gov/infocus/energy> (last visited April 28, 2005).

23. The Property and Environment Research Center (PERC), for example, combines Libertarian, Pareto Optimist, and Jeffersonian Conservative approaches—as reflected in their publications. See, e.g., Terry L. Anderson & Donald R. Leal, *FREE MARKET ENVIRONMENTALISM* (rev. ed. 2001) (combining libertarianism and economics); *ENVIRONMENTAL FEDERALISM*, *supra* note 19 (taking a Jeffersonian Conservative approach).

24. According to John Graham, who heads the Office of Information and Regulatory Affairs at the Office of Management and Budget, Jeffersonian and Hamiltonian perspectives often collide when deciding how to approach state-federal conflicts in the environmental field. Elizabeth Shogren, *States, White House At Odds on Environment*, L.A. TIMES, Dec. 29, 2002, at 23.

entitlement to subject other individuals to pollution or other environmental assaults that significantly interfere with their health or property.<sup>25</sup> Libertarians typically do not believe in balancing such injuries against the societal benefits of the polluting activity. Rights against pollution and other physical assaults constitute moral constraints that no one is entitled to violate, no matter what societal interests can be mustered in favor of the challenged activity.<sup>26</sup>

Libertarians, however, do not necessarily support vigorous regulation of environmental harms by administrative agencies. Because Libertarians view environmental issues as a matter of legal or natural rights rather than of policy, Libertarians frequently advocate addressing environmental problems in the judicial system through common law principles such as nuisance or trespass, rather than through administrative regulation.<sup>27</sup> Libertarians often are skeptical of legislative and administrative motivations and judgment, and they may suspect that environmental regulations are the result of political rent-seeking rather than good faith efforts to protect human rights against material physical interference.<sup>28</sup>

Moreover, because the effort to protect people from pollution and other environmental injuries may interfere with the “right” of others to engage in economic and other legitimate activities, Libertarians also may demand clear evidence that material harm indeed will occur. Where the government prohibits a particular activity on environmental grounds, but the activity does not measurably harm people, the government has unjustifiably interfered with liberty interests. Strong Libertarians may argue that no action should be taken until harm has already occurred and been proven;<sup>29</sup> even moderate Libertarians may want convincing evidence that an activity will actually cause injury before the government acts to constrain private action.

Libertarians also are likely to be more sympathetic to protecting human health than to other forms of environmental protection. Libertarians, as noted, condemn material, physical assaults on humans

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25. See, e.g., Rothbard, *supra* note 17, at 60-63, 80, 84 (discussing the right against physical invasions, including harmful pollution).

26. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-42 (1974) (discussing the role of moral side constraints in libertarian philosophy and attacking utilitarianism for not recognizing such constraints).

27. See, e.g., David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, in THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 3 (Roger E. Meiners & Andrew P. Morriss eds., 2000).

28. Some Libertarians argue that environmental regulations are improper because regulations proscribe actions before the actions are proven to be harmful and thus illegal. See Rothbard, *supra* note 17, at 95 (no modern environmental regulation “can be permissible under libertarian theory,” since it is only permissible under libertarian theory “to proceed coercively against someone if he is a proven aggressor”).

29. *Id.*

and property. Libertarians are likely to be more skeptical of governmental efforts to protect scenic or cultural amenities, environmentally sensitive lands, and biodiversity through mandatory regulation. When the government seeks to prohibit property owners from destroying scenic, cultural, or environmental amenities on their land, Libertarians may view the action as a violation of the property owners' "right" to utilize their property as they wish, rather than as protective of any "public rights" to the environmental amenities. If some members of society enjoy a scenic vista, they should pay for it – not require others to bear the burden. Although some Libertarians are supportive of animal rights, they typically advocate protecting individual animals rather than protecting biodiversity.<sup>30</sup> Many other Libertarians do not believe that animals have rights equivalent to those enjoyed by humans.<sup>31</sup>

In seeking new, more effective approaches to environmental protection, Libertarians often begin by looking for ways to protect the environment by reducing government's reach. Most Libertarians suspect the government of being a major contributor to environmental harm through governmental subsidies of environmentally damaging activities (e.g., subsidies of western water consumption through the federal Bureau of Reclamation),<sup>32</sup> governmental tax policies (e.g., tax policies favoring production of fossil fuels), or direct governmental activities (e.g., constructing highways and dams). Getting the government out of these areas, the Libertarian will argue, is the best way of reducing or eliminating environmental harm.<sup>33</sup>

Noting that many environmental problems are the result of the tragedy of the commons, Libertarians also frequently argue for converting common resources into private property rights that can be managed by individual property owners rather than by the government. Libertarians, for example, sometimes argue that the best way to ensure the protection of wildlife is to find means of privatizing the resource.<sup>34</sup>

Similarly, many Libertarians believe that the best means of controlling pollution is to carefully specify individual rights to be free of

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30. See, e.g., NOZICK, *supra* note 26, at 35-42 (setting out a libertarian argument for the protection of animals).

31. See, e.g., Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 143 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

32. See, e.g., Anderson & Leal, *supra* note 23, at 52-53 (describing subsidies from the federal reclamation program).

33. See, e.g., Mary Ruwart, *The Pollution Solution: Stopping the Environment's Worst Enemy*, at <http://www.lp.org/issues/environment.shtml> (last visited Apr. 28, 2005); Daniel C. Burton, *the Libertarian Solution to Our Environmental Problems*, at <http://www.ocf.berkeley.edu/~callib/docs/environment-notes.html> (last visited Apr. 28, 2005).

34. See Anderson & Leal, *supra* note 23, at 107-21, 165-67 (discussing individual transferable quotas (ITQs) for fisheries, among other property-right solutions to environmental problems).

pollution exposures and then to provide an effective means of enforcing those rights through the common law. In the view of these Libertarians, inadequately specified and protected property rights are the primary cause of pollution and other environmental problems.<sup>35</sup> Reform therefore should focus on common law rights and judicial processes for enforcing those rights.<sup>36</sup>

### B. Pareto Optimists

“Pareto Optimists” are likely to support a wide spectrum of environmental regulations. The Pareto Optimist believes that governments should seek to increase economic efficiency by ensuring that activities that pollute or risk other environmental harms take into account the cost to society of that pollution or harm. Where the costs of eliminating pollution or other environmental harms are less than the costs of the pollution or harm itself, the Pareto Optimist would proscribe the pollution or harm. Because many activities do not internalize their environmental costs, the Pareto Optimist is likely to favor a broad environmental program of environmental protection.

The Pareto Optimist, however, is likely to favor environmental regulation only to the degree that it corrects for such negative externalities. The Pareto Optimist typically will oppose environmental regulations whose benefits do not exceed their regulatory costs, and thus will likely support using cost-benefit analyses to decide whether to adopt specific environmental regulations.<sup>37</sup> The Pareto Optimist and Libertarian thus may disagree on when environmental regulations are warranted. While many Libertarians would outlaw any pollution that materially injures human health, for example, the strict Pareto Optimist would not prohibit the pollution unless the monetary cost of doing so is less than the cost of the injury. As noted earlier, the Libertarian might not support protecting wetlands, endangered species, or wilderness, while the Pareto Optimist would support such protection if the economic value to humans of the wetlands, species, or wilderness is sufficiently high.

In looking for new approaches to environmental protection, the Pareto Optimist is likely to focus on economic incentives and disincentives. Like the Libertarian, the Pareto Optimist may advocate eliminating governmental subsidies that promote environmental harm. To the Pareto Optimist, such subsidies distort economic decision making

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35. *Id.* at 27 (“The risk of ... hazardous waste pollution under a property rights system of accountability remains unless or until the recipient of the pollutant can enforce his property rights against trespass.”).

36. See, e.g., Rothbard, *supra* note 17; Schoenbrod, *supra* note 27; Burton, *supra* note 33.

37. See JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 30-36 (2003) (describing utilitarianism and cost-benefit analysis).

by artificially reducing the cost of engaging in an activity. The Pareto Optimist also might join Libertarians in looking for ways of reducing environmental harms by creating clear and enforceable property rights, which could help internalize the costs of environmental harms.

Pareto Optimists, however, also are likely to favor a variety of other alternative approaches. Prominent in the Pareto Optimist's tool kit are economic incentive systems. The Pareto Optimist, for example, may favor imposing a tax on activities that cause environmental harm equal to the social cost of that harm.<sup>38</sup> Such a Pigouvian tax forces decision makers to take account of (i.e., internalize) the harm in deciding whether to pursue an activity.<sup>39</sup> Alternatively, the Pareto Optimist might support subsidizing environmentally beneficial actions (the flip side of the Pigouvian tax).<sup>40</sup>

Where the government chooses to regulate an environmentally harmful activity such as polluting, destroying wetlands, or fishing, the Pareto Optimist is likely to advocate creating a market in the regulated activity.<sup>41</sup> Such "cap and trade" systems minimize the cost of the regulation by permitting regulated firms or individuals to trade rights to engage in the restricted activity. If the right to engage in the activity is more valuable to some firms or individuals than to others, they can purchase the right from those for whom the right is less valuable. Polluters, for example, who find it difficult to reduce their discharges can purchase pollution rights from factories who find it relatively easy to limit their discharges. Fishermen who are particularly efficient at catching fish can purchase fishing rights from those who have higher operating costs or are less effective at finding fish. Although "cap and trade" systems do not directly increase the degree of environmental protection, they may make it easier to adopt environmental regulations by reducing the economic impact on the regulated industry (and thus the level of industry

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38. See *id.* at 45 (discussing interest in taxes and fees).

39. Named after the British economist A.C. Pigou, Pigouvian taxes internalize the costs of environmental and other harms by charging the cost of the harms to the people and entities that generate the harms. See A.C. PIGOU, *THE ECONOMICS OF WELFARE* 134, 183-88 (4th ed. 1932) (describing the idea of Pigouvian taxes).

40. One example of environmental subsidies is the national subsidy for alternative fuels technology. See James W. Moeller, *Of Credits and Quotas: Federal Tax Incentives for Renewable Resources, State Renewable Portfolio Standards, and the Evolution of Proposals for a Federal Renewable Portfolio Standard*, 51 *FORDHAM ENVTL. LAW J.* 69 (2004) (describing the subsidy program); Charles D. Patterson, III, *Environmental Taxes and Subsidies: What is the Appropriate Fiscal Policy for Dealing with Modern Environmental Problems?*, 24 *WM. & MARY ENVTL. L. & POL'Y REV.* 121 (2000) (same). Ideally, the subsidies would approximate the environmental benefits, in economic terms, of switching from fossil to alternative fuels (e.g., the value of lower carbon emissions). Bottle bills, in providing a payment to those who return bottles to recycling facilities, are older examples of environmental subsidies. See Ann E. Carlson, *Recycling Norms*, 89 *CALIF. L. REV.* 1231, 1293-95 (2001) (describing the importance of bottle bills to the promotion of recycling).

41. See SALZMAN & THOMPSON, *supra* note 37, at 45-47 (discussing proposals for environmental markets).

opposition) and by encouraging the development of new environmental technologies and processes.

### C. Jeffersonian Conservatives

Jeffersonian Conservatives are less interested in the substance of policy debates than in the level of government that has decision making authority.<sup>42</sup> Jeffersonian Conservatives favor devolution of environmental decision making, wherever possible, to the lowest level of government.<sup>43</sup> They can vary dramatically in their substantive views of environmental regulations and may be either supportive of or hostile towards specific environmental regulations. To Jeffersonian Conservatives, who decides is the key issue.

Jeffersonian Conservatives may see such devolution as beneficial to public policy for several reasons. First and most importantly, the Jeffersonian Conservative may believe that local and state decision making gives individual citizens a greater say in environmental policy – promoting popular democracy. Second, the Jeffersonian Conservative may see local and state regulatory agencies as less bureaucratic and more responsive and flexible in their ability to regulate the environment than federal agencies are. Third, the Jeffersonian Conservative may praise the diversity of approaches taken at local and state levels. Local experimentation can generate new ideas and provide information on the comparative advantages and deficiencies of alternative approaches. Finally, the Jeffersonian Conservative may believe that local, particularly rural, communities have a much better understanding of their environment and therefore how best to protect it. In the view of at least some Jeffersonian Conservatives, those who are closest to the land often have the greatest appreciation for the land and its needs.<sup>44</sup>

Devolution of environmental decision making to state and local governments may increase the level of environmental protection in some cases but decrease it in others. Local suburban communities, for example, may be quite strict in the cleanup standards that they demand of Superfund sites. By contrast, rural communities might be quite hostile to the listing and protection of endangered species.

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42. For an interesting and useful discussion of the role that Thomas Jefferson has played in modern conservative thought, see Clyde Wilson, *The Jeffersonian Conservative Tradition*, 14 MODERN AGE 36 (1969-70).

43. See, e.g., Robert H. Nelson, *Western Myths and Realities*, REGULATION, Summer 2002, at 38, 43-44 (advocating for greater decentralization of decisions regarding federal lands in the western United States).

44. According to Professor Jonathan Adler, the “local and regional nature of many environmental problems means that local knowledge and expertise is necessary to develop proper solutions. Such localized knowledge is inevitably beyond the reach of even the most intrepid federal regulators.” Adler, *supra* note 19.

In determining how to reform environmental laws, Jeffersonian Conservatives are likely to look for ways both to devolve greater responsibility to state and local governments and to provide these governments with the resources needed to take more active roles in environmental protection. For example, they may advocate providing state governments with greater say in decisions whether to list particular species as endangered and in designing recovery plans for such species. Jeffersonian Conservatives also may argue that Congress should provide grant programs that enable states to develop their own biodiversity programs.

#### D. *Hamiltonian Conservatives*

If Libertarians and Pareto Optimists frequently are supportive of environmental protection, and Jeffersonian Conservatives care more about *who* decides than *what* is decided, Hamiltonian Conservatives often are hostile to strict environmental regulation of business. In contrast to Jeffersonian Conservatives, Hamiltonian Conservatives do not worry about the power of the national government. Indeed, Hamiltonian Conservatives believe that national power should be used actively to promote the economy. In their view, economic growth is of the greatest importance to the nation's future. Like virtually everyone, Hamiltonian Conservatives favor a healthful environment. But if a conflict arises between economic growth and environmental protection, Hamiltonian Conservatives believe that economic growth generally should win out.

Hamiltonian Conservatives are likely to believe intuitively in a strong version of the Environmental Kuznets Curve,<sup>45</sup> which links income growth with environmental quality. According to some studies, a variety of environmental measures such as air quality actually improve as per capita incomes and consumption levels increase. In line with these studies, many Hamiltonian Conservatives argue that one of the most effective means of achieving environmental improvement is to stimulate economic growth and consumption through such public policies as resource development, more flexible regulations, trade liberalization, price reform, and fiscal stimulation.<sup>46</sup>

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45. For general reviews of the Kuznets curve, its empirical support, and potential implications for public policy, see Bruce Yandle et al., *Environmental Kuznets Curves: A Review of Findings, Methods, and Policy Implications* (2004), available at [http://www.perc.org/pdf/rs02\\_1a.pdf](http://www.perc.org/pdf/rs02_1a.pdf) ; Simone Borghesi, *The Environmental Kuznets Curve: A Survey of the Literature* (November 1999), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=200556](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=200556).

46. In announcing his alternative to the Kyoto Protocol, for example, President George W. Bush stated, "[t]oday, I'm confident that the environmental path that I announce will benefit the entire world. This new approach is based on this common-sense idea: that economic growth is

In contrast to the Jeffersonian Conservative's desire to promote democratic participation, the Hamiltonian Conservative also is likely to be suspicious of public judgment on many environmental issues, believing that the public tends to irrationally overreact to various environmental risks.<sup>47</sup> Rather than leave environmental determinations such as appropriate pollution levels or cleanup standards to the general public, Hamiltonian Conservatives often espouse turning these judgments over to scientific and other elites who can evaluate the risks more "rationally."<sup>48</sup>

When the subject turns to reforming current environmental laws and policies, Hamiltonian Conservatives favor taking greater account of the needs and interests of the business sector. Like Pareto Optimists, they might argue for cost-benefit analyses of environmental regulation, in order to ensure that the economy is not hampered unless the benefits are clear and overriding. They also might argue for greater involvement of business in environmental regulation (perhaps through public-private partnerships such as the Netherlands' green plans)<sup>49</sup> or for greater use of business-oriented approaches to environmental management (such as Environmental Management Systems or EMS's).<sup>50</sup> For the reasons mentioned, moreover, Hamiltonian Conservatives also may argue for delegating regulatory decisions to scientific and other expert boards.

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key to environmental progress, because it is growth that provides the resources for investment in clean technologies." Press Release, The White House, President Announces Clear Skies and Global Climate Change Initiatives (Feb. 14, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020214%2D5.html>.

Hamiltonian Conservatives are not alone in their belief that economic growth can promote environmental improvement. Other conservatives, including Libertarians and Pareto Optimists, also frequently cite the Kuznets Curve to support their approaches to environmental protection. See, e.g., Yandle et al., *supra* note 45; Terry L. Anderson, *Cooling the Global Climate Debate: Why Economic Growth Is Good for the Environment*, HOOVER DIGEST (Summer 2004), available at <http://www-hoover.stanford.edu/pubaffairs/we/2004/anderson05.html> (last visited April 10, 2005).

47. In this regard, the Hamiltonian Conservative builds on broader skepticism concerning the ability of the public to deal with complex environmental issues. See, e.g., CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* (2002) (arguing for a larger role for technocrats).

48. For arguments in favor of technocratic evaluation and management of risks, see *id.*; STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

49. See, e.g., Barton H. Thompson, Jr., *The Search for Regulatory Alternatives*, 15 STAN. ENVTL. L.J. 8, 16 (1996) [hereinafter *Regulatory Alternatives*] (citing green plans as an example of a valuable environmental alternative); Resource Renewal Institute, *Green Plans: The Netherlands* (providing a brief overview of green plans), available at <http://greenplans.rri.org/inaction/netherlands.html> (last visited April 30, 2005).

50. See, e.g., *REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS?* (Cary Coglianese & Jennifer Nash eds., 2001) (discussing potential uses of EMSs).

*E. Burkean Conservatives*

Burkean Conservatives, like Hamiltonian Conservatives, may oppose stringent new environmental regulations. But Burkean Conservatives are skeptical of stringent new regulations because they question the need for dramatic change in general, not because they favor economic development over the environment. Burkean Conservatives are likely to want clear proof that new regulations are needed to protect the environment. To the Burkean Conservative, stability is a virtue. Particularly where individuals have relied upon property rights or other legal entitlements in making investments or planning for the future, Burkean Conservatives may argue in favor of protecting those rights absent compelling environmental needs. Burkean Conservatives also are likely to question calls for “reform,” whether from the right or the left. To the Burkean Conservative, new and untested environmental policies and approaches pose a risk of making overall public welfare worse rather than better. Policies that have been successful in the past present the best guidance for the future.

Burkean Conservatives, however, also may be strong believers in sustainability. Under a Burkean philosophy, each generation owes obligations both to past generations (to follow tradition) and to future generations (to ensure that society provides a stable and supportive base on which future generations can build).<sup>51</sup> True Burkean Conservatives therefore should support laws protecting critical resources and life support systems that future generations will need to meet their needs.<sup>52</sup>

Most Burkean Conservatives are unlikely to think in terms of innovative reform of environmental regulation. Talk of novel environmental markets or taxes, subsidy reforms, or significant new devolution in government responsibilities raises concerns that such

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51. As Edmund Burke wrote in one of his most quoted passages, society is a partnership “between those who are living, those who are dead, and those who are to be born.” EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), available at [http://www.constitution.org/eb/rev\\_fran.htm](http://www.constitution.org/eb/rev_fran.htm) (last visited April 10, 2005).

52. One of the great Burkean conservatives of the twentieth century, Russell Kirk, thus was a strong environmentalist. According to Kirk,

In America especially, we live beyond our means by consuming the portion of posterity, insatiably devouring minerals and forests and the very soil, lowering the watertable, to gratify the appetites of the present tenants of the country.... Turning away from the furious depletion of natural resources, we ought to employ our techniques of efficiency in the interest of posterity, voluntarily conserving our land and our minerals and our forests and our water and our old towns and our countryside for the future partners in our contract of eternal society.

RUSSELL KIRK, PROSPECTS FOR CONSERVATIVES 81, 173 (1989). See generally John R.E. Bliese, *Conservative Principles and the Environment*, THE GREEN ELEPHANT (Fall 1997), at [http://www.rep.org/news/GEvol1/ge1.3\\_John.Bliese.html](http://www.rep.org/news/GEvol1/ge1.3_John.Bliese.html) (describing philosophical underpinnings of conservative environmentalism).

reforms may backfire and leave society in a worse position than the current approaches. Government in general should stick with environmental approaches that have worked in the past. This is not to say that the Burkean Conservative will never support reform. As just noted, the Burkean Conservative may believe that environmental protection requires stronger support than is currently provided. But the Burkean Conservative is not likely to seek out reform and will generally demand a higher demonstration of probable effectiveness than other conservatives.

## II. BUSH ADMINISTRATION POLICIES

Given the divergent environmental views of conservatives, one should not expect that the Bush Administration, or any Republican White House for that matter, in designing environmental policies would be able to please all conservatives. Yet many conservative environmentalists – particularly those with significant Libertarian or Pareto Optimist leanings – have been particularly disappointed in the Bush Administration’s environmental record. For example, the Property and Environmental Research Center (PERC), which gave birth to the term “free market environmentalism,” awarded the Bush Administration a C- in a 2003 “Mid-Term Report Card” for the first two years of the administration’s environmental policies.<sup>53</sup> Approximately two years later, PERC gave the Bush Administration’s first full term in office a slightly improved grade of C+ – passing but still mediocre.<sup>54</sup>

PERC concluded that the Bush Administration had mixed success on its individual environmental policies. The Administration did not deserve an A on any policy. The highest grade that the Bush Administration earned in the end-of-the-term report card was a B+ for “Chemical Plant Security,” perhaps not surprising given President Bush’s focus on the “War on Terrorism.”<sup>55</sup> At the other end of the grading scale, PERC awarded the Bush Administration a D for its management of ocean fisheries during its first term in office, because it both delayed

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53. PROPERTY AND ENVIRONMENTAL RESEARCH CENTER, MID-TERM REPORT CARD: BUSH ADMINISTRATION’S ENVIRONMENTAL POLICY (2003), available at [http://www.perc.org/pdf/reportcard\\_2002.pdf](http://www.perc.org/pdf/reportcard_2002.pdf).

54. PROPERTY AND ENVIRONMENTAL RESEARCH CENTER, REPORT CARD 2004: BUSH ADMINISTRATION’S ENVIRONMENTAL POLICY (2004) [hereinafter REPORT CARD 2004], available at [http://www.perc.org/publications/enviro\\_report\\_cards/reportcard\\_2004/reportcard\\_tblofcon\\_2004.php](http://www.perc.org/publications/enviro_report_cards/reportcard_2004/reportcard_tblofcon_2004.php).

55. *Id.* at 25-28. The Bush Administration scored relatively well for allowing “security priorities to be set by experts at Homeland Security rather than environmental officials at EPA” and “for attempting to improve federal security efforts by facilitating voluntary information exchanges between the public and private sectors.” *Id.* at 28. It did not receive a higher grade because it had “not been as aggressive as necessary to remove sensitive information about chemical plants that is currently available in public libraries” (an interesting criticism for a Libertarian-leaning think tank). *Id.*

implementing Individual Fishing Quotas (IFQs) and failed to eliminate subsidies for investments in fishing boats.<sup>56</sup> The Bush Administration received an F for “Air Quality Regulation” for promoting “unnecessarily expensive and even counterproductive pollution control strategies.”<sup>57</sup>

PERC has not been alone among conservative think tanks in criticizing the Bush Administration for not spearheading innovative new approaches to environmental problems. In an interview on National Public Radio, for example, Jerry Taylor of the Libertarian-leaning Cato Institute complained that the Bush Administration “won’t lift a finger” to promote various market approaches to the environment, such as permitting environmentalists to purchase grazing permits or water rights from agricultural interests.<sup>58</sup> According to the Cato Institute, the Bush Administration’s reluctance to pursue such innovative policies has been the result of being “ beholden to special interests like farmers and ranchers, a political base in the West.”<sup>59</sup>

To get a better sense of whether and how the Bush Administration has pursued various forms of environmental reform, the remainder of this Part examines the administration’s record on a variety of reforms frequently pushed by one or another conservative group – subsidy reform, information disclosure, economic incentives, market mechanisms, and devolution of responsibility to state and local governments. This review also permits a more detailed look at some of the tensions created by the divergent strands of philosophical thought that make up the modern conservative political movement. As one might expect, the Bush Administration’s record on environmental reform is neither as good nor as bad as political pundits claim. The overall picture, however, reveals an administration that seems in no rush to push major reform measures, perhaps because of the tensions within conservative environmental thought or general administrative disinterest in the environment, but also perhaps due to industry pressure to reduce, rather than reform, environmental regulation.

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56. *Id.* at 61-69. The PERC report card also complained that the Bush Administration had “accepted wholesale the Clinton administration’s expansion of marine protected areas without establishing criteria that would prevent political abuse.” *Id.* at 65.

57. *Id.* at 17. PERC also criticized the Bush Administration for “exaggerat[ing] the harm from current levels of air pollution and the benefits of additional air pollution controls” and “fail[ing] to take even baby steps toward addressing underlying shortcomings of the current Clean Air Act regulatory structure.” *Id.*

58. *Philosophy Behind the Bush Administration’s Environmental Politics* (All Things Considered, NPR radio broadcast, Jan. 21, 2004).

59. *Id.*

### A. Subsidy Reform

As noted already, a variety of conservative environmentalists argue that one of the most effective means of improving environmental conditions is to eliminate governmental subsidies that encourage environmentally harmful activities. Indeed, a number of existing subsidies contribute toward environmental damage.<sup>60</sup> Agricultural subsidies and price supports, for example, encourage the farming of marginal lands, with potentially adverse consequences for neighboring water quality, local imperiled species, and wetlands.<sup>61</sup> Water subsidies under the federal reclamation program similarly have encouraged the construction of environmentally damaging water projects, excessive withdrawals of water to the detriment of aquatic species, and higher levels of agricultural runoff with adverse consequences for water quality.<sup>62</sup> Various forms of federal subsidies to the commercial fishing industry have contributed to overcapacity and thus significant pressure to relax fishing quotas, leading to a decline in fisheries throughout United States waters.<sup>63</sup>

It is perhaps too much to hope that any administration would take on the reduction or elimination of all environmentally harmful subsidies, as subsidy recipients generally are well organized and typically have strong congressional support. Eliminating or reducing subsidies over their opposition is not politically easy.<sup>64</sup> Yet opponents of such subsidies have previously found ways to reduce the environmental damage that results from the subsidies. The 1996 Federal Agricultural Improvement and

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60. For a general discussion of subsidies and their impact on natural resources and the environment, see David Malin Roodman, *Paying the Piper: Subsidies, Politics, and the Environment* (Worldwatch Institute Paper No. 133, 1996).

61. See Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1166 (1999) [hereinafter *People or Prairie Chickens*] (noting that “governmental intervention in agriculture historically has presented one of the greatest threats to biodiversity”); Roodman, *supra* note 60, at 30, 32 (discussing the environmental impacts of farm subsidies); C. Ford Runge, *Environmental Impacts of Agricultural and Forestry Subsidies*, in ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT, *SUBSIDIES AND ENVIRONMENT: EXPLORING THE LINKAGES* 139, 142-47 (1996) (general discussion of the environmental effects of farm subsidies); see also J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263 (2000) (discussing the wide range of environmental harms caused by farming operations, including habitat loss and water degradation).

62. See JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 654-57 (3d ed. 2001) (discussing environmental impacts of subsidized reclamation program); *People or Prairie Chickens*, *supra* note 61, at 1167 (describing how water subsidies constitute a “major threat to aquatic species”).

63. See *People or Prairie Chickens*, *supra* note 61, at 1166.

64. See *id.* at 1169 (noting the difficulty of eliminating subsidies); Marcus Moench, *Groundwater: Potential and Constraints*, 2020 FOCUS, Oct. 2001, available at [http://www.ifpri.org/2020/focus/focus09/focus09\\_08.htm](http://www.ifpri.org/2020/focus/focus09/focus09_08.htm) (noting political difficulty of eliminating energy subsidies).

Reform Act (FAIR) is an illustration.<sup>65</sup> Prior to FAIR, the subsidies that a farmer received generally were linked to the farmer's production levels and thus encouraged farmers to increase the acreage that they farmed.<sup>66</sup> FAIR reduced this environmentally perverse incentive by replacing most traditional crop subsidies with a program of "production flexibility contracts" that gave farmers fixed payments that were to decline over a seven-year period of time.<sup>67</sup> FAIR thus provided for a gradual reduction of subsidies and decoupled the subsidies from current production levels.<sup>68</sup> Farmers no longer would benefit under the subsidy program by planting additional acreage, and thereby increasing any associated environmental harm.

FAIR illustrates two techniques by which an administration can try to reduce the environmentally harmful effect of subsidies over strong political opposition. First, reformers can seek to modify the way in which a subsidy is awarded in order to remove the environmentally perverse incentives, rather than try to eliminate or reduce the subsidy funding. So long as most subsidy recipients continue to get the same general level of funds from the government, they may not care strongly about how the subsidy is allocated. In at least some cases, reformers may even be able to reconfigure a subsidy to reward and thus encourage environmentally beneficial behavior.<sup>69</sup> Second, reformers can agree to phase out a subsidy over time rather than seeking to end it tomorrow. The present value of \$X in future subsidies is less than \$X in current subsidies. Indeed, using reasonable discount rates in today's economy, the present value of subsidies that will not be received for twenty or more years may be less than half their nominal value.<sup>70</sup> Although subsidy recipients obviously would prefer to maintain their subsidies in perpetuity, they are likely to fight future reductions less than more immediate reductions.

In its first term, however, the Bush Administration showed little interest in reducing or eliminating environmentally destructive subsidies or even in reforming the subsidies to remove perverse incentives. As

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65. Federal Agricultural Improvement and Reform Act, Pub. L. No. 104-127, 110 Stat. 888 (1996).

66. See REPORT CARD 2004, *supra* note 54, at 2 (noting pre-FAIR practice of tying subsidies to production).

67. See Christopher R. Kelley, *Recent Federal Farm Program Developments*, 4 DRAKE J. AGRIC. L. 93 (1999) (providing a general description of FAIR).

68. See Economic Research Service, Department of Agriculture, 1996 FAIR Act Frames Farm Policy for 7 Years, AG. OUTLOOK SUPP., April 1996, at 1, *available at* <http://www.ers.usda.gov/publications/agoutlook/aosupp.pdf> (discussing details and implications of FAIR).

69. See *People or Prairie Chickens*, *supra* note 61, at 1171-72 (discussing the opportunity to transform existing subsidies into "environmentally benign transfer payments").

70. At a four percent discount rate, for example, a subsidy payment of \$1,000 to be received in twenty years is worth only \$456 today. At a five percent discount rate, the present value of the future subsidy drops to only \$377.

noted, PERC gave the Bush Administration an exceptionally low grade (a D) on its marine fisheries policy in large part because the administration had taken no steps to remove commercial fishing subsidies.<sup>71</sup> PERC complained in particular about the administration's failure to reform the Fishing Vessel Obligation Program, which provides low-interest loans to fishermen wishing to acquire more powerful vessels or more effective equipment, and the Capital Construction Fund, which enables fishermen to use pre-tax funds to acquire new vessels.<sup>72</sup> PERC also noted that the Bush Commerce Department continues to charge user fees to United States fishermen that cover less than one half of one percent of the actual costs to the government of fisheries management.<sup>73</sup>

The Bush Administration is not merely neglectful of the subsidy issue—in some cases, the administration has helped protect and even extend environmentally harmful subsidies. The federal Bureau of Reclamation, for example, delivers subsidized water to farmers pursuant to contracts that, in many cases, are subject to periodic renewal and renegotiation.<sup>74</sup> Most of the contracts in the Bureau's largest project (the huge Central Valley Project (CVP) in California) are currently up for renewal.<sup>75</sup> Over the objections of environmental organizations and libertarian groups, the Bush Administration currently is locking in existing subsidies by renewing CVP contracts for new 25-year terms under largely the same pricing provisions as before.<sup>76</sup> These subsidies amount to approximately \$416 million per year.<sup>77</sup> Although current law

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71. REPORT CARD 2004, *supra* note 54, at 61-64 (explaining why marine fisheries policy received a grade of D).

72. *Id.* at 64. For a brief overview of subsidies provided to the fishing industry, see Becky Mansfield, Fisheries Development or Open Access? Creating Large-Scale Fishing on the U.S. West Coast, available at <http://globetrotter.berkeley.edu/macarthur/marine/papers/mansfield-3.html> (last visited May 1, 2005).

73. REPORT CARD 2004, *supra* note 54, at 64.

74. See SAX ET AL., *supra* note 62, at 651-53 (describing the contract system of the federal Bureau of Reclamation).

75. See Environmental Working Group, Virtual Flood, available at <http://www.ewg.org/reports/virtualflood/execsumm.php> (last visited April 29, 2005) (critiquing the proposed contract renewals as well as the subsidies received by farmers in California's Central Valley).

76. See, e.g., Bettina Boxall, *Water Pacts Give State's Growers New Profit Stream*, L.A. TIMES, Feb. 16, 2005, at A1 (describing the controversy surrounding the renewal of the CVP contracts); Glen Martin, *Big Farms Found to Get Most Water Subsidies*, S.F. CHRON., Dec. 15, 2004, at B1 (quoting Representative George Miller, D-California, as criticizing the Bush Administration for attempting to "lock in" subsidies from contracts written in the 1950s). The renewal of the contracts has led the libertarian Cato Institute to question the Republican commitment to "free markets and letting the economic chips fall where they may." Peter Van Doren & Jerry Taylor, *Dam Pacts*, available at <http://www.cato.org/research/articles/doren-040405.html> (last visited April 29, 2005).

77. For a discussion of the subsidies received by CVP farmers and the impacts of the subsidies, see Environmental Working Group, *California Water Subsidies*, available at <http://www.ewg.org/reports/watersubsidies/execsumm.php> (last visited April 29, 2005).

provides for contract renewals, critics charge that the Bush Administration is signing contracts that provide too much water, for too long of a term, and perhaps most importantly, at an unnecessarily large subsidy.<sup>78</sup>

One reason that the Bush Administration does not score well on subsidy reform may be that reducing subsidies to industrial sectors such as agriculture or fishing can produce philosophical conflicts within the administration's conservative political base. Although Libertarians<sup>79</sup> and Pareto Optimists<sup>80</sup> generally favor subsidy elimination or reform, some Burkean Conservatives may be concerned that subsidy reforms would undermine or threaten years of reliance interest by subsidy recipients, as well as generate unexpected and perhaps deleterious consequences.<sup>81</sup> The Burkean Conservative wishes to ensure some stability in governmental policy over time, which significant and unexpected changes in subsidy policies can undermine. Although the Burkean Conservative might be troubled by the consequences of the existing subsidy scheme, he is likely to balance any gains to the environment against the potential costs to societal stability. Likewise, Hamiltonian Conservatives may worry about the impact on economic growth in the subsidized sector.<sup>82</sup>

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78. Boxall, *supra* note 76 (critics "complain that the new contracts skirt Congress' intent in three major areas: their duration, the amounts of water involved and the price the irrigators will pay").

According to the Bush Administration, the new contracts are needed to "provide for stability and functioning markets." *Id.* Although water markets can be environmentally beneficial, however, they are not as advantageous as the elimination of subsidies. Markets merely reallocate existing supplies, while subsidy-reduction, by increasing the price that farmers must pay for water, can lead farmers to reduce their consumption, thus reducing overall demand for off-stream consumption. While firm water rights are important to markets, moreover, contracts can provide firm rights without continuing existing subsidies.

79. See, e.g., J. Bishop Grewell, *Farm Subsidies Are Harm Subsidies*, AM. ENTER. ONLINE, at [http://www.taemag.com/issues/articleid.17703/article\\_detail.asp](http://www.taemag.com/issues/articleid.17703/article_detail.asp) (last visited April 29, 2005) (criticizing farm subsidies because of the environmental harm that they create).

80. See, e.g., PROJECT 88: HARNESSING MARKET FORCES TO PROTECT OUR ENVIRONMENT: INITIATIVES FOR THE NEW PRESIDENT 6 (1988) (report prepared by more than 50 economists recommending "removing ... government subsidies which promote economically inefficient and environmentally unsound practices").

81. See, e.g., Daryll Ray, *Whence Low Prices? High Payments or the Lack of an Effective Throule*, DELTA FARM PRESS, Nov. 19, 2004, available at <http://deltafarmpress.com/news/111904ray-column> (cautioning against elimination of farm subsidies); Robert Goodman, *A Five-Point Defense of Farm Subsidies*, ALFA FARMERS, available at [http://www.alfafarmers.org/issues/farm\\_programs.phtml](http://www.alfafarmers.org/issues/farm_programs.phtml) (last visited May 8, 2005) (defending farm subsidies in part on the ground that they provide stability and that phasing them out would have "unintended consequences").

82. See, e.g., Jim Langcuster, *Economists Defend Cotton Subsidies*, S.E. FARM PRESS, Feb. 18, 2004, available at [http://www.southeastfarmpress.com/mag/farming\\_economists\\_defend\\_cotton](http://www.southeastfarmpress.com/mag/farming_economists_defend_cotton) (discussing view of agricultural economists who believe that farm subsidies are important for the American economy).

This divergence within conservative thought on whether or not to support environmental improvements through government subsidy reform also highlights a potentially significant tension in the lens through which conservative groups interpret the takings doctrine. Libertarians may support the takings clause as a means of protecting individuals and property from the government and a popular majority; Pareto Optimists may favor takings protections in order to ensure that the government does not suffer from “fiscal illusion” when deciding whether to appropriate private property rights. Burkean Conservatives, by contrast, may support the takings protections in order to ensure stability and security in expectations, while Hamiltonian Conservatives may see the takings protections as providing stable legal rights from which business can effectively operate.

Given the different perspectives on why uncompensated takings should be unconstitutional, these various conservative groups may disagree on whether the elimination of existing subsidies should constitute an unconstitutional “taking” of the recipients’ “property.” The question of whether the elimination of subsidies should constitute a “taking” is likely to seem nonsensical to Libertarians and Pareto Optimists. To these conservatives, protecting governmental subsidies does not fall within the purpose of the takings clause. Since subsidies are inappropriate *ab initio* to Libertarians and Pareto Optimists, the government should not protect the subsidies. Extending takings protection to subsidies, however, may seem reasonable to at least some Burkean or Hamiltonian Conservatives because the purpose of the clause, in their view, is to protect legal expectations and ensure economic stability.<sup>83</sup> Judicial doctrine reflects this tension to some degree. Courts have recognized that a wide variety of governmental promises, including contractual promises by the government, can constitute “property” for purposes of the takings protection.<sup>84</sup> Yet at least some courts have felt uncomfortable binding the government to financial promises that the government later decides were ill advised and thus typically give the

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83. This argument has played out to some degree in the debate over whether public utilities that undergo deregulation should receive, as a matter of constitutional law or policy, compensation for various “stranded assets.” See, e.g., WILLIAM J. BAUMOL & J. GREGORY SIDAK, *TRANSMISSION PRICING AND STRANDED COSTS IN THE ELECTRIC POWER INDUSTRY* (1995) (arguing for the protection of such assets).

84. See, e.g., *Lynch v. United States*, 292 U.S. 571, 579 (1934) (holding that contracts can constitute property for purposes of protection under the takings clause of the Fifth Amendment); *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397 (9th Cir. 1993) (same); *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 821 (9th Cir. 1990) (same).

government wider latitude under the takings clause to change subsidy policy than real property rules.<sup>85</sup>

The Bush Administration's approach toward environmentally harmful subsidies, however, does not appear to be driven by splits within conservative environmental thought. If stability were the concern, for example, reforms could be devised that address it. For example, by phasing out subsidies over time, FAIR helped ensure gradual rather than sudden change.<sup>86</sup> Yet the Bush Administration has shown no interest in trying to find effective ways of eliminating perverse incentives. Rather, in some cases, the Bush Administration has willingly created or enlarged such incentives. While expressing general opposition to excessive farm subsidies,<sup>87</sup> for example, President Bush in 2002 signed a new farm bill that not only increased farm subsidies but reestablished a link between subsidies and current production levels.<sup>88</sup>

As in the Reagan Administration,<sup>89</sup> budget deficits might ultimately become a driving force for reduced subsidies and thus for valuable reform. In February 2005, President Bush presented a fiscal year 2006 budget that tries to spread reductions among a large number of non-defense programs.<sup>90</sup> President Bush proposed both caps on the subsidies

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85. See, e.g., *Madera Irrigation Dist.*, 985 F.2d at 1397 (permitting changes in the terms of reclamation water contracts on renewal); *Peterson v. U.S. Dep't of Interior*, 899 F.2d 799 (9th Cir. 1990) (allowing modification of price provisions of a reclamation water contract).

86. 7 U.S.C. §§ 7202(5), 7231, 7235 (2000).

87. See, e.g., Richard T. Estrada, *Bush Warns Farmers Away from Subsidies*, SCRIPPS-MCCLATCHY WESTERN SERV., Nov. 28, 2001 (reporting that President Bush in an interview stressed that the era of massive farm subsidies is over).

88. Under the 2002 Farm Security and Rural Investment Act (FSRI), farmers can choose one of two measures to determine their subsidy level: their base acreage in 1985 or an average of the number of acres that they have planted over the last three years. REPORT CARD 2004, *supra* note 54, at 2. FSRI thus provides an incentive to farmers to increase the number of acres that they plant so that, in future years, their subsidies will increase. For a detailed overview of the provisions of FSRI, see Economic Research Service, Department of Agriculture, Farm Policy – The 2002 Farm Bill: Provisions and Economic Implications, June 4, 2003, at <http://www.ers.usda.gov/Features/farmbill>; Economic Research Service, Department of Agriculture, Farm Policy: Title I – Commodity Programs, July 9, 2002, at <http://www.ers.usda.gov/Features/farmbill/titles/title1commodities.htm>.

President Bush's decision to sign the 2002 farm bill "angered many fellow Republicans," who felt that the President's decision "abandoned principles of free markets." *Politics of Farming* (Talk of the Nation, NPR radio broadcast, May 15, 2002); see also Robert Novak, *Bush, DeLay Go Own Ways*, CHI. SUN-TIMES, May 6, 2002, at 33 (noting that Bush's willingness to sign the farm bill "appalled" many GOP leaders who felt that the bill was a "caricature of government excess").

89. See Bromley, *supra* note 4 (observing that Reagan tax cuts drove need to eliminate funding for environmentally harmful water projects).

90. See Office of Management and Budget, Overview of the President's 2006 Budget, at <http://www.whitehouse.gov/omb/budget/fy2006/overview.html> (last visited April 30, 2005) (noting Bush Administration's plan to "tighten spending further" in Fiscal Year 2006 "by limiting the growth in overall discretionary spending, even after significant increases in defense and homeland security, to 2.1 percent – less than the projected rate of inflation").

that any individual farmer can receive and overall reductions in the size of the farm program – although the subsidies would still remain linked to some degree to recent production levels.<sup>91</sup> In the eyes of environmental organizations, the proposed changes would constitute a major reform of the subsidy program.<sup>92</sup> Whether the Bush Administration will expend the political capital needed to enact the proposed changes, however, remains to be seen.

### B. Information Disclosure

Since the late 1980s, information disclosure has become one of the most popular “innovations” in environmental management. Current information disclosure techniques fall into two general categories.<sup>93</sup> First, the government requires some companies to disclose information regarding their environmental performance both to inform public debate about environmental regulation and to place public pressure on companies to improve their performance. Perhaps the best example of this first form of information disclosure is the federal Toxics Release Inventory (TRI), which requires companies to inform the Environmental Protection Agency of their releases of major toxic substances;<sup>94</sup> this information is then published by EPA and widely disseminated to the public through the media and environmental organizations.<sup>95</sup> Various studies have suggested that the TRI attracts the attention of a company’s shareholders, customers, employees, and neighbors and has provided companies with a significant incentive to lower their TRI releases (on paper if not in reality).<sup>96</sup>

Using a second information disclosure technique, the government requires various companies to disclose information about the environmental risks of their products or production methods so that consumers can decide whether or not to purchase their products. Perhaps

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91. See Jerry Hirsch, *Growing Concerns on Farm Cuts*, L.A. TIMES, Feb. 8, 2005, at C1 (discussing proposed caps and tightening of agricultural subsidies).

92. See, e.g., *id.* (noting the views of the Environmental Working Group).

93. For general discussions on the use of information disclosure in environmental policy, see Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001).

94. See *id.* (describing the TRI). For detailed information on the TRI, see Environmental Protection Agency, Toxics Release Inventory (TRI) Program, at <http://www.epa.gov/tri> (last visited April 7, 2005).

95. Environmental Defense, for example, supports a web-based Environmental Scorecard, based in part on TRI data, that permits people to use their zip code to find major corporate polluting facilities in their vicinity and the emissions of those facilities. See Environmental Defense, Scorecard: The Pollution Information Site, at <http://www.scorecard.org> (last visited May 8, 2005).

96. See generally Archon Fung & Dara O’Rourke, *Reinventing Environmental Regulation from the Grassroots Up: Explaining and Expanding the Success of the Toxics Release Inventory*, 25 ENVTL. MGMT. 115 (2000).

the best example of this second form of information disclosure is California's Proposition 65, otherwise known as the Safe Drinking Water and Toxic Enforcement Act of 1986,<sup>97</sup> which requires companies to post warnings on all products containing substances known to the State of California to be carcinogenic or to cause reproductive toxicity.<sup>98</sup> A prominent federal example is the labeling requirement for "dolphin-safe" tuna.<sup>99</sup> The two major approaches to information disclosure obviously overlap: product labels or warnings also place pressure on companies to change their products or production methods.<sup>100</sup> Even if a company does not change its product or production method, however, this second form of information disclosure allows consumers to make educated decisions regarding their purchases.

Information disclosure fits well with the goals of a number of strands of conservative philosophy.<sup>101</sup> In the case of Libertarians, for example, information disclosure focuses attention on the power of individuals, rather than governments, to influence environmental behavior. To Pareto Optimists, information disclosure helps market participants make rational decisions.<sup>102</sup> To Jeffersonian Conservatives, information disclosure helps local governments and populations play a more informed role. The fit between information disclosure and conservative goals is not always perfect. Libertarians, for example, might wonder whether the government need intervene to provide information to consumers, or whether markets will automatically provide the information that consumers demand.<sup>103</sup> Pareto Optimists similarly might worry that the cost of providing some types of information is not worth the cost to the reporting organizations. In general, however, most environmental conservatives support information disclosure as a useful environmental tool.

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97. Cal. Health & Safety Code §§ 25249.5-25249.13 (2005).

98. Cal. Health & Safety Code § 25249.6 (2005).

99. Dolphin Protection Consumer Information Act of 1990, 16 U.S.C. § 1385 (2005).

100. See Ellen K. Silbergeld, *Risk Assessment: The Perspective and Experience of U.S. Environmentalists*, 101 ENVTL. HEALTH PERSPECTIVES 100 (1993) (noting that Proposition 65 has led to product reformulation, and citing study by the California Attorney General that assessed Proposition 65 as an "efficient and productive mechanism for risk reduction").

101. For conservative perspectives on information disclosure, see Jeffrey C. Terry & Bruce Yandle, *EPA's Toxic Release Inventory: Stimulus and Response*, 18 MANAGERIAL & DECISION ECON. 433 (1997); J. Bishop Grewell, *Keeping Forests Green: Certification Competition*, Sept. 2003, at <http://www.perc.org/publications/percreports/sept2003/forests.php>.

102. See, e.g., REPORT CARD 2004, *supra* note 54, at 5 (noting that government labeling requirements of organic food are "'public goods' of value to all").

103. Conservatives may point to various certification or information programs run by non-profit organizations, such as the LEEDS standards for green buildings or the Forest Stewardship Council's certification program for sustainable forestry, as preferable to governmental information disclosure.

Despite its appeal to a range of conservative groups, the Bush Administration has shown little interest in initiating new information-disclosure approaches or uses. In several cases, the Bush Administration has followed through on information-disclosure initiatives begun during the Clinton Administration. In 2001, for example, the Bush Administration announced that it would require greater disclosure of lead releases in the TRI, as initially proposed by the Clinton EPA.<sup>104</sup> The Bush Administration's approach to the TRI otherwise has been mixed. The administration, for example, has made significant efforts to provide the TRI to the public electronically, enabling more robust analyses of its information but drawing criticism from some environmental groups that the electronic report provides less information to the public than the traditional report has provided.<sup>105</sup> The Bush Administration also has not addressed long-standing concerns about the accuracy of TRI information<sup>106</sup> and the administration has informally proposed cutting back on reporting requirements, although it has not followed through on any of these proposals to date.<sup>107</sup>

Promoting certification of organic foods, the Bush Administration has helped implement the Organic Foods Production Act of 1990,<sup>108</sup> created a cost-sharing program in 2001 to help growers in 15 states

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104. See Environmental Protection Agency, TRI Lead Rule, available at [http://www.epa.gov/tri/lawsandregs/tri\\_pb\\_rule.htm](http://www.epa.gov/tri/lawsandregs/tri_pb_rule.htm) (last visited May 1, 2005) (describing the lead rule); Randy Lee Loftis, *Toxic Emission Figures Disputed*, DALLAS MORN. NEWS, June 23, 2004, at 10A (noting increased lead reporting in 2002).

105. Compare Press Release, Office of Management & Budget, OMB Urges EPA to Accelerate and Simplify Distribution of Widely Used Toxic Release Inventory Data (Mar. 4, 2002), available at <http://www.whitehouse.gov/omb/pubpress/2002-13.html> (describing OMB's suggestion that EPA make greater use of electronic reporting), with Bush Greenwatch, EPA Narrows Access to Toxics Release Data, July 6, 2004, available at [http://www.bushgreenwatch.org/mt\\_archives/000149.php](http://www.bushgreenwatch.org/mt_archives/000149.php) (criticizing EPA's decision not to release traditional full TRI report to the public as part of its new electronic reporting approach).

106. See Loftis, *supra* note 104 (discussing criticisms of TRI program for underreporting actual releases).

107. See, e.g., Cindy Skrzycki, *Report Sheds Light on Changing Role of Regulation*, WASH. POST, Jan. 25, 2005, at E1 (noting proposal to change reporting thresholds for the TRI program); Ken Ward, Jr., *Toxic Emissions Up Again in W. Va.*, CHARLESTON GAZETTE, Feb. 20, 2005, at P9N (noting Bush Administration proposal to reduce data that companies must report); OMB Watch, Industry Pushing for TRI Reporting Changes, Oct. 6, 2003, at <http://www.ombwatch.org/article/articleview/1837/1/241?TopicID=1> (reporting that "EPA is in the process of developing a rule that could change how mining companies report toxics in waste rock under TRI"); OMB Watch, Proposals to Lighten TRI Burden Likely to Reduce Information, Nov. 17, 2003, at <http://www.ombwatch.org/article/articleview/1926/1/241?TopicID=1> (criticizing EPA's efforts to lighten TRI burden on industry); OMB Watch, EPA Plans for TRI Burden Reduction, Nov. 2, 2004, at <http://www.ombwatch.org/article/articleview/2499/1/241?TopicID=1> (same); Children's Environmental Health Network, Right-to-Know & Access to Government Information, at <http://www.cehn.org/cehn/reportaccess.html> (last visited April 7, 2005) (complaining that the Bush Administration is "proposing reducing the scope of the Toxic Release Inventory").

108. 7 U.S.C. §§ 6501-22 (2005).

become certified,<sup>109</sup> and supported the provisions of the 2002 Farm Security and Rural Investment Act (FSRI) that provide federal cost sharing to eligible organic growers throughout the nation who wish to be certified.<sup>110</sup> Again, however, the Clinton Administration took the lead in developing a federal program for certifying organic foods, and the Bush Administration has largely followed.<sup>111</sup> Several consumer organizations, moreover, have criticized and brought suit against the Bush Administration for trying to modify the certification standards to allow a broader and questionable segment of foods to be labeled as organic, improperly overseeing the certification process, and failing to provide documents on how the certification standards and processes were developed.<sup>112</sup>

The Bush Administration, moreover, has actively opposed requiring food suppliers to disclose whether the food contains any genetically modified organisms (GMOs) and has complained that European efforts to require labeling of GMO food products violate international trade rules.<sup>113</sup> The Bush Administration's opposition reflects the split within conservative thought as to whether consumers can "rationally" evaluate various forms of environmental risks. To most Libertarians and many Pareto Optimists, the consumer is king; the consumer, rather than the government, should decide what people buy and consume. As noted in Part I, however, some conservatives, and in particular Hamiltonian Conservatives, view the public as unable to evaluate particular environmental risks on a rational basis and would hand the management of such risks over to risk experts. In line with this view, some

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109. REPORT CARD 2004, *supra* note 54, at 5.

110. National Organic Certification Cost-Share Program, 7 U.S.C. § 6523 (2005).

111. See REPORT CARD 2004, *supra* note 54, at 5 (noting that Clinton Administration deserved credit for initiating the certification program). The Clinton Administration first proposed regulations for an organic labeling program in 1997. See National Organic Program, 62 Fed. Reg. 65,850 (1997).

112. See *Center for Food Safety v. Dep't of Ag. (D.D.C.)* (complaint filed Aug. 5, 2004) (seeking release of public documents detailing qualifications of certifiers); Stephen Clapp, *Lawsuit Questions Qualifications of Organic Certifying Agents, Labeling*, FOOD CHEMICAL NEWS, Aug. 16, 2004, at 1 (discussing the lawsuit by the Center for Food Safety against the Department of Agriculture); Thane Peterson, *The Lies Spoiling Organic Food*, BUSINESSWEEK ONLINE, July 9, 2003 (noting that, according to a Consumer Reports editorial, since initial organic standards were developed, "a number of attempts have been made to jiggle the rules so that foods can carry this designation that otherwise wouldn't qualify"); Press Release, Center for Food Safety, USDA Sued Over Secrecy of Organic Agriculture Records (Aug. 5, 2004), at [http://www.centerforfoodsafety.org/press-release8\\_5\\_2004.cfm](http://www.centerforfoodsafety.org/press-release8_5_2004.cfm) (press release announcing and describing lawsuit against Department of Agriculture).

113. See REPORT CARD 2004, *supra* note 54, at 4 (noting that the Bush Administration has resisted pressure to label GMO foods). The Bush Administration also warned Oregon that a state ballot measure that would have required local labeling of GMO foods could violate federal law. See Elizabeth Weise, *FDA Tries to Remove Genetic Label Before It Sticks*, USA TODAY, Oct. 9, 2002, at 7D (describing letter sent by the deputy commissioner of the U.S. Food and Drug Administration to Oregon Governor John Kitzhaber).

conservatives oppose governmentally required labeling of GMO foods because it would imply health risks for which they do not believe that there is any scientific evidence.<sup>114</sup>

### C. Economic Incentives

A third approach to environmental policy reform, favored in particular by Pareto Optimists, is the creation of new economic incentives designed to encourage people and companies to adopt more environmentally beneficial behavior. These incentives can be either negative, such as environmental taxes and fees, or positive, such as environmental subsidies and tax credits. Pareto Optimists are attracted to incentive programs as a means of internalizing the environmental costs and benefits of particular actions. If incentives are set equal to the cost of a particular environmental harm, for example, incentives encourage people and businesses who engage in activities leading to such harm to reduce the harm to the extent that the harm outweighs the reduction cost – the appropriately “efficient” result in the eyes of the classical Pareto Optimist.<sup>115</sup>

The government can try to reach the same result through a regulatory scheme that estimates the costs and benefits of particular activities and then orders companies to reduce harmful activities to the degree that the benefits appear to outweigh the costs. To Pareto Optimists, however, such a “command and control” approach is inferior to incentives in at least two ways. First, under the command and control approach, the government needs accurate information about both costs and benefits in order to determine the appropriate regulatory standard. While the government might have some information about the benefits of regulation, industry generally has the best cost information and an incentive to overstate the costs in communications with the government. Even if the government could obtain accurate information, moreover, it must spend money and resources obtaining and processing that information. Under an incentive system, however, the government needs only to set the incentives equal to the benefits (a tough task, but no tougher than in determining command and control regulations) and then

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114. See, e.g., Henry I. Miller, *Biotech Labeling vs. Scientific Consensus*, WALL ST. J., Nov. 1, 2002, at A18 (letter to the editor supporting Bush Administration’s opposition to GMO labeling); REPORT CARD 2004, *supra* note 54, at 4 (giving the Bush Administration an A grade for its opposition to labeling).

115. See SALZMAN & THOMPSON, *supra* note 37, at 45 (describing the theory behind environmental taxes and fees).

let the companies balance the costs and determine the appropriate behavior.<sup>116</sup>

A second way in which the command and control system is inferior is that regulated entities have no incentive to perform better than the regulatory standard because they do not directly enjoy any benefit from doing so. Even if the aggregate costs of meeting a higher standard are less than the societal benefits, industry will not voluntarily improve its performance. In many cases, the governmental standard will be lower than the economically optimal performance for a particular company because the government did not have adequate information when it set the original standard, the government miscalculated the appropriate standard, the costs and benefits have changed over time, or the company enjoys lower compliance costs than the industry on average. Properly structured economic incentives, by contrast, provide individuals and companies with a continuing incentive to improve. If individuals and companies can find a less expensive way to improve their environmental performance, they will, since they can then lower their taxes or increase their incentive payments.<sup>117</sup> Incentives therefore can lead to greater environmental protection.

Libertarians also often call for reforming environmental policy by making greater use of incentive systems.<sup>118</sup> Libertarians and Pareto Optimists, however, may disagree on the types of incentives to use. Libertarians, for example, are likely to favor positive incentives (which encourage rather than penalize people's behavior) and common-law type damage provisions (which internalize the costs of personal injuries or property damage). As explained in Part I, however, Libertarians may oppose negative incentives, such as taxes, that penalize activities not leading to personal injury or property damage (e.g., taxes on the development of the habitat of an imperiled species). Pareto Optimists, by contrast, generally are interested in internalizing all forms of environmental costs through either positive or negative incentives.

The Bush Administration has shown strong enthusiasm for positive economic incentives, particularly in protecting habitat and other

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116. See BAXTER, *supra* note 18, at 65-68, 76 (noting that command regulations require the government to have more information than economic incentive systems); *People or Prairie Chickens*, *supra* note 61, at 1179 (same).

117. See BAXTER, *supra* note 18, at 78 (noting that taxes provide a continual incentive to improve); *People or Prairie Chickens*, *supra* note 61, at 1180 (same).

118. In establishing criteria for evaluating the Bush Administration's environmental performance, for example, the Property and Environmental Research Center (which is partly economic-conservative in orientation and partly libertarian) looked to see whether "[m]arket forces, as opposed to command-and-control, have a major role in determining and enforcing standards" and whether the government worked to change "the incentives of private owners so that they would protect more species and clean up more hazardous waste." REPORT CARD 2004, *supra* note 54, at viii.

environmentally sensitive land. In its first term, the administration created a number of new incentives for property owners to engage in conservation – part of what President Bush has labeled his “legacy of cooperative conservation.”<sup>119</sup> Typical programs include the Landowner Incentive Program (which provides federal cost-sharing funds to states wishing to establish positive incentive programs for private property owners who protect and restore habitat on their land)<sup>120</sup> and the Private Stewardship Grants program (which provides federal funds for local, private, and non-profit conservation benefiting species listed under the federal Endangered Species Act).<sup>121</sup> Other programs help encourage wetlands restoration in Southern Oregon, the removal of invasive plants in Southeastern Florida, and mitigation measures for threatened marine species in the Kenai Fjords of Alaska.<sup>122</sup>

Throughout its period in office, the Bush Administration also has supported increased funding for positive incentive programs.<sup>123</sup> Despite budget cuts in a wide variety of social programs, for example, the Bush Administration currently is proposing increased funding for a wide variety of environmental incentive programs run by the Department of Agriculture, Department of the Interior, Department of Commerce, and Environmental Protection Agency.<sup>124</sup> These increases would build on record budgetary outlays for a variety of environmental incentive programs in prior Bush Administration budgets.<sup>125</sup>

The Bush Administration has shown no comparable enthusiasm for environmental fees or taxes. The principal reason for the administration’s bias toward positive incentives may well be political: subsidies and other

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119. See *Bush Reinforces Commitment to Cooperative Conservation in 2006 Budget*, U.S. FED NEWS, Feb. 9, 2005 [hereinafter *Cooperative Conservation Budget*].

120. For more information on the Landowner Incentive Program, see Fish and Wildlife Service, Landowner Incentive Program, at <http://federalaid.fws.gov/lip/lip.html> (last visited May 2, 2005).

121. The main web page for the Department of the Interior’s Private Stewardship Grants Program is [http://endangered.fws.gov/grants/private\\_stewardship](http://endangered.fws.gov/grants/private_stewardship) (last visited May 2, 2005).

122. *Cooperative Conservation Budget*, *supra* note 119.

123. See The White House, Key Bush Environmental Accomplishments, at [http://www.whitehouse.gov/infocus/environment/key\\_bush\\_environmental\\_accomplishments.pdf](http://www.whitehouse.gov/infocus/environment/key_bush_environmental_accomplishments.pdf) (last visited May 9, 2005) (describing Bush Administration efforts to increase positive incentives to farmers to conserve their land and for “cooperative conservation”).

124. *Id.* The FY2005 budget requests, for example, proposed almost a 25 percent increase for “cooperative conservation programs” administered by the Department of the Interior. *Id.*

125. See, e.g., *Bush’s FY 2005 Budget Proposes Highest Level of Funding for Environment, Natural Resource Programs*, STATE NEWS SERV., Feb. 2, 2004 (discussing budget proposals in FY 2005). Critics of the Bush Administration, however, note that President Bush failed to “live up to his campaign pledges to ‘fully fund’ the Land and Water Conservation Fund,” which provides funding for various environmental acquisitions. League of Conservation Voters, 2004 Presidential Candidate Profiles: George W. Bush 13, 15, at [http://www.johnkerry.com/pdf/2004\\_lcv\\_profiles.pdf](http://www.johnkerry.com/pdf/2004_lcv_profiles.pdf) (visited January 5, 2005) (on file with author).

positive incentive programs are politically far more popular than fees and taxes.<sup>126</sup> Someone must pay for either form of incentive: regulated individuals or companies bear the environmental fee or tax, while general taxpayers pay for the subsidies. In practice, however, subsidies are politically easier to pass, both because their cost is spread among all taxpayers and because they are buried in the overall budget. The administration also may favor positive incentives because of a belief that companies and private landowners have an entitlement to engage in the environmentally damaging behavior at issue and therefore should not have to incur a tax to do so. While Pareto Optimists may not care whether an incentive is positive or negative, many Libertarians as noted above believe that the government should not penalize the exercise of property rights that do not cause personal injury or damage to other property.

Although the Bush Administration has promoted positive incentives, it is less clear whether the administration has favored incentives programs because of their environmental benefits or because the regulated community likes them. The Bush Administration occasionally has displayed a willingness to modify incentive programs to favor politically powerful constituencies in ways that jeopardize environment benefits. One of the largest and longest standing incentive programs, for example, is the Conservation Reserve Program (CRP).<sup>127</sup> Created as part of the 1985 Farm Bill, CRP pays farmers to retire marginal farm land from production and plant native grasses and other plants beneficial to wildlife on the land.<sup>128</sup> With the approval of the Bush Administration, Congress in 2002 modified the program to permit farmers to engage in some light grazing and occasional haying on CRP land as part of the Farm Security and Rural Investment Act (FSRI).<sup>129</sup> According to a lawsuit filed by the National Wildlife Federation against the government, the Bush Administration has used this provision to permit millions of acres of CRP

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126. See Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313, 315-17, 348, 355 (1998) (discussing the political barriers facing environmental taxes).

127. 16 U.S.C. §§ 3801-62 (2005); 7 C.F.R. §§ 1410.1-1401.63 (2004).

128. For general overviews of CRP, see Barton H. Thompson, Jr., *Conservation Options: Toward a Greater Private Role*, 21 VA. ENVTL. L.J. 245, 271-72 (2001-02); Farm Service Agency, Department of Agriculture, Conservation Reserve Program, at <http://www.fsa.usda.gov/dafp/cepd/crp.htm> (last visited May 3, 2005).

129. 16 U.S.C. § 3832(a)(7) (2005). See Dave Henderson, *Outdoors – Groups Sue to Protect Conservation Program*, PRESS & SUN-BULL., Oct. 27, 2004, at 2C (describing 2002 change in CRP program). Under the congressional change, grazing and haying can be permitted only when and where “consistent with the conservation of soil, water quality, and wildlife habitat (including habitat during nesting seasons for birds in the area).” 16 U.S.C. § 3832(a)(7) (2005).

land to be subjected to substantial haying and grazing – to the benefit of the landowners but the detriment of habitat value.<sup>130</sup>

#### D. Market Mechanisms

Another policy reform long advocated by Pareto Optimists is the greater use of tradable permits – or what sometimes are called “cap and trade” systems. The mechanics of such systems are now well known.<sup>131</sup> The government starts by capping the amount of an activity that can occur, whether it be fishing, the discharge of pollutants, or the withdrawal of water from streams for consumption, and issuing permits for the activity in the determined amount. The government then permits individuals or entities to trade the permits.

As discussed in Part I, Pareto Optimists, as well as many other environmental conservatives, like tradable permits for a number of reasons. First, tradable permits can reduce the overall cost of achieving environmental goals. If, as is frequently the case, different individuals or companies have varying abilities to reduce their harm to the environment, tradable permits allow those who can do so at the least cost to take the principal responsibility for reducing the harm in return for payments from others who find it more difficult to reduce the harm. If two companies face significantly different pollution-reduction costs, for example, the company that can reduce pollution at the lower cost can reduce its pollution more and then sell its pollution rights to the company that faces higher costs.

A second reason why some conservatives support tradable permit programs is because they hope that permit programs can facilitate passage of more rigorous environmental regulations by reducing the cost of those regulations. If tradable permits merely reduced the cost of regulation and nothing more, they would be valuable, but the nation’s environment would not be improved. By reducing regulatory costs, however, permit programs also can reduce opposition to regulation and thus help improve the environment. The first Bush Administration helped to pass the acid rain provisions of the Clean Air Act Amendments

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130. National Wildlife Federation v. Veneman (W.D. Wash., filed Oct. 20, 2004). A copy of the complaint is available at <http://www.nwf.org/nwfwebadmin/binaryVault/FINAL%20COMPLAINT%20w%20JH%20formatting.pdf> (last visited May 2, 2005). See generally Henderson, *supra* note 129 (noting lawsuit by the National Wildlife Federation against the Department of the Interior for allowing haying and grazing on CRP lands); *Briefs*, ROCKY MTN. NEWS, Nov. 5, 2004, at 20C (same).

131. For an overview of tradable permit systems, see SALZMAN & THOMPSON, *supra* note 37, at 91-99, 120-22 (describing market systems under the federal Clean Air Act and the Kyoto Protocol); Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?*, 18 ECOLOGY L.Q. 1 (1991) (describing market mechanisms more generally).

of 1990 by incorporating into the law a tradable permit system that lowered the overall cost that the electricity industry faced in reducing SO<sub>2</sub> emissions.<sup>132</sup> Some states also have used markets to minimize the economic impact of mandated water reductions and thus increase their political acceptability.<sup>133</sup> In reducing groundwater withdrawals from the Edwards Aquifer, Texas authorized a water market so that water users with highly valued needs could purchase groundwater from others with less need.<sup>134</sup> California also has used water markets to help gain political consensus for restricting water withdrawals.<sup>135</sup>

A third reason that some environmental conservatives favor tradable permits is that permit programs may encourage the development of new environmental technology and processes that can achieve better results at lower cost. Because individuals or companies can trade any reductions that they make in their regulated activities, the regulated community has an incentive to develop less expensive, more effective means of making those reductions. Although this in itself does not automatically improve the environment (because the overall regulatory standard initially remains the same), improved technology ultimately may enable regulators to tighten that standard.<sup>136</sup>

A final advantage of tradable permit systems is that they can provide non-profit environmental organizations with the opportunity to purchase permits, retire them, and thus directly improve the environment. An emerging group of "water trusts," for example, have begun to purchase and retire water rights in western rivers and streams, increasing the flow

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132. See, e.g., Joskow & Schmalensee, *supra* note 8, at 45-51; David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21<sup>st</sup> Century*, 20 COLUM. J. ENVTL. L. 145, 160 n.61 (1995). Even some market skeptics agree that markets can help pass environmental laws. For example, according to Professor Rena Steinzor, testifying on behalf of the Center for Progressive Regulation, "trading has the potential to break political stalemate. The acid rain program established by the 1990 Clean Air Act Amendments broke a 13-year legislative stalemate regarding whether and how to control sulfur dioxide emissions from power plants." Testimony of Rena Steinzor, Senate Subcomm. on Fisheries, Wildlife, and Water, Sept. 16, 2003, at [http://www.progressiveregulation.org/articles/EPA\\_Enforcement\\_Testimony\\_091603.pdf](http://www.progressiveregulation.org/articles/EPA_Enforcement_Testimony_091603.pdf) (last visited May 9, 2005).

133. See Richard E. Howitt, *Water Market-Based Conflict Resolution*, in ROSENBERG INTERNATIONAL FORUM ON WATER POLICY: RESOLVING CONFLICT IN THE MANAGEMENT OF WATER RESOURCES 49 (Robin Sanchez et al. eds., 1998) (explaining how market mechanisms can be used to help resolve conflicts over water resources).

134. See Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 266-67 (2000) (describing the use of markets in restricting withdrawals from the Edwards Aquifer).

135. See Calfed Bay-Delta Program, Programmatic Record of Decision, Aug. 28, 2000, at 71-72 (discussing steps to be taken to promote water marketing in California).

136. See *Regulatory Alternatives*, *supra* note 49, at 8 (discussing the incentives to innovate under tradable permit systems).

available for fish and recreation.<sup>137</sup> Since the mid-1990s, environmental organizations have acquired more than half a million acre-feet of water in most years for this purpose.<sup>138</sup> Some environmental organizations also have purchased and retired pollution permits and permits to graze livestock on the public domain.<sup>139</sup> In the eyes of Libertarians, markets thus allow individuals to promote their environmental goals without using governmental coercion; to Pareto Optimists, markets ensure that people who value additional environmental protection can acquire it.

The Bush Administration has been very supportive of tradable permits. Tradable permits form a key element of the Bush Administration's Clear Skies proposal.<sup>140</sup> The Clear Skies initiative would reduce current emissions of mercury, nitrogen oxides, and sulfur dioxide from power plants.<sup>141</sup> Like the SO<sub>2</sub> tradable permit system adopted in the 1990 Clean Air Act Amendments, the Clear Skies initiative would minimize the cost of these reductions through active trading systems.<sup>142</sup> As President Bush noted in announcing the initiative, "[i]nstead of the government telling utilities where and how to cut pollution, we will tell them when and how much to cut. We will give them a firm deadline and let them find the most innovative ways to meet it."<sup>143</sup>

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137. Barton H. Thompson, Jr., *Markets for Nature*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 261, 270 (2000). The oldest and most prominent water trust is the Oregon Water Trust, whose web site is <http://www.owt.org> (last visited May 9, 2005).

138. Thompson, *supra* note 137, at 270.

139. See Sally K. Fairfax, *State Trust Lands: The Culture of Administrative Accountability*, in ENVIRONMENTAL FEDERALISM, *supra* note 19, at 61 (discussing efforts to acquire grazing rights on public trust lands); Charles P. Lord et al., *Natural Cities: Urban Ecology and the Restoration of Urban Ecosystems*, 21 VA. ENVTL. L.J. 317, 377 (2003) (noting purchase and retirement of pollution rights).

140. See Gregg Easterbrook, *Greener Pastures*, NEW REPUBLIC ONLINE, Dec. 14, 2004, at <https://ssl.tnr.com/p/docsub.mhtml?i=express&s=easterbrook121404> (noting central role of market system in Clear Skies legislation). Although Congress in 2004 voted against the Clear Skies bill proposed by the Bush Administration, the Administration has adopted portions of the proposal through administrative actions and continues to seek legislative approval of the entire package. See Richard W. Stevenson, *Bad Weather Forces Change in Bush's Earth Day Plans*, N.Y. TIMES, Apr. 23, 2005, at A9 (noting that President Bush still is pressing Congress to pass his Clear Skies proposal and has enacted many of the provisions of the proposal through executive orders); Austin Gelder, *EPA Releases Rules on Mercury Emissions*, ARK. DEMOCRAT-GAZETTE, Mar. 16, 2005 (noting that administrative rules "accomplish much of what Bush was hoping to put into legislation with his Clear Skies initiative").

141. See Environmental Protection Agency, Summary of Clear Skies Act of 2002, at <http://www.epa.gov/air/clearskies/summary.pdf> (last visited May 3, 2005).

142. Lynn L. Bergeson, *Washington Watch: New Source Review: The Debate Rages On*, ENVTL. QUALITY MGMT., Winter 2002, at 73, 77-78 (discussing tradable permit system under the proposed Clear Skies Initiative); Dallas Burtraw & Alan J. Krupnick, *A Mercurial Reaction on Mercury?*, Dec. 12, 2003, available at <http://www.rff.org/rff/News/Features/A-Mercurial-Reaction-on-Mercury.cfm> (same).

143. Press Release, White House, Bush Announces Clear Skies & Global Climate Change Initiatives, available at <http://www.whitehouse.gov/news/releases/2002/02/20020214-5.html> (last visited May 1, 2005).

The Bush Administration also has expanded the use of tradable permits to pollution settings in which they have not been utilized in the past. Tradable permits historically have been used under the Clean Air Act to address pollutants that widely disperse and thus can be readily traded without affecting local environmental quality.<sup>144</sup> As part of the Clear Skies initiative, however, the Bush Administration has proposed using tradable permits for mercury pollution, which has greater localized impacts than traditionally traded pollutants.<sup>145</sup> Under the Clean Water Act, the Bush Administration also has encouraged water quality trading within a number of watersheds, including the Chesapeake Bay and the Lower Colorado River.<sup>146</sup> Trading in these contexts is trickier and requires more sophisticated systems because trading from one pollution source to another can change local pollution levels, even if overall pollution loading remains the same, raising health and equity issues for those living in areas with increased pollution levels.<sup>147</sup>

The Bush Administration, furthermore, has encouraged trading systems in connection with a variety of other regulated resources. Following the expiration of a congressional moratorium on individual fishing quotas (IFQs) under the Magnuson-Stevens Act, the Bush Administration has advocated their adoption in a variety of fisheries (although little has been accomplished to date).<sup>148</sup> Under the Endangered Species Act, the Bush Administration issued a guidance document in 2003 for “conservation banking,” in which property owners protect or create habitat on their land in return for credits that they can sell to future developers who wish to build on regulated habitat.<sup>149</sup> Finally, the

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144. See *Regulatory Alternatives*, *supra* note 49, at 19 (noting that “early environmental markets have developed in the air pollution field where the right to emit a given quantity of air pollution often can be transferred from one source to another without significant environmental worry”).

145. See Steinzor, *supra* note 132 (noting that the Clear Skies initiative “would establish a complex credit-swapping scheme by which power plants will be entitled to trade mercury emissions”).

146. See *id.* (describing the Bush Administrations’ water quality trading system).

147. See *id.* (emphasizing importance of carefully designing these trading systems because of the localized effects); *Regulatory Alternatives*, *supra* note 49, at 19 (noting difficulty of modeling trades involving water pollution and the problem of “hot spots”).

148. See Andrew Freedman, *White House Proposals Garner Mixed Response from Advocates*, GREENWIRE, Dec. 20, 2004 (noting that the White House’s oceans plan “endorses market-based approaches to fishing known as individual fishing quotas or IFQs”); *President Signs Executive Order on Ocean Policy – No New Money, But IFQs, Offshore Aquaculture to Be Pushed by Administration*, SUBLEGALS, Dec. 17 & 24, 2004, at 1, 2 (quoting James Connaughton, head of the Council of Environmental Quality, that Bush Administration will “pursue innovative eco-system based approaches that are market-based, including individual fishing quota (IFQ) programs that will help us recover and sustain our fisheries”).

149. Fish and Wildlife Service, Department of the Interior, *Guidance for the Establishment, Use, and Operation of Conservation Banks*, May 2, 2003, available at <http://www.artba.org/public/docs/enviro/articles3/FWSConservationBankingGuidance.pdf> (last visited May 3, 2005).

Bush Administration has encouraged water markets in the western United States as a means of meeting the water demands of growing regions and to defuse conflict.<sup>150</sup> The Clinton Administration, however, also supported these same efforts.

Although the Bush Administration has promoted tradable permits, moreover, it is less clear whether the administration has promoted market systems merely to reduce the economic burden of environmental regulations on business or also to increase environmental protection itself. Contrast, for example, the current Bush Administration's inclusion of market systems in its Clear Skies initiative with the former Bush Administration's support of a cap-and-trade system as part of the Clean Air Act Amendments of 1990. As noted earlier, the cap-and-trade system, by reducing the cost of regulation, helped to pass the 1990 amendments.<sup>151</sup> The cap-and-trade system thus both reduced industry costs and helped obtain environmental protection that otherwise might have been impossible. By contrast, there is no evidence that cap-and-trade systems have increased the likelihood that Congress will ever pass the Clear Skies initiative – or, more importantly, that the Bush Administration included cap-and-trade systems in the proposal for that reason. Indeed, many observers have argued that the Clear Skies initiative would result in more air pollution than the Clean Air Act currently allows.<sup>152</sup> Far from having to be convinced to support the Clear Skies initiative, the business community has been a strong supporter of the initiative from the outset; environmental organizations have been the skeptics.<sup>153</sup>

The Bush Administration also has not always welcomed the efforts of environmental organizations to use market systems to purchase and

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150. See, e.g., Department of the Interior, *Water 2025: Preventing Crises and Conflicts in the West*, at <http://www.doi.gov/water2025/water2025-report/page3.html> (last visited April 11, 2005) (noting value of water markets in reducing water conflicts).

151. See note 132 *supra* and accompanying text.

152. See, e.g., League of Conservation Voters, *supra* note 125, at 13 (noting that environmentalists

maintain that the plan would raise sulfur emissions targets by up to 50 percent and delay by up to 10 years major cuts in sulfur emissions required by the Clean Air Act and allow millions more tons of smog-forming nitrogen oxides and three times more mercury emissions than current law).

153. See, e.g., Natural Resources Defense Council, *Dirty Skies: The Bush Administration's Air Pollution Plan*, at <http://www.nrdc.org/air/pollution/qbushplan.asp> (last visited May 2, 2005) (criticizing the Clear Skies initiative); Sierra Club, *Clean Air: Facts About the Bush Administration's Plan to Weaken the Clean Air Act*, at [http://www.sierraclub.org/cleanair/clear\\_skies.asp](http://www.sierraclub.org/cleanair/clear_skies.asp) (last visited May 2, 2005) (same).

As noted earlier, Congress has not adopted the Clear Skies proposal because of concerns that the proposal is too weak. See *Recall Dubious Federal Mercury Rules*, SEATTLE TIMES, Mar. 24, 2005, at B6 (noting that Congress viewed the Clear Skies proposal "as too soft on smokestack emissions from power plants").

retire rights to use natural resources, further suggesting that its motivation is more related to reducing industry costs than fostering new environmental improvements. During the administration's first term, for example, the Grand Canyon Trust sought to purchase and retire grazing rights on approximately one million acres of land in the Grand Staircase Escalante National Monument in Southern Utah.<sup>154</sup> Local ranchers opposed the Trust's efforts, probably because the Trust presented competition in the lease of grazing rights.<sup>155</sup> Although the Department of the Interior ultimately approved the purchase and sale,<sup>156</sup> it initially stood as a hurdle and delayed the completion of the transaction.<sup>157</sup>

### E. Federalism

Jeffersonian Conservatives, as discussed in Part I, favor devolving more responsibility over environmental policy to state and local governments. In the view of Jeffersonian Conservatives, state and local governments should play a greater role in both the choice and implementation of environmental and resource policy. Where the states exercise authority, the federal government should be careful not to preempt it; where the federal government exercises its authority, it should consider giving the states as large of a role as possible in the implementation of the federal law.

Consistent with the views of Jeffersonian Conservatives, the Bush Administration has provided states with more decision-making authority in a variety of contexts. Under the Endangered Species Act, for example, the Department of the Interior has promoted Candidate Conservation Agreements (CCAs) in which state and local governments, often in conjunction with private entities, enter into agreements to protect candidate species – avoiding the need to list the species.<sup>158</sup> CCAs

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154. See John D. Leshy, *Natural Resources Policy in the Bush (II) Administration: An Outsider's Somewhat Jaundiced Assessment*, 14 DUKE ENVTL. L. & POL'Y F. 347, 356 (2004) (describing the proposed purchase and retirement); Brent Israelsen, *Land for Peace?*, SALT LAKE TRIB., Sept. 9, 2003, at A1 (same); Brent Israelsen, *Grazing Permits to Retire*, SALT LAKE TRIB., Jan. 14, 2003, at B1 (same).

155. See Israelsen, *Land for Peace?*, *supra* note 154.

156. See Keith Raether, *Voluntary Grazing Permit Buyout Gathers Momentum on Capitol Hill*, WATERSHEDS MESSENGER, Spring 2003, at 1, available at [http://www.westernwatersheds.org/watmess/watmess\\_2003/2003html\\_spring/article7.htm](http://www.westernwatersheds.org/watmess/watmess_2003/2003html_spring/article7.htm) (noting recent decision by the U.S. Bureau of Land Management to approve the purchase by the Grand Canyon Trust).

157. See Leshy, *supra* note 154, at 256 (noting that the Bush Department of the Interior had impeded rather than facilitated the transaction); Israelsen, *Grazing Permits to Retire*, *supra* note 154 (same).

158. See Barton H. Thompson, Jr., *Can the Endangered Species Act Manage the "Working Landscape"?*, in THE ENDANGERED SPECIES ACT AT 30 (forthcoming) (noting that CCAs are increasing at a faster rate than Habitat Conservation Plans). Although the Bush Administration has strongly promoted CCAs, the Clinton Administration actually adopted the underlying policy

effectively give states and local governments the ability to preempt strict federal regulation by adopting protective measures of their own. In other examples of devolution, the Bush Administration has transferred title to more than ten federal reclamation projects to local users<sup>159</sup> and has adopted policies providing for greater local control over national forest policy.<sup>160</sup>

The Bush Administration, however, has not been consistent in its approach to federalism in the environmental area. As the above examples illustrate, the administration has promoted greater state and local involvement in areas where stakeholders have complained about federal regulation. In situations where states or local governments have tried to impose stricter regulations than the federal government, however, the Bush Administration has sometimes argued that national policies preempt the state or local efforts.<sup>161</sup> In one court case, for example, the Bush Administration argued that national mining laws preempted local regulation of a proposed processing plant for federal minerals that would sit on private lands.<sup>162</sup> In another example, the administration urged the United States Supreme Court to rule that national law preempts a state court from holding herbicide manufacturers liable to farmers.<sup>163</sup> In one of the most important examples, the Bush Administration has sided with United States automobile manufacturers in their arguments against a California law that would require them to reduce carbon dioxide emissions from all vehicles sold in the state by the end of this decade.<sup>164</sup>

The Bush Administration also has failed to support state efforts to pursue strong environmental measures and has urged Congress to

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and regulations. See Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999); Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,706 (June 17, 1999).

159. See REPORT CARD 2004, *supra* note 54, at 106-07.

160. See Randal O'Toole, *Money to Burn?*, REGULATION, Winter 2002-03, at 16, 20 (highlighting the Bush Administration's "charter forest" proposal as a "first step towards ... decentralization"); *New Forest Rules: Another Unkind Cut*, S. ILLINOISAN, Jan. 7, 2005, available at [http://www.southernillinoisan.com/articles/2005/01/03/opinions/guest\\_columns/doc41d7ee8b0a3a3970609250.eml](http://www.southernillinoisan.com/articles/2005/01/03/opinions/guest_columns/doc41d7ee8b0a3a3970609250.eml) (criticizing the move toward greater decentralization).

161. Leshy, *supra* note 154, at 356-57.

162. Amicus Brief for the United States at 2, *Oil-Dri Corp. v. Washoe County*, Civ. No. 02-0186 (D. Nev. Feb. 22, 2003). See Leshy, *supra* note 154, at 356 (noting the Bush Administration's argument); Shogren, *supra* note 24 (noting the Bush Administration's position as one example of its willingness to interfere with state efforts to protect the environment).

163. Brief for the United States as Amicus Curiae, *Bates v. Dow Agrosciences LLC*, No. 03-388 (U.S. Nov. 24, 2004). See Douglas T. Kendall, *Ouch! You're Hurting Us: How the Court is Stifling Innovation at the State Level*, WASH. POST, Nov. 14, 2004, at B3 (criticizing the United States brief for undermining federalism principles).

164. See Shogren, *supra* note 24 (noting that the Bush Administration sided with the automobile manufacturers before the federal court of appeals); League of Conservation Voters, *supra* note 125, at 18 (noting the Bush Administration's support of the manufacturers' lawsuit).

preempt state and local regulations where those regulations stand in the way of national industrial policy that the administration supports. As part of its energy policy, for example, the Bush Administration has urged Congress to preempt local regulation of energy rights-of-way.<sup>165</sup> According to the head of the national organization of state pollution control administrators, members of the Bush Administration “talk about states’ rights, but they take away key tools states have needed to clean up the air.”<sup>166</sup>

The Bush Administration’s apparently inconsistent position on the appropriate role of state and local governments should not be surprising. Federalism is an issue on which conservative environmentalists can strongly disagree. While Jeffersonian Conservatives favor greater state and local involvement, Hamiltonian Conservatives favor national policymaking in order to better protect the interests of the nation’s economy, and Libertarians and other environmental conservatives care more about the policies adopted than who adopts them. John Graham, who heads the Office of Regulatory Affairs at the Office of Management and Budget, described the dilemma well in defending the Bush Administration’s record on states’ rights in the environmental field. “Thomas Jefferson’s views of strong states’ rights are clearly a part of the administration’s philosophy; we also recognize the value of Alexander Hamilton’s strong central government to promote commerce and a strong economy. Balancing those two perspectives is very difficult.”<sup>167</sup>

### III. CONCLUSION

The Bush Administration has supported conservative environmental innovations in a number of settings. As described, the Bush Administration has created and funded a variety of new programs to provide positive incentives to property owners to protect wildlife and other environmental amenities on their land. The administration also has promoted the use of environmental markets in a variety of new contexts. Finally, the administration has devolved responsibility over a number of environmental issues to states or local decision makers. Many of these efforts are important conservative advances in environmental policy for which the Bush Administration deserves credit.

The Bush Administration’s record in supporting other conservative environmental innovations, however, has been disappointing. This lackluster record may be attributable in part to the conflicts that exist

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165. Leshy, *supra* note 154, at 356.

166. See Shogren, *supra* note 24 (quoting William Becker, executive director of the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials).

167. *Id.* (quoting Graham).

among the varying strands of conservative environmental thought. While Libertarians and Pareto Optimists might favor the elimination of subsidies, for example, Hamiltonian and Burkean Conservatives may oppose such efforts because of the impact of eliminating subsidies on industry or economic stability. Efforts to provide more information to the public about environmental risks similarly may split some conservatives off from Hamiltonian and other conservatives who are suspicious of the public's ability to evaluate such risks in a rational fashion. Proposals to decentralize environmental decision making are likely to split Jeffersonian Conservatives from Hamiltonian Conservatives where Hamiltonian Conservatives fear that state or local governments will not adequately account for national economic interests. Gregg Easterbrook has suggested that "environmental reform is currently impossible. Neither the left nor the right will allow it."<sup>168</sup> The experiences of the Bush Administration suggest that splits within the "right," all by itself, may hinder many opportunities for environmental reform.

In examining the Bush Administration's record, however, one also notices that most of the conservative environmental reforms that the administration has pursued benefit the regulated sector. The principal reforms generally reduce the regulated community's cost of achieving various environmental goals or devolve responsibility to states in contexts where the regulated community might be more amenable to state regulation. Only a few of the reforms appear to have been adopted to provide greater protection to the environment itself. This may suggest that Hamiltonian Conservatives dominate the current Bush Administration; consistent with the view of Hamiltonian Conservatives, the emphasis is on promoting economic growth, through national power where necessary. It also may suggest that politics, and the voices of corporate supporters, rather than philosophical principles, are primarily influencing the Bush Administration's decisions. The external evidence of the Bush Administration's policies are consistent with either explanation.

Whatever the reasons, the failure of the Bush Administration to more actively investigate and pursue environmental innovations advocated by Libertarians, Pareto Optimists, and Jeffersonian Conservatives is a loss to the environment. Conservative presidential administrations offer an opportunity for testing new approaches that have been ignored in the past, yet hold the potential for providing increased or improved environmental protection.

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168. Easterbrook, *supra* note 140.

