

# About-Face: Pragmatic Positions in Perennial Environmental Disputes

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## Introduction

Designing any environmental policy involves answering three principal questions. First, what are the policy's goals? Second, what instrument should be used to carry out the policy? Third, what level of government should carry out the work?

In the 1970s and 1980s, when U.S. environmental policy was in its infancy, the position of interest groups with respect to these questions was clear and predictable. On the first question, industry groups—principally trade associations representing polluters—favored the use of cost-benefit analysis, arguing that environmental benefits needed to be weighed against the resulting undesirable economic consequences. In contrast, in general environmental group vigorously opposed cost-benefit analysis, claiming in part that it would systematically lead to weak protections

On the second question, industry groups favored marketable permit schemes on the grounds that they led to the least-cost way to meet a given environmental standard and that they provided desirable incentives for technological innovation. Environmental groups, in contrast, argued that such schemes were “licenses to pollute” and therefore unethical, and also that they would compromise the effectiveness of environmental controls.

On the third question, industry groups extolled the virtues of state regulation, focusing on the benefits of decentralization in a country where citizens of different regions have markedly different preferences, and where local conditions are likely to make one-size-fits-all approaches undesirable. In contrast, environmental groups viewed state governments as poorly suited to the task of environmental regulation, partly on the ground that the state political processes that had brought us Jim Crow could not be trusted only a decade later to deal appropriately with a new serious social problem and partly because of concern that state competition for industrial activity would produce a “race to the bottom” leading to significant under-regulation.

Now, decades later, when the field of environmental regulation is quite mature, industry and environmental group continue to have strong and opposite positions on each of the three principal building blocks of environmental policy. That is not surprising. But what is surprising is that each of the positions held by the competing sides is, to a significant extent, the diametric opposite of the position they held in the 1970s and 1980s.

On cost-benefit analysis, many industry groups have largely abandoned their commitment to a weighing of environmental benefits against economic costs. Instead, they spend considerable energy casting doubt on the economic models that they themselves had advocated only a few decades earlier, calling them unreliable and manipulable. In contrast, they vigorously embrace the mantra of “job killing regulations,” arguing that any regulations that have a negative impact on jobs should not be undertaken, regardless of how many tens of thousands of lives the regulation might save and how small a number of jobs it might eliminate. And, to calculate the impact of regulations on jobs, they use economically indefensible methodologies that have no support in the peer reviewed literature.

The position of environmental groups has also shifted, though less dramatically. A number of significant groups now engage in methodological discussions of how cost-benefit analysis should be conducted and participate effectively in the types of administrative

proceedings that they would have eschewed decades earlier. And while other groups still view cost-benefit analysis with suspicion, the opposition has softened considerably.

As to marketable permit schemes, the industry groups that had been enthusiastic about them until the 1990s have turned against them, referring to them derisively as “cap and tax” approaches and invoking a parade of horrors that would allegedly follow their adoption.. In contrast, environmental groups have embraced marketable permit schemes and have taken an active role in designing them and lobbying Congress for their adoption.

And, on federalism, the industry groups that had once extolled the virtues of state governments now unrelentingly want to preempt state environmental standards. In contrast, the environmental groups that had questioned the efficacy of state governments in the past now expend considerable efforts defending their legitimacy.

What happened? Why did the positions of the 1970s and 1980s largely become the opposite positions in the 2000s and 2010s? The best explanation is that neither side had any robust commitment to any of the positions they espoused then and similarly has no robust commitment to the positions they are espousing now. Instead, each of the sides had (and continues to have) only a commitment to particular substantive outcomes on the stringency of environmental policy. Industry groups want laxer standards and environmental groups want more stringent ones, and they are prepared to invoke any argument that will advance their respective positions along that spectrum.

As to cost-benefit analysis, industry groups came to see that, properly conducted, the technique could justify stringent regulation. And, similarly, environmental groups came to see the promise of cost-benefit analysis. In particular, over time the Environmental Protection Agency (EPA) refined its methodology for computing the “value of statistical life” (VSL), which is the benefit from averting a death from pollution. That value is now around \$9 million, and can justify quite stringent regulations, especially when coupled with a growing body of research demonstrating causal links between environmental quality and mortality. Similarly, the federal government now uses an estimate for the “social cost of carbon” (SCC)—the estimated damage of a ton of carbon dioxide emissions—of around \$40. This value, likewise, can justify significant regulation of greenhouse gases.

On marketable permit schemes, environmental groups came to see that they provided the best hope for a comprehensive approach to climate change regulation, in particular because the command-and-control regimes that they had previously favored would be far more expensive and therefore more likely to get defeated. And, industry groups came to see that maligning marketable permit schemes was a potentially effective strategy to defeat greenhouse gas regulation altogether.

With respect to federalism, the last major piece of federal environmental regulation was the 1990 amendments to the Clean Air Act. While the EPA has moved forward with important regulations under pre-existing authority since then, many significant states, particularly California and the Northeastern states, have taken the lead on cutting-edge environmental issues, especially climate change. In the absence of federal standards, they have adopted stringent state standards, contrary to the race-to-the-bottom predictions of an earlier time. As a result, knocking down states became a productive strategy for anti-regulatory interest groups whereas propping them up became attractive to pro-regulatory interest groups.

The positions did not flip overnight. In fact, there was a relatively brief moment when it looked like a relative consensus might emerge, at least on cost-benefit analysis and marketable permit schemes. But that consensus evaporated almost as soon as it coalesced as environmental issues became increasingly polarized across the political parties, removing the opportunity and incentive for interest groups to arrive at compromise positions.

This type of symmetric flip-flopping is not limited to the issues that we discuss in this Essay. In the 1970s and early 1980s, when Judge J. Skelly Wright and David Bazelon led the D.C. Circuit, environmental groups argued for robust judicial review of agency action; decades later, when the D.C. Circuit was no longer a bastion of liberalism, they sought a more deferential approach. And for each of these inconsistent positions, industry groups were on the opposite side. Similarly, when President Reagan was in the White House, environmental groups went to Congress to promote their agenda and railed against executive control of agencies. During the Clinton and Obama administrations, when Democratic Presidents faced highly confrontational conservative Republican leadership in the House, environmental groups decried congressional obstructionism, and industry groups railed against executive overreach.

Behind this story is a broader point about the nature of legal argumentation, though not one that we will have the opportunity to explore in any detail here. Should we regard legal argumentation as merely a self-serving exercise in service of a substantive goal? Is that an inevitable consequence of our adversarial system? Do the Article III standing rules, with the central role they assign to “injury in fact” and their disdain for ideological plaintiffs, make it difficult for structural arguments to be presented in a consistent manner to the federal courts? We will not get to answer these questions in the Essay but hope that our case study will be useful to commentators interested in exploring them at some point.

## **I. Cost-Benefit Analysis**

The use of cost-benefit analysis to evaluate the regulatory policy of the federal government has been a constant, significant feature of the U.S. administrative state since the early 1980s, but its sources of support and opposition have varied considerably during these three decades. In fact, the appeal of cost-benefit analysis has, to some extent, shifted from one side of the political aisle to the other.

In the late 1970s, conservatives within the Republican Party promoted cost-benefit analysis as a way to slow, and sometimes stop, agencies from promulgating regulations. Early in his first administration, President Reagan issued Executive Order 12,291, which required agencies to prepare a detailed cost-benefit analysis of any proposed regulation with a significant impact on the economy. This requirement succeeded in creating a serious drag on the regulatory process and was reviled by progressive groups for two decades.

During the administration of President Barack Obama, there was a marked shift as some progressive groups finally began to see the advantages of cost-benefit analyses that placed a monetary value on the health and environmental benefits of a regulation. But at the same time conservatives, perhaps sensing a shift in power, began to lose interest, turning their rhetoric away from cost-benefit analysis and toward reframing the debate to one about employment, economic growth, or energy prices. In particular, some conservatives and regulated industry have argued

that regulation-induced layoffs should, in effect, act as a trump that outweighs all other considerations.

Cost-benefit analysis has weathered similar critiques in the past. Any ascendant political group is likely to chafe against cost-benefit analysis, with its tendency to place the concerns of that group within a broader social context. But despite the recent criticisms from the right—just as with those from the left three decades ago—cost-benefit analysis will likely remain a significant tool in the evaluation of regulatory policies.

#### A. “Putting a Price on Life”

Cost-benefit analysis first became a polarizing political issue when prominent Republicans adopted it as a way of constraining regulation. This process began during Reagan’s campaign, when he cast regulation and the federal bureaucracy as the enemy of economic growth, positioning his agenda of deregulation and tax cutting as the key to creating jobs and increasing prosperity. Within a month of his inauguration in 1981, Reagan issued Executive Order 12,291, which asserted significant presidential control over the administrative state.<sup>1</sup> Reagan’s executive order created the basic architecture of the central review of agency action that is in place today. It required agencies to prepare detailed cost-benefit analysis of proposed regulations with a significant impact on the economy, and, in general, required that a regulation’s expected benefits exceed its expected costs. Officials within OIRA—the Office of Information and Regulatory Affairs, within the Office of Management and Budget—oversaw the cost-benefit analysis process, and OIRA became known at the time as a “black hole” for regulations, in part because of its delay in performing reviews.<sup>2</sup> Many progressive groups fought back by rejecting the validity of cost-benefit analysis altogether, claiming that it suffered from fatal technical and moral problems.<sup>3</sup>

In 1993, President Clinton issued Executive Order 12,866, maintained the basic architecture of cost-benefit analysis based regulatory review,<sup>4</sup> giving rise to bipartisan support for the requirement. Protection oriented greeted the Clinton order with similar distrust.<sup>5</sup>

Revesz became interested in the political context for cost-benefit analysis about fifteen years ago when he served on a U.S. Environmental Protection Agency (EPA) advisory committee on environmental economics, which was conducting a peer review on EPA’s guidelines for the preparation of cost-benefit analyses. The committee meetings discussed the major building blocks of cost-benefit analysis, including important questions

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<sup>1</sup> RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY* 25 (2008).

<sup>2</sup> *Id.* at 26.

<sup>3</sup> *See id.*

<sup>4</sup> Summarize updates

<sup>5</sup> Michael A. Livermore & Richard L. Revesz, *Retaking Rationality Two Years Later*, 48 HOUS. L. REV. 1, 6-7 (2011).

like the right estimate for the value of a statistical life, whether carcinogens should be treated in the same way as non-carcinogens, what discount rate should be used for latent harms, and whether the same discount rate should be used for environmental problems affecting future generations.

There was a severe imbalance in the participation of interest groups in these proceedings. Major trade associations for polluters participated frequently in the meetings, generally represented by the most sophisticated Washington, D.C. law firms, always arguing for a lower valuation of benefits and less regulation. But no environmental group ever showed up. When Revesz raised this issue with a senior official at a major environmental organization, he recognized that from a strategic standpoint the environmental groups in the U.S. were missing out on an important opportunity to affect policy. But he said that the various constituencies of the environmental groups including their funders and members were suspicious of cost-benefit analysis, and that, as a result, these groups did not want to lend legitimacy to the process by entering the fray.

Years later, Revesz was giving a talk at the American Enterprise Institute, and alluded to this experience. Someone from the back of the room asked me a question. It was Sally Katzen, who had served as the OIRA Administrator in the Clinton Administration. She said, similarly, that she had spent time trying to convince environmental groups that cost-benefit analysis could be a “neutral tool,” and encouraging them to participate, alongside industry groups, in methodological discussions concerning the valuation of costs and benefits. Whereas industry groups were eager to participate in these conversations, environmental groups were not. Eventually she gave up trying to bring them to the table.<sup>5</sup>

Our book *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health*, published in 2008, documents how anti-regulatory academics and trade associations for polluters influenced the processes for determining appropriate methodologies for conducting cost-benefit analyses. We argue that as a result of the absence of progressive groups in these debates, important methodological imbalances arose that were not supported by economic theory or empirical evidence.

### *B. A Turn Toward Economics for Protection Oriented Groups*

In August 2008, a few months after we published our book, we launched the Institute for Policy Integrity, a think tank and advocacy organization at NYU Law School. In part, we sought to support progressive groups that decided to participate meaningfully in cost-benefit analyses. Protection oriented groups in general, and environmental organizations in particular, have begun to take an interest in the idea that cost-benefit analysis might advance their causes. Recently, there have been signs of a change in which progressive groups are finally starting to speak the language of cost-benefit-analysis.

For example, at the request of the Center for Reproductive Rights, prepared an assessment of the cost-benefit analysis that the U.S. Department of Health and Human Services conducted in support of a “midnight regulation” at the end of the Bush administration, which made it much more difficult for women to obtain adequate

reproductive health services. Our analysis was then used by the Center and other groups in their regulatory comments.

Similarly, Public Citizen asked Policy Integrity to file an amicus brief in a challenge to a Bush Administration deregulation that allowed truckers to spend longer hours behind the wheel, risking additional accidents and long-term health consequences from fatigue. Also, building on research conducted by Professor Rachel Barkow, among others, we expanded our work into the area of criminal justice reform. By focusing government resources on those interventions that deliver the greatest public benefit at the lowest expense, cost-benefit analysis can provide a much-needed corrective to criminal justice expenditures that impose significant pressure on state budgets.

Over the last two years, Policy Integrity has had a robust partnership with the Environmental Defense Fund and the Natural Resources Defense Council, focused on providing a strong intellectual justification for the use of the “social cost of carbon” (SCC) in regulatory proceedings. The SCC is the estimate of the climate change damage caused by one ton of carbon dioxide emissions. It plays a key role in the regulatory impact analysis not only of the Obama administrations regulation of greenhouse gases under the Clean Air Act but also in other important regulatory contexts. The three organizations have been filing comments in every regulatory proceeding in which the SCC is used to justify the regulation. They argue that the Obama administration’s estimate is a reasonable one given the current state of scientific knowledge, but that it should be regarded as the lower bound on the actual number because a number of important negative consequences of climate change, such as wildfires and forced migration have not yet been incorporated into the models. We argue that further support should be given to research in this area and that there be a regularized, periodic process for updating the SCC. To bring attention to these issues and to act as a catalyst for further work in this area, last year the three organizations launched a “Cost of Carbon Pollution” website that focuses on damages that are omitted from the SCC calculation.

A sign of the changing times came in connection with the 2010 Frankel Lecture, which Revesz delivered at the University of Houston Law Center. He provided a progress report on how the arguments in *Retaking Rationality* and the work the work that Policy Integrity had undertaken in conjunction with other environmental organizations.. Professor Douglas Kysar of Yale Law School provided one of the responses. Kysar is part of the leadership of the Center for Progressive Reform, an organization that has exhibited unvarnished antipathy toward cost-benefit analysis. In commenting on the lecture, Kysar wrote, “[a]ssuming Livermore and Revesz are correct that cost-benefit analysis is here to stay—and [I have] no reason to doubt their prediction—then proponents of environmental, health, and safety regulation would do well to start talking the talk as best they can.”<sup>6</sup>

More generally, advocates of stronger environmental protections have started to understand the importance of cost-benefit analysis as a tool. The biggest groups have hired economists and taken steps to be involved in even the most detailed of cost-benefit questions. The value of a statistical life, once reviled as a crass manner of placing a dollar figure on the worth of a human being, is now beginning to have a place in the toolbox of progressive advocacy

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<sup>6</sup> Kysar at 37.

organizations. And arguments in defense of the “social cost of carbon” are now commonplace among several environmental organizations.

### *C. Jobs, Jobs, Jobs*

Unfortunately, in the aftermath of the serious economic crisis that began in 2008, the political right has been insistent calling for an end to new environmental protections. Rather than focusing on cost-benefit analysis, over which it no longer exhibited the same level of primacy, it has sought to reframe the debate around specific economic factors, such as employment, growth, or energy prices.

During the 2012 campaign, Mitt Romney addressed the issue as follows:

Where standards are put in place to constrain the issuance of regulations—such as requiring the use of cost-benefit analysis—they tend to be vulnerable to manipulation and also disconnected from the central issue confronting our country today, namely, generating economic growth and creating jobs. The end result is an economy subject to the whims of unaccountable bureaucrats pursuing their own agendas.<sup>7</sup>

Note that Romney, with his Harvard Business School training and Boston Consulting Group pedigree is not the most obvious person to question the reliance on economic models as “vulnerable to manipulation.”

There was a brief moment in which it appeared that cost-benefit analysis would become the agreed-upon language that different groups from across the American political spectrum could finally speak together. Instead, just as one side was getting on the cost-benefit analysis train, the other side was getting off, practically at the same station. Conservatives abandoned cost-benefit analysis as a way of preventing regulation shortly after liberals decided that it could be used to bolster support for the regulations they wanted. Of course, these two trends are probably related. Alexander Volokh, a noted libertarian and professor at Emory Law School, also commented on my Frankel Lecture, which I mentioned earlier in connection with Professor Kysar’s comment. Volokh said that libertarians had advocated for cost-benefit analysis because they had believed that it would lead to less stringent regulations. But he noted that if as a result of our work cost-benefit analysis could begin to be used by progressives to lead to more stringent regulation, then “libertarians should reconsider their tolerance of cost-benefit analysis and focus more on making their case for deregulation in moral terms.”<sup>8</sup>

Conservatives may be more reluctant to tout cost-benefit analysis than they once were. But what is the alternative to cost-benefit analysis? The alternative certainly cannot be jobs analysis. Anti-regulatory voices have been keen to label as “job killing” practically any regulation that any agency proposes, especially those proposed by the EPA, while

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<sup>7</sup> Mitt Romney, *Believe In America: Mitt Romney's Plan for Jobs and Economic Growth--Regulatory Policy*, available at <http://www.mittromney.com/sites/default/files/shared/Regulatory.pdf>.

<sup>8</sup> Volokh at 38.



simultaneously knocking down cost-benefit analysis models that predict lives lost, as Romney’s statement indicates. From 2007 to 2011, the phrase “job-killing regulations” underwent a 17,550% increase in usage in U.S. newspapers (from just four appearances in 2007 to over seven hundred in 2011).<sup>9</sup> A study by Peter Dreier of Occidental College and Christopher R. Martin of the University of Northern Iowa found that the number of stories with the phrase “job killer” increased 1,156% between the first three years of the George W. Bush administration and the first three years of the Obama administration (from 16 stories to 201 stories).<sup>10</sup>

The idea of “job killing” regulations is based on a one-sided model in which regulatory benefits are completely excluded. Under this approach, it is better to be dead than unemployed, because a regulation that eliminates a job should not be adopted even if it saves a life.

Reliance on job models is also problematic because they are still in a somewhat primitive state—far more primitive than the models used to value environmental benefits. The models are intended to capture how different sectors of the economy interact and what effect those interactions will have on employment. But most models can look only at part of the picture—like layoffs or hiring in a particular sector—and cannot predict the dynamic, economy-wide effects of a policy on aggregate employment levels.<sup>11</sup> Because overall employment responds to large, macroeconomic factors, individual environmental regulations will rarely have lasting effects on aggregate employment.<sup>12</sup> Environmental regulations are more likely to influence the geographic and sectorial distribution of employment opportunities, rather than national employment levels.<sup>13</sup> The current models are better suited to identify these effects than to forecast economy-wide consequences. While this information may be useful for policymakers, it should not be mistaken for an accurate picture of the net effects of an environmental policy on employment.<sup>14</sup> And although nearly every controversial environmental policy proposed during the last several years has given rise to a debate about the possible employment effects, the studies used to support either side of the debate hardly ever address the models’ limitations.<sup>15</sup>

These limitations, however, are abundantly clear. A stark example can be found in the studies of two different groups that looked at the effect on employment of the Clean Air Transport Rule, dealing with the interstate transport of pollution, and the Utility MACT (which stands for Maximum Achievable Control Technology) rule, controlling hazardous air pollution from boilers. The Political Economy Research Institute at the University of Massachusetts Amherst, found that 1.46 million jobs would be gained over the next five years, whereas a study

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<sup>9</sup> Livermore and Schwartz.

<sup>10</sup> Peter Dreier and Christopher R. Martin, “*Job Killers*” in *the News: Allegations without Verification 2* (June 2012), available at [http://www.uni.edu/martinc/JobKillerStudy\\_June2012.pdf](http://www.uni.edu/martinc/JobKillerStudy_June2012.pdf).

<sup>11</sup> INSTITUTE FOR POLICY INTEGRITY, *THE REGULATORY RED HERRING: THE ROLE OF JOB IMPACT ANALYSIS IN ENVIRONMENTAL POLICY DEBATES 12* (2012).

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 14.

commissioned by the American Council for Clean Coal Energy, found that 1.44 million jobs would be lost over the next seven years due to the same regulations.<sup>16</sup> These two studies essentially agreed on the number; they just disagreed on the sign of the effect—a quite important factor. So when conservatives like Romney argue that the models predicting lives saved are unreliable, and that instead we should worry about jobs, one has to wonder which jobs study it is that he finds so reliable. There may well be another study that cancels it out completely.

One frequent problem in jobs analyses is that they conflate short-term and long-term unemployment. Doing so can lead to incorrect cost calculations and misleading rhetoric—the difference between them should be taken into account when determining the economic costs of layoffs. Short-term unemployment may involve minor costs for job searches and retraining, whereas long-term unemployment can have more severe effects, including long-term income and productivity effects as well as negative health consequences. Long-term unemployment can be driven by a number of factors, including inflexible wage rates, technological change, and foreign competition.<sup>17</sup> And long-term unemployment tends to be higher during periods of economic contraction. If an environmental regulation causes layoffs, that effect is likely to be worse during an economic downturn because those workers may have a harder time finding a new job.<sup>18</sup> But during an economic downturn, regulated industries might hire otherwise unemployed workers to design, manufacture, and install necessary pollution control equipment.<sup>19</sup> In such cases, where the regulatory costs are higher in some respects and lower in others, the net effect on jobs is ambiguous. Delaying implementation of a rule might not be the appropriate choice, even if one’s only concern is with jobs. And delaying implementation will always mean foregoing the net social benefits that a rule would have generated in the meantime by improving environmental quality.<sup>20</sup>

Moreover, environmental regulations can have positive effects on a labor market. Regulation can spur demand in a local labor market by, for example, requiring facilities to retrofit pollution control technology.<sup>21</sup> Analysts and advocates on both sides of the debate should be careful to look at the whole picture and resist the temptation to cherry-pick results. And legislators should do the same when they are voting on bills that would impose across-the-board moratoria on rulemakings.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 10.

<sup>22</sup> In January 2011, Representative Don Young proposed the Regulation Audit Revive Economy (RARE) Act of 2011, H.R. 213, seeking to create a two-year moratorium on rulemakings. Senator Ron Johnson introduced the Regulation Moratorium and Jobs Preservation Act of 2011, S. 1438, which would prevent agencies from taking any significant regulatory action until the national unemployment rate drops below 7.7%. Senator Warner has also started drafting a “regulatory paygo” bill, which would require that for every new regulation an agency wants to

Finally, economic models used to predict employment effects should be appropriate to the type of regulatory effect policymakers are trying to estimate. Some models are better suited to estimating effects in a single region or industry, while others can better handle multi-sector or nationwide analysis. Models designed to understand regional or sector-specific impacts are often used incorrectly to make predictions about the nationwide, aggregate effects of regulations on employment. These models are poorly suited to that task because they do not take into account the primary factors that drive national employment levels, like aggregate demand or wage-price rigidity.<sup>23</sup>

Jobs analysis should not replace cost-benefit analysis because it looks at only one consequence of regulation. But labor transition costs can and should be incorporated into cost-benefit analysis using standard economic principles.<sup>24</sup> The labor transition costs that cost-benefit analysis could reflect include relocation costs, retraining costs, long-term productivity effects, and any negative effects on psychological or physical health resulting from long-term unemployment. If these transition costs are substantial, they may be enough to justify altering the rule.<sup>25</sup>

## II. Marketable Permits

The evolution of views about marketable permits over the past several decades followed a similar pattern. Perhaps even more so than for cost-benefit analysis, it initially found support among conservatives, was increasingly adopted by the left, and was eventually abandoned by industry and other regulatory skeptics (at least in the context of greenhouse gases). Originally, proponents of marketable permits characterized the technique, as they did cost-benefit analysis, as a preferable alternative to the dominant approach (here, command-and-control regulation). However, in the context of climate change, the alternative was perhaps *no* regulation, so this advantage disappeared in the minds of industry groups and their ideological allies. In addition, the fact that each desired marketable permit scheme must be affirmatively passed by Congress poses an additional hurdle not present to cost-benefit analysis, which is already institutionalized and can be modified by unilateral executive order.

Conservative and industry backlash against cost-benefit analysis and marketable permit schemes has focused on a similar message: that environmental protections, even if achieved by marketable permits, are job-killing, growth-depressing, and inevitably drive up energy prices.

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propose, it first must eliminate one existing regulation with similar economic impacts. Luke Burns, *PAYGO Proposed to Manage Agency Regulations*, REG BLOG, May 5, 2011, <http://www.law.upenn.edu/blogs/regblog/2011/05/paygo-proposed-to-manage-agency-regulations.html>; EMILY YEHLE, *Democratic Senator Offers Sweeping Regulatory Reform Proposal*, E&E DAILY, Feb. 16, 2012.

<sup>23</sup> INSTITUTE FOR POLICY INTEGRITY, *THE REGULATORY RED HERRING: THE ROLE OF JOB IMPACT ANALYSIS IN ENVIRONMENTAL POLICY DEBATES* 20 (2012).

<sup>24</sup> *Id.*; see also Jonathan S. Masur & Eric A. Posner, *Regulation, Unemployment, and Cost-Benefit Analysis*, 98 VA. L. REV. 579, 624 (2012).

<sup>25</sup> *Id.* at 9.

This line of attack has been supported by the continued economic anxiety accompanying the lagging recovery from the recession that began in 2008. The shifting tides of industry support and involvement in a variety of marketable permit proposals over the past three decades reveals that their allegiance—or lack thereof—is driven by their concerns for their bottom line.

### *A. Markets as a Constraint on Regulation*

Marketable permit schemes as a tool for addressing pollution were formulated in the late 1960s and early 1970s by economists and EPA regulators as a method for reducing pollution at least cost, that is, more efficiently than traditional command-and-control regulation. At that time the concept was most commonly referred to as “emissions trading.” The initial idea is most often credited to John Dales, but several others contributed to the early development of and theoretical support for the framework.<sup>26</sup> These early works largely focused on the problem of externalities, aiming to design an efficient market that would control for these externalities.<sup>27</sup> Economists continued to explore the framework, attempting to quantify its potential cost savings over traditional regulation,<sup>28</sup> questioning several of its basic assumptions,<sup>29</sup> and evaluating the performance of small-scale pilot programs and proposals for implementation.<sup>30</sup>

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<sup>26</sup> See JOHN H. DALES, *POLLUTION, PROPERTY & PRICES* (1968); see also Thomas D. Crocker, *The Structuring of Atmospheric Pollution Control Systems*, in *THE ECONOMICS OF AIR POLLUTION* (Harold Wolozin ed., 1966) (advocating a marketable permit program to address air pollution); J.H. Dales, *Land, Water, and Ownership*, 1 *THE CANADIAN J. OF ECON.* 791, 801 (1968) (advocating transferable permits as a market-based solution to depletion and pollution problems); W. David Montgomery, *Markets in Licenses and Efficient Pollution Control Programs*, 5 *J. ECON. THEORY* 5, 395 (1972) (providing a theoretical framework for the use of allowance markets to address pollution).

<sup>27</sup> For an overview of the theory, see WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* (1975).

<sup>28</sup> See, e.g., THOMAS H. TIETENBERG, *EMISSIONS TRADING: AN EXERCISE IN REFORMING POLLUTION POLICY* 42–43 (1985) (estimating that some command and control systems cost twice as much as a theoretically pure tradable permit system).

<sup>29</sup> See Robert W. Hahn, *Market Power and Transferable Property Rights*, 99 *Q.J. ECON.* 753, 753–64 (1984) (demonstrating that minor changes in the allocation of permits can greatly affect the efficiency of the market system); Stephen H. Linder & Mark E. McBride, *Enforcement Costs and Regulatory Reform: The Agency and Firm Response*, 11 *J. ENVTL. ECON. & MGMT.* 327 (1984) (modeling to account for enforcement challenges and imperfect compliance); Scott E. Atkinson & T.H. Tietenberg, *The Empirical Properties of Two Classes of Designs for Transferable Discharge Permit Markets*, 9 *J. ENVTL. ECON. & MGMT.* 101, 101–10 (1982), available at [http://ac.els-cdn.com/009506968290016X/1-s2.0-009506968290016X-main.pdf?\\_tid=7b23b4ea-2472-11e3-a5a9-00000aab0f26&acdnat=1379956166\\_8b2cc9553741cf1f1473e21c72006dd7](http://ac.els-cdn.com/009506968290016X/1-s2.0-009506968290016X-main.pdf?_tid=7b23b4ea-2472-11e3-a5a9-00000aab0f26&acdnat=1379956166_8b2cc9553741cf1f1473e21c72006dd7) (pointing out the advantages and weaknesses of two competing models for permit scheme design).

<sup>30</sup> See, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 *STAN. L. REV.* 1333, 1351–65 (1985) (proposing that auctions be used to distribute permits and moving away from uniform ambient air quality standards); Robert W. Hahn & Roger Noll, *Designing a Market for Tradable Emissions Permits*, in *REFORM OF ENVIRONMENTAL REGULATION* 119–45 (Wesley Magat ed., 1982).

The concept of emissions trading infiltrated the political arena in the 1980s, when a Reagan administration lawyer named C. Boyden Gray promoted it as a preferable approach to the traditional method of addressing air pollution.<sup>31</sup> This accords with the political climate of the time, when environmental problems such as air pollution were acknowledged by both political parties, and the main differences of opinion were not over whether they were problems that should be addressed, but rather how (to what extent and in what fashion). Its ideological supporters preferred emissions markets because they were predicted to accomplish the desired environmental goals in a less burdensome fashion by not prescribing exactly how firms reduce their emissions, and allowing market mechanisms to allocate that burden most efficiently.

Firms themselves sought the flexibility to comply with existing regulations and to expand at the least cost. In an early example, the manager of the Oklahoma City Chamber of Commerce arranged for offsets by oil storage facilities in order to allow for the construction of a large General Motors assembly plant in the city.<sup>32</sup> However, that was in response to EPA's requirement that any additional pollution be offset by reductions in existing pollution in a given area—not an endorsement of tradable pollution rights in the abstract.<sup>33</sup> Similarly, industry groups advocated for the “bubble” approach to measuring emissions from an entire industrial complex, allowing them to meet an overall target through the most cost-effective means rather than meeting a reduction goal for each individual smokestack.<sup>34</sup>

Industry response to marketable permit schemes appears to have been more diverse than its almost uniform early support for cost-benefit analysis. This can be attributed to two reasons: the value placed on certainty,<sup>35</sup> and the fact that markets by their nature create winners and

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<sup>31</sup> See Richard Conniff, *The Political History of Cap and Trade*, SMITHSONIAN MAGAZINE (Aug. 2009), available at <http://www.smithsonianmag.com/science-nature/Presence-of-Mind-Blue-Sky-Thinking.html?c=y&story=fullstory> (describing the evolution of the political viability of emissions trading from its early days as the favorite of an alliance of free-market Republicans and unorthodox environmentalists to the modern debate over cap-and-trade greenhouse gas regulation).

<sup>32</sup> *Pollution Becomes a Hot Commodity*, MILKWAUKEE JOURNAL (Aug. 22, 1977), at 4, available at <http://news.google.com/newspapers?nid=1499&dat=19770822&id=RmlaAAAAIABAJ&sjid=eykEAAAIAIBAJ&pg=6924,2062051> (describing the arrangement in Oklahoma City as well as other informal

<sup>33</sup> See *id.* (explaining the informal trading of pollution “rights” as a creative reaction to EPA’s implementation of the Clean Air Act).

<sup>34</sup> The list of intervenors in support of EPA’s bubbling policy at the D.C. Circuit level in *Chevron v. NRDC* included the American Petroleum Institute, American Iron and Steel Institute, General Motors, Rubber Manufacturers Association, Alabama Power Company, and the Chemical Manufacturers Association. See *NRDC v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), *reversed sub nom Chevron v. NRDC*, 467 U.S. 837 (1984). Industry groups also sued the EPA in order to remove limitations on its early implementation of the bubble concept and allow broader use of bubbling. See *ASARCO Inc. v. EPA*, 578 F.2d 3119 (D.C. Cir. 1978). Those very same groups had pressured EPA to adopt bubbling in the first place. See *id.* at 323–24 (citing letter from James M. Henderson of ASARCO to Donald F. Walters, then Chairman of the National Air Pollution Control Techniques Advisory Committee, Dec. 27, 1972, at 4).

<sup>35</sup> See Hahn & Hester, *supra* note 8 at 142 (citing evidence that firms did not use bubbling except when they faced compliance deadlines, implying that they value certainty highly, as they chose the option to simply comply with the limits in their permits if possible, rather than choosing the more flexible bubbling option). *But see* Michael Kranish, *A Clean Air Revival*, BOSTON GLOBE (Oct. 17, 2010),

losers. Unlike cost-benefit analysis, which was uniformly regarded by industry as reducing regulatory burden, and supported enthusiastically as such, early emissions trading-type options were not embraced by industry to the same degree. One such “loser” created by the 1990 Clean Air Act Amendments was American Electrical Power Company, the operator of a large power plant in the Ohio Valley that contributed to acid rain in New England. AEP fought the acid rain trading program, claiming that it would result in “the potential destruction of the Midwest economy.”<sup>36</sup> Numerous other utility companies initially opposed the Clean Air Act Amendments, but then, like AEP, came to appreciate the success and cost-saving measures of the acid rain trading program, and endorsed the Waxman-Markey climate change legislation two decades later.<sup>37</sup> Mike Morris, the CEO of AEP, attributed this shift to the recognition that marketable permits “turned out to be a beautiful idea” and saved industry a significant amount of money in compliance costs while benefitting the environment.<sup>38</sup>

Environmentalists initially greeted the concept of marketable permits with suspicion.<sup>39</sup> Their opposition to emissions trading fell into three categories: moral objections to the concept that clean air is “for sale”; concerns about prioritization of goals (specifically, that environmental quality would be sacrificed for economic efficiency); and the symbolic message sent by a system that allows the polluters—not the government—to make decisions about tradeoffs between economics and the environment.<sup>40</sup> Environmental groups opposed early forms of trading such as bubbling and offsets, seemingly motivated by these concerns.<sup>41</sup> The only major environmental organization that showed a strong interest in developing market-based solutions to environmental problems, the Environmental Defense Fund (EDF) under the new leadership of Fred Krupp, was reviled by the left as “cynical and gutless.”<sup>42</sup>

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[http://www.boston.com/yourtown/malden/articles/2010/10/17/washing\\_away\\_of\\_acid\\_rain\\_offers\\_lesson/](http://www.boston.com/yourtown/malden/articles/2010/10/17/washing_away_of_acid_rain_offers_lesson/) (reporting that a power company executive supports a cap-and-trade program for greenhouse gases because “his company craves certainty about the shape of new carbon regulations”).

<sup>36</sup> See Kranish, *supra* note 35.

<sup>37</sup> See *id.* (“AEP has some powerful company in this view [supporting cap-and-trade]. The Edison Elective Institute, which represents many utility companies that fought acid rain controls 20 years ago, endorsed the House version of the climate change legislation, which included a cap-and-trade plan.”). See also *id.* (quoting Congressman Waxman as noting the reversal from 1990, when industry fought the marketable permit program but significant numbers of Republicans supported the legislation, to 2010, when many industry players supported cap-and-trade but Republicans were uncooperative).

<sup>38</sup> See *id.*

<sup>39</sup> See, e.g., Fred Krupp, *The Making of a Market-Minded Environmentalist*, 51 STRATEGY+BUSINESS (June 10, 2008), available at <http://www.strategy-business.com/article/08201?pg=all> (author describes how his colleagues at the Environmental Defense Fund did not share his interest in using market mechanisms to combat environmental problems when he became president of the organization in 1984, preferring to stick to a litigation strategy instead).

<sup>40</sup> Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA’s Emissions Trading Program*, 6 YALE J. ON REG. 109, 142 (1989).

<sup>41</sup> See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (in which an environmental group opposed EPA’s “bubbling” policy which allowed sources to combine multiple stacks into one single “source” for emissions purposes so that they could reduce emissions more from some than others so long as the aggregate emissions met the target).

However, unlike in the cost-benefit analysis context, in which the immediate effect of Executive Order 12,291 thrust the technique into the center of the regulatory process, marketable permit schemes were implemented to a much less significant degree. Where they were implemented on a minor scale—bubbling and offsets—industry participated in the process with sophistication,<sup>43</sup> while environmental groups litigated the theory rather than shaping its implementation.

### *B. A Brief Consensus*

In 1986, Fred Krupp received a call from C. Boyden Gray, then-counsel to Vice President George H. W. Bush, in response to an op-ed he penned for the *Wall Street Journal* outlining his vision for the next “wave” of the environmental movement, in which environmentalists collaborate with policymakers and industry on creative and flexible solutions to environmental problems.<sup>44</sup> At the end of the piece he briefly mentioned “market-oriented incentives” as a way to accomplish “greater environmental and economic benefits at a lower social and economic cost.”<sup>45</sup> Gray’s interest in addressing environmental issues was perhaps not mainstream for Reagan administration staff,<sup>46</sup> but when his boss was elected president in 1988, Gray turned to Krupp and EDF for ideas on how to address the growing problem of acid rain—and the concomitant foreign policy implications for the United States’ relationship with Canada—and provide the new president with a legacy issue on the environment, an issue that was still largely bipartisan at that time.<sup>47</sup> Accounts of the passage of the 1990 Amendments to the Clean Air Act, which included the landmark emissions trading program that capped output of sulfur dioxide (an precursor to acid rain), describe the response of most parties as skeptical of the framework.<sup>48</sup> However, it passed Congress with remarkably bipartisan vote counts and was quickly lauded as an innovative policy (and especially touted after its success exceeded expectations).<sup>49</sup>

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<sup>42</sup> Krupp, *supra* note 7 (quoting Citizens Party cofounder Barry Commoner’s criticism of EDF’s willingness to work on market-based issues and collaborate with the Republican presidential administration).

<sup>43</sup> See *supra* notes 32-34 and accompanying text. See also Laurens H. Rhinelander, *The Proper Place for the Bubble Concept Under the Clean Air Act*, 13 *Env. L. Reporter* 10406 (1983) (documenting the efforts of several large industrial plants to use bubbling to reduce the costs of compliance, and to push the EPA to recognize more creative and expansive views of what constitutes a bubble).

<sup>44</sup> Krupp, *supra* note 7.

<sup>45</sup> *Id.*

<sup>46</sup> See Conniff, *supra* note 6 (describing the Reagan White House as a place “where environmental ideas were only slightly more popular than godless Communism”).

<sup>47</sup> *Id.* (alluding to Bush’s campaign promise to be the “environmental president”).

<sup>48</sup> See *id.* (describing EPA staffers, White House staff, Congressional staff, and environmentalists as skeptical of the idea, and often misunderstanding it); Krupp, *supra* note 7 (recalling blowback from the media, environmental groups, Congress, and the administration); *supra* notes 35-36 and accompanying text.

Fueled by the success of the acid rain emissions trading program, more Republicans, industry leaders, and environmentalists converted to the movement for marketable permit schemes as viable alternatives to command-and-control regulation in appropriate contexts.<sup>50</sup> The success of the Montreal Protocol, which used a trading mechanism to phase out the use of ozone-depleting CFCs, further boosted the credibility of marketable permit schemes. Alongside these policy successes, academic commentators continued their general support for market-based approaches.<sup>51</sup>

By the 2000s, support for market mechanisms gained the status of bipartisan consensus. When George W. Bush's administration promulgated a trading scheme under the Clean Air Interstate Rule (CAIR) to address interstate pollution spillovers in 2005, it could be said that three Republican presidents in a row had enacted some form of emissions trading program (Reagan oversaw the lead phase-down, and George H. W. Bush passed the acid rain legislation and negotiated the Montreal Protocol).<sup>52</sup> Newt Gingrich, spoke in favor of cap and trade for greenhouse gases in a 2007 interview, and even appeared in a television commercial with then-House Speaker Nancy Pelosi in support of immediate action on climate change.<sup>53</sup> In the 2008 presidential election, the frontrunners for the presidential nomination from both parties<sup>54</sup> strongly supported a cap and trade system for reducing greenhouse gases, such that it was not a point of contention during the primaries or the general election campaign. Further, while environmentalists largely opposed such mechanisms in the mid-1980s, by the 2008 election they were described as “ador[ing]” cap and trade.<sup>55</sup>

However, because marketable permit schemes were not embedded in the regulatory state in the way that cost-benefit analysis was, even this bipartisan support did not translate into

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<sup>49</sup> See Richard L. Revesz & Michael A. Livermore, *Cap and Trade Was Republican's Good Idea*, HUFFINGTON POST (Mar. 8, 2010, 10:04 AM), [http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/cap-and-trade-was-republi\\_b\\_489863.html](http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/cap-and-trade-was-republi_b_489863.html) (“Only ten senators (five Democrats and five Republicans) vote (sic) against the bill—as bipartisan as it gets.”).

<sup>50</sup> See *supra* notes 37-38 and accompanying text.

<sup>51</sup> See, e.g., BUYING A BETTER ENVIRONMENT: COST-EFFECTIVE REGULATION THROUGH PERMIT TRADING (Erhard F. Joeres & Martin H. David eds., 1983); THOMAS H. TIETENBERG, EMISSIONS TRADING: AN EXERCISE IN REFORMING POLLUTION POLICY (1985); Robert W. Hahn, *Innovative Approaches for Revising the Clean Air Act*, 28 NAT. RESOURCES J. 171 (1988).

<sup>52</sup> Richard Schmalensee & Robert Stavins, *The Power of Cap-and-Trade*, BOSTON GLOBE (July 27, 2010), *reprinted in* [www.robertstavinsblog.org](http://www.robertstavinsblog.org) (last visited Sept. 22, 2013).

<sup>53</sup> Interview with Newt Gingrich, FRONTLINE ON PBS (Feb. 15, 2007), <http://www.pbs.org/wgbh/pages/frontline/hotpolitics/interviews/gingrich.html> (“I think that if you have mandatory carbon caps combined with a trading system, much like we did with sulfur, and if you have a tax-incentive program for investing in the solutions, that there's a package there that's very, very good. And frankly, it's something I would strongly support.”).

<sup>54</sup> Specifically, John McCain, Hillary Clinton, and Barack Obama.

<sup>55</sup> Matt Negrin, *Whatever Happened to Cap and Trade?*, ABC NEWS (July 17, 2012), <http://abcnews.go.com/Politics/OTUS/environment-happened-cap-trade-global-warming/story?id=16790018> (revisiting Barack Obama's 2008 campaign promises and describing cap and trade as “the system environmentalists adored for regulating gases that trap heat in the atmosphere”).



immediate institutionalization. Thus, the increasing popularity of marketable permit schemes, which required legislative and executive action to be authorized and executed for every discrete program, was more tenuous. The emerging consensus—and any practical effect that followed from it—was thus more easily shattered.

### C. “Cap-and-Tax”

In advance of what would become a more general political backlash against marketable permits, several academics questioned the free-market basis of marketable permit schemes. Robert McGee and Walter Block argued that marketable permits systems, while preferable to command-and-control regulation, are inferior to “fully protected private property rights.”<sup>56</sup> This argument foreshadows the later rejection of cap-and-trade: when other regulation appears likely or inevitable, an anti-regulation decisionmaker will gravitate to less-burdensome alternatives such as marketable permits; however, if the options are no regulation or cap and trade, the same decisionmaker will opt to oppose cap and trade. This is particularly exacerbated in the climate context, in which the very scientific basis of human-caused climate change has been rejected by a significant number of political actors. Block went so far as to invoke the label “socialist” to marketable permit schemes:

“... to mimic a market is not at all the same as *have* a market. Indeed, a case could easily be made that they are opposites. After all, this was the burden of the market socialists. They, too, saw all sorts of market imperfections and market ‘failures.’ The results of real, live markets were anathema to them. They, too, wished to ‘mimic’ what they thought would be the results of markets unsullied by these inadequacies.”<sup>57</sup>

However, these academics were outliers until the political tide turned against cap-and-trade in 2009.

When the Waxman-Markey climate bill—with a cap and trade greenhouse gas program at its heart—passed the House of Representatives, shifting the debate to the Senate, Republican pundits were quick to recast the bill as a tax on energy.<sup>58</sup> The GOP’s “Pledge to America” in 2010 included language expressly opposing cap and trade, which it called an “energy tax.”<sup>59</sup> The

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<sup>56</sup> Robert W. McGee & Walter E. Block, *Pollution Trading Permits as a Form of Market Socialism and the Search for a Real Market Solution to Environmental Pollution*, 6 FORDHAM ENVTL. L.J. 51 (1994).

<sup>57</sup> Walter Block, *Private Property Rights, Economic Freedom, and Professor Coase: A Critique of Friedman, McCloskey, Medema, and Zorn*, 26 Harv. J.L. & Pub. Pol’y 923, 942–43 (2003) (characterizing Coasian theory as socialist and criticizing it from a libertarian perspective).

<sup>58</sup> See, e.g., Jeremy P. Jacobs, *Barrasso Knocks Cap and Trade in GOP Response*, THE HILL (May 23, 2009, 3:52 AM), <http://thehill.com/blogs/blog-briefing-room/news/lawmaker-news/35441-barrasso-knocks-cap-and-trade-in-gop-response> (characterizing the Waxman-Markey cap and trade legislation as a national tax on energy).

<sup>59</sup> *A Pledge to America: A New Governing Agenda Build on The Priorities of Our Nation, The Principles We Stand For & America’s Founding Values*, 43, <http://pledge.gop.gov/resources/library/documents/solutions/a-pledge-to-america.pdf>.

GOP retook the House in 2010 running partly against what they called “cap-and-tax” and characterized as a job-killing big government program.<sup>60</sup> This shift between the 2008 presidential election and the 2010 midterms had solidified by 2012, when Republican candidates for the presidential nomination were attacked for their (almost universal) previous support of cap and trade. In 2008, the Republican nominees for President and Vice President—John McCain<sup>61</sup> and Sarah Palin<sup>62</sup>—both openly supported a cap-and-trade program (although Palin’s support has been interpreted by some as symbolic). In 2007, Newt Gingrich also expressed support for such a system.<sup>63</sup> By 2009, both Palin<sup>64</sup> and Gingrich<sup>65</sup> opposed cap-and-trade, she characterizing it as “cap and tax.” Several observers have pointed out that almost all the main candidates for the Republican nomination for President in 2012 had once supported cap-and-trade for addressing greenhouse gases, some as recently as 2008.<sup>66</sup> As one commented, though, this was unlikely to seriously hurt any candidate because they almost all shared the trait:

“These changed minds show that a lot has changed in the GOP when it comes to energy policy in just a few short years. In 2007 and 2008, the party’s top politicians had reached a consensus that global warming existed, was probably caused by humans, and required an aggressive emissions-regulation scheme to confront it.”<sup>67</sup>

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<sup>60</sup> See Chris Good, *Almost Every 2012 Republican Has a Cap-and-Trade Problem*, THE ATLANTIC (May 13, 2011, 7:30 AM), <http://www.theatlantic.com/politics/archive/2011/05/almost-every-2012-republican-has-a-cap-and-trade-problem/238776/> (describing the shift in the GOP party line in the House leading up to the 2010 midterm elections, and the subsequent shift in presidential candidates’ positions on cap and trade).

<sup>61</sup> See 2008 Republican Platform at 35, <http://www.gop.com/wp-content/uploads/2012/06/2008platform.pdf>; <http://wonkroom.thinkprogress.org/wp-content/uploads/2008/05/5-12-08-qa-climate-change-details.pdf>.

<sup>62</sup> See, e.g., Vice Presidential Debate at 34:00, available at <http://www.youtube.com/watch?v=89FbCPzAsRA> (in which Sarah Palin expresses her ticket’s support for a cap and trade system).

<sup>63</sup> See *supra* note 19.

<sup>64</sup> Sarah Palin, *A “Cap and Tax” Road to Economic Disaster*, WASH. POST (July 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/13/AR2009071302852.html> (predicting that cap and trade would “kill responsible domestic energy production” and “clobber every American consumer with higher prices”).

<sup>65</sup> See Glenn Kessler, *Gingrich and Cap-and-Trade: A Flip-Flop?*, WASH. POST (Dec. 5, 2011, 6:15 AM), [http://www.washingtonpost.com/blogs/fact-checker/post/gingrich-and-cap-and-trade-a-flip-flop/2011/12/04/gIQANXNVVO\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/gingrich-and-cap-and-trade-a-flip-flop/2011/12/04/gIQANXNVVO_blog.html) (quoting Gingrich saying “I’ve never favored cap and trade” just two days earlier).

<sup>66</sup> David Weigel, *Pretty Much Every Republican Front-Runner Used to Support Cap and Trade*, SLATE.COM (May 11, 2011, 10:21 AM), [http://www.slate.com/blogs/weigel/2011/05/11/pretty\\_much\\_every\\_republican\\_front\\_runner\\_used\\_to\\_support\\_cap\\_and\\_trade.html](http://www.slate.com/blogs/weigel/2011/05/11/pretty_much_every_republican_front_runner_used_to_support_cap_and_trade.html) (listing six candidates who had previously expressed support for the policy, with the only exception in the field being Mitch Daniels). See also Daniel J. Weiss, *The GOP Changes Its Tune on Cap and Trade*, CENTER FOR AMERICAN PROGRESS (Oct. 22, 2010) (pointing out that, among other reversals, Senator Mitch McConnell has spoken out aggressively about defeating the cap and trade system modeled after the acid rain legislation he voted for in 1990).

<sup>67</sup> Weiss, *supra* note 31.

While Republican politicians—no doubt influenced by primary threats from Tea Party candidates<sup>68</sup>—almost uniformly rejected cap and trade between 2008 and 2012, some traditional allies of the party, have criticized this strategy as short-sighted.<sup>69</sup> Richard Schmalensee, writing with economist Robert Stavins, points out that the last three Republican presidents passed cap-and-trade programs, and implores that “... market-based policies should be embraced, not condemned by Republicans (as well as Democrats). After all, these policies were innovations developed by conservatives in the Reagan, George H.W. Bush, and George W. Bush administrations (and once strongly condemned by liberals).”<sup>70</sup> The two authors go on to strongly admonish politicians on the dangers of abandoning principle for short-term political gain:

“To reject this legacy and embrace the failed 1970s policies of one-size-fits-all regulatory mandates would signify unilateral surrender of principled support for markets. If some conservatives oppose energy or climate policies because of disagreement about the threat of climate change or the costs of those policies, so be it. But in the process of debating risks and costs, there should be no tarnishing of market-based policy instruments. Such a scorched-earth approach will come back to haunt when future environmental policies will not be able to use the power of the marketplace to reduce business costs.”<sup>71</sup>

While other traditional conservatives and economists likely share this view, cap and trade legislation has been called “dead,” at least for the time being.<sup>72</sup>

Industry involvement in the greenhouse gas cap-and-trade debate surrounding the unsuccessful attempt to pass legislation during the 111<sup>th</sup> Congress was mixed and contentious.<sup>73</sup> The U.S. Chamber of Commerce opposed the bill while several of its members joined the U.S. Climate Action Partnership (USCAP), a coalition of industry and environmental stakeholders that attempted to hammer out a workable compromise that could attract the necessary votes to become law.<sup>74</sup> Ideologues and other staunch opponents of cap-and-trade lambasted the USCAP

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<sup>68</sup> See, e.g., Kate Galbraith, *Republican Senator Takes Heat for cooperating on Cap-and-Trade*, N.Y. TIMES GREEN BLOG (Oct. 16, 2009, 8:17 AM), [http://green.blogs.nytimes.com/2009/10/16/sen-graham-takes-heat-for-climate-stance/?\\_r=0](http://green.blogs.nytimes.com/2009/10/16/sen-graham-takes-heat-for-climate-stance/?_r=0) (describing the backlash Senator Lindsay Graham received from constituents immediately after they caught wind of his work with Senator John Kerry on cap and trade legislation).

<sup>69</sup> Richard Schmalensee & Robert Stavins, *The Power of Cap-and-Trade*, BOSTON GLOBE (July 27, 2010), reprinted in [www.robertstavinsblog.org](http://www.robertstavinsblog.org) (last visited Sept. 22, 2013).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Jordan Fabian, *McConnell: Cap-and-Trade “Dead”*, THE HILL (Aug. 24, 2010, 6:30 AM), <http://thehill.com/blogs/blog-briefing-room/news/115501-mcconnell-pronounces-cap-and-trade-dead> (quoting Senate Majority Leader Mitch McConnell as having said “I think cap-and-trade, which is also known as the national energy tax, is dead in the United States Senate”); Ezra Klein, *Cap-and-Trade is Dead*, WASH. POST (July 19, 2010, 9:00 AM), [http://voices.washingtonpost.com/ezra-klein/2010/07/were\\_not\\_getting\\_a\\_price\\_on\\_ca.html](http://voices.washingtonpost.com/ezra-klein/2010/07/were_not_getting_a_price_on_ca.html).

<sup>73</sup> See, e.g., John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES (June 26, 2009), [http://www.nytimes.com/2009/06/27/us/politics/27climate.html?\\_r=2&hp&](http://www.nytimes.com/2009/06/27/us/politics/27climate.html?_r=2&hp&) (“Industry officials were split, with the United States Chamber of Commerce and the National Association of Manufacturers opposing the bill and some of the nation’s biggest corporations, including Dow Chemical and Ford, backing it.”).

member companies on the editorial pages of the *Wall Street Journal* and in the blogosphere as turncoats, losers, and bald-faced rent seekers aiming to profit through a classic “Baptists and Bootleggers” coalition.<sup>75</sup> Meanwhile, the National Association of Manufacturers announced that a study it had commissioned “confirm[ed] that the Waxman-Markey bill is an ‘anti-jobs, anti-growth’ piece of legislation,<sup>76</sup> and the National Mining Association warned of “devastating [job] losses” and a reduction in household disposable income of \$1,800 per year.<sup>77</sup> An argument can be made that the division amongst industry players resulted from differences in opinion about the inevitability of some form of climate regulation coming down the pike. Those that joined USCAP, the argument goes, wanted to shape the program to their advantage—and center it on a marketable permit system with an allocation of permits favorable to their interests—rather than be subject to a more stringent and less flexible regulatory program created without their input, while those who believed that greenhouse gas regulation could be defeated invested their efforts exclusively in fighting the bill.<sup>78</sup>

The collaboration between centrist environmental groups and industry players disintegrated before long, however, as the group was unable to agree on the distribution of allowances and other details of the program. One prominent member began using the pejorative term “cap and tax” to decry the President’s vision for the legislation,<sup>79</sup> and although a compromise bill passed the House, momentum slowed as opposition grew and several key members of USCAP—BP, ConocoPhillips, and Caterpillar—left the group, citing disappointment over the details of the bill.<sup>80</sup>

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<sup>74</sup> See Michael Burnham, *U.S. Chamber of Commerce Sharpens Critique of House Climate Bill*, N.Y. TIMES (May 15, 2009), <http://www.nytimes.com/gwire/2009/05/15/15greenwire-us-chamber-of-commerce-sharpens-critique-of-ho-19116.html>; see also Statement of William L. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs, to U.S. Chamber of Commerce to Senate Western Caucus & House Western Caucus (July 30, 2009), available at [https://www.uschamber.com/sites/default/files/legacy/testimony/090730\\_capandtrade\\_testimony.pdf](https://www.uschamber.com/sites/default/files/legacy/testimony/090730_capandtrade_testimony.pdf) (describing what in the Chamber’s view are the shortcomings of the proposed legislation).

<sup>75</sup> See Eric Pooley, *THE CLIMATE WAR* [chapter 20’s first three pages] (2010).

<sup>76</sup> NAT’L ASS’N OF MANUFACTURERS, STATE-BY-STATE ANALYSIS OF WAXMAN-MARKEY CAP AND TRADE LEGISLATION PAINTS DOOR PICTURE FOR NATION’S ECONOMY: NAM-ACCF STUDY CONCLUDES BILL WILL COST 2.4 MILLION JOBS (Aug. 12, 2009), <http://www.nam.org/Communications/Articles/2009/08/StatebyStateAnalysisofWaxmanMarkeyCapAndTrade.aspx>.

<sup>77</sup> HOUSE COMMITTEE APPROVES SWEEPING CLIMATE CHANGE LEGISLATION, 15 NMA MINING WEEK (May 22, 2009), available at [http://nma.org/pdf/mining\\_week\\_archives/mw052209.pdf](http://nma.org/pdf/mining_week_archives/mw052209.pdf); Press Release, National Mining Association, NMA Urges House to Reject Waxman-Markey Climate Proposal (May 20, 2009), available at [http://nma.dev2.networkats.com/newsroom/press\\_releases.asp?year=2009#](http://nma.dev2.networkats.com/newsroom/press_releases.asp?year=2009#).

<sup>78</sup> See *id.* at [4<sup>th</sup> page of chapter 20] (quoting Duke Energy executive Jim Rogers, a member of USCAP, as responding to criticism of his participation by coal mining executive Robert Murray of Murray Energy with “Legislation is coming. We can help shape it, or we can sit on the sidelines and let others do it”).

<sup>79</sup> See Eric Pooley, *The Smooth-Talking King of Coal—And Climate Change*, BLOOMBERGBUSINESSWEEK (June 3, 2010), [http://www.businessweek.com/magazine/content/10\\_24/b4182058740829.htm](http://www.businessweek.com/magazine/content/10_24/b4182058740829.htm) (describing Jim Rogers of Duke Energy’s frustration with President Obama’s proposal to auction 100% of the permits rather than allocate a significant amount for companies such as his own).

### III. Federalism

[NOTE TO WORKSHOP PARTICIPANTS: THIS SECTION WILL BE RECAST TO FOCUS MORE ON THE RESPECTIVE POSITIONS OF INTEREST GROUPS, BEGINNING IN 1970. THE SHIFTING POSITION ENVIRONMENTAL GROUPS MIRRORS THE SHIFTING POSITION OF DEMOCRATIC POLITICIANS. AND INDUSTRY AND REPUBLICAN POLITICIANS ARE ALIGNED AS WELL.]

While the federalism debate is considerably more older and more nuanced than either cost-benefit analysis or marketable permits, there are important parallels in the shifting allegiances from the 1980s to the present.

Controversy over the proper roles of the states and the federal government in relation to each other is as old as—in fact, older than—the Republic itself. This debate has fueled a rich academic literature amongst political scientists and legal academics, including abundant and innovative accounts of environmental federalism.<sup>81 82 83</sup>

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<sup>80</sup> See Michael J. Graetz, *THE END OF ENERGY: THE UNMAKING OF AMERICA’S ENVIRONMENT, SECURITY, AND INDEPENDENCE* 239 (2011).

<sup>81</sup> See, e.g., Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L.J.* 1196 (1977) (establishing an economic framework for environmental federalism in which regulation should be located at the local level by default unless local decisionmakers would not be forced to internalize all the costs and benefits of their regulatory decision); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. REV.* 1210 (1992) (challenging the assumption that a “race to the bottom” would result from an absence of national environmental standards and asserting that regulation in such contexts is inefficient). These foundational works seek to articulate a theoretical foundation for normative policy analysis rather than advocating for any substantive policy outcome, and assume that absent a compelling reason for federal intervention, environmental regulation should remain at the state and local level. See Revesz, *id.*, at 1222 (“Given our system of federalism, in which state and local governments have broad police powers, and in which, through most of our history, they have had primary responsibility for health-and-safety regulation, there ought to be an affirmative justification for federal intervention.”). A new crop of scholarship explores the virtues of redundancy and joint regulation. See, e.g., David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 *Minn. L. Rev.* 1796 (2008) (rejecting the principle that a given problem should be dealt with at the level that most closely matches their geographic scope in favor of “adaptive federalism,” which incorporates a presumption against federal preemption and national “ceilings” that preclude more stringent state regulations).

<sup>82</sup> Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889 (2014), available at <http://www.yalelawjournal.org/essay/federalism-as-the-new-nationalism-an-overview> (“If we characterize the two camps in this fashion, it becomes clear that federalism *can* serve the ends that the nationalists have long associated with their vision of American democracy. It is possible to have a ‘nationalist account of federalism,’ an ‘intrastatutory federalism,’ or for ‘federalism’s afterlife [to be] a form of nationalism.’ It is possible to imagine federalism integrating rather than dividing the national polity. Given the importance of ‘build[ing] a union’ to the Founding generation, it is even possible that ‘federalism . . . has always been the United States’ distinctive species of nationalism.’” (quoting authors from the Feature)).

<sup>83</sup> See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *HARV. L. REV.* 915 (2005). See also Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 564 (2011) (arguing that federalism can be a “tool of national

Leading up to 1980, the political parties' alignment in the federalism debate traces to the New Deal. Under the standard account, liberals favored a strong federal government and uniform national standards, while conservatives preferred weaker federal government and flexibility at the state level. Rhetorically, liberals supported their case by pointing to slavery, racism, and Jim Crow, and argued that federalism creates a "race to the bottom." In contrast, conservatives championed state and local governments as closer to the people and reflecting the country's diversity while promoting active self-government and serving as a counter to the dangerous concentration of power in the federal government.<sup>84</sup> As Democrats embraced civil rights and lost support in the south (and with it any interest in states' rights), these positions became more polarized and internally homogeneous.<sup>85</sup>

However, the parties occupied the opposite sides of this debate in the nineteenth century, with modern Democrats tracing their lineage to Jefferson and Jackson and Republicans to Hamilton and Lincoln. Just as desegregation contributed to the polarization of the parties' positions on federalism in the middle of the twentieth century, the early debate over the proper roles of the national and state governments was informed by slavery and racial control.<sup>86</sup> According to one commentator, partisan stances on federalism are informed more by interest group politics than by principle:

Partisan views of federalism change with shifts in the interests of groups with which the parties are aligned. Since these alterations are gradual, parties do not herald their new positions with loud proclamations. But just as continental drift can gradually accumulate to produce massive geological change, so partisan adjustments can acquire large significance, even when taking place slowly, without fanfare.<sup>87</sup>

Peterson goes on to note that just such a shift occurred in the early decades of the twentieth century leading up the New Deal.

Furthermore, the allegiance of parties to one side or another was always far from absolute. Many Republicans—including President Richard Nixon—supported the passage of the major environmental legislation of the 1970s. A recent commentary on liberals' rediscovery of the "joys of federalism" notes that the liberal penchant for national policies has always "coexisted alongside a quieter tradition of principled federalism."<sup>88</sup> While liberals moved

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power" through its enlistment of states in implementing the national statutory regime, which "entrenches" that regime and invests political actors in its success).

<sup>84</sup> R. Shep Melnick, *Federalism and the Parties: Flip-Flop, Fatality, or Reformulation?*, Lecture at U.C. Berkeley, Feb. 29, 2008, at 2 (notes on file with author).

<sup>85</sup> *Id.* at 3. See also Paul E. Peterson, *The Changing Politics of Federalism in the United States*, in TERRITORY, DEMOCRACY AND JUSTICE: REGIONALISM AND FEDERALISM IN WESTERN DEMOCRACIES 92, 97 (Scott L. Greer, ed., 2006) ("Despite these anomalies [pointing to Republican-appointed Justices Earl Warren and Harry Blackmun, the authors of *Brown* and *Roe*, respectively, and the defection of states' rights Democrats], the twentieth-century configuration, once fixed by Franklin Roosevelt, proved remarkably durable, gaining additional force and energy during the Great Society years over while Lyndon Johnson presided.").

<sup>86</sup> Peterson, *supra* note 5.

<sup>87</sup> *Id.* at 96.

towards more homogeneously nationalist views in response to World War II and segregationist rhetoric, so-called New Left groups such as Students for a Democratic Society railed against centralization, and communitarian thinkers such as Michael Sandel provided a theoretical basis for an anti-nationalist ethos.<sup>89 90</sup>

#### A. *The Devolution Revolution (1980-1994)*

Despite the origins of the Republican party's alliance with decentralization going back to the New Deal, "it was not until the 1970's and 1980's, with the successive election of two governors to the presidency, Jimmy Carter and Ronald Reagan, that the modern concept of devolving power to the states began to take hold."<sup>91</sup> "When Ronald Reagan assumed office in 1981, welfare state retrenchment became the first order of domestic business. More importantly, Republicans became the dominant political party in the South, the region most opposed to federal power. The partisan realignment over federalism that had begun with the New Deal had now fully crystallized."<sup>92</sup> Reagan championed devolution, "pledg[ing] to return power to state and local governments."<sup>93</sup> "Rehnquist Revolution," consisting of several controversial federalism decisions in which five Republican appointees (sometimes dubbed the "Federalist Five") limited the power of the national government and broadened the immunities of the states.<sup>94</sup>

Conservative thinkers and activists continued to champion devolution through the 1990s.<sup>95</sup> It also played a role in the success of the unexpected Republican takeover of Congress

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<sup>88</sup> Franklin Foer, *The Joy of Federalism*, N.Y. TIMES (Mar. 6, 2005), available at [http://www.nytimes.com/2005/03/06/books/review/006FOERL.html?\\_r=0](http://www.nytimes.com/2005/03/06/books/review/006FOERL.html?_r=0).

<sup>89</sup> See *id.* (Michael Sandel ended "Democracy's Discontent" with a plea for progressives to tap into "the 'unrealized possibilities implicit in American federalism'").

<sup>90</sup> See *supra* note 7 and accompanying text; Foer, *supra* note 8 ("This is hardly the first time that self-described federalists [here, the Republicans who took control of Congress in 1994] have abandoned the cause. Strong Thurmond ran on the States' Rights Party ticket in 1948, but throughout his long career as a senator, he never had qualms about heaving bushels of federal money into his state.").

<sup>91</sup> James Dao, *Red, Blue and Angry All Over*, N.Y. TIMES (Jan. 16, 2005), available at [http://www.nytimes.com/2005/01/16/weekinreview/16dao.html?pagewanted=print&position=&\\_r=0](http://www.nytimes.com/2005/01/16/weekinreview/16dao.html?pagewanted=print&position=&_r=0).

<sup>92</sup> Peterson, *supra* note 5, at 98. "The party of the right, the party of Hamilton, had become identified as a states' rights party with a strong basis of southern support. The party of the left, the party of Jefferson and Jackson, had become the advocate of a strong central state, with only a whisper of support south of the Mason-Dixon line." *Id.*

<sup>93</sup> Melnick, *supra* note 4, at 3.

<sup>94</sup> Melnick, *supra* note 4, at 3. In *United States v. Lopez*, the Court placed limits on Congress's powers under the Commerce Clause for the first time since the New Deal, ruling that the Gun-Free School Zones Act of 1990 unconstitutionally exceeded those powers. 514 U.S. 549 (1995).

<sup>95</sup> See David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1802-03 (2008) ("Devolution emerged as a rallying cry among mostly conservative scholars and political activists in the 1990s, and it was initially embraced by the administration

in the 1994 midterm elections.<sup>96</sup> The so-called “devolution revolution” was a central component of the Republicans’ legislative agenda, dubbed the “Contract with America,” which emphasized devolution of authority to state and local governments as well as federal regulatory retrenchment.<sup>97</sup> While issues such as welfare reform dominated headlines, the 104<sup>th</sup> Congress also pushed this agenda in the arena of environmental regulations, attempting to rewrite broad swaths of long-standing environmental statutes and starve federal agencies of the resources necessary to pursue the full extent of their regulatory authority.<sup>98</sup>

For their part, liberals charged that the conservative agenda on devolution and retrenchment of health, safety, and environmental regulations was a thinly veiled giveaway to special interests.<sup>99</sup>

However, Democratic president Bill Clinton took up the mantle of decentralization with his declaration that “the era of big government is over” and the significant grant of autonomy to states in the landmark welfare reform bill he signed into law in 1996.<sup>100</sup> Ten years later, it was

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of George W. Bush. The Bush administration soon backtracked, though, and sought both to centralize control over environmental policymaking at the federal level and to preempt state initiatives.”).

<sup>96</sup> See U.S. HOUSE OF REPRESENTATIVES COMM. ON GOVERNMENT REFORM, CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS 1 (June 2006), available at <http://oversight-archive.waxman.house.gov/documents/20060606095331-23055.pdf> (“These claims [that Republicans respect the role of states as laboratories of democracy] were an important element of the midterm elections in 1994 that led to Republican control of Congress.”).

<sup>97</sup> Melnick, *supra* note 4, at 3; see also CONTRACT WITH AMERICA, THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (1994), available at <http://www.nationalcenter.org/ContractwithAmerica.html>.

<sup>98</sup> See John H. Cushman Jr., *House Votes Sweeping Changes in Clean Water Act*, N.Y. TIMES (May 17, 1995), available at <http://www.nytimes.com/1995/05/17/us/house-votes-sweeping-changes-in-clean-water-act.html> (describing the vote, for a bill that would relax dozens of pollution controls, as reflective of the new Congress’s anti-regulatory fervor and characterizing it as a harbinger of things to come). Responding to another House vote aimed at limiting federal agencies’ ability to enforce health, safety, and environmental laws, EPA Administrator Carol Browning commented that “This legislation is not reform, it is a full frontal assault on protecting public health and the environment.” John H. Cushman, Jr., *House Approves Sweeping Changes on Regulations*, N.Y. TIMES (Mar. 1, 1995), available at <http://www.nytimes.com/1995/03/01/us/104th-congress-environment-house-approves-sweeping-changes-regulations.html>. In their appropriation for 1996, the House Committee on Appropriations said of the EPA, “[T]he agency has headed in the wrong direction, for the wrong reasons, and in a manner which can impose unnecessary costs on American industry . . . . The agency needs to recognize that there are simply not enough available financial resources to ‘fix’ every perceived environmental problem.” H.R. Rep. No. 104-201, at 51 (1995). See also Bob Herbert, *In America: Health & Safety Wars*, N.Y. TIMES (July 10, 1995), available at <http://www.nytimes.com/1995/07/10/opinion/in-america-health-safety-wars.html> (describing House Republican’s plan to cut funding to federal agencies that enforce health and safety regulations, quoting Rep. David McIntosh as saying “The laws would remain on the books, but there would be no money to carry them out. It’s a signal to the agencies to stop wasting time on these regulations”).

<sup>99</sup> See Herbert, *supra* note 17 (lambasting Congressional leaders as indifferent to the pain and suffering of ordinary Americans that regulations are designed to protect in their quest to “rid big business of the inconvenience of Federal regulations aimed at protecting the health and safety of Americans”).

<sup>100</sup> See Foer, *supra* note 8. Clinton made this statement in his State of the Union address on January 23, 1996. See Jaime Fuller, *The 3<sup>rd</sup> Most Memorable State of the Union Address: Bye Bye Big Government*, WASH. POST (Jan. 26,



noted that “[t]hough many Democrats in Congress initially opposed the movement [for devolution], it gained steam under President Bill Clinton, another former governor, who signed landmark legislation giving states broad powers to run welfare programs.”<sup>101 102</sup>

### *B. Liberals Adopt Federalist Rhetoric*

With the election of George W. Bush, Democrats found themselves unable to advance their policy goals at the national level. Instead, many liberals pursued progress at the state and local level, and even adopted the rhetoric of federalism historically associated with Republicans. Massachusetts took the lead on universal health care, Illinois took action on affordable prescription drugs, and California forged the way in combatting climate change. Even before 2000, the multistate tobacco settlement of 1998 established a huge tax on tobacco products and a set of national rules governing its marketing, advertisement, and lobbying—all without the blessing of a single federal official. As attorney general of New York, Eliot Spitzer effectively created national regulatory regimes for securities, insurance, and banking industries through litigation under a state anti-fraud statute.<sup>103</sup> Spitzer even declared himself a “fervent federalist”

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2014), available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/01/26/the-3rd-most-memorable-state-of-the-union-address-bye-bye-big-government/>.

<sup>101</sup> James Dao, *Red, Blue and Angry All Over*, N.Y. TIMES (Jan. 16, 2005), available at [http://www.nytimes.com/2005/01/16/weekinreview/16dao.html?pagewanted=print&position=&\\_r=0](http://www.nytimes.com/2005/01/16/weekinreview/16dao.html?pagewanted=print&position=&_r=0).

<sup>102</sup> Further, Paul Peterson characterized the welfare reform of 1996 as centralization, not devolution, and cast the legislation as part of the realignment of the parties vis-à-vis federalism. According to his telling, Democrats fought for state waivers from federal work requirements and time limits, which allowed states to evade the nationally imposed strictures imposed by Republicans: “Ironically, Republicans declared this muscular exercise of central power to be a devolution of power from the central government to the states consistent with their traditional philosophy. To support this not very convincing claim, Republicans pointed out that TANF was a ‘block grant’ that gave states almost complete discretion as to how the monies could be used . . . . All in all, TANF constituted a rapid expansion of federal power over welfare assistance.” Peterson, *supra* note 5, at 104.

Peterson argues that the expressed views of the political parties on federalism result from issues arising from the natural evolution of social welfare programs. He points to the same shift of allegiances in the context of the Bush Administration’s 2004 rules attempting to assert greater federal control over how states spend Medicaid funds:

Once again, the problems that come with the maturation of the welfare state altered partisan political strategies. Republicans asserted central authority, despite their longstanding defense of state rights. Democrats sought waivers and protections for states, despite their traditional commitment to a more unified national welfare policy. Noticeably, the transformation was awkward for both political parties. Republicans claimed that they were using a ‘block grant’ to devolve power to the states. Democrats did not so much defend states’ rights as object to specific welfare reforms. Still, party practice had come to differ from standard party doctrine. *Id.* at 104–05.

<sup>103</sup> Melnick, *supra* note 4.

as he pursued his policy of “regulating by litigation,” even making the case to the Federalist Society, much to their chagrin, that decentralization belongs as much to him as to anyone.<sup>104</sup>

In adopting federalist rhetoric on issues from same-sex marriage to climate change, liberals seemed to be rediscovering the rhetoric of Justice Brandeis’ *New State Ice* dissent on the role of states as “laboratories of democracy” in the push for progressive reforms.<sup>105</sup> While Brandeis’ position was largely neglected by progressives soon after he penned it—when FDR came to power, progressives (successfully) pursued their policy objectives at the federal level<sup>106</sup>—in the years after George W. Bush came to power, liberals began to see its value:

The federal government is showing Hoover-style inaction today on some of the most critical social and economic issues of the day, and the states are stepping forward. In corporate America, the New York attorney general, Eliot Spitzer, has uncovered widespread malfeasance, which federal regulators were unwilling or unable to uncover. While the federal government has dug in its heels on gay rights, 14 states and the District of Columbia prohibit discrimination against gays, and Massachusetts is leading the way on gay marriage. Conservatives, who long railed against federal power, understand how the states’ rights dynamic has changed. After Massachusetts’ gay marriage ruling, conservative activists demanded a federal marriage standard. Republicans in Congress now regularly try to insert pre-emption provisions, like the one in the new antispam e-mail law, that invalidate stronger state protections. Liberals, too, are making the switch. They are not only having policies adopted in the states, they are starting to invoke states rights. . . . Somewhere, Justice Brandeis was smiling.<sup>107</sup>

Borrowing directly from Brandeis and bemoaning the trend towards increasing federal preemption, progressive groups are encouraging states to serve as laboratories to “try novel social and economic experiments without risk to the rest of the country” and highlighting environmental regulation as an area in which states have long taken the lead in developing innovative policy solutions, prompting the national government to follow only after states initiated protections for consumers, public health and safety, and the environment.<sup>108</sup> This call for progressives to focus their efforts at the subnational level has continued even well into President Obama’s second term in the White House, as Democrats struggle to push legislation through a recalcitrant Congress. Announcing that “States’ Rights are for Liberals,” Emily

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<sup>104</sup> See James Traub, *The Attorney General Goes To War*, N.Y. TIMES (June 16, 2002), available at <http://www.nytimes.com/2002/06/16/magazine/the-attorney-general-goes-to-war.html> (pointing out that “Spitzer and other attorneys general are filling a void that was intended, by the anti-Washington right, to be filled by the marketplace—by, say, self-regulating Wall Street businesses—not by other legal actors like state A.G.’s.”).

<sup>105</sup> Adam Cohen, *Brandeis’s Views on States’ Rights, and Ice-Making, Have New Relevance*, N.Y. TIMES (Dec. 7, 2003), <http://www.nytimes.com/2003/12/07/opinion/07SUN3.html>.

<sup>106</sup> *Id.* (“Brandeis’s liberal argument for state power was quickly pushed aside, due to historical happenstance.”).

<sup>107</sup> *Id.*

<sup>108</sup> NAT’L ASS’N OF STATE PIRGS, TYING THE HANDS OF STATES: THE IMPACT OF FEDERAL PREEMPTION ON STATE PROBLEM-SOLVERS 1, 5 (July 2004), available at <http://www.calpirg.org/sites/pirg/files/reports/TyingtheHandsofStates.pdf> (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Bazelon reassured her readers that unlike the historic narrative of “conservative states asserting their sovereignty in the face of the federal government—most damningly, in the bad old days of Jim Crow,” states are now advancing progressive causes (gay marriage, medical marijuana) and allowing minorities to assert control in areas where they wield electoral power (even as majorities), and governors can shape the implementation of federal law through such cooperative federalism regimes as the ACA.<sup>109</sup>

The fact of this abrupt switch was not lost on Democrats. Congresswoman Maxine Waters (D-CA), commenting on her defense of California’s right to enact consumer privacy laws more stringent than those mandated by Congress, said “If anyone had told me that I would be on the floor of Congress arguing for states rights . . . I would have told them they are crazy.”<sup>110</sup> Surely the irony was not lost on Congressman Barney Frank when he asked, in the context of same-sex marriage, “should the federal government say no state can make this decision for itself?” It wasn’t lost on the New York Times, which compared Frank’s rhetoric to that of Strom Thurmond in the 1950s.<sup>111</sup>

In a striking about-face, commenters labeled Democrats “the party of federalism,” declaring that “liberal energies once devoted to expanding the national government are being redirected towards the states.”<sup>112</sup> As part of their claim, Democrats attacked Republicans for their hypocrisy on federalism. A report created for Rep. Henry Waxman criticized Republicans for their about-face on federalism as shown by a comprehensive review of the legislative record of the Republican-controlled Congress from 2001 to 2006: “[T]here exists a wide gulf between the pro-states rhetoric of Republican leaders and the actual legislative record. Rather than ceding power to the states, the Republican-controlled Congress and President Bush have repeatedly preempted state authority and centralized policy-making in Washington.”<sup>113</sup>

Meanwhile, California continues to forge ahead with bold initiatives to curb greenhouse gas emissions and address climate change, even going so far as to enter into international agreements with China and Quebec and entering into a regional agreement with Oregon, Washington, and British Columbia.<sup>114</sup> For over a decade, ten northeastern states have

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<sup>109</sup> Emily Bazelon, *States’ Rights Are for Liberals*, THE ATLANTIC (June 19, 2013, 10:05 PM), <http://www.theatlantic.com/magazine/archive/2013/07/states-rights-are-for-liberals/309388/>.

<sup>110</sup> Richard Simon, *Congress Flexes Muscle on State Laws; Federal Interference with Local Legislation called “Troubling Trend”*, L.A. TIMES (Oct. 20, 2003), available at [http://www.boston.com/news/nation/articles/2003/10/20/congress\\_flexes\\_muscle\\_on\\_state\\_laws/](http://www.boston.com/news/nation/articles/2003/10/20/congress_flexes_muscle_on_state_laws/).

<sup>111</sup> Foer, *supra* note 8.

<sup>112</sup> *Id.*

<sup>113</sup> U.S. HOUSE OF REPRESENTATIVES COMM. ON GOVERNMENT REFORM, CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS 1 (June 2006), prepared for Rep. Henry A. Waxman.

<sup>114</sup> GOVERNOR BROWN JOINS OREGON, WASHINGTON, BRITISH COLUMBIA LEADERS TO COMBAT CLIMATE CHANGE, Press Release, Oct. 28, 2013, available at <http://gov.ca.gov/news.php?id=18284>. See also Joe Garofoli, *California, China to Link Climate-Change Efforts*, SFGATE (Sept. 13, 2013), <http://www.sfgate.com/politics/joegarofoli/article/California-China-to-link-climate-change-efforts-4813917.php>; Mark Hertsgaard, *California Takes the Lead with New Green Initiatives*, ENVIRONMENT360 (Mar. 8, 2012), [http://e360.yale.edu/feature/california\\_takes\\_the\\_lead\\_with\\_new\\_green\\_initiatives/2504/](http://e360.yale.edu/feature/california_takes_the_lead_with_new_green_initiatives/2504/).

experimented with their own cap-and-trade system, with nine of them committed to continuing it with a more stringent cap set for 2020.<sup>115</sup> Cities have also stepped up on climate change, planning for adaptation.<sup>116</sup> While climate change is the paradigmatic case for broader policy cooperation—if international more than merely national—states and localities are stepping in where the federal government has failed to act. Further, in many areas—notably auto emissions—more stringent standards in a large (and more amenable) state like California can function effectively as national standards, as the economy of scale in production and uniform national distribution systems push manufacturers to meet the more stringent regulation nationwide.

### *C. Republicans Embrace Centralized National Power*

Meanwhile, one of the forces behind Democrats' shift on federalism has been a complementary shift by Republicans towards centralized power and federal preemption. Despite coming to power on the same rhetoric of devolution espoused by Republicans for the two preceding decades,<sup>117</sup> “under President Bush, the pendulum has swung back.”<sup>118</sup> Shep Melnick has attributed much of this shift to two core Republican constituencies: the religious right and the business community. While the former group has moved from protesting sweeping, national Supreme Court decisions on social issues such as abortion and school prayer in the late 1970s and early 1980s to demanding national uniformity on these and other social issues such as assisted suicide, medical marijuana, and same-sex marriage, business leaders have also pushed for centralization in order to ease and simplify their regulatory burden and liability. The U.S. Chamber of Commerce lobbied hard for “tort reform” such as the 2005 law allowing defendants

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<sup>115</sup> Brad Plumer, *Cap-and-Trade is Still Alive in New England. Is it Working?*, WASH. POST (Feb. 9, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/09/cap-and-trade-is-still-alive-in-new-england-is-it-working/>.

<sup>116</sup> For a list of cities and states with (or in the process of completing) adaptation plans, see STATE AND LOCAL ADAPTATION PLANS, GEORGETOWN CLIMATE CENTER, <http://www.georgetownclimate.org/adaptation/state-and-local-plans>.

<sup>117</sup> U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM, CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS 1 (June 2006), prepared for Rep. Henry A. Waxman (“Republican leaders in Congress and President Bush have long claimed to respect the role of states as laboratories of democracy. These claims . . . were an important part of George W. Bush’s presidential campaign in 2000. After the 2000 election, President Bush pledged to support the nation’s governors and affirmed his view that the role of the federal government is ‘not to impose its will on states and local communities.’”). The report goes on to assert that President Bush and Congressional Republicans’ legislative record belies this commitment.

<sup>118</sup> James Dao, *Red, Blue and Angry All Over*, N.Y. TIMES (Jan. 16, 2005), *available at* [http://www.nytimes.com/2005/01/16/weekinreview/16dao.html?pagewanted=print&position=&\\_r=0](http://www.nytimes.com/2005/01/16/weekinreview/16dao.html?pagewanted=print&position=&_r=0). Dao cites the attacks of September 11, 2001 as a major reason for this shift, but says the trend goes beyond that: “But Mr. Bush also supports aggressive federal action on many domestic issues. Indeed, it was John Kerry who wanted to leave the issue of same sex marriage to the states, while Mr. Bush called for a constitutional amendment banning them, a position some conservatives criticized.” *Id.*

to remove class actions to federal court, and for federal preemption that will set uniform national standards that will serve as ceilings (not floors) for regulation.<sup>119</sup>

On the social front, conservatives adopted a number of policies associated with centralized national power during the Bush administration. During the Terri Schiavo controversy, Republicans adopted the stance, antithetical to their previously-held position on states' rights, that the federal government should overturn a state court ruling in an area traditionally governed by state law.<sup>120</sup> In response to state decisions allowing for same-sex marriage, conservatives have advocated for a constitutional amendment to define marriage—another realm of law historical left to the states—as exclusively between a man and a woman.

Perhaps most sweeping, though, is the Republican centralization of power at the national level through preemption. A report prepared for Rep. Henry Waxman showed that from 2001 to 2006, the Republican-controlled House and Senate voted to preempt state laws and regulations 57 times, resulting in 27 laws becoming enacted that preempt state authority.<sup>121</sup> California attorney general Bill Lockyer protested that “This is the most aggressive federal government in the history of the United States.”<sup>122</sup> He had reason to complain, as California was often the target of pre-emption, from their stringent auto emissions standards to protective consumer privacy laws.<sup>123</sup> Scholars also noted a sharp uptick in the frequency of federal preemption, including federal agencies claiming in preambles to regulations that their actions preempt state statutory and common law.<sup>124</sup> Such actions have benefitted from favorable treatment by the Supreme

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<sup>119</sup> R. Shep Melnick, *Nationalized Politics, Entrepreneurial States: The Newest Form of America's Oldest Political Debate*, draft at 19–21 (Dec. 2006) (on file with author).

<sup>120</sup> U.S. HOUSE OF REPRESENTATIVES COMM. ON GOVERNMENT REFORM, CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS 1 (June 2006), prepared for Rep. Henry A. Waxman (“Last year, Congress passed—and the President flew through the night to sign—legislation to override the judgment of a state court in an individual family’s private end-of-life decision.”).

<sup>121</sup> U.S. HOUSE OF REPRESENTATIVES COMM. ON GOVERNMENT REFORM, CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS 1 (June 2006), prepared for Rep. Henry A. Waxman. The report groups these into four categories: usurpation of state choices on social policies, prevention of states from protecting health, safety, and the environment, overriding of state consumer protection laws, and seizing power from state courts. *Id.* at 2. On the environment, health, and safety front, Waxman points to 15 Congressional votes preempting states from regulating emissions from lawnmowers, controlling the siting of LNG terminals and electricity transmission lines, and requiring the use of clean-burning gasoline. *Id.*

<sup>122</sup> Neal Peirce, *Attack of the Federalists*, SEATTLE TIMES (Feb. 27, 2006), [http://seattletimes.com/html/opinion/2002831180\\_peirce27.html](http://seattletimes.com/html/opinion/2002831180_peirce27.html) (cataloging complaints from state attorneys general and progressive groups about the Bush Administration’s use of rulemaking to pre-empt state initiatives on global warming, consumer protection, and a host of other public-interest related areas).

<sup>123</sup> Richard Simon, *Congress Flexes Muscle on State Laws; Federal Interference with Local Legislation called “Troubling Trend”*, L.A. TIMES (Oct. 20, 2003), available at [http://www.boston.com/news/nation/articles/2003/10/20/congress\\_flexes\\_muscle\\_on\\_state\\_laws/](http://www.boston.com/news/nation/articles/2003/10/20/congress_flexes_muscle_on_state_laws/) (“When it comes to California, the Republican-controlled Congress has abandoned its natural tendency to support states’ rights. Congressional Republicans are moving on a variety of fronts to rein in state actions they believe go too far, leaving Democrats to complain about federal interference with state business.”).

<sup>124</sup> See, e.g., William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1573 (2007) (listing many proposed bills that would preempt state and local laws on fuel

Court.<sup>125</sup> Erwin Chemerinsky, a prominent federalism scholar, commented that “[t]his [federal pre-emption of more stringent state consumer privacy laws] is part of a very troubling trend by Congress to use its authority to preempt state laws that go further than federal law in protecting consumers and the environment,” and went on to suggest that the trend is motivated by substantive policy goals: “Congress acting to preempt state laws is not new. But the repeated efforts to preempt more progressive state legislation is new.”<sup>126</sup>

Republicans defend this practice as not necessarily antithetical to their long-cherished principle of respecting states’ rights by characterizing regulations such as California’s as effectively setting a national standard, raising costs and hurting other states. One Republican Senator was quoted as saying “‘States’ rights doesn’t mean the right to hurt other states.”<sup>127</sup> Industry groups, alarmed by what they have seen from states, seek federal pre-emption: “With the rise of aggressive state attorneys general willing to investigate industries from tobacco to securities to insurance and banking, many large corporations have begun turning to Washington for relief. Though they once favored dealing with state regulators, many multinational corporations now would prefer the oversight of a single federal agency.”<sup>128</sup> On business groups’ preference for congressional restrictions on lawsuits (an approach adopted by the George W. Bush administration), a former AMA president explained: “If we had to do this state by state, we’d face too many hurdles.”<sup>129</sup> Others label industry’s argument as “disingenuous,” characterizing it as a smoke screen for their desire to not be subject to more rigorous consumer-protection laws.<sup>130</sup> Another observer, from the National Conference of State Legislatures, noted an uptick in “measures seeking to ‘render the states helpless,’” and explained thusly: “You have more organized interests that are seeking one-stop resolution to their perceived problems.”<sup>131</sup>

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efficiency (H.R. 2927, 110<sup>th</sup> Cong. § 2(a) (2007)), renewable/alternative energy (Alternative Fuel Standard Act of 2007, S. 1158, 110<sup>th</sup> Cong. § 2 (2007)), siting of oil refineries on federal lands, and more). Some bills expressly reject preemption, but this has been cited as further evidence of heated debate. *See* David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008).

<sup>125</sup> The Supreme Court found that the Clean Air Act preempted California’s more stringent regulations of public and private fleet operators’ vehicle purchases in *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). Adelman & Engel connect this to a “long line of cases in which the Court has preempted a variety of state actions designed to protect the public.” *Supra* note 14, at 1798 n.5 & accompanying text.

<sup>126</sup> Richard Simon, *Congress Applies the Brakes to California Laws*, L.A. TIMES (Oct. 19, 2003), available at <http://articles.latimes.com/2003/oct/19/nation/na-preempt19> (quoting Erwin Chemerinsky).

<sup>127</sup> *Id.*

<sup>128</sup> James Dao, *Red, Blue and Angry All Over*, N.Y. TIMES (Jan. 16, 2005), available at [http://www.nytimes.com/2005/01/16/weekinreview/16dao.html?pagewanted=print&position=&\\_r=0](http://www.nytimes.com/2005/01/16/weekinreview/16dao.html?pagewanted=print&position=&_r=0).

<sup>129</sup> *Id.* The president of the U.S. Chamber’s Institute for Legal Reform also noted difficulty of a national actor complying with 50 different regulatory schemes. *Id.*

<sup>130</sup> *Id.* (attributing such a view to the legislative director of the Consumer Federation of America, Travis Plunkett).

<sup>131</sup> *Id.*

This aggressive nationalization of policymaking has even elicited criticism from within Republican and conservative ranks. Senator Lamar Alexander (R-TN) claimed “The principle of federalism has gotten lost in the weeds by a Republican Congress that was elected to uphold it in 1994. . . . Conservatives are as bad as liberals about imposing mandates once they come to Washington.”<sup>132</sup> Some “red” states have also bristled at actions taken by Republicans at the national level: “Ten years after Newt Gingrich’s Republican revolutionaries won control of the House under the banner of states’ rights, states across the country are again complaining about the heavy heel of federal authority on everything from taxes to tort law to education to the environment. But now, the mandates and pre-emptions emanating from Washington are coming not from big-government Democrats but conservative Republicans. And thanks to the party’s successes in recent years, more of the state and local officials who are complaining about those actions are Republicans, too.”<sup>133</sup> Paul Peterson points to President Bush’s signature domestic policy, No Child Left Behind—the large, prescriptive education bill criticized as one-size-fits-all and filled with unfunded mandates—as “a compelling instance of the new politics of American federalism” in which “Republicans are using central power to control and limit the size of the welfare state, while Democrats seek to use local power centers to resist the retraction.”<sup>134</sup>

#### *D. Fair Weather Federalism?*

Both Democrats and Republicans have been called out for their selective embrace of federalism when it happens to suit their substantive policy objectives. James Gimpel describes the charges of hypocrisy levied by each side at the other before concluding that “both sides have used federalism selectively, as they have other constitutional doctrines, on an ‘as needed’ basis.”<sup>135</sup> A reviewer describes Michael Greve’s “The Upside-Down Federalism,” which points the finger at states as well as the federal government, “as posit[ing] that all levels of government cheat at the federalism game, with state and local officials invading Washington’s turf just about as much as Washington invades theirs,” and characterizing American federalism as a “free-for-all in which any level of government is willing to take on any sort of issue—the feds becoming the lead players in education standards, states driving new environmental regulations—and interest groups simply root around for any legislative or legal venue that’s likely prove friendly.”<sup>136</sup>

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<sup>132</sup> James Dao, *Red, Blue and Angry All Over*, N.Y. TIMES (Jan. 16, 2005), available at <http://www.nytimes.com/2005/01/16/weekinreview/16dao.html?pagewanted=print&position=&r=0>.

<sup>133</sup> *Id.* (highlighting Utah’s opposition to provisions inserted by Republicans into a bill to overhaul the nation’s intelligence system intended to push states to standardize divers’ licenses).

<sup>134</sup> Peterson, *supra* note 5, at 98. Peterson also points to welfare programs as an illustration of the realignment. *Id.* at 102–05.

<sup>135</sup> James G. Gimpel, *The Federalism Flip-Flop: Democrats Now Argue for States’ Rights*, BOSTON GLOBE (Dec. 19, 2004), [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2004/12/19/the\\_federalism\\_flip\\_flop?pg=full](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/12/19/the_federalism_flip_flop?pg=full). Gimpel labels such behavior as far from unique: “Our political and legal history is full of this kind of constitutional opportunism.” *Id.*

Both parties have also been criticized—usually by separate observers—for favoring federalism only when it cuts in their preferred direction: either for more or less regulation. Shep Melnick describes the recent taste Democrats have developed for federalism as policy-driven and only working in one direction: They endorse federalism for same-sex marriage, but certainly not for anti-sodomy laws or abortion. “The role of the states, in other words, is not to pursue diverse policies, but to serve as progressive gadflies, constantly prodding the federal government to be more generous in its entitlement programs and more aggressive in regulative business. Federalism becomes a one-way ratchet.”<sup>137</sup> Melnick’s prediction that were Democrats to regain control of both houses of Congress and the White House in 2008, they would attempt to enact national legislation on greenhouse gases and health insurance held true, and his argument that Democrats “view state action as a useful catalyst for national action, not a substitute for it”<sup>138</sup> is further bolstered by a Public Interest Research Group report, which argues for federal law to serve as a floor but not a ceiling.<sup>139</sup> On Republicans recent and frequent yielding to business interests and the religious right, and Democrats’ use of state power to achieve national aims when they are otherwise unable to do so at a national level, Melnick laments that “Federalism seems to have lost an ally and gained only a fair weather friend.”<sup>140</sup>

Others have attacked the ideology of federalism itself as unprincipled, or at best based on a misguided perception of the relationship between states and the federal government. Pointing out that “instead of dismantling Washington, [the Reagan] administration imposed a raft of new health and safety regulations on the states,” Franklin Foer wonders if

Perhaps federalists have failed to reshape American government because federalism isn’t really a governing philosophy. Its proponents describe a world that doesn’t exist. In actuality, the states and federal government aren’t cut-throat competitors but codependents, with state governments living off federal money and implementing federal programs. Rather, ‘states’ rights’ can be seen as a subgenre of political rhetoric, part of what the historian Michael Kazin calls the ‘populist persuasion.’ And like so much of the language of populism, it proves hollow once its adherents obtain power.<sup>141</sup>

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<sup>136</sup> Alan Greenblatt, *Fair-Weather Federalism: One Critic Argues that State Complaints About Washington Are Just Posturing*, GOVERNING.COM (Nov. 2005), <http://www.governing.com/topics/politics/Fair-Weather-Federalism.html>.

<sup>137</sup> R. Shep Melnick, *Nationalized Politics, Entrepreneurial States: The Newest Form of America’s Oldest Political Debate*, draft at 23 (Dec. 2006) (on file with author).

<sup>138</sup> *Id.* at 25.

<sup>139</sup> NAT’L ASS’N OF STATE PIRGS, TYING THE HANDS OF STATES: THE IMPACT OF FEDERAL PREEMPTION ON STATE PROBLEM-SOLVERS 6 (July 2004), available at <http://www.calpirg.org/sites/pirg/files/reports/TyingtheHandsofStates.pdf>.

<sup>140</sup> R. Shep Melnick, *Nationalized Politics, Entrepreneurial States: The Newest Form of America’s Oldest Political Debate*, draft at 25 (Dec. 2006) (on file with author). This also accords with the fact that 17 states had raised the minimum wage above the national standard before Democrats took control of Congress in 2006 and raised it across the board.

<sup>141</sup> Franklin Foer, *The Joy of Federalism*, N.Y. TIMES (Mar. 6, 2005), available at [http://www.nytimes.com/2005/03/06/books/review/006FOERL.html?\\_r=0](http://www.nytimes.com/2005/03/06/books/review/006FOERL.html?_r=0). Foer doesn’t spare liberals in his critique: “One suspects that many if not most of today’s liberal federalists haven’t converted out of



In his account of how the party system has shaped American federalism, Larry Kramer posits that “American parties . . . are more concerned with getting people elected than with getting them elected for any specific purpose. . . . when ideology conflicts with electoral success, it is usually ideology that yields.”<sup>142</sup> Even if each party retains a preference for their more traditional (at least, most recently so) allegiance, support and opposition to devolution

shows some interesting contradictions. Most generally, conservatives hoped that the combination of federal deregulation and devolution of powers to the states would lead to a greatly reduced regulatory role at both levels. Instead, federal deregulation and reduced social regulatory enforcement created a gap that some state actors have moved to fill. And while conservatives generally applaud the idea of different state and local jurisdictions pursuing different policy approaches, they get quite concerned when one or a few states or local jurisdictions are able to leverage their policies into, in effect, national policies. On the other hand, from the historical lessons of segregation policies by the states, halted only by federal policy intervention, many liberals retain strong skepticism about state policymaking even in an era when it often seems to their advantage, at least in regulatory policy.<sup>143</sup>

Naturally, of course, whichever party is in control of Congress and the presidency attempts to deploy national power to achieve its policy objectives, while the party on the outside uses whatever means it can at the state level to advance its own. Paul Peterson, commenting on this phenomenon, asserts that “It is too simple to say that parties like that level of government that they happen, at any particular moment, to control. But if a party has little opportunity to win a particular bastion of power, they are unlikely to appreciate its virtues.”<sup>144</sup>

In a 2008 presentation, Shep Melnick offered an alternative to the ideas that federalism is “dead”<sup>145</sup> or that the parties have “flip-flopped” on federalism. Melnick suggests instead a

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true belief, either.” He suggests it may be “a rational outlet” for the alienation of George W. Bush being reelected (instead of moving to Canada, retreat to state and local government). *Id.*

<sup>142</sup> Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 278–79 (2000). Kramer goes on to include professions of belief in states’ rights as just such a way that parties attempt to get elected: “It has not hurt that for much of our history—most of the nineteenth century and a considerable part of the twentieth—the dominant political party was self-consciously dedicated to a states’ rights philosophy. But parties adopt this philosophy for a reason—namely, that it has had, and continues to have, popular appeal.” *Id.*

<sup>143</sup> PAUL TESKE, REGULATION IN THE STATES 238 (2004).

<sup>144</sup> Peterson, *supra* note 5, at 107. Peterson cites that when Republicans could not win both houses of Congress for more than 4 years between 1933 and 1968, and only held the White House for 8 of those years, they had “few partisan incentives to support the expansion of federal power. For Democrats, the show was, of course, altogether on the other foot.” *Id.* But when Republicans gained such solid control of the south that they were in a better position in regards to both Congress and the presidency, “the Republicans now had the opportunity to exercise unified power over the central government in the same way the Democrats enjoyed this opportunity during the New Deal and Great Society decades. For the winners, it was hard not to become more interested in federal power; for the losers it’s easy to rediscover the value of state and local control.” *Id.*

reformulation of debates over federalism as a tension between “competitive federalism”—the intensification of competition between the states, allowing citizens to sort themselves by preferences—and “empowerment federalism,” which emphasizes cooperative schemes and embraces redundancy, increasing the likelihood that *some* level of government will act on a given problem. Under Melnick’s scheme, conservatives promote the former while liberals argue for the latter.<sup>146</sup>

## Conclusion

[To come].

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<sup>145</sup> It may be worth describing the argument that America was so thoroughly transformed by the New Deal, the Cold War, Civil Rights, and the Great Society that all of politics has been nationalized and there is no going back to the antiquated notion of federalism. At least one scholar has argued that shifts in federalism are not driven by an inexorable shift towards centralization inherent in our Constitutional structure, but rather by a complex set of socioeconomic conditions and institutional and ideological changes that shape the moral authority of different levels of government and substantive beliefs in their value. Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONSTITUTIONAL L.Q. 483 (1998).

<sup>146</sup> R. Shep Melnick, *Federalism and the Parties: Flip-Flop, Fatality, or Reformulation?*, Lecture at U.C. Berkeley, Feb. 29, 2008, at 18–24 (notes on file with author); see also R. Shep Melnick, *Nationalized Politics, Entrepreneurial States: The Newest Form of America’s Oldest Political Debate*, draft (Dec. 2006) (on file with author).