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# Obstacles to Regulatory Reform

C. Boyden Gray†

## I. THE NEED FOR COST-JUSTIFIED ENVIRONMENTAL REGULATION

The current foment about campaign finance, special interest money, and ethics offers an opportunity to illustrate how ethics are relevant to environmental problems. Although I was involved in many environmental issues during the Bush administration, my principal job was ethics enforcement, and while the connection is not always readily apparent, there is an important relationship between the two.

I think there is a consensus about what is wrong and what needs to be done. First, we have misplaced prioritization. John Graham argues that we need to improve prioritization; one study he cites claims we could save 60,000 more lives if we were a little smarter about redirecting our spending priorities.<sup>1</sup> Asbestos removal, for instance, wasted ten billion dollars of school funds and arguably created more problems than it solved.<sup>2</sup> The lead phase-

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† Attorney, Wilmer, Cutler, and Pickering and Former Counsel to the President during the Bush administration. This Article is based on a transcript of remarks delivered at the *University of Chicago Legal Forum Symposium*, November 1, 1996, entitled "Rethinking Environmental Protection for the 21st Century."

<sup>1</sup> John D. Graham, *Legislative Approaches to Achieving More Protection at Less Cost*, 1997 U Chi Legal F 13; Tammy O. Tengs et al, *Five Hundred Life-Saving Programs and Their Cost-Effectiveness*, 15 Risk Analysis 369 (1995); Tammy O. Tengs and John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Lifesaving*, in Robert W. Hahn, ed, *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* 167, 172 (Oxford 1996). See also Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan L Rev 247 (1996).

<sup>2</sup> The Unfunded Mandates Reform Act of 1995: One Year Later, Hearings before the Subcommittee on Human Resources and Intergovernmental Relations of the House Committee on Government Reform and Oversight, 104th Cong, 2d Sess 139 (Mar 22, 1996), reprinted in 1996 WL 7137162 (testimony of Michael A. Resnick on behalf of the National School Boards Association, estimating the cost of removal of asbestos from schools at \$10 billion). See also *Review and Outlook: The Schools' Burdens*, Wall St J A10 (May 10, 1991) (reporting that 670 school systems that answered a survey by the National School Board Association reported asbestos removal costs of six billion dollars); Barbara Rosewicz, *Health Risk of Asbestos Downplayed*, Wall St J B1 (Jan 19, 1990) (reporting low levels of risk for children in schools with asbestos insulation, but an increase in risk levels after removal, which stirs up asbestos fibers).

down in the 1970s<sup>3</sup> was a good thing as far as it went, but it cost tens of billions of dollars to produce octane substitutes for lead such as benzene, toluene, and xylene—octane-enhancing aromatic hydrocarbon compounds, all of which are known carcinogens.<sup>4</sup> We then had to spend billions more in early 1991 to control toxic emissions from aromatics in fuel.<sup>5</sup>

The second problem with environmental regulation today is that costs often are not even remotely justified. Superfund,<sup>6</sup> for example, has been better for lawyers than for the public.<sup>7</sup> The Maximum Available Control Technology (“MACT”) standards<sup>8</sup> set forth in the Clean Air Act do not make much sense because they provide so few benefits.

Third, the prevailing regime of command-and-control regulation magnifies the cost of environmental protection. Compliance costs are far beyond what they would be if we used the marketplace to sort out the responsibilities for pollution reduction. Consider the EPA’s Acid Rain Program.<sup>9</sup> Compliance costs are estimated to be one-fifth of what was originally anticipated, and the environmental progress is about 40 percent beyond the reductions required under the Clean Air Act.<sup>10</sup> Normally, the EPA expects to get only 80 percent of their goal from a command-and-control regulation.<sup>11</sup> Thus, the program nearly doubled the yield at a fifth of the cost. Instead of using the Acid Rain Program as a model for other regulation, however, the EPA seems eager to hide it in the closet and throw the key into the Potomac River.

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<sup>3</sup> 40 CFR § 80.20 (1976).

<sup>4</sup> Francesca Lyman, *The Gassing of America: A High-Octane Campaign against Toxic Fuel Additives*, Wash Post C5 (Apr 13, 1990).

<sup>5</sup> See Rose Gutfeld and Barbara Rosewicz, *Clean-Air Accord is Reached in Congress That May Cost Industry \$25 Billion a Year*, Wall St J A2 (Oct 23, 1990).

<sup>6</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC § 9601 et seq (1994).

<sup>7</sup> A large portion of the Superfund budget is consumed by huge litigation outlays and repetitive feasibility studies, leaving little for actual cleanup of contaminated sites. See, for example, Robert W. McGee, *Superfund: It’s Time For Repeal After a Decade of Failure*, 12 UCLA J Envir L & Pol 165, 170, 173 (1993).

<sup>8</sup> Clean Air Act, 42 USC § 7412(d)(2) (1994).

<sup>9</sup> Clean Air Act, 42 USC §§ 7651-7651o (1994).

<sup>10</sup> Environmental Protection Agency, *Press Release: Emissions that Cause Acid Rain from Major Emitters Cut in Half, Exceed Reduction Goals by 40 Percent*, (Aug 8, 1996) <<http://www.epa.gov/docs/PressReleases/1996/August/Day-08/pr-796.html>>.

<sup>11</sup> See, for example, Environmental Protection Agency, Approval and Promulgation of Air Quality Implementation Plans; Virginia; 15 Percent Rate of Progress Plan for the Metropolitan Washington, DC Area, 62 Fed Reg 11395, 11402 (1997). This is called the “rule-effectiveness,” or “RE,” factor. Id.

The keys to the Acid Rain Program's success should be the model for future environmental regulation. First, we need to do proper risk assessment. This includes more public participation, better information, and independent peer review so that the science is objective and unbiased. Second, cost-benefit analysis is necessary to sustain a reasonable connection between marginal costs and benefits. Third, performance standards that attempt to use market incentives are essential to let the regulated community determine the best way to achieve compliance. The central theme here is better public information. There is a consensus about all of this. Several independent groups have reached these same conclusions.<sup>12</sup> Still, given this broad consensus, one might ask why the last Congress could not pass regulatory reform to implement these concepts.<sup>13</sup>

The most immediate reason for the failure of broad, institutional regulatory reform can, I believe, be found in presidential politics. John Graham has pointed out that such reform was defeated, not on the merits, but in part because it was proposed by Bob Dole, a presidential candidate.<sup>14</sup> His opponent, President Clinton, didn't want to give Senator Dole a victory that might translate to the polls. Furthermore, backlash from the new House's overreaching after the 1994 revolution might have contributed to Congress's failure to adopt generic regulatory reform.

That is not to say that all was lost. There were some advances. The Safe Drinking Water Act Amendments,<sup>15</sup> the Accountable Pipeline Safety and Partnership Act of 1996,<sup>16</sup> and the Delaney Clause reform<sup>17</sup> reflect most of the key principles de-

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<sup>12</sup> See, for example, Harvard Group on Risk Management Reform, *Reform of Risk Regulation: Achieving More Protection at Less Cost*, 1 Hum & Ecological Risk Assessment 183 (1995); National Academy of Public Administration, *Setting Priorities, Getting Results: A New Direction for the U.S. Environmental Protection Agency* (1995); President's Council on Sustainable Development, *Eco-Efficiency Task Force Report* ch 2 (1995) <<http://www.whitehouse.gov/WH/EOP/pcsd/tf-reports/eco-top.html>>; Carnegie Commission on Science, Technology, and Government, *Risk and the Environment: Improving Regulatory Decision Making* (1993).

<sup>13</sup> See Sunstein, 48 Stan L Rev at 247-53 (cited in note 1).

<sup>14</sup> Graham, 1997 U Chi Legal F at 57 (cited in note 1).

<sup>15</sup> Safe Drinking Water Act Amendments of 1996, Pub L 104-182, 110 Stat 1613, codified at 42 USC § 300f et seq (1994 & Supp 1996) (requiring independent peer review of the scientific bases for EPA action, public availability of information on health effects, and risk analysis).

<sup>16</sup> Pub L 104-304, 110 Stat 3793 (1996), codified at 49 USC § 60101 et seq (1994 & Supp 1996) (requiring risk management and peer review).

<sup>17</sup> Food Quality Protection Act of 1996, Pub L No 104-170, 110 Stat 1489, 1514-35, codified at 21 USC § 346a (1994 & Supp 1996).

scribed above. Still, on the whole, there was more bad news than good.

Take, for example, EPA's Project XL, which seeks to allow regulated parties to develop their own alternatives to command-and-control regulation as long as the new proposed methods produce greater environmental benefits.<sup>18</sup> The theory underlying Project XL is that market incentives can create more efficient solutions to environmental problems. Unfortunately, the program's performance hasn't matched its promise. The EPA has only approved a handful of projects.<sup>19</sup> The agency simply does not want to give up micromanagement, which defeats the whole point of performance standard flexibility for regulated entities. The Agency, in fact, does not have the authority to implement the project fully, even as it tells Congress not to enact legislation to provide authority. In reality, EPA does not want enabling legislation. In any event, Congress has not enacted any legislation granting the authority under which the current administration purports to be acting, in part due to the Agency's own dissembling. Thus, the EPA has been unwilling to extend the acid rain allowance trading system<sup>20</sup> to the NO<sub>x</sub> rules issued under Title IV of the Clean Air Act.<sup>21</sup> If there were ever an opportunity to act on the principles enunciated in Project XL and in the report of the President's Council on Sustainable Development,<sup>22</sup> the NO<sub>x</sub> rules are it, and yet the first chance the EPA had to act on these principles, it ran in the opposite direction.<sup>23</sup>

The EPA's recently released Particulate Matter/Ozone (PM/Ozone) proposal<sup>24</sup> is another example of a missed opportu-

<sup>18</sup> Environmental Protection Agency, *Regulatory Reinvention (XL) Pilot Projects*, 60 Fed Reg 27282 (1995). The "XL" stands for "excellence and leadership." See Environmental Protection Agency, *Press Release: EPA Announces New Regulatory Reinvention Initiatives* (Apr 18, 1997) <<http://www.epa.gov/epahome/Press.html>>.

<sup>19</sup> Environmental Protection Agency, *Press Release: EPA Administrator, Intel Corp. Sign Final Project XL Agreement* (Nov 21, 1996) <<http://www.epa.gov/epahome/Press.html>>; Environmental Protection Agency, *Press Release: First XL Regulatory Reinvention Project Approved* (July 12, 1996) <<http://www.epa.gov/epahome/Press.html>>.

<sup>20</sup> 42 USC § 7651b (1994); Environmental Protection Agency, *Acid Rain Program: Permits, Allowance System, Sulfur Dioxide Opt-Ins, Continuous Emission Monitoring, Excess Emissions, and Appeal Procedures*, 61 Fed Reg 68340 (1996).

<sup>21</sup> 42 USC § 7476 (1994). Environmental Protection Agency, *Acid Rain Program; Nitrogen Oxides Emissions Reduction Program*, 62 Fed Reg 3463 (1997), amending Environmental Protection Agency, *Acid Rain Program; Nitrogen Oxides Emission Reduction Program*, 61 Fed Reg 67111 (1996).

<sup>22</sup> President's Council on Sustainable Development, *Eco-Efficiency Task Force Report* (cited in note 12).

<sup>23</sup> This thought was expressed to me by Ken Lay, chairman of Enron Corporation.

<sup>24</sup> Environmental Protection Agency, *National Ambient Air Quality Standards for*

nity. The PM/Ozone proposal is perhaps an exemplar of a wise emissions trading opportunity, but the EPA will not let it happen. As a result, we will have one of the most expensive, productivity-stultifying rules in American history. The reason the EPA gives for boycotting trading is a bit astonishing. They say they do not have enough scientific understanding about the relationship of the various constituents or precursors of fine particles (including NO<sub>x</sub>, VOCs and SO<sub>2</sub>) to permit trading between these precursors.<sup>25</sup> Indeed, the EPA isn't even allowing the trading of NO<sub>x</sub> in existing programs.<sup>26</sup> If the EPA does not understand how to allow trading in PM components, it really does not understand how to regulate PM to start with. That's why market incentives are so important—if you can't use them in connection with a rule, it shows that the rule is fundamentally flawed.

## II. OBSTACLES TO REGULATORY REFORM

Because of problems like these, the fight for regulatory reform must continue. I believe that continued discussion about the consensus on rational priority setting, risk management, and performance standards will eventually lead us to regulatory reform. But clearly, the presidential politics of 1996 cannot explain why this consensus hasn't led to action.

Accordingly, it's important to explore the political reasons why converting the consensus on regulatory reform into legislated reality has been so difficult. In my view, the two main obstacles to rational regulation are described briefly in a pair of articles in this volume. The first obstacle is addressed by Sanford Gaines, who suggests that innovative solutions to environmental problems are often opposed by rent-seeking industry as well as by environmental groups for their own reasons of political control.<sup>27</sup> Cass Sunstein alludes to the second idea in his description of misguided media attention as a "pathology of regulatory

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Particulate Matter; Proposed Rule, 61 Fed Reg 65637 (1996); Environmental Protection Agency, National Ambient Air Quality Standards for Ozone; Proposed Rule, 61 Fed Reg 65715 (1996); Environmental Protection Agency, Interim Implementation Policy on New or Revised Ozone and Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS); Proposed Rule, 61 Fed Reg 65751 (1996).

<sup>25</sup> National Ambient Air Quality Standards for Particulate Matter, 62 Fed Reg 38652, 38667 (July 18, 1997).

<sup>26</sup> See Environmental Protection Agency, Acid Rain Program; Nitrogen Oxides Emission Reduction Program, 61 Fed Reg 67111, 67155 (1996).

<sup>27</sup> Sanford E. Gaines, *Rethinking Environmental Protection, Competitiveness, and International Trade*, 1997 U Chi Legal F 231, 238-42.

policy.”<sup>28</sup> These are significant obstacles, and they deserve further study.

### A. Rent-Seeking and Interest-Group Resistance to Regulatory Reform

The first obstacle to rational regulatory reform is rent-seeking. Rent-seeking promotes inefficient and misguided government activity, and it is responsible for what Cass Sunstein calls “the status quo bias.”<sup>29</sup> Bruce Ackerman and William Hassler’s *Clean Coal/Dirty Air*<sup>30</sup> illustrates how interest groups distorted the legislative process and gave us the New Source Performance Standards (“NSPS”) of 1978,<sup>31</sup> which effectively mandated the use of dirty coal.<sup>32</sup> The technology-based MACT standards of the 1990 Clean Air Act<sup>33</sup> were equally counterproductive. I fought very hard during the Clean Air Act Amendments of 1990 to have a risk-based air toxics standard. Nonetheless, Congress mandated technology-based standards. Even the EPA acknowledges that some of the expensive rules it has issued have absolutely no environmental benefit.<sup>34</sup>

Congress’s rejection of risk-based standards was motivated by interest group pressure. It was the chemical industry, by and large, which came in and decided it didn’t want a risk-based standard, and thus used its influence to push for MACT standards.<sup>35</sup> The largest companies supported the technology-based standards.<sup>36</sup> Economies of scale allow them to buy the technology at a quantity discount and to absorb the burden or pass it on to consumers. Smaller companies have a harder time and there-

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<sup>28</sup> Cass R. Sunstein, *Which Risks First?*, 1997 U Chi Legal F 101, 123.

<sup>29</sup> *Id.* at 120-21.

<sup>30</sup> Bruce Ackerman and William Hassler, *Clean Coal/Dirty Air* (Yale 1981).

<sup>31</sup> 42 USC § 7411(f) (1994).

<sup>32</sup> See Ackerman and Hassler, *Clean Coal/Dirty Air* at 2-58 (cited in note 30).

<sup>33</sup> 42 USC § 7412(d)(2) (1994).

<sup>34</sup> To its credit, the EPA has done its best to reduce the economic damage done by the technology-based standards.

<sup>35</sup> Clean Air Amendments of 1989, Hearings on S 816 before the Subcommittee on Environmental Protection of the Senate Committee on Environmental and Public Works, 101st Cong, 1st Sess 12, 88, 102-03 (1989) (testimony of Eugene H. McBrayer, President of Exxon Chemical Company and Chairman of the Executive Committee of the Chemical Manufacturers Association (“CMA”), Clean Air Working Group, and written statement of the CMA, arguing that technology based standards are the most effective way of protecting air quality).

<sup>36</sup> *Id.* at 33, 215, 223 (testimony of Walter Williams, Chairman of Bethlehem Steel Corp. on behalf of American Iron and Steel Institute, supporting technology-based control regulation and opposing risk-based standards).

fore end up at a competitive disadvantage. As a result, the large companies pushed for expensive technology-based standards to maximize their market position. This is classic rent-seeking behavior. Unfortunately, we in the White House were unaware of it at the time.

The current regulation of electricity and pollution from power plants also illustrates how special interests can harm regulatory policy. In 1981, at the beginning of the Reagan administration, the country was in an extraordinary situation. Despite price controls,<sup>37</sup> the country was experiencing high escalating fuel prices.<sup>38</sup> Inflation had climbed into the double-digits, and interest rates had soared to more than 20 percent.<sup>39</sup> Electricity generators were governed by the Powerplant and Industrial Fuel Use Act,<sup>40</sup> which prohibited the use of natural gas—the cleanest fuel—and we had New Source Performance Standard regulations based on the 1977 amendments,<sup>41</sup> which prohibited the use of clean coal. The consumer had the worst of all possible worlds: he received a slow and inefficient reduction in pollution and a blanket prohibition on the cleanest fuels, and he paid for it with extraordinarily high energy costs.

It took the Reagan and Bush administrations twelve years to undo all that.<sup>42</sup> It took two stages to repeal the harmful provisions of the Fuel Use Act<sup>43</sup> and a couple of stages to deregulate natural gas.<sup>44</sup> Congress passed the Clean Air Act provisions for an allowance trading system<sup>45</sup> to wipe out the New Source Performance Standards. The price controls were among the first to go,<sup>46</sup> and then in 1992, Congress passed the Energy Policy Act

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<sup>37</sup> See Marilu Hunt McCarty, *Economic Aspects of the Carter Energy Program*, in Herbert D. Rosenbaum and Alexej Ugrinsky, eds, *The Presidency and Domestic Policies of Jimmy Carter* 555, 562 (Greenwood 1994).

<sup>38</sup> See Richard C. Thornton, *The Carter Years: Toward a New Global Order* 420-34 (Paragon House 1991).

<sup>39</sup> See Rich Jaroslovsky, *Reagan's Record Sparkles on Inflation But Shows Failure in Fight to Cut Deficit*, Wall St J A6 (Feb 2, 1984).

<sup>40</sup> 42 USC §§ 8301-484 (1982), repealed by Pub L No 100-42, 110 Stat 310 (1987).

<sup>41</sup> Clean Air Act Amendments of 1977, Pub L No 95-95, 91 Stat, 685, 697-703, codified at 42 USC § 7411 (1982).

<sup>42</sup> See, for example, Robert L. Bradley, Jr., *Energy Policies: A Few Bright Spots*, in David Boaz, ed, *Assessing the Reagan Years* 305 (Cato Institute 1988) (describing price deregulation, allocation decontrol, and rescission of restrictions on the use of natural gas and oil in industrial and power plant boilers).

<sup>43</sup> Pub L No 100-42, 101 Stat 310, 310-14 (1987).

<sup>44</sup> Order No 380, 49 Fed Reg 22778 (May 25, 1984); Order No 436, 50 Fed Reg 42408 (Oct 18, 1985).

<sup>45</sup> Clean Air Act, 42 USC § 7651b (1994).

<sup>46</sup> See Bradley, *Energy Policies* (cited in note 42).

to allow wholesale interstate wheeling of power.<sup>47</sup> As a result, we now have fairly low inflation, low interest rates, generally low energy prices, and a relatively accelerated reduction in pollution.

Now we are about to revert back to a high-cost reduced-environmental-benefit scenario. How could this happen? First, environmental interest groups can exert substantial pressure upon the Democratic administration, more so than upon Republican administrations. Second, the unions spent tens of millions of dollars on the presidential race and expect something in return. The influence of these two interest groups portends a return to the old-fashioned technology-based, command-and-control standards of the late 1970s, when regulations mandated inefficient uniform use of coal scrubbers so that eastern high-sulfur coal could remain competitive with cleaner western low-sulfur coal.<sup>48</sup>

The current controversy over electricity deregulation promises to tell a similar story. Electricity restructuring is analogous to telecommunications deregulation, only larger: the New York Times estimates the value of the electric power industry at \$200 billion a year.<sup>49</sup> Electricity deregulation has bipartisan support.<sup>50</sup> The more efficient the production and distribution of electricity, of course, the lower the pollution, because atmospheric pollution in the air and water results primarily from incomplete combustion and inefficient use of resources. In the long run, deregulation will make us better off as a society and will give us cheaper prices and less pollution.

Right now, though, it looks as if the environmentalists are going to try to delay electricity deregulation by subjecting it to command-and-control environmental regulation. Because efficiency gains from energy deregulation will aid long-range pollution

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<sup>47</sup> 16 USC §§ 824i-824k (1994).

<sup>48</sup> See Ackerman and Hassler, *Clean Coal/Dirty Air* at 2-58 (cited in note 30).

<sup>49</sup> Electric Consumers Protection Act of 1997, S 237, 105th Cong, 1st Sess, in 143 Cong Rec S 865 (Jan 30, 1997). See Eric Schmitt, *Sides Square Off On Decontrolling Electricity Sales: Competition May Follow: Wrangling About Utility Rules Helps Lobbyists Now and Maybe Customers Later*, NY Times A1 (Apr 14, 1997) ("*Sides Square Off On Decontrolling Electricity Sales*").

<sup>50</sup> Schmitt, *Sides Square Off On Decontrolling Electricity Sales*, NY Times at A1 (cited in note 49) (noting that "the battle lines on retail electricity competition cut across political lines, with Republicans and Democrats on both sides"). Incidentally, the biggest deregulator of all in the United States Congress was Senator Kennedy, aided by his staff assistant, Stephen Breyer, now Justice Breyer. Breyer is fond of observing that the chances of getting infected by mad cow disease by eating hamburgers is about the same as getting hit by an airplane when you're just walking around; therefore, if you're nervous about getting mad cow disease, you should wear a helmet at McDonald's.

reduction, delays in deregulation will ultimately slow down environmental improvement.

## B. Media Resistance to Regulatory Reform

The second obstacle to regulatory reform is the media. The media is sympathetic to big government. A recent study revealed that shortly before the 1996 election, 89 percent of all Washington bureau chiefs planned to vote for Bill Clinton.<sup>51</sup> Clearly, the media likes environmentalists. Environmental interest groups "own" the media, and both entities love the command-and-control regime because it increases their influence. They are hostile to market-oriented strategies because they can't control them as well.

Furthermore, the media has gotten into the habit of doing in the policy realm what they figured out long ago in the political world: they realized that they could make more money by cutting politicians from 40-second to 7-second sound bites and then forcing them to buy the time back. The market for political advertising has grown to enormous proportions, and it accounts for a healthy portion of the networks' bottom line.<sup>52</sup> The media has now discovered that the same strategy works with normal policy advertising. If the networks reduce policy coverage, interested groups have to buy the coverage in the form of paid advertising. Most newspapers now find their only growing source of advertising in what they call advocacy advertising. One newspaper, for instance, has a manager of advocacy advertising whose sales pitch is that if interest groups can't get newspapers to run stories that include their point of view, then they should buy full-page ads to state their views, and if the ad is clever, the paper will consider running a story about it.

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<sup>51</sup> See Christopher Georges, *Dole Joins in Republican Attacks on the Press, While Party Expands Use of Alternative Media*, Wall St J A16 (May 29, 1996). The poll, conducted by the Freedom Forum, showed that Washington bureau chiefs preferred Clinton to Dole in the 1996 election by a margin of over twelve to one, that they were over twelve times as likely to consider themselves Democrats as Republicans, and that 61 percent considered themselves liberal or liberal-to-moderate, as compared with only 7.2 percent identifying themselves as conservative or conservative-to-moderate. See also James K. Glassman, *The Press: Obvious Bias*, Wash Post A19 (May 7, 1996).

<sup>52</sup> See, for instance, Campaign Advertising, Hearing before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 102d Cong, 1st Sess 50, 55 (1991) (statement of Fred Wertheimer, reporting that Congressional candidates spent over \$120 million on advertising in the 1990 elections); id at 77, 83 (testimony of Jerald Fritz on behalf of the National Association of Broadcasters, arguing that political advertising is a "not insignificant" source of broadcast revenue).

The difficulty, then, in moving ideas like the regulatory reform consensus into the public debate is that the media is not going to cover it for free. The press treats regulatory reformers like merchants. "If you want to sell some shoes," they say, "or if you want to sell some cars, you have to take out ads. If you want to sell your pet policy viewpoint, then you have to take out an ad as well."

Both rent-seeking behavior and media bias tend to require retention of systematic big government, for fear that regulatory reform will diminish media and special-interest influence. Two anecdotes from right before the 1994 election bear this out. The first comes from a luncheon I attended hosted by the Progress and Freedom Foundation, House Speaker Newt Gingrich's think tank. Shortly before the luncheon, the Speaker had threatened the PACs, warning that if they didn't start shifting their campaign contributions away from incumbent Democrats and toward Republicans, the PACs wouldn't have access to GOP leadership after the Republicans took control of the House.<sup>53</sup> At the luncheon, I wrote a note to the Speaker's former chief of staff, Jeff Eisenach, saying that Gingrich's reliance on PACs was troublesome because it meant that Gingrich would have to keep big government running to pay off the PACs after he won. Eisenach wrote back and said, "Yes, this is a problem. Can you really see Newt presiding over a shrinking federal establishment?" That was a bit chilling.

The second example centers on an article that New York Times reporter Matt Wald wrote at the same time that the regulatory reform bill came up.<sup>54</sup> The article reported that the acid rain allowance trading system was a total failure because the costs of compliance, as determined by the market price of the tradeable permits, had dropped so low.<sup>55</sup> Essentially, the article argued that we ought to discontinue the program because its success is so high and its cost is so low.<sup>56</sup> A few weeks later, I had lunch with Mary Nichols, the EPA Administrator for Air and Radiation, and I asked her about the piece. She said, "I thought it was a terrible article. I went up there and spent three hours

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<sup>53</sup> See Dan Balz, *GOP Plays Hardball with PACs: Goal Is to Reverse Pattern of Giving*, Wash Post A1 (Oct 13, 1994).

<sup>54</sup> Matthew L. Wald, *Acid-Rain Pollution Credits Are Not Enticing Utilities*, NY Times A11 (June 5, 1995).

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

<sup>56</sup> This is what I refer to as the "root canal" theory of environmental protection: it can't be any good unless it really hurts badly.

with him in New York and I couldn't talk him out of it." I said, "What did he tell you?", and she said that he kept saying that she was giving away all the power. I said, "What did he mean by that, Mary?" And she told me that he said, "You're giving away all the power to the private sector. Command-and-control, command-and-control, why else did you take your job?"

Those anecdotes illustrate that politicians and the media, whether because of bias or a vested interest in big government, are loathe to abandon the command-and-control regime in favor of market and public participation in environmental regulation. A system of performance standards and market incentives to sort out the cheapest, most effective, most innovative ways of achieving regulatory goals would discourage rent-seeking from the outset. That is why of all the keys to rational regulation, the performance standard that lets a regulated entity choose or design its own compliance option is the most important. It ensures that regulated entities meet environmental goals, while at the same time using the market and the regulated entities' own ingenuity to frustrate the improper influence of special interests.

To close the loop: requiring compliance through market incentives serves two goals. First, it ensures that the agency knows what it's doing, and second, it diminishes the danger of questionable behavior by ethically-challenged rent-seekers. Market-based regulatory compliance is thus a useful check on agency performance: if the agency could use a transparent performance standard with market incentives but refuses to do so, it usually means the agency does not know what it's doing or has a secret agenda to reward campaign donors and other political allies at the expense of its opponents—and, more important, of the public at large.

