

Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform

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For years, economists and lawyers have bemoaned the inefficiencies of the current centralized, command-and-control regime of environmental regulation. Despite the manifest failure of the current regime, however, the system of environmental regulation seems to be largely immune to rationalization and reform. This Article advances a public choice explanation for the persistence of the current centralized, command-and-control system of environmental regulation. The model is premised on a simple model of gains to trade. Because of the defects of the political process, well-organized and powerful special interests can use the apparatus of government to transfer wealth to themselves. To the extent that the strategic use of regulation creates economic rents, it creates the opportunity for the division of those rents among these same interest groups. This Article identifies a number of special interests that share an attachment to the current regime, and hostility to decentralized, market-based alternatives. In particular, this Article identifies industries and firms directly benefited from environmental regulation; industries and firms indirectly benefited through cartel-like effect of restricting industry output and preventing entry; organized environmental interests who gain power, prestige, and money from the current system; politicians and regulators; and lawyers. Through the system of environmental regulation, these interests can generate economic rents to be distributed among themselves at the expense of the dispersed public. Thus, the Article challenges the conventional portrayal of the system of environmental regulation as a struggle between industry polluters who oppose regulation and the public represented by environmental lobbying groups and regulators that favor regulation. Finally, the possibilities for reform of the current regime are presented.

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The inefficiencies of the current environmental regulation regime are widely recognized.¹ Law journals and economics journals are

1. See David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century*, 20 COLUM. J. ENVTL. L. 145, 176-77 (1995) ("Most of the many attempts to measure the costs of this inefficiency place the costs of command and control regulation anywhere from 50% to many times greater than market-based alternatives."); see also TOM TIETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 402-05 (3d ed. 1992) (summarizing studies); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171, 175-78 (1988) (same); Robert W. Hahn, *United States Environmental Policy: Past, Present and Future*, 34 NAT. RESOURCES J. 305, 321 (1994) [hereinafter Hahn, *Environmental Policy*] (noting that costs of 1990 Clean Air Act

filled with articles bemoaning the costs, perverse effects, and inefficiencies of the regulatory monolith which has arisen this century. With the fall of the Soviet Union, the current environmental regulatory structure in America has been characterized as one of the largest centralized, command-and-control planning structures still in existence.² Moreover, experience in recent years has led to the recognition that more flexible and decentralized institutions are available that can deliver comparable (or even superior) environmental protection at a lower cost than the current regime. Some of these, such as tradable pollution permits or emission taxes, are of relatively recent vintage. Others, such as renewed reliance on markets and the common law, are of ancient vintage.³ Regardless of differences in age, however, these institutions share a common fate of remaining largely academic curiosities with little real-world impact.

Despite the widespread recognition of the failures of the current regime and the availability of superior alternatives, the current system remains largely impervious to change.⁴ While small and limited

Amendments significantly exceeded benefits, as did Federal Water Pollution Control Act Amendments of 1977).

2. See Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153, 154 (1988) (“[T]he system [of federal control over environmental policy] has grown to the point where it amounts to nothing less than a massive effort at Soviet-style central planning of the economy to achieve environmental goals.”).

3. See BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT: CREATING WEALTH IN HUMMINGBIRD ECONOMIES (1997) [hereinafter YANDLE, COMMON SENSE]; Roger E. Meiners & Bruce Yandle, *Clean Water Legislation: Reauthorize or Repeal?*, in TAKING THE ENVIRONMENT SERIOUSLY 73 (Roger E. Meiners & Bruce Yandle eds., 1993); Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 961 (1996) [hereinafter Zywicki, *Unanimity-Reinforcing*]; Roger E. Meiners et al., *Burning Rivers, Common Law, and Institutional Choice for Water Quality (Political Economy Forum on The Common Law and the Environment: Rethinking the Statutory Basis for Modern Environmental Law)* (Oct. 1998) (manuscript copy on file with author). Market incentives, such as the desire to preserve investments in name-brand capital and the desire to appear environmentally friendly also provide important incentives for environmental conservation. See YANDLE, COMMON SENSE, *supra*, at 44-48. Customary rules for governing the use of environmental resources would also be included in this category. See generally ELINOR OSTROM, GOVERNING THE COMMONS (1990).

4. See Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?*, 18 ECOLOGY L.Q. 1, 3 (1991) (“This is hardly the first time that market-based environmental protection ideas have been advanced; economists have recommended such approaches to environmental protection for over twenty years. Until now, however, policymakers have largely ignored these suggestions.”) (footnote omitted); Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313-14 (1998) (noting that command-and-control instruments “are used to a significantly greater degree” than market-based or economic-incentive instruments, “despite economists’ consistent endorsement of the latter”).

exceptions can be identified, such as limited use of tradable pollution permits, these remain anomalous, notable for their rareness.⁵ The dominant approach, a centralized, command-and-control system resistant to rationalization and improvement, remains headquartered in Washington, D.C.

Why does such a manifestly failed system continue to persevere in the face of its own failures and the failures of similar command-and-control bureaucracies around the world?

This Article will attempt to answer this question by examining the special interests that benefit from the current regime and identifying the sources of their hostility to reform. Once the beneficiaries of the current system are identified, it will be possible to understand the forces blocking reform. This Article concludes by discussing the prospects for reform of the current system and how such a plan must unfold.

I. THE DYNAMICS OF ENVIRONMENTAL REGULATION

To understand why environmental regulation remains captive to a regime of centralized, command-and-control regulation, it is necessary to understand the realities of the regulatory system. The myth persists that environmental regulation is driven by a zero-sum conflict between regulated "industry" on one hand, and environmental activists and "the public" on the other.⁶ In this view of the political process, regulation is all about imposing costs on industries and the attempt by industries to avoid these costs. The battle is between "polluters" on one side and "pollutees" on the other.

It is further argued that in this regulatory game the deck is stacked in favor of industry. The reasoning is seductively simple: regulation imposes costs on discrete producers, whereas the benefits of clean air are distributed among the public at large. "Individual citizens who wish to breathe clean air are a classic example of a large, disorganized population seeking a collective good which will benefit each individual by only a small amount," it is argued.⁷

5. See Paul L. Joskow & Richard Schmalensee, *The Political Economy of Market-Based Environmental Policy: The U.S. Acid Rain Program*, 41 J.L. & ECON. 37, 37-38 (1998); Spence, *supra* note 1, at 177 (noting that "market-based approaches play only a supplementary role in American environmental policy").

6. See, e.g., E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 322 (1985); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 597-98 (1996); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67, 101 (1996).

7. Elliott et al., *supra* note 6, at 322 (citations omitted).

The costs of environmental regulation, on the other hand, tend to fall heavily on a relatively small number of companies, which are already reasonably well-organized and thus presumably less subject to free-rider problems. According to most popular theories of political influence, well-organized industries would be systematically overrepresented and diffuse environmentalists systematically underrepresented in formulating policy.⁸

This model is based on a flawed understanding of the regulatory process and does not explain the actual pattern of environmental regulation in the economy. To understand how environmental regulation is carried out, it is necessary to pierce the myth that the system is driven by a zero-sum conflict between environmentalists, business, and regulators. Rather, the current regulatory regime is the outcome of *cooperation* among them, rather than *conflict*. Through cooperation (often implicit) they can *all* gain, and none of them needs to lose. The story is an old one: where there are gains to trade, they will usually be identified and captured. As this Article will demonstrate, there are ample gains to trade so that industry, lawyers, regulators, and environmentalists can all gain.

“Industry,” or at least some firms within an industry, often benefits from regulation. It is also naïve to suggest that environmental interest groups represent the public’s preferences for appropriate levels of pollution control, rather than the preferences of the groups themselves and their members. Environmental lobbyists are just as discrete and concentrated an interest group as industry. Industry, environmental activists, and others will often find regulation a positive-sum game, rather than a zero-sum game.

Who loses? The primary losers in this process are those who lack the incentive or ability to influence the political process—the dispersed, powerless public that is forced to pay higher prices for the goods they consume, to subsidize the preferences of environmental interest groups, to bear the burden of complex regulations and litigation that enriches lawyers, and to support politicians and regulators. More regrettably, often the environment itself suffers as a result of the current system, thereby harming those who genuinely care about the environment.⁹ The public also suffers indirectly through the

8. *Id.*; see also Swire, *supra* note 6, at 101-03.

9. The negative effects of the current regulatory regime will not be a major theme in this Article, but will be mentioned where appropriate and will be important in explaining the support of environmental interest groups for command-and-control regulation. See *infra* notes 121-192 and accompanying text.

use of environmental regulation that stifles competition and entrepreneurship.

Well-organized interest groups can use the regulatory process to transfer wealth to themselves at the expense of the dispersed public. Thus, even if commentators are correct that environmental organizations have more difficulty organizing relative to industry, environmental groups still have a huge comparative advantage relative to the mass of unorganized consumers who suffer from inefficient regulation. The collective action problems of environmental lobbying groups are trivial in comparison to those of the public.¹⁰ The relevant comparison for predicting the outcome of the regulatory struggle is not industry against environmental groups. At a minimum, regulation is a three-way struggle among industry, environmental interest groups, and dispersed consumers and taxpayers. Among these three groups, industry and environmental interest groups will find fertile ground to ally against the unrepresented interests of the public, especially when their interests mirror the preferences of politicians and regulators.

The *modus operandi* of modern environmental law scholarship is to identify a purported environmental "externality" which cannot or will not be resolved by the market, and to call for political regulation to correct this externality. Nonetheless, these same scholars rarely acknowledge the "externalities" of the political process. But as Buchanan and Tullock have observed, the analysis is identical, regardless of whether the party imposing the externality is a private actor imposing the cost, or private actors using the political process to impose the cost. "[T]he discussion about externality in the literature of welfare economics has been centered on the external costs expected to result from *private* action of individuals or firms,"¹¹ they observe.

To our knowledge little or nothing has been said about the *external* costs imposed on the individual by *collective* action. Yet the existence of such external costs is inherent in the operation of any collective decision-making rule other than that of unanimity. Indeed, the essence of the collective-choice process under majority voting rules is the fact that the minority of voters are forced to accede to actions which they

10. See Keohane et al., *supra* note 4, at 331-32. Keohane notes that:

Among citizen groups, taxpayer and consumer organizations may face greater free-riding problems than environmental groups: their lobbying actions are likely to have an even wider range of potential beneficiaries; they may be able to offer fewer material incentives; and they lack the compelling moral mission that may drive the purposive incentives motivating members of environmental groups.

Id.

11. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF A CONSTITUTIONAL DEMOCRACY* 89 (1962).

cannot prevent and for which they cannot claim compensation for damages resulting. Note that this is precisely the definition previously given for externality.¹²

Political externalities are inherent in any collective decision made according to any nonunanimous voting rule. Nonunanimous voting rules make it possible for some people to obtain goods and services without being forced to bear their full costs. Those in the majority can defray their costs by forcing those in the minority to subsidize their preferences.¹³ As Richard Epstein has observed, democratic politics in effect gives a politician "a spigot that allows him to tap into other people's property, money, and liberty. The legislator that casts a vote on an appropriations bill is spending not only his own wealth, but everyone else's."¹⁴ Under majority voting rules, political externalities are routine.

But the similarities between political and environmental externalities do not end there. Just as market externalities are the result of imperfectly defined property rights, so are political externalities. Where property rights are well defined, the danger of inefficient government regulation is at least mitigated by the Takings Clause, the Contracts Clause, and other constitutional protections for property. But the law has generally countenanced some degree of government control over environmental resources through nuisance law and the police power. Unlike its treatment of many other types of private property, government generally has had greater leeway to regulate use of environmental resources in the name of the "public good." Thus, there is no constitutionally protected property right to pollute the air or the water.¹⁵ If the government uses its police powers to destroy the opportunity to pollute, it owes no compensation for doing so. Under the rubric of the "public trust doctrine" and other arguments, the scope of government control over environmental use and private property has accelerated in recent decades.¹⁶ Thus, from the outset

12. *Id.* at 89-90.

13. See James M. Buchanan, *The Coase Theorem and the Theory of the State*, 13 NAT. RESOURCES J. 579, 583-87 (1973); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 482-83 (1999); Zywicki, *Unanimity-Reinforcing*, *supra* note 3, at 984-88.

14. Richard Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, in ECONOMIC LIBERTIES AND THE JUDICIARY 40 (James A. Dorn & Henry G. Manne eds., 1987).

15. Courts sometimes recognize such a right through the use of doctrines such as "coming to the nuisance," but there is no property right to pollute that an "owner" can transfer or for which he can seek compensation if it is lost. See *Hadachek v. Sebastian*, 239 U.S. 394 (1915); see also RICHARD A. EPSTEIN, *TAKINGS* 120-21 (1985).

16. See Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 254 (1992).

environmental resources have been subject to a large scope of government regulation. In turn, this has given the government broad discretion both in the initial allocation of rights to use the environment, as well as in the ability to reallocate those rights over time. Given the extremely valuable nature of these rights and the absence of effective constraints on their allocation and subsequent reallocation, there is little wonder that the government has chosen to assert its control over these resources and use them for its own benefit and for the benefit of favored special interests.¹⁷ Again we have a "political externality," as the lucky recipients in the government property rights lottery can purchase new property rights to environmental resources without having to pay the prior "owner" of those rights. The power of the government to allocate the privilege to use environmental resources, to reallocate those rights at will, and to limit their use means that those property rights can be "leased" to private users but never "sold."¹⁸

Moreover, critics of the Coase Theorem and other apolitical approaches to environmental use have been quick to criticize its unrealistic assumptions and thereby to condemn market and common law approaches to environmental regulation. Nonetheless, they rarely examine the unrealistic assumptions about the political process which implicitly underlie their reliance on government action. Again, a narrow focus on the problem of market externalities has resulted in blindness about political externalities.

Finally, in a perverted way the current system of environmental regulation is consistent with Demsetz's model of the rise of private property.¹⁹ The demand for environmental purity fits Demsetz's model of the evolution from a free good to a scarce good. For two reasons, it has been only recently that a widespread demand for environmental purity has developed. First, environmental purity is a

17. The allocation of radio and television airwaves illustrates an analogous situation. In 1926, legal experts, relying on recent court rulings, laid the foundation for private parties to assert private property rights in the electromagnetic spectrum, presumably according to the standard first-appropriation rule. Arthur De Vany, *Property Rights in the Electromagnetic Spectrum*, in 3 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 167, 168 (Peter Newman ed., 1998). Congress moved swiftly to head off this privatization move by declaring the spectrum to be "the inalienable possession of the people of the United States," which gave the federal government control over the allocation of rights to use the electromagnetic spectrum. *See id.* Unsurprisingly, the traditional allocation process for airwave use was subject to political cronyism and largely served the purposes of politicians and regulators rather than the public at large. *See id.* Arthur De Vany notes that "an extraordinary number of broadcast licences are held by former members of Congress." *See id.*

18. *See Zywicki, Unanimity-Reinforcing*, *supra* note 3, at 999.

19. *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347 (1967).

luxury good, and it has been only recently that individuals have reached a stage of sufficient wealth that they have been willing to forego economic development in exchange for greater environmental purity. Early environmental efforts were aimed at the eradication of life-threatening health risks, such as the control of malaria and typhus. Only recently has demand arisen for control of less severe health discomforts from pollution and for the widespread use of environmental amenities as a consumption good. The evolution of demand for these products has steadily increased the demand for environmental quality. Second, recent technological improvements have made it increasingly possible to control pollution in a cost-effective manner.²⁰ The combination of these demand and supply factors has given rise to incompatible uses of environmental goods: productive use that pollutes the environment on one hand versus consumption uses of clean air and water on the other. In short, recent decades have seen an evolution of environmental inputs from essentially being a free good to being a scarce good marked by incompatible uses. As Demsetz notes, where a free good becomes a scarce good, common-use arrangements will tend to break down and be replaced by private property arrangements.²¹

But unlike Demsetz's fur trade, environmental resources have not been privatized for the benefit of private individuals. Instead, politicians and regulators have expropriated environmental resources for their *own* benefit, and they distribute these valuable rights according to their personal preferences and in exchange for campaign contributions and other benefits. In some cases these benefits are little more than the opportunity for an Environmental Protection Agency (EPA) administrator to indulge her personal preference as to whether certain land will be used for backpacking or paper production. Again, the regulator gains a private benefit for which the public pays, not her. Other recreational users also benefit by getting to use the land without paying for it. A backpacker who uses the political process to avoid paying the opportunity cost for using the land as desired is imposing

20. See Indur M. Goklany, *Empirical Evidence Regarding the Role of Federalization in Improving U.S. Air Quality*, in *THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW* (Roger E. Meiners & Andrew Morris eds., forthcoming 1999); Jonathan R. Macey & Henry N. Butler, *Federalism and the Environment*, in *THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW* (Roger E. Meiners & Andrew Morris eds., forthcoming 1999) [hereinafter Macey & Butler, *Federalism and the Environment*]. As Goklany notes, the greatest marginal reductions in air pollution as a result of technological development came in the era preceding federal regulation.

21. See Demsetz, *supra* note 19, at 350.

an externality on the public in the same way as a paper plant that does not have to pay the full value of the resources it uses.²²

Many special interest groups benefit from the current system of environmental regulation. While benefits are provided to them through different means, they share a major similarity: they are all major beneficiaries of the current regime and would all lose from the adoption of a more efficient regime. As a result, they also share a common interest in maintaining the regulatory status quo, despite its cost to the public. Each of the groups identified here receive large transfers of wealth and power through the current system of regulation. While they also bear some costs from regulation, both directly and indirectly, they are able to externalize most of those costs of regulation on the dispersed public. Moreover, each of these players are the paradigmatic concentrated, fairly homogeneous groups with a single paramount goal who thrive under public choice models of the political process. Because special interest groups are the primary beneficiaries of regulation, but only bear a fraction of its cost, economic logic suggests that they will demand a higher than optimal level of regulation, and will favor regulatory approaches that maximize the wealth transfers to them. Through manipulation of the political process, benefited groups are able to impose externalities on the public without paying full compensation for the imposition of those externalities.

This "economic theory of regulation" dates to a paper by George Stigler, in which he observed that "as a rule, regulation is acquired by the [regulated] industry and is designed and operated primarily for its benefit."²³ Through the savvy use of regulation, those regulated can use government action to create rents. For instance, regulation of the legal profession artificially limits the supply of lawyers in the economy, thereby allowing lawyers to charge higher prices for their services than would be the case absent regulation. Of course, politicians and regulators are not "potted plants" passively responding to the demands of interest groups for favorable regulation. After all, it is potentially a very lucrative game, and thus it is to be expected that they will be active participants in the process and will seek to share in the gains generated.

22. See JAMES M. BUCHANAN, *Rights, Efficiency, and Exchange: The Irrelevance of Transaction Cost*, in *ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY* 161 (Robert D. Tollison & Viktor J. Vanberg eds., 1987).

23. George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971).

Moreover, democratic politics is likely to impose only a small constraint on the ability of special interests to use government power to funnel wealth to themselves.²⁴ This skepticism about the ability of democratic politics to control rent-seeking behavior is grounded in several factors.²⁵ First, voters are rationally ignorant of politics. Because each individual's vote will have a trivial impact on an election, voters have little incentive to invest time, money, and effort to learn about the details of alternative policies. Given the small benefits to each individual in relation to the costs, few private individuals will educate themselves about the issues to be considered.²⁶ Even if the public is able to monitor at a very high level of generality, it will be unable to understand all of the details of legislation and will be unable to retain the energy and interest to monitor subsequent amendments to the legislation and its implementation and enforcement by the EPA.²⁷ Indeed, for similar reasons, most elected politicians will even be rationally ignorant of most of the bills on which they vote.²⁸ In turn, even the best intentioned politician would find his ability to conform to public preferences frustrated by the "lumpiness" of political decisions. Each candidate stands for a bundle of positions on a broad range of issues; thus, when elected he will be unable to distinguish which issues caused which voters to vote for him.²⁹ Finally, even if voters could express their policy preferences in a coherent and rational way, and if politicians could understand the voters' preferences on this

24. Of course, democratic politics will provide some constraint on this rent-seeking process. See generally Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976). For the reasons identified in the text, however, this constraint is likely to be quite small, especially in an area as complex and confused as the current system of environmental regulation. Thus, the discussion in this Article will proceed as if the preferences of the public at large for an optimal level of pollution control carried out by the most efficient means possible remains largely unexpressed in the political process.

25. These issues are discussed in greater detail in Pritchard & Zywicki, *supra* note 13, at 477-89.

26. See GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION* (1993); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 246 (1957); MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 25-26 (1982). Of course, the problem of rational ignorance will be compounded by the fact that special interests and politicians will have an incentive to disseminate misinformation about the intent and consequences of government policy, thereby raising the costs of determining the truth about competing policies even more. See Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1138 (1997).

27. See Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 195-97 (1988).

28. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 633 (1993).

29. See GORDON TULLOCK, *PRIVATE WANTS, PUBLIC MEANS* 113 (1970); Donald J. Boudreaux, *Was Your High-School Civics Teacher Right After All?*, 1 INDEP. REV. 111 (1996).

variety of issues, the problem of Arrow's Theorem prevents any logical aggregation of these disparate preferences into a coherent social ranking.³⁰

II. THE POLITICAL ECONOMY OF ENVIRONMENTAL REGULATION

The current regime can be understood as an implicit collusion of several well organized, discrete, and powerful interests to act in ways that use the political process to impose externalities on the public through the political process and to transfer wealth to themselves. In particular, this Article will focus on four such groups: (1) industry, (2) environmental interest groups, (3) regulators and politicians, and (4) lawyers. As will become evident, the traditional view of industry opposition to regulation and a purported conflict among many of these groups has been misunderstood. Instead, these groups share many common goals, and their large overall gains explain why they generally support the current system of complex, centralized, command-and-control regulation. Thus, while there are conflicts among these groups at the margins, they share a commitment to the general approach of the current regime.

A. *Industry Beneficiaries: Regulation and Rent-Creation*

The classic model of environmental regulation pits proregulatory forces (such as the public, so-called "public interest" lawyers and environmental groups, and government regulators) against antiregulatory forces (such as polluting industry).³¹ In this model, the final amount and type of regulation results from a compromise among these clashing interests.

But this classic model of regulation ignores two important complexities. First, it ignores that "industry" is not a homogeneous term. While some industries may be injured by regulation, other industries in fact *benefit* from regulation, at least relatively, and thus will support regulatory initiatives. We can call these the "directly benefited" industries. Second, it ignores that government will have at its disposal several alternative mechanisms for regulating the offensive conduct. While regulated industries may be opposed to some forms of regulation, other forms of regulation may actually be *beneficial* to the regulated industry, or at least to some identifiable subset of firms within that industry. Again, where the regulation transfers wealth to a

30. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951).

31. See discussion *supra* at notes 6-8 and accompanying text.

given industry or to certain firms within that industry, those parties will favor the regulation, not oppose it. We can call these the “indirectly benefited” industries or firms.

1. Directly Benefited Industries

Industries which are directly benefited by regulation are those which directly and foreseeably benefit from the imposition of the regulation. Regulation can directly benefit an industry either by increasing demand for the industry’s product or by restricting the entry of competitors into that industry, thereby increasing the profits of incumbent firms. An example of the latter type of regulation would be the creation of barriers to entry in a profession, such as requiring passage of a state bar exam as a prerequisite to practicing law in that state. While one could imagine similar *de jure* environmental regulations which limit entry, they do not appear to be common. Direct wealth transfers through increasing demand for an industry’s product through environmental regulation, however, are ubiquitous.

Two obvious and well documented direct beneficiaries of environmental regulation are the ethanol industry and the waste treatment industry. The size of the wealth transfers to these industries during the era of federal environmental regulation are staggering.

Consider the ethanol industry. For many years, the government has encouraged ethanol use through a 5.4¢-per-gallon tax subsidy, a subsidy which was recently extended through the year 2007. The 1990 amendments to the Clean Air Act added additional government preferences designed to support the ethanol industry.³² Far more expensive than ordinary gasoline, the very existence of an ethanol industry attests to the size of the direct transfers to particular industries through environmental regulation.³³ According to Jonathan Adler, without subsidies, ethanol would cost at least a dollar more than gasoline for the same energy equivalent.³⁴ Likewise, gasohol would cost ten to twenty cents more for the same energy equivalent.³⁵ Indeed, some estimates conclude that producing ethanol uses more energy than the final product generates.³⁶ These calculations do not

32. See Jonathan H. Adler, *Clean Fuels, Dirty Air*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 19, 19-23 (Michael S. Greve & Fred L. Smith, Jr., eds. 1992) [hereinafter Adler, *Clean Fuels*].

33. See *id.* at 23; see also Jack Thompson, *Does Ethanol Survive on Merits or Money?*, OMAHA WORLD-HERALD, June 17, 1998, at xx.

34. See Adler, *Clean Fuels*, *supra* note 32, at 23.

35. See *id.*

36. See *Corn Fed Pork*, BANGOR DAILY NEWS, Aug. 25, 1997, at xx.

even include the increase in food prices that consumers have to pay to compensate for the diversion of grain from food to fuel production.³⁷

Perhaps these costs would be justified if increased use of ethanol actually increased environmental quality. But ethanol is not a "cleaner" fuel than gasoline. Increased use of ethanol will simply inject different but equally dangerous pollutants, such as carcinogenic aldehydes, into the air we breathe.³⁸ According to the Federal Government's General Accounting Office, the ethanol subsidy has cost more than seven billion dollars since 1979 and has returned little in the way of environmental benefits or reduced reliance on foreign oil.³⁹

The waste industry is another direct beneficiary of the current scheme of environmental regulation. Superfund illustrates the point. Ostensibly designed to clean up toxic and other forms of hazardous waste, from the beginning Superfund's primary mission seems to have been to enrich the hazardous waste industry and lawyers. As the initial Superfund statute worked its way through Congress, votes for tougher provisions were reflected in statistically significant gains in the value of waste treatment company stocks.⁴⁰ As the statute became tougher, the waste treatment industry became richer.

Companies engaged in the treatment of hazardous waste have grown at phenomenal rates since the creation of Superfund in 1980. One company grew into a 160 person firm in just four years. As Marc Landy and Mary Hague observe, "[m]ost of this growth is attributable to stringent environmental regulations, and to Superfund in

37. The Congressional Research Service has estimated that diverting enough grain to produce enough ethanol to substitute for a mere five percent of gasoline consumption would increase food prices by \$13 billion per year, or over two dollars per gallon of ethanol produced. The study is cited in Robert C. Anderson et al., *The Economics of Gasoline Ethanol Blends*, Research Study No. 45, at 48 (Washington, D.C.: American Petroleum Institute, November 1988); see also Adler, *Clean Fuels*, *supra* note 32, at 23.

38. Because ethanol is more volatile than gasoline, it evaporates more quickly. As a result, widespread use of ethanol will increase evaporative hydrocarbon emissions substantially, leading to increased urban smog. Moreover, because ethanol is water soluble and cannot be transported via pipeline, most gasohol is produced by adding ethanol to gasoline near the point of retail sale, a process known as splash blending. This too will increase the problem of evaporative emissions. See Adler, *Clean Fuels*, *supra* note 32, at 23.

39. See *Watchdog Attack on ADM Questions Ethanol Subsidy*, CHEMICAL MARKET REP., June 22, 1998, at 35. As will be discussed below, although ethanol generates no benefits for the public in exchange for these costs, it is hugely beneficial to politicians of both parties, especially presidential candidates seeking to curry favor with Iowa's farmers.

40. See Brett A. Dalton et al., *The Political Production of Superfund: Some Financial Market Results*, 22 E. ECON. J. 75, 79-86 (1996). This empirical evidence also tends to raise doubts about the claim that special interest theories "fail to account for Superfund." Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1520 (1998).

particular."⁴¹ As *Chemical Week*, a leading industry trade journal, predicted in 1987, "there is little doubt that the infusion of new EPA funding and changing regulations will keep the hazardous waste management action at near fever pitch during the next several years, at least."⁴²

The influence of the hazardous waste lobby is manifest in Superfund's design. Superfund is primarily concerned with the cleanup of hazardous waste sites, not with containment or disposal of hazardous waste. If hazardous waste is contained, of course, then there is nothing to clean up. As a result, the hazardous waste treatment lobby has consistently obstructed efforts to limit the amount of hazardous waste produced, such as encouraging conservation by taxing the amount of waste produced or recycling certain substances used in industrial production, such as oil and steel.⁴³ Similarly, the hazardous waste treatment lobby has also sought to expand the number of sites designated as Superfund sites requiring cleanup and has sought to ensure that the most expensive forms of cleanup be required. A former EPA counsel summarized the waste industry's strategy: "They're interested in having a lot of waste designated as hazardous so they can get rid of it."⁴⁴

The joint and several liability provisions of Superfund also provide a disincentive for containment procedures. Joint and several liability imposes cleanup costs on all parties regardless of their contribution to the problem. Thus, whereas a corporation bears the full cost of containment efforts, it will likely bear only a fraction of the cost for cleanup, externalizing the remaining costs on others.⁴⁵

By increasing demand for the services of the ethanol and toxic waste industries, ethanol subsidies and Superfund policies transfer wealth directly to those industries. Moreover, these policies have only limited beneficial impact for the environment. In the case of Superfund, the lobbying pressures of the waste industry have helped to perpetuate an inefficient obsession with post-spillage cleanup, rather

41. Marc K. Landy & Mary Hague, *The Coalition for Waste: Private Interests and Superfund*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 67, 78 (Michael S. Greve & Fred L. Smith Jr. eds., 1992).

42. *Regulating Small-Quantity Generators*, CHEMICAL WK., Aug. 19, 1987, at 53.

43. See Landy & Hague, *supra* note 41, at 78-79.

44. Peter Caronara, *The Greening of Waste Management*, AM. LAW., Dec. 1990, at 44 (referring to Waste Management, Inc., the nation's largest waste disposal company).

45. See RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 296-97 (1995) ("[A] party that reduces his pollutants by 99 percent receives virtually no benefit for his labors, for he can still be held fully liable for the sins of countless others who co-inhabit the same dumpsite."); Robert W. McGee, *Superfund: It's Time for Repeal After a Decade of Failure*, 12 UCLA J. ENVTL. L. & POL'Y 165, 175 (1998).

than reduction in overall waste levels through taxes and recycling. Other examples of interests lobbying for environmental regulations that will directly benefit them could be cited.⁴⁶

2. Indirectly Benefited Industries

Much environmental regulation does not appear to benefit certain industries directly. Is it possible that environmental regulation could actually benefit the industry regulated? Not only is it possible, but a desire to benefit the industry, as parts of the industry, that is the subject of regulation helps to explain the structure of environmental regulation, and especially its reliance on centralized, command-and-control regulations, as opposed to decentralized market, common law, and incentive-based forms of pollution control.

a. Regulation as Cartel-Creation

James M. Buchanan and Gordon Tullock's unjustly neglected article on the political economy of environmental regulation provides insight into the ways in which certain types of environmental regulation can be used to enrich the regulated industries.⁴⁷ Once it is understood how environmental regulation can operate to transfer wealth to those regulated, it will become more evident why regulatory initiatives generally follow inefficient, centralized, command-and-control approaches, rather than more decentralized and flexible approaches, such as taxes or tradable pollution permits. The paradox is striking: while economists stress taxes and emissions fees,

46. See Jonathan H. Adler, *Rent Seeking Behind the Green Curtain*, REGULATION: THE CATO REVIEW OF BUSINESS & GOVERNMENT, 1996 No. 4, at 26-27 [hereinafter Adler, *Rent-Seeking*] (listing examples of special-interest environmental regulations).

47. See generally James M. Buchanan & Gordon Tullock, *Polluters' Profits and Political Response: Direct Controls Versus Taxes*, 65 AM. ECON. REV. 139 (1975) [hereinafter Buchanan & Tullock, *Polluters' Profits*]. I say that their article is "neglected" because a recent Westlaw search of law journals and periodicals revealed that Buchanan and Tullock's paper has only been cited a total of 13 times in legal literature (two of which were in previous articles of mine). Ignorance of Buchanan and Tullock's insight may help to account for the continued perception that regulated industries have nothing to gain and much to lose from the imposition of environmental regulation. Professor Farber, for instance, has said that the model rests on "dubious economics," see Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 62 n.4 (1992), but it is not clear whether he was actually aware of Buchanan and Tullock's paper at the time, as he does not cite it. Nor does he cite Maloney and McCormick's later restatement of the thesis. As a result, Farber remains trapped in the mindset that environmental regulations impose costs on regulated firms with no offsetting benefits.

regulators generally prefer direct restrictions on pollution emissions or the imposition of technological requirements.⁴⁸

Part of the reason for the prominence of direct regulation is that the regulated industry may also prefer direct regulation.⁴⁹ Where regulators charge a tax in proportion to the amount of pollution created, or require a firm to buy the right to pollute through purchase of tradable pollution permits, the cost of doing business will increase. The polluter previously was entitled to use the environmental resource for free; now it must pay for each unit of waste it creates. After this reallocation of property rights, firms will minimize their use of these inputs (the input being the right to pollute), just as they do with any other resource that they must purchase, whether it be labor, capital, or any other rights. While costs will increase, there will be a tendency toward an equilibrium which will fully reflect the cost of this input when used in connection with other inputs.⁵⁰ Firms which fail to use their pollution rights efficiently will be driven from the market by firms that do. Pollution rights will tend to flow towards the firms and industries that can use them most efficiently.⁵¹ Costs will be higher and output lower, but a competitive outcome will be achieved and all remaining producers will earn normal returns.⁵²

Direct controls, however, will reduce overall industry output, thereby raising prices. If the marginal price increase that results from the output restriction exceeds the marginal increase in cost from regulation, especially if it makes the firm's supply curve more inelastic, then the regulated industry will be more profitable after the imposition of the regulation than before.⁵³ In short, the regulation will effectively cartelize the industry, by artificially restricting output and thereby raising prices.⁵⁴ This is not to say that all firms in a given

48. As Maloney and McCormick state the issue, "[t]he maze of environmental quality regulation is overwhelming and bears little resemblance to the efficiency criteria proposed in the economics literature." Michael T. Maloney & Robert E. McCormick, *A Positive Theory of Environmental Quality Regulation*, 25 J.L. & ECON. 99, 100 (1982).

49. See Buchanan & Tullock, *Polluters' Profits*, *supra* note 47, at 141.

50. See *id.* at 140-42.

51. Because all that is being traded is the abstract right to pollute and pollution rights to certain kinds of effluents are fungible, transaction costs will be low. This suggests that pollution rights will eventually be held by the highest valued user. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Moreover, given the nature of the rights at stake, there is little reason to worry about income or wealth effects.

52. See Buchanan & Tullock, *Polluters' Profits*, *supra* note 47, at 141-42; see also YANDLE, *COMMON SENSE*, *supra* note 3, at 65-67.

53. See Maloney & McCormick, *supra* note 48, at 100-05, 122.

54. See Buchanan & Tullock, *Polluters' Profits*, *supra* note 47, at 142. Environmental regulations are not the only type of regulations which can be used to raise prices in an industry. See Pritchard & Zywicki, *supra* note 13, at 484 n.313 (discussing the

industry will benefit or benefit equally, as the increase in cost may be larger for some firms than others and may even drive some firms from the market, especially where there are no limitations on entry. It does suggest, however, that at least some firms within the industry will benefit from this cartelizing effect.⁵⁵

Empirical support for Buchanan and Tullock's thesis has been provided by Michael T. Maloney and Robert E. McCormick's study of OSHA's promulgation of cotton dust standards for textile mills and the United States Supreme Court's decision interpreting certain copper smelting regulations that effectively limited entry of new smelting plants.⁵⁶ In both situations, the promulgation of tough regulations increased costs and thereby reduced output. Despite this increase in costs, the stock values of incumbent businesses also increased, implying increased profits and price increases that exceeded the increased costs.⁵⁷ Similar forces may also account for the otherwise puzzling decision of some automobile producers in 1980 to support even stricter miles-per-gallon standards than Congress eventually adopted.⁵⁸ Presumably, for these manufacturers, the relative benefits of regulation in raising prices outweighed the direct compliance costs.

Of course, it will also be necessary to restrict entry into the industry so as to prevent the dissipation of these rents, but such entry restrictions are routine. Environmental regulations commonly impose stricter pollution control requirements on new firms than on existing firms.⁵⁹ For example, the 1970 Clean Air Act and its amendments imposed standards on existing pollution sources as a function of the ambient air quality, while new firms had to meet the strictest standards

use of limitations on price advertising in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), as an instrument to maintain high prices in the Rhode Island liquor industry).

55. See Maloney & McCormick, *supra* note 48, at 108.

56. See *id.* at 109-21.

57. See *id.* at 111-17. But see John S. Hughes et al., *The Economic Consequences of the OSHA Cotton Dust Standards: An Analysis of Stock Market Price Behavior*, 29 J.L. & ECON. 29, 58-59 (1986) (challenging Maloney and McCormick's conclusions).

58. See Bruce Yandle, *Fuel Efficiency by Government Mandate: A Cost-Benefit Analysis*, 6 POL'Y ANALYSIS 291, 300 (1980).

59. See YANDLE, COMMON SENSE, *supra* note 3, at 65-66; Robert W. Hahn, *The Political Economy of Environmental Regulation: Towards a Unifying Framework*, 65 PUB. CHOICE 21, 27 (1990) [hereinafter Hahn, *Political Economy*] ("One persistent theme in environmental regulation is that new sources of pollution get regulated more stringently than existing sources."); Keohane et al., *supra* note 4, at 314 (noting that "the required level of pollution abatement has generally been far more stringent for new pollution sources than for existing ones"); Maloney & McCormick, *supra* note 48, at 101.

regardless of local air quality.⁶⁰ Robert Crandall observes that “federal policy to promote nondegradation of air quality in regions where the air is cleaner than national standards has a long history.”⁶¹ The law “heap[s]” requirements on those seeking permits that “can only be described as baroque,” while remaining silent about existing sources.⁶² In short, “[e]ntry restrictions seem to pervade every aspect of this regulatory process.”⁶³ Not only does this squash entry by new firms, but it also discourages existing firms from replacing older, heavier polluting plants with new, cleaner plants, thereby harming the environment in the process.

Some barriers to entry are de facto instead of de jure. Large up-front investments in pollution abatement equipment raise the minimal capital demands of doing business.⁶⁴ Increasing capital requirements tends to fall hardest on start-up businesses, thereby choking off entrepreneurship and entry by new firms.⁶⁵ This dampening of the entrepreneurial market process harms consumers.⁶⁶

These barriers to entry in a given industry are compounded by the application of different rules to different regions of the country. Under Prevention of Significant Deterioration (PSD) rules, established heavily polluted regions of the country are held to a lower standard of ambient air quality than less developed regions of the country that lack both industry and accompanying pollution. Cleaner but poorer regions of the country would seem to be those most interested in attracting industrial development, as well as having the greatest room to allow some amount of pollution in exchange for economic growth.⁶⁷ But these are the regions of the country that were held to the highest standards of air quality, and thus were disadvantaged in attracting new industry from dirtier industrial areas. Indeed, Peter Pashigian’s study

60. See Robert W. Hahn & Roger G. Noll, *Barriers to Implementing Tradable Air Pollution Permits: Problems of Regulatory Interactions*, 1 YALE J. REG. 63, 64 (1983) [hereinafter Hahn & Noll, *Tradable Air Pollution Permits*]; Keohane, *supra* note 4, at 315.

61. ROBERT W. CRANDALL, *CONTROLLING INDUSTRIAL POLLUTION: THE ECONOMICS AND POLITICS OF CLEAN AIR* 125 (1983).

62. *Id.* at 126.

63. Maloney & McCormick, *supra* note 48, at 101.

64. See *infra* text accompanying notes 68-73.

65. See Thomas J. Dean & Robert L. Brown, *Pollution Regulation as a Barrier to New Firm Entry: Initial Evidence and Implications for Future Research*, 38 ACAD. MGMT. J. 288, 299 (1995).

66. See *id.* at 301 (“Because new entry is often associated with heightened competition and the price and profit disciplining of markets, it appears that environmental regulations may have the socially undesirable consequence of decreasing competition.”) (citations omitted).

67. See Robert Quinn & Bruce Yandle, *Expenditures on Air Pollution Control Under Federal Regulation*, 16 REV. REGIONAL STUD. 11 (1986).

of this phenomenon in the 1977 Clear Air Act revealed that politicians were driven more by the desire to protect home-state special interests from competition from less developed areas of the country than by environmental concerns.⁶⁸ Nationwide environmental regulation, combined with PSD rules, enabled northern and urban areas to improve their air quality, and stick other parts of the country with large parts of the bill. Robert Crandall has also noticed that industrial interests in northern states have deliberately used strict environmental regulations to restrict the migration of industry to the southern and western parts of the country.⁶⁹ As one scholar commented on this phenomenon, “[c]ommon sense suggests that dirtier regions would have to clean up more. The statute required just the reverse.”⁷⁰ Quite obviously, this further limits entry by destroying the incentive to move to less developed regions where labor and other costs may be lower.⁷¹

b. Intraindustry Wealth Transfers

Moreover, the costs of complying with environmental regulations will not fall equally on all producers in a given industry.⁷² Command-and-control regulations, such as requiring the installation of smoke scrubbers or other fixed capital investments, cost approximately the same regardless of the size of the firm installing it. Because the cost of this investment is fixed, it will fall harder on small businesses than on large businesses.⁷³ Because most paperwork and other regulatory compliance measures are relatively constant costs, they will also fall

68. See generally B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 23 *ECON. INQUIRY* 551 (1985).

69. See CRANDALL, *supra* note 61, at 110-30.

70. YANDLE, *COMMON SENSE*, *supra* note 3, at 71.

71. See Maloney & McCormick, *supra* note 48, at 101.

72. Of course, the use of regulation as a mechanism for intraindustry wealth allocations has a long pedigree. See, e.g., Donald J. Boudreaux et al., *Antitrust Before the Sherman Act*, in *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE* 255 (Fred S. McChesney & William F. Shughart, II eds. 1995) (describing use of state “mini-Sherman Acts in 1880s to protect home state from out-of-state competitors); Howard P. Marvel, *Factory Regulation: A Reinterpretation of Early English Experience*, 20 *J.L. & ECON.* 379 (1977) (arguing that the effect of the Factory Act of 1833 was to redistribute wealth from small, water-powered factories to large, steam-powered mills).

73. See WILLIAM A. BROCK & DAVID S. EVANS, *THE ECONOMICS OF SMALL BUSINESSES: THEIR ROLE AND REGULATION IN THE U.S. ECONOMY 167-77* (1986); B. Peter Pashigian, *The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares*, 27 *J.L. & ECON.* 1, 4-5 (1984); Russell W. Pittman, *Issue in Pollution Control: Interplant Cost Differences and Economies of Scale*, 57 *LAND ECON.* 1, 13 (1981) (concluding that “[t]reatment requirements increase the minimum efficient size of plant, thus increasing barriers to entry and exacerbating any lack of competition in the industry”).

harder on small firms and dampen competition.⁷⁴ As compared to small firms, large firms can also absorb the costs of the numerous lawyers needed to weave their way through the regulatory and litigation thicket.⁷⁵ Thus, not only may the benefits to some firms in an industry come at the cost of other firms who are eliminated from the industry, but the beneficiaries will tend to be large firms who can absorb these costs more readily. By contrast, the losers generally will be smaller firms. Thus, tradable permits or taxes linked to the amount of waste generated will have a proportional effect between large and small firms. Smaller firms will pollute less, therefore, they will not have to make the same amount of up-front investment as a larger firm.

Superfund yet again provides an example of how this plays out in practice.⁷⁶ Because of the joint and several liability provisions of Superfund, it is virtually impossible for a firm to predict its potential exposure in case of a lawsuit. A firm that only dumped a minuscule amount of waste may be held liable to the same degree as one that dumped a substantial amount. Private insurers have no rational basis for estimating the risk faced by one particular firm, because that firm may be found liable for the actions of other firms. Because liability exposure has become impossible to predict, privately provided environmental liability insurance has disappeared from the market.⁷⁷ As a result, chemical firms must self-insure for environmental liability. This provides several advantages for large firms relative to small

74. See Adler, *Rent-Seeking*, *supra* note 46, at 28; Daniel F. McInnis, *Ozone Layers and Oligopoly Profits*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 129, 148 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992); see also BROCK & EVANS, *supra* note 73, at 167-77 (noting that costs of complying with and documenting regulatory compliance has large fixed-cost component that is more costly to small businesses on a per-unit basis); Phillip H. Birnbaum, *Political Strategies of Regulated Organizations as Functions of Context and Fear*, 6 STRATEGIC MGMT. J. 135, 138 (1985) (finding that regulatory compliance requires specialized resources that large businesses can amortize more easily than small businesses); William A. Brock & David S. Evans, *The Economics of Regulatory Tiering*, 16 RAND J. ECON. 398, 399 (1985) (concluding that economies of compliance exist for some regulatory requirements); Gerardo Rivera Ungson et al., *The Effects of Regulatory Agencies on Organizations in Wood Products and High Technology/Electronics Industries*, 28 ACAD. MGMT. J. 426, 441 (1985) (same as Birnbaum). One recent study found that small companies spend 80% more per employee in complying with federal regulation than do larger firms. See Michael Selz, *Costs of Complying with Federal Rules Weigh More Heavily on Small Firms*, WALL ST. J., Nov. 1, 1995, at B2.

75. See B. Peter Pashigian, *A Theory of Prevention and Legal Defense with an Application to the Legal Costs of Companies*, 25 J.L. & ECON. 247, 261-62 (1982) (noting that larger companies spend proportionately less on legal services (as a percentage of sales) than do small companies).

76. See Bruce Yandle, *Taxation, Political Action, and Superfund*, 8 CATO J. 751, 761 (1989) [hereinafter Yandle, *Taxation*].

77. See MARTIN T. KATZMAN, CHEMICAL CATASTROPHES: REGULATING ENVIRONMENTAL RISK THROUGH POLLUTION LIABILITY INSURANCE 83-85, 94-95 (1985).

firms. Liability is unrelated to firm size, but the ability to self-insure is a function of firm size. Large firms have the ability to spread this fixed cost over a larger output base, thus the costs of this self-insurance are proportionally cheaper for them.

Various studies of the coal industry have illustrated the intraindustry impact of regulation. Limitations on strip mining, for instance, raise the relative costs of surface mining, thereby resulting in a wealth transfer from surface mining interests to underground mining interests. Thus, underground mining interests traditionally have been strong supporters of strip-mining regulations.⁷⁸ Bruce Ackerman and William Hassler's classic study of the Clean Air Act amendments in 1977, *Clean Coal, Dirty Air*, reveals a similar intraindustry tension.⁷⁹ They document the alliance between eastern-based coal producers and United Mine Workers to protect the eastern coal industry. Because eastern coal had a higher sulfur content than western coal, simply mandating reductions in sulfur issuance would have led many plants to substitute low-sulfur western coal for high-sulfur eastern coal.⁸⁰ The alliance of eastern industry, eastern labor, and eastern politicians forced through a requirement that *all* plants install expensive scrubbers—regardless of whether the plant was burning “clean” western coal for which scrubbers would have been unnecessary or “dirty” eastern coal.⁸¹ Not only did this impose large and unnecessary costs on coal burning facilities, but the evidence has indicated that in many ways these regulations actually harmed the environment.⁸² This regulatory coalition of Midwestern and Appalachian utility and mining elements was maintained during most of the 1980s through continuing control over key congressional leadership positions and presidential opposition to new environmental regulation.⁸³

c. Dividing the Spoils: Labor Union Beneficiaries of Regulation

The beneficiaries of this rent-seeking legislation are not limited solely to industry itself. While environmental legislation can create economic rents for various companies, the distribution of those rents within the company is up for grabs. Thus, there is some evidence that

78. See Joseph P. Kalt, *The Costs and Benefits of Federal Regulation of Coal Strip Mining*, 23 NAT. RESOURCES J. 893, 906-08, 912 (1983).

79. See Adler, *Rent-Seeking*, *supra* note 46, at 28-29.

80. See *id.*

81. See *id.* at 29.

82. See *id.*

83. See Joskow & Schmalensee, *supra* note 5, at 80.

organized labor shares some of these rents with the benefited corporations.⁸⁴ As Bruce Yandle observes:

If labor is organized in the polluting industries, unions may bargain for higher wages to be paid from rents generated by regulatory-derived output restrictions.... Union leaders would support stricter enforcement of standards so long as the gain in worker wages and total dues was greater than the additional cost of bargaining.⁸⁵

But because these rents are created by restrictions on output, this windfall for organized labor comes at the expense of other workers who lose their jobs or who are never hired in the first place. Labor unions will also have an interest in improving the working conditions of their members. One way to do this is to reduce the air pollution to which those members are exposed. Under normal circumstances, however, the acquisition of a benefit, such as improved working conditions, would come only at the expense of reductions in salary or other benefits, resulting in these workers having to internalize the full costs of their preferences. Through use of political influence, however, union workers can force the taxpayers to subsidize pollution control devices, such as publicly owned treatment plants, thereby externalizing some of the costs of improved working conditions on the public.⁸⁶ Empirical tests suggest that union members can indeed use the public fisc to acquire private benefits of superior working conditions and to externalize the costs on the public.⁸⁷

Labor unions also share with industry a desire to prevent entry and fight regulatory reform. As noted above, businesses in the established industrial areas of the country favor strict and unequal environmental standards so as to prevent movement of industry to the growing southern and western areas of the country. But these older, industrialized areas of the country also tend to be the areas with the greatest union activity. As a result, labor unions will share this desire to use federal law as a mechanism to limit the movement of jobs to the south and west, where labor costs tend to be lower. Again, state and local regulation will be unable to accomplish this end because it, by

84. There is evidence in other areas of "rent-sharing" by unions through collective bargaining with rent-earning regulated firms. See, e.g., Nancy L. Rose, *Labor Rent Sharing and Regulation: Evidence from the Trucking Industry*, 95 J. POL. ECON. 1146 (1987).

85. Bruce Yandle, *Economic Agents and the Level of Pollution Control*, 40 PUB. CHOICE 105, 107 (1983) [hereinafter Yandle, *Economic Agents*].

86. The federal government also provides large subsidies to aid in the construction of municipal waste treatment plants. See Hahn, *Political Economy*, *supra* note 59, at 21.

87. See Bruce Yandle, *Unions and Environmental Regulation*, 6 J. LAB. RES. 429, 431-33 (1985) [hereinafter Yandle, *Unions*].

definition, requires the imposition of costs on other areas of the country. Yandle writes:

The fact that environmental control eventually migrated from the state-local level to the federal level suggests that some potential gainers or losers were not satisfied with the mid-1960 result [prior to federal regulation]. Firms could relocate and escape the control net. Unions could lose members. . . . By imposing uniform standards and levels of enforcement across space, most of the principal rent-seeking groups could gain.⁸⁸

Organized labor also will favor command-and-control systems of regulation. First, as with industry beneficiaries of the cartel-like effects of command-and-control regulation, economic rents can be generated only through output-restricting forms of regulation. Emission permits and waste taxes will not have this effect, thus there will be no economic rents to be shared among the various constituencies.

Second, command-and-control regulations usually mandate certain capital investments. More particularly, technology-based command-and-control regulations require the installation of *nonproductive* capital, in that it adds no value to the production process.⁸⁹ In essence, command-and-control regulations act like a tax on capital, inducing firms to substitute labor for capital at the margin.⁹⁰ Market-based mechanisms will not have the same effect of inducing a substitution of labor for capital. Again, empirical testing suggests that this "labor substitution" effect helps to explain the prevalence of command-and-control regulation instead of market-based mechanisms, as investments in pollution control technology tend to be higher in areas of high union membership.⁹¹

d. Implications of Political Externalities

The failure to recognize the existence of political externalities plagues legal scholarship on environmental law. Consider Daniel Esty's recent article arguing for continued centralization of environmental regulation. Esty correctly recognizes that some pollution problems overlap jurisdictions; thus, arbitrary political boundaries will not match up with the scale of the externality to be

88. Yandle, *Economic Agents*, *supra* note 85, at 108-09.

89. See Yandle, *Unions*, *supra* note 87, at 435 n.10.

90. See *id.* at 435.

91. *Id.*

regulated. As a result, he concludes, "centralized" action is necessary to cope with these problems.⁹²

But this conclusion does not necessarily follow from the premise. While Professor Esty recognizes the problems of interjurisdictional spillover of pollution, he ignores the interjurisdictional spillover of regulation—namely, the application of inefficient regulation to those who do not need it or want it.⁹³ Federal political boundaries do not match up any better with the scope of the externality than local and state boundaries and may match significantly worse. Thus, "political boundaries may be both more inclusive and more exclusive than the group affected by the externality."⁹⁴ Given that most pollution problems are local or regional, not national problems,⁹⁵ the prevalence of national regulation suggests that interest group dynamics, not efficiency, are driving the choice of which jurisdiction has regulatory authority.

Esty appears to be unaware of the abundant literature discussed above that demonstrates the ways in which some areas of the country use regulation to punish potential competitors from other regions of the country. Federal or other centralized action gives political control over to many people who are not affected by the externality in any real way, thereby suggesting that the inefficiencies caused by underrepresentation of third parties in the case of environmental externalities is replaced by the overrepresentation of those same third parties in the political process, thereby generating political

92. See Esty, *supra* note 6, at 614-23.

93. He is not alone in failing to account for this phenomenon. See Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL L. & POL'Y 225, 246-47, 266-68 (1997); Swire, *supra* note 6, at 99-100 ("In the United States, given the difficulties that states face in negotiating compacts to address pollution, the presence of interstate pollution argues for a substantial federal role.").

94. Zywicki, *Unanimity-Reinforcing*, *supra* note 3, at 986. Jonathan Macey and Henry Butler refer to this normative principle of regulating externalities at the most local practicable level as the "matching principle." See Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, YALE L. & POL. REV./YALE J. ON REG. 23, 25 (1996); Macey & Butler, *Federalism and the Environment*, *supra* note 20.

95. See McGee, *supra* note 45, at 172-73 (noting that a GAO study involving groundwater problems in fifteen states did not find a single case involving interstate groundwater problems); Jonathan H. Adler, Note, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 628 (1998). These problems can be considered natural only if implausible assumptions about speculative "national values" are considered. This error is simply a variation on the existence value fallacy. See *infra* note 99.

externalities.⁹⁶ Moreover, elevating the question to the federal level will not necessarily lead to the inclusion of "more" voices than present at the local level;⁹⁷ it may simply lead to domination by *different* voice.⁹⁸ As I wrote several years ago:

With respect to large-number externalities such as pollution, severing the costs from the benefits of collective action suggests that one type of inefficiency simply may replace another. Separating influence over results from the costs of those results means that the original underrepresentation of third parties to the externality is replaced by an ability of those only tangentially linked to the matter to dominate the decision process. For example, third parties may vote for stricter pollution regulation when they are hardly affected by the pollution source in question, but feel none of the costs of the action, such as the loss of jobs.⁹⁹

96. It should also be mentioned that the common law provides one institutional remedy that potentially avoids the problem of inconsistencies in the overlap between arbitrary political jurisdictions and the scope of the environmental externality. In the common law, the judge can draw the boundary of the lawsuit to cover all of those affected by the externality, and *only* those affected by the externality, regardless of political boundaries. By having the flexibility to match the boundaries of the lawsuit to the boundaries of the environmental externality, common law judges can avoid the twin problems of overrepresentation and underrepresentation of third parties. See Zywicki, *Unanimity-Reinforcing*, *supra* note 3, at 990.

97. This appears to be the premise of Sarnoff's argument that national political processes can do a superior job of aggregating individual preferences than local governments. See Sarnoff, *supra* note 93, at 243-48.

98. See Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994) [hereinafter Zywicki, *Senators*]; see also Clayton P. Gillette, *The Exercise of Trumps By Decentralized Governments*, 83 VA. L. REV. 1347, 1404 (1997). As an example, Elliott, Ackerman, and Millian argue that the impetus of the Motor Vehicle Pollution Control Act of 1965 was for the auto industry and the soft coal industry to influence the federal government to preempt stricter pollution controls that were emerging on the state level. See Elliott et al., *supra* note 6, at 326.

99. Zywicki, *Unanimity-Reinforcing*, *supra* note 3, at 986. In fact, this seems to be exactly what Esty has in mind, by his observation that "Americans who will never visit Yellowstone National Park value its preservation." Esty, *supra* note 6, at 640. Without a consideration of how this "value" is to be accurately calculated and accurately weighed in the legal system, however, this observation is nonsensical. Americans value a lot of different and often mutually contradictory things. For instance, they value both spotted owls and reasonably priced lumber. People undoubtedly draw benefits from the knowledge that hearty lumberjacks are hard at work taming the frontier, rather than sitting around unemployed, even though they have never seen a lumberjack except on ESPN (and now ESPN2). As one commentator observes, "personally, I like strip mines," P.J. O'ROURKE, ALL THE TROUBLE IN THE WORLD: THE LIGHTER SIDE OF OVERPOPULATION, FAMINE, ECOLOGICAL DISASTER, ETHNIC HATRED, PLAGUE, AND POVERTY 182 (1994), presumably because the "failure to develop surface reserves can impose psychic costs on individuals who have tastes for the existence of a developed, industrial environment." Joseph P. Kalt, *The Costs and Benefits of Federal Regulation of Coal Strip Mining*, 23 NAT. RESOURCES J. 893, 895 (1983). It is only by being forced actually to choose among these competing uses—to "put their money where their mouth is"—that people's real preferences can be determined. As Thomas Sowell states

Given Esty's failure to consider the problem of political externalities, it should not be surprising that in the end he suggests that it would be appropriate to concentrate authority in even more centralized bodies—those with an international scope.¹⁰⁰ In so doing, he fails to realize that exactly the same problems of political externalities arise again on the international stage, only this time the gains to special interests from capturing the levers of power to transfer wealth to themselves is potentially even greater because it becomes impossible to escape the grasp of inefficient regulation.¹⁰¹ For example, the EPA estimates that the phase-out of production of chloroflourocarbons (CFCs) mandated by the Montreal Protocol on Substances that Deplete the Ozone Layer will have cartel-like effects that will create a windfall profit to American producers of \$1.8 billion to \$7.2 billion by the end of the century.¹⁰² Moreover, American producers are also the likely beneficiaries of a move toward CFC replacements, as they hold most of the world's patents on potential CFC substitutes and have a substantial headstart on research for replacements.¹⁰³ Among these firms, the largest producers of CFCs (DuPont and Imperial Chemical Industries) will benefit to a

the problem, "I might *think* that, if faced with the stark prospect of bankruptcy, I would rather sell my automobile than my furniture, or sacrifice the refrigerator rather than the stove, but unless and until such a moment comes, I will never *know* even my own trade-offs, much less anybody else's." THOMAS SOWELL, KNOWLEDGE AND DECISIONS 218 (1980). James Buchanan similarly notes that until someone is actually confronted with the choice among competing options, any estimate of competing values is "almost wholly arbitrary." JAMES M. BUCHANAN, COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY 71-72 (1969). The use of the existence value concept is discussed in Donald J. Boudreaux et al., *The Existence Value Fallacy* (unpublished manuscript on file with author). Moreover, as noted above, majoritarian political processes are an extremely crude mechanism for measuring social preferences. Esty cannot be seriously suggesting that a weak and intermittent positive valuation for the purity of particular environmental resources should count equally against intense preferences of others to use those resources for economic ends or competing environmental ends, such as bird hunting versus bird watching. Nonetheless, majoritarian voting gives each of these individuals an equal say in the decision of how to use that resource.

100. See Esty, *supra* note 6, at 643-47.

101. See, e.g., MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS (1990).

102. See Protection of Stratospheric Atmosphere, 53 Fed. Reg. 30,604, 30,606 (1988) (codified at 7 C.F.R. pt. 82). This is because while the Montreal Protocol placed limits on the future production of CFCs, it did almost nothing to reduce demand for CFCs. See McInnis, *supra* note 74, at 146, 147.

103. See McInnis, *supra* note 74, at 148.

disproportionate degree as they are also the frontrunners in the race to develop CFC substitutes.¹⁰⁴

DuPont's favorable response to CFC regulation suggests another fruitful area for the strategic use of regulation. Firms can create new compliance technologies *before* the enactment of domestic or international legislation and *then* proceed to encourage regulations that employ the developed technology to create entry barriers.¹⁰⁵ This strategy will often meet with great success. As one commentator has observed, "[c]ompanies that spot what society wants have an opportunity for innovation. . . . Once they have done so, government is likely to raise standards When this happens, the innovative company acquires a protected market, hedged in by environmental standards that it can meet, but its competitors cannot."¹⁰⁶ This leverage is even greater because once new technology is created, the "Best Available Technology" requirement of environmental law creates a built-in ratchet that makes it easy to raise the standards to the new level.

The recent Kyoto Protocol reflects many of the same interest group pressures. As Bruce Yandle observes, "The Kyoto Protocol creates a new and enhanced stage upon which nations, groups, and companies can pursue their special interests. The treaty opens up opportunities for favor-seeking that were previously closed."¹⁰⁷ In particular, the Kyoto Protocol will transfer wealth from coal-dependent industries and countries to those who have adopted alternative energy sources. Thus, it is not surprising that producers of alternative fuels have endorsed the Kyoto Protocol.¹⁰⁸

Two additional examples will suffice to explain how regulation can be used strategically. The 1970 Clean Air Act amendments required that automobiles reduce pollution emissions by ninety percent within five years. It turns out that Ford Motor Company had a great technological lead in developing pollution control technology, and thus was able to reach the goals much easier than other companies.¹⁰⁹ As a

104. See Kenneth A. Oye & James H. Maxwell, *Self-Interest and Environmental Management*, in LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS 191, 198 (Robert O. Keohane & Elinor Ostrom eds., 1995).

105. See Dean & Brown, *supra* note 65, at 300.

106. Frances Cairncross, *UNCED, Environmentalism and Beyond*, 27 COLUM. J. WORLD BUS. 12, 16 (1992).

107. Bruce Yandle, *Bootleggers, Baptists, and Global Warming*, PERC POL'Y SERIES, Nov. 1998, at 2.

108. See *id.* at 8.

109. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 363-38 (D.C. Cir. 1973) (describing these facts).

result, Ford was benefited by the new regulation at the expense of other manufacturers.

Nor is the phenomenon of technology-inducing regulation uniquely American. Take the example of Henkel, a German detergent manufacturer. Henkel informed the German government that it had developed a detergent ingredient that reduced phosphates by fifty percent and then built a plant to produce it.¹¹⁰ The government predictably responded by requiring that all detergent phosphates be reduced by fifty percent, providing a windfall to Henkel who had already created the production capacity to meet the new regulations.¹¹¹ In short, international lawmaking encounters similar problems to domestic lawmaking.

e. A Story of Spotted Owls

Bruce Yandle provides a striking anecdotal example of how environmental regulation can be used to dampen competition and raise prices for those in a regulated industry.¹¹² Yandle reports that Weyerheuser actually hired wildlife biologists to look for spotted owls—on non-Weyerheuser-owned federal lands.¹¹³ At that time, laws protecting spotted owl habitat had forced Weyerheuser to curtail logging on 320,000 acres of land. Although a seemingly large amount of land to place off-limits, it is a small sacrifice when it is recognized that restrictions were also placed on over five million acres of federal land making it off-limits to loggers as well.¹¹⁴ As expected, taking these federal trees out of circulation caused lumber prices to go “through the roof.”¹¹⁵ As the *Wall Street Journal* summarized the benefit to Weyerheuser of spotted owl protections, “[o]wl-driven profits enabled the company to earn \$86.6 million in the first quarter [of 1992], up 81% from a year earlier.”¹¹⁶ Thus, even though Weyerheuser was unable to log on 320,000 acres of its own land, this sacrifice was more than offset by the overall effect of the logging restrictions on the market as a whole.¹¹⁷ By 1995, the reduction of

110. See Scott Barrett, *Strategy and the Environment*, 27 COLUM. J. WORLD BUS. 202, 206 (1992).

111. See *id.* at 203, 206.

112. See YANDLE, COMMON SENSE, *supra* note 3, at 74.

113. See *id.*

114. See *id.*

115. See *id.*

116. *Id.* (quoting the *Wall Street Journal*'s report on these statistics).

117. As Yandle further notes, President Clinton's “timber summit,” which was conducted shortly after he took office, led to further restrictions on lumber harvesting. Far from “deal[ing] a blow” to the lumber industry, as some papers reported, financial markets

supply in the timber market caused by federal protection of spotted owls had reduced the supply of timber to the point where profits were up forty-three percent—essentially doubling the value of the corporations' private timber holdings.¹¹⁸ But, of course, this positive effect on timber industry profits was not uniform: "But what enriched some large corporations crippled smaller, independent mills that depended on federal logs. In the end, the larger corporations not only saw their private holdings double in value, they also lost many of their smaller competitors."¹¹⁹ Of course, consumers also lost, as these logging restrictions added approximately \$300 to the price of a \$100,000 house.¹²⁰

In short, the assumption of a "conflict" between industry and the public is fictional. Industry, or at least some members of industry, are often the beneficiaries of the proposed regulation. This helps to explain the seeming perversities of the current environmental regulatory environment.

B. Environmental Interest Groups

Environmental interest groups also are both direct and indirect beneficiaries of the current command-and-control regime. They benefit directly by the prominent role that they play in the current regulatory and litigation-based system of environmental protection, a role that would be reduced by a movement to more decentralized market-based forms of control. They also benefit indirectly by the opportunity to share in the rents created for industry by command-and-control regulatory systems. Thus, rather than being unbiased advocates of the public interest, environmental interest groups are riven with conflicts of interest that lead them unerringly to support centralized command-and-control methods of pollution control. In addition, they stand by this orientation even when it has negative consequences to the environment when compared to more efficient regulatory mechanisms.

responded by driving up the stock values of paper and lumber companies in anticipation of lower harvests and thus, higher lumber and paper prices. See YANDLE, COMMON SENSE, *supra* note 3, at 74.

118. See Dale A. Oesterle, *Public Land: How Much is Enough?*, 23 *ECOLOGY L.Q.* 521, 526 (1996).

119. *Id.*

120. See *id.* at 530 & n.50.

1. Direct Benefits of Command-and-Control Regulation: Agenda Control

The environmental lobby has a strong stake in the current regulatory system, in that the command-and-control regime gives it massive control over the creation, implementation, and enforcement of environmental laws and regulation. The prominence of environmentalists in the current system would seem to create a self-evident conflict of interest with respect to their receptivity to decentralized and incentive-based systems that would reduce their influence over policy.¹²¹

The importance of environmental lobbyists in the legislative and regulatory process cedes to them a degree of control unmatched in almost any other area of politics.¹²² They maintain almost a complete stranglehold on the flow of information to politicians and regulators.¹²³ They also play an important role in generating legislative proposals and drafting statutory language.¹²⁴ Given their inherent tendency to favor command-and-control strategies over decentralized, incentive-based strategies,¹²⁵ this control over legislation effectively allows them to block more efficient forms of regulation. Indeed, they have the power to stop all forms of regulatory reform with which they disagree, even preventing them from reaching the floor of Congress.¹²⁶ Through the ruthless enforcement of their party line, they play a pronounced role in making or breaking the careers of individual politicians.¹²⁷

This disproportionate control over the legislative process is backed up by an equally prominent role in the implementation process.

121. Despite this obvious conflict of interest Farber seems to believe that the interests of environmental lobbyists are aligned with the public, and he further seems to believe that this disproportionately large role for environmental lobbyists in policymaking is justified as a normative matter. Thus, he seems unconcerned about the massive powers given to environmental lobbyists under the current regime. See Farber, *supra* note 47, at 71-75; see also Daniel A. Farber & Philip P. Frickey, *Public Choice Revisited*, 96 MICH. L. REV. 1715, 1742 (1998) (arguing that environmental groups help to overcome the transaction costs and free-rider barriers to environmental legislation).

122. Casual empiricism suggests that the AARP may have a comparable stranglehold on Social Security, Medicare, and other elderly issues, while teachers' unions do on education issues, but few other areas are so dominated by particular interest groups.

123. See Farber, *supra* note 47, at 70-71. Farber notes that this stranglehold on information gives environmental lobbyists "important influence in the legislative process." *Id.* at 72.

124. See *id.* at 71.

125. See *infra* notes 134-150 and accompanying text.

126. JONATHAN ADLER, ENVIRONMENTALISM AT THE CROSSROADS: GREEN ACTIVISM IN AMERICA, at xvi-xvii (describing efforts by environmental lobbyists to kill regulatory reform following 1994 elections) [hereinafter ADLER, CROSSROADS].

127. See Farber, *supra* note 47, at 71.

As Farber notes, environmental activists play a "crucial part" in enforcing environmental law.¹²⁸ He writes:

Since early in the emergence of modern environmental law, these groups have been the major sources of litigation on behalf of environmental quality. The major national groups, most notably the Sierra Club and Natural Resources Defense Council, have participated in scores of major suits against EPA and other government agencies such as the Interior Department. Even a cursory study of environmental law reveals their pivotal role in shaping judicial decisions. They have also made effective use of litigation and other procedural delays to stall adverse agency action. Congress allowed them to pursue private enforcement actions as a substitute for agency enforcement. Moreover, environmental statutes typically allow citizens to sue violators for injunctions and civil penalties, and to collect attorney's fees if they prevail. These citizen suit provisions deliberately encourage environmental litigants to supplement government enforcement activities.¹²⁹

In addition, many members of the Clinton Administration's environmental policy team were lifted from the leadership ranks of environmental interest groups.¹³⁰ Given the obvious conflicts of interest that environmental lobbyists face in deciding when to litigate, Professor Farber is remarkably sanguine (and seemingly enthusiastic) about the vast powers given to unaccountable environmental activists to enforce command-and-control regulations. Indeed, he describes with approval the pivotal role of environmental litigation in the destruction of the policies of James Watt, former Secretary of the Interior Department under President Reagan.¹³¹ "Frequently, litigation would both delay a project and publicize opposition to Watt's position, accompanied by loud protest from congressional leaders," Farber writes.¹³² "Ultimately, even when the environmental suit was unsuccessful on the merits, Congress either blocked the action through the appropriations process (avoiding the possibility of a veto), or

128. *See id.* at 72-73, 79.

129. *Id.* at 72-73 (citations omitted).

130. ADLER, *CROSSROADS*, *supra* note 126, at 65-70.

131. *See id.* at 73. To be fair, Farber does not explicitly state that the role of environmental groups in legislation and enforcement is favorable. Nonetheless, it is evident that he believes it to be the case, as he repeatedly extols the virtues of environmental interest groups in solving free-rider problems among the public and in offsetting "industry interests" in the legislative process, *see id.* at 78-79, and that monitoring and litigation by environmental groups is necessary to prevent agency "shirking" from legislative directives. *See id.* at 75; *see also* Farber & Frickey, *supra* note 121, at 1742.

132. Farber, *supra* note 47, at 73.

exerted enough oversight pressure to force Watt to back down."¹³³ Few other interest groups have sufficient power over the federal government single-handedly to obstruct policy implementation on a massive scale and eventually to drive a duly appointed cabinet officer from power, as environmental interest groups did with James Watt. Nonetheless, Farber's greatest concern is *not* that environmental groups have too much power over the implementation of environmental law, but that recent Supreme Court decisions have limited the standing of environmental interest groups to bring suits to enforce environmental laws and regulations, thereby reducing their power.¹³⁴

In contrast to all of this, there is little benefit to environmental organizations from accepting something like an emission rights scheme, or taxing the amount of pollution created. These regimes are largely self-executing and self-enforcing, resting on decentralized, market-based decisionmaking. As a result, these regimes would reduce the prominence of environmental groups in controlling information, punishing politicians, writing legislation, and enforcing regulations through litigation.¹³⁵ As Michael Greve has commented:

A self-enforcing regulatory system that mimicked market incentives would make advocacy groups superfluous, at least with respect to the enforcement process; a coercive and litigious regulatory system makes them essential. This may help explain why environmental groups have been so slow and reluctant to endorse more flexible regulatory schemes even when such schemes would demonstrably result in greater environmental gains.¹³⁶

The conflicts of interest of environmental interest groups is evident in their continued enthusiasm for command-and-control forms of regulation, even where command-and-control schemes conflict with environmental goals. Thus, they have favored higher restrictions on new sources, even where this deters the replacement of old, polluting plants with new, cleaner plants.¹³⁷ They have supported smoke-stack

133. *Id.* Of course, environmental interest groups also found ready allies with members of the Interior Department, who also opposed Watt for political and ideological reasons. See TOM BETHELL, *THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES* 273 (1998).

134. See Farber, *supra* note 47, at 75-78.

135. It is no response to say that they do not "trust" politicians and regulators to look out for their interests in the environment, as General Motors could make the identical argument.

136. Michael S. Greve, *Introduction: Environmental Politics Without Romance*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 1, 8 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992) [hereinafter Greve, *Environmental Politics*].

137. See *supra* notes 59-71 and accompanying text.

scrubbers for coal, even though this has undermined the incentives to switch to cleaner coal.¹³⁸ They have also supported continued subsidies for recreational use of public lands, despite the environmental damage caused by these uses.¹³⁹ The priorities of environmental activists and their attitude toward more efficient pollution control mechanisms is further illustrated by their opposition to “waste-end” taxes in the 1986 Superfund debate. One proposal raised at that time was to tax the actual amount of waste produced, thereby creating an incentive to produce less waste. Remarkably, environmental activists *opposed* this recommendation—precisely *because* it would lead to less waste.¹⁴⁰ Less waste would mean less revenue for the fund which pays for Superfund cleanup. Of course, their calculus is correct when measured toward the long-term goal of cleanup of abandoned sites. Nonetheless it is “striking” that they were “willing to sacrifice an opportunity to encourage [source reduction] for the much less clear-cut benefit of spending more money on abandoned sites.”¹⁴¹ Similarly, environmentalists strenuously object to the use of containment strategies instead of cleanup, even where containment would have a large positive marginal impact by allowing treatment on far more sites.¹⁴² Needless to say, the adherence of environmentalists to a firm “cleanup” position found them fighting side-by-side with the waste treatment industry.

Environmentalists also favor the current regime which centralizes power in Washington, D.C. As noted above, moving the locus of regulation from local action to federal action does not increase the number of voices heard and considered in policymaking. It simply changes the voices that are dominant. Most professional environmental groups have only a weak grass-roots foundation.¹⁴³ As a result, they favor moving the locus of decisionmaking authority from local action to federal action, where they have highly sophisticated lobbying apparatuses headquartered in Washington.¹⁴⁴ Indeed, it was the failure of earlier environmentalists to build localized, grass-roots support for their programs that led them to view action by the federal government as a mechanism to end-run the process of localized consensus-building.¹⁴⁵ Once again, environmentalists have found

138. See *supra* notes 72-75 and accompanying text.

139. See *infra* notes 186-192 and accompanying text.

140. See Landy & Hague, *supra* note 41, at 74.

141. *Id.* at 74-75.

142. *Id.*

143. See *id.* at 76; ADLER, CROSSROADS, *supra* note 126, at 109-10.

144. See Oesterle, *supra* note 118, at 552-53.

145. See *id.* at 552.

receptive ears in federal bureaucrats and eastern politicians who use federal land policy for their personal and political benefit.¹⁴⁶

But it is not just politicians who pay the price when they cross the dominant national environmental interest groups. Consider the fate of the Quincy Library Group, an informal group formed by local environmentalists in Quincy, California, a northern California logging area.¹⁴⁷ After a fractious fifteen-year debate over logging, all of the interested parties finally reached a mutually agreeable compromise, only to see it vetoed by national interest groups. The national interest groups attempted to strong-arm the local group to make changes to their plan before the national environmental groups would support it.¹⁴⁸ Then, when members of the Quincy Library Group proposed legislation implementing their agreement, the “national groups stepped up their attacks,” and to date have been successful in killing the legislation.¹⁴⁹ Needless to say, “[m]any local groups regard national organizations as more interested in protecting [the national lobbyists] turf than in achieving solutions that advance conservation.”¹⁵⁰

2. Indirect Benefits of Command-and-Control: Rent-Sharing

Unquestionably, most environmental interest groups are animated by a sense of protecting the environment. But in order to do this effectively and to sustain the large number of people on the payrolls of environmentalist organizations, they need money. They also seek to maximize their membership base to increase their raw political clout, as well as seek to enhance their prestige in the policy arena.¹⁵¹ Often a compromise will be reached where environmental activists can form an alliance with various industries to support their projects, thereby furthering all of the various parties’ goals simultaneously. In other cases, however, such a compromise will not be available—and environmental activists’ desire for environmental protection will often clash with their desire for funds, prestige, and policy influence. Moreover, it is evident that the notion of environmental interest groups as “public interest” groups is somewhat naïve; environmental activists represent the interests of themselves and their members, and it is

146. *See id.* at 552-53.

147. The discussion of the Quincy Library Group is drawn from Charles C. Mann & Mark L. Plummer, *Grass-Roots Seeds of Compromise*, WASH. POST, Oct. 11, 1998, at C3.

148. *See id.*

149. *Id.*

150. *Id.*; *see also* Tim Fitzgerald, *The Quincy Library Affair*, 16 PERC REP. 1 (Mar. 1998).

151. *See* Keohane et al., *supra* note 4, at 333.

purely serendipitous if their private interests overlap with those of the public.

The key variable for understanding the methods of environmental interest groups is that, like private firms, they produce certain outputs. Their "output" is cleaner air and water.¹⁵² Their sole input to produce this output is in the form of political lobbying and litigation. The implications of this simple fact are huge: environmentalists can pursue environmental purity without having to worry at all about the offsetting economic costs of their agenda.¹⁵³ In short, through the political process they are able to externalize onto producers and the public the *entire* amount of the production of the goods they desire. There is no incentive for them to consider the costs that they are imposing on other parties, because they bear practically none of those costs.¹⁵⁴

This means that environmentalists should be indifferent in choosing among different competing means to accomplish the ends of environmental purity. So given a goal of reducing air pollution by say ten percent, environmentalists will be indifferent as to whether that goal is accomplished through efficient means (such as tradable pollution permits) or inefficient means (such as command-and-control mandates). Because the costs of the inefficient form of regulation are spread across all consumers in the economy, individual environmentalists bear a trivial amount of the costs of choosing inefficient means instead of efficient ones. This indifference as to means gives environmental groups great flexibility, making them an ideal coalition partner for other interest groups that benefit from environmental regulation. For instance, imagine an environmentalist choosing between two regimes for reducing air pollution: tradable permits or command-and-control technology. Assuming that the

152. This may be an unduly favorable characterization of the "outputs" of environmental lobbying groups. In practice, an "output" such as "clean air" may be too intangible to measure, especially for donors. Thus, their real output actually may be rules and regulations as an end in themselves, as evidence of influence and success. Moreover, environmental interest groups rarely celebrate good environmental news. I thank Jonathan Adler for suggesting this point to me. If true, it exacerbates the problems identified in the text.

153. This also means that environmental activists have no way of measuring the relative prices of their inputs and outputs. Thus, they will monomaniacally pursue ever-cleaner air and water, even beyond the point where it would be economically optimal. For normal economic goods, of course, rising marginal cost and falling marginal benefit curves would signal to the producer the point at which resources should be freed up to be used in more economically valuable alternative uses.

154. Moreover, because of their relative affluence, environmental activists will tend to be less concerned about the costs of environmental regulation, as many of them are relatively income inelastic. See discussion *infra* at notes 190-193 and accompanying text.

overall amount of pollution is the same under either regime, environmentalists will be largely indifferent.¹⁵⁵

But industry will not be indifferent between these two systems. As discussed earlier, command-and-control regulation raises the prospect of reduced output, increased profits, and economic rents to members of the industry through a cartelization effect. Tradable permits, however, will simply raise costs and dissipate economic rents. The command-and-control scheme raises the possibility of gains to trade between the benefited industry and environmental groups. Given the indifference of environmental groups between the alternative schemes, it is a simple application of economic logic to predict that the industry can buy the support of environmentalists for the command-and-control scheme. Simply by sharing with environmentalists some of the economic rents generated by the command-and-control regime, the benefited corporations can gain the political support of environmental groups and the public relations benefits of the green cloak. Under this scheme, both industry and environmentalists win. Under a permit system, by contrast, no economic rents are generated, thus there is no "surplus" to be shared between industry and environmental lobbyists. Under a permit system, only the dispersed public benefits.

But if environmental lobbyists were primarily concerned about the end of pollution abatement, they would be indifferent about the means. Indeed, in their roles as consumers they would be expected to have a mild preference for more efficient over less efficient means of control. But environmental lobbying groups have proven themselves *not* to be indifferent between the two approaches. With a lone exception, environmental activists consistently have favored command-and-control methods of pollution control over incentive-based mechanisms.¹⁵⁶ While other explanations may be available for this preference, it is also consistent with the view that rent-receiving firms are buying the support of environmental lobbyists for rent-generating legislation.

155. Of course, they would likely have a slight preference for the more efficient system as a result of their marginal interest in lower prices as a consumer, but this interest is negligible.

156. The lone exception has been the Environmental Defense Fund (EDF). In part, the EDF's decision was probably motivated by an entrepreneurial desire to distinguish itself from other environmental groups and to increase its influence over the political process as a result. During the Reagan years, this calculation appears to have been correct. See ADLER, CROSSROADS, *supra* note 126, at xx (showing that EDF's willingness to embrace market-based reforms on this point appears to be an anomaly, as EDF generally still favors regulatory strategies).

The gains to trade between environmental lobbyists and industry interest groups are even more striking when considering the ways in which federal environmental law is used to redistribute wealth across the country. Thus, incumbent industries in polluted areas of the country agree with environmentalists that developing areas of the country should be subject to more stringent nondegradation regulations than older areas of the country. Environmentalists want to preserve the environmental purity of these areas and established industry wants to prevent the establishment of new industry in those areas of the country. The gains to trade in this situation are obvious. Similarly, environmental lobbyists, the waste treatment industry, and lawyers will often find common ground in pushing for increased cleanup of Superfund sites.

The presence of these "gains to trade" politics may explain the otherwise puzzling financial support of industry for environmental interest groups.¹⁵⁷ For instance, in recent years members of the waste treatment industry have pumped hundreds of thousands of dollars into the coffers of various environmental advocacy groups, including the National Audubon Society and the National Wildlife Federation.¹⁵⁸ Indeed, the Sierra Club has recognized that "the commercial waste industry has an interest in improving regulations sufficiently to drive mom-and-pop operations out of business."¹⁵⁹ Of course, the waste treatment industry also is aware of these potential gains to trade.¹⁶⁰ Oil companies, including Atlantic Richfield and Chevron, contribute to environmental groups such as the National Audubon Society, who lobby to restrict opening new areas for drilling,¹⁶¹ thereby keeping new supplies off the market. As these examples illustrate, there are ample gains to trade between environmentalists and polluting industries, and they are usually exploited.

157. A detailed examination of the corporate-environmental interest relationship is provided in ADLER, *CROSSROADS*, *supra* note 126, at 85-107.

158. See AUSTIN FULK & STUART NOLAN, *PATTERNS OF CORPORATE PHILANTHROPY: GIVING IN THE CLINTON ERA* 137 (1997); Landy & Hague, *supra* note 41, at 80.

159. ADLER, *CROSSROADS*, *supra* note 126, at 97 (quoting Blakeman Early of the Sierra Club).

160. See *id.* at 97 (quoting William Y. Brown, former director of environmental affairs for Waste Management, Inc. (now WMX Technologies) observing, "we're in a position to benefit from the same direct objectives that [environmental interest groups] are pursuing Stricter legislation is environmentally good and it also helps our business.").

161. See FULK & NOLAN, *supra* note 158, at 137.

3. Environmental Lobbyists and Lawyers

The shared financial interests of environmentalists and lawyers in the status quo is even more transparent. Almost every federal environmental statute contains a so-called "citizen suit" provision allowing "any citizen" or "any person" to sue private parties for noncompliance with the statute. Under these statutes, no harm to any particular plaintiff needs to be shown.¹⁶² All that is necessary is to show a technical violation of the statute.¹⁶³ Citizen suit provisions allow private citizens to step into the government's shoes and to act as "private attorneys general," unconstrained by the usual restraints of balancing competing priorities in enforcement.¹⁶⁴ And while these provisions contemplate grassroots "citizen suits," in practice these suits are brought almost exclusively by environmental advocacy groups, such as the Sierra Club Legal Defense Fund or the Natural Resources Defense Counsel.¹⁶⁵ Indeed, through strategic use of citizen suit provisions, these and other environmental advocacy groups have been able to establish an ongoing program of litigation, using the attorneys' fees recovered in one case to bankroll future cases.¹⁶⁶ Moreover, evidence suggests that the decision by these groups regarding how to allocate their litigation resources is driven more by the cost of the action, the ease of victory, and the likely payoff, rather than the severity of the harm or an absence of public enforcement.¹⁶⁷ As Greve notes,

The fact that transfer payments to environmental organizations constitute the overwhelming portion of settlements of Clean Water Act citizen suits might lead one to suspect that the pattern and scope of private enforcement are determined *not*, as intended, by its expected public benefits, but rather by the enforcers' expected rewards or, more precisely, the 'spread' between the costs and the benefits of enforcement *to the enforcer*. A closer examination of the Clean Water Act enforcement campaign shows this suspicion to be correct.¹⁶⁸

162. Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Suits Became an Entitlement Program*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105, 105-06 (Michael S. Greve & Fred L. Smith, Jr. eds., 1990) [hereinafter Greve, *Private Enforcement*].

163. *See id.*

164. *See id.*

165. *See id.* at 107.

166. *See* Spence, *supra* note 1, at 168 (noting that citizen suits have "raised significant revenues" for environmental organizations).

167. *See* Greve, *Private Enforcement*, *supra* note 162, at 109.

168. *Id.* at 110-11.

As a result, professional environmental litigants have focused primarily on litigation under the Clean Water Act, which contains the required criteria. Clean Water Act suits are usually settled, with the plaintiff group recovering attorneys' fees.¹⁶⁹ In practice, however, environmental groups are usually compensated according to the going rates of private attorneys, rather than their actual costs.¹⁷⁰ As a result, they routinely recover significantly more than their actual costs, meaning that "litigation is potentially a profit-making activity."¹⁷¹ Moreover, most settlements provide for the payment of certain "credits" or "mitigation" programs such as the establishment of environmental education programs. Unsurprisingly, environmental groups are usually the recipients of many of these payments, some of which exceed one million dollars in a single case.¹⁷² This combination of easy victory, overcompensatory attorneys' fees, and windfall "credit" program payments has created a potent revenue source for environmental organizations.

The "fee seeking" nature of suits brought by activist environmental groups is illustrated by their almost complete focus on private defendants. Although municipalities violate their permits with greater frequency than private parties, between 1984 and 1988 environmental activist groups filed more than six times as many notices to sue against private industry than against governmental entities.¹⁷³ By contrast, individuals and nonprofessional groups sued governmental entities with the same frequency as private defendants. Moreover, many of these suits against private industry were for technical violations of permits, actions which bestowed no identifiable environmental benefits.¹⁷⁴ In short, many actions simply redistributed wealth from private defendants to professional advocacy groups, which used that money to fund similar suits against other private

169. Greve identifies several reasons for the desirability of Clean Water Act (CWA) suits, including the detailed nature of the permits required under the CWA and the ease of discovering violations of the permit requirements. As Greve notes, "It takes less than one day for environmental organizations to train student volunteers to scan these records and identify infractions." *Id.* at 109. Thus, it is easy to establish liability, and no actual harm to any individual needs to be established. Under the CWA, litigants also can enforce the fines provisions of the CWA, thereby holding powerful leverage for settlement. *See id.* Under many other statutes, private plaintiffs can only seek injunctive relief. *See id.*

170. *See* Blum v. Stenson, 465 U.S. 886, 892-96 (1984); ADLER, CROSSROADS, *supra* note 126, at 45.

171. Farber, *supra* note 47, at 74 n.22.

172. *See* Greve, *Private Enforcement*, *supra* note 162, at 110.

173. *See id.* at 111.

174. *See id.*

defendants, in an endless cycle of litigation that produces few, if any, environmental benefits.

The preoccupation of environmental groups with the financial aspect of litigation, rather than the environmental benefits generated, is evidenced in their response to the Supreme Court's decision last year in *Steel Co. v. Citizens for a Better Environment*.¹⁷⁵ In that case, the Chicago Steel and Pickling Company had failed to file certain forms required by the Emergency Planning and Community Right-To-Know Act of 1986 (Act).¹⁷⁶ There was no allegation that any harm had been caused to any party from the failure to file these forms. As required by the Act, Citizens for a Better Environment (CBE) notified Chicago Steel of its intent to sue for the permit violations and then sued after waiting the statutorily mandated sixty-day period.¹⁷⁷ During that sixty-day period, however, Chicago Steel managed to file all of the overdue forms with the relevant agencies.¹⁷⁸ As a result, Chicago Steel was fully in compliance when CBE actually filed the suit.

Nonetheless, CBE pressed forward with its suit, seeking civil fines on behalf of the government for the period of noncompliance, and attorneys' fees for itself.¹⁷⁹ The Supreme Court dismissed the suit, concluding that CBE did not have standing to sue because there was no continuing violation at the time of the suit that would warrant injunctive relief.¹⁸⁰ The Court also found CBE to lack authorization to enforce the public fines provisions.¹⁸¹ Because it had no underlying substantive claim, CBE was not entitled to bring suit for the attorneys' fees alone. As Justice Scalia characterized the situation, "[CBE] finds itself, in other words, impaled upon the horns of a dilemma: for the expenses to be reimbursable under the statute, they must be costs of litigation; but reimbursement of the costs of litigation cannot alone support standing."¹⁸²

One would think that environmental groups would be undisturbed by the Supreme Court's decision. After all, no actual harm resulted from Chicago Steel's failure to file the required permits, and at the time of the suit they were in compliance with the statute. No harm, no foul, right? Wrong—environmental advocacy groups felt themselves gored by the very horns of the dilemma that Justice Scalia

175. 118 S. Ct. 1003 (1998).

176. *See id.* at 1009.

177. *See id.*

178. *See id.*

179. *See id.* at 1008-09, 1018-19.

180. *See id.* at 1019-20.

181. *See id.*

182. *Id.* at 1019.

mentioned. One would think that they would redirect their efforts towards seeking out actual environmental harms, rather than technical violations of permits. Wrong again. Instead, CBE's attorney James D. Brusslan resolved, "We're looking at statutes where we believe there is no possible chance companies can come into compliance within the sixty-day period: statutes like the Clean Water Act, which they can be violating for years, and there's no way they can come into complete compliance by the time we file suit."¹⁸³ In other words, CBE will redirect its efforts towards cases where they can be assured of recovering attorneys' fees—regardless of the actual environmental harm involved.

Environmental activists also benefit from the adoption of the "technology forcing" elements of command-and-control approaches. These "technology forcing" requirements are almost uniformly unrealistic in their goals and often detrimental to the environment generally.¹⁸⁴ Nonetheless, they serve the goals of individual Congressmen and environmental groups. Individual Congressmen can claim credit for establishing ambitious environmental goals, and then delegate to administrative agencies the burden of figuring out how to meet those unrealistic goals. Once the inevitable failure results, Congressmen can criticize those same administrators for a failure to achieve the goals, or alternatively, for imposing "unreasonable" sanctions on private industry in the attempt to reach those goals.¹⁸⁵

But environmentalists gain from this practice as well. The failure to meet these technology enforcing deadlines makes for easily proven lawsuits. Again, there is no harm to the public from the failure to reach an arbitrary deadline by failing to invent a cost-effective technology that does not exist. And even though environmental groups have filed few suits to compel the government to enforce deadlines, the specter of missed deadlines provides a potent rhetorical tool to point to government failure to take adequate steps to enforce existing environmental laws.

4. Backpackers and Recreational Cost Externalization

Finally, environmental lobbyists benefit directly by the massive subsidy created by the current regime for environmental recreation and

183. Lisa Stein, *Enviro Ruling Limits Suits by Citizens*, NAT'L L.J., Aug. 10, 1998, at B1, B2.

184. See R. Shep Melnick, *Pollution Deadlines and the Coalition for Failure*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 89, 89-90 (Michael S. Greve & Fred L. Smith Jr. eds., 1992).

185. See *id.* at 97.

tourism. Charging below-market rates for recreational uses results in a subsidy of millions of dollars per year to these users. The Bureau of Land Management (BLM) estimated in 1988 that recreational users, who pay less than \$2 million in user charges on BLM land, cost the BLM \$125 million.¹⁸⁶ Although the Forest Service lost \$88 million on timbering activities in 1997, this amount is dwarfed by its loss of \$162 million on recreational activities.¹⁸⁷ This massive subsidy for recreational users has resulted in overuse of park lands by recreational users, thereby creating new problems of pollution and environmental damage.¹⁸⁸

Moreover, recreational users tend to be primarily wealthy and upper-middle class users; thus, this subsidy goes to those who need it least.¹⁸⁹ As Kalt wryly notes, "The caricatures of environmentalists as well-educated and wealthy, and outdoor recreationalists as Winnebago owners and back-to-the-earth college-aged offspring of well-to-do families are inaccurate, but not terribly so."¹⁹⁰ Indeed, much of the cost of environmental regulation is borne disproportionately by lower-income families, and the benefits accrue to upper-income individuals. Demand for electricity usage, for instance, tends to be highly income inelastic.¹⁹¹ Thus, to the extent that strip mining regulations raise the cost of coal or drilling regulations raise the cost of oil, the cost of these regulations impacts lower-income families harder than other income groups. In his 1983 article on strip mining regulations, Joseph Kalt estimated that the impact of strip mining regulations was to transfer \$288.6 million per year on individuals to upper-income land owners, stockholders, and coal miners, while imposing a loss of \$399.1 million per year on individuals at the lower end of the income scale.¹⁹²

The result of this disproportionate distribution is that environmentalists are provided with the amenities that they desire, but are able to use the political system to externalize the costs on others. Often this subsidy runs from lower-income Americans to upper-income environmentalists. Moving to a market-based system would likely force environmentalists to pay market rates for their use of these

186. See Oesterle, *supra* note 118, at 548.

187. See H. Sterling Burnett, *States Save Trees and Make a Profit*, INVESTOR'S BUS. DAILY, Aug. 13, 1998, at A28.

188. See Oesterle, *supra* note 118, at 548.

189. See WILLIAM TUCKER, PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM 48 (1982); Kalt, *supra* note 78, at 909; William Tucker, *Environmentalism: The Newest Toryism*, 14 POL'Y REV. 141 (1980).

190. Kalt, *supra* note 78, at 909.

191. See *id.* at 908.

192. See *id.* at 909.

valuable resources. Little wonder that they too favor the current system of environmental regulation.

C. *Politicians and Regulators*

1. Personal Benefits to Politicians and Regulators

Politicians and regulators have their own interests as well. In particular, politicians seek reelection, and the fame, power, and money that accompanies a long and successful political career.¹⁹³ In order to be reelected, politicians need campaign contributions and political support. Those who are not seeking reelection may instead be seeking higher office, such as Congressmen and Senators who set their sights on the White House. They too need money and support. Indeed, the desire of Senator Muskie to make a forceful statement on a national policy issue as part of his 1972 presidential campaign, and President Nixon's vigorous response to try to stop Muskie's capture of the issue, largely explains the swift migration of environmental regulation from the state to the federal level under the Clean Air Act of 1970.¹⁹⁴ Given this theory, it should be recognized that all of the arguments about "spillover externalities," regulation efficiencies, or other arguments advanced to support vigorous federal regulation of predominantly local problems are merely post hoc rationalizations for policies which resulted in large part from the intramural struggle between Muskie and Nixon in the 1972 presidential campaign.¹⁹⁵ The explanation for the federalization of environmental law lies not in theories of efficient regulation of externalities, but in presidential power politics.

Politicians will also have inherent conflicts of interest in selecting the means for carrying out regulation. Superfund provides an example. The underlying problem at Love Canal was that the land was owned by the Niagara Falls Board of Education, which had bought the land under the threat of condemnation proceedings.¹⁹⁶ Because the Board was immune from suit, the victims in Love Canal were unable to compel it to clean up the contamination and to pay damages for harm. Rather than taking the direct route of waiving sovereign immunity and allowing suits in cases such as this, politicians

193. See Keohane et al., *supra* note 4, at 333 (describing elements of the utility function for the average legislator).

194. See Elliott et al., *supra* note 6, at 334-36.

195. See, e.g., Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 285-87 (1997); Samoff, *supra* note 93, at 266-67 (arguing that interjurisdictional spillovers provide an argument for national environmental regulatory policy).

196. See YANDLE, COMMON SENSE, *supra* note 3, at 79.

created Superfund. Waiving sovereign immunity would have required politicians to pay out government money to clean up toxic wastes, money that politicians would prefer to spend on other projects. Superfund, by contrast, piles all of the responsibility on private parties. Similarly, although the Department of Defense alone generates more hazardous waste than the largest five chemical companies combined, it is rarely asked to pay anything at all towards cleaning up the wastes it has generated.¹⁹⁷ Moreover, as discussed above, Superfund's initial design seems only loosely linked to environmental protection, but seems closely linked to enriching the waste treatment industry, among others.

Superfund also illustrates the way in which politicians serve as political entrepreneurs, creating a political issue and then taking the lead in coalescing interest groups around that issue.¹⁹⁸ A measured response to Superfund would have involved an examination of the underlying cause of the Love Canal debacle and the most direct means to remedy the situation. But instead, politicians whipped up public hysteria about toxic waste, which they then turned to their own advantage and the advantage of favored interest groups. The events at Love Canal may have created the timing for something like Superfund, but the actual structure of Superfund has operated from the beginning primarily to enrich the waste treatment industry, lawyers, and politicians. Stated more bluntly, it is possible to imagine Superfund being enacted without Love Canal; it is more difficult to imagine Superfund being enacted without the support and the enrichment of the waste treatment industry, lawyers, and politicians.

Superfund, of course, is not a unique episode of political entrepreneurs seizing or even creating perceived crises that they then offer to solve through increased regulation. Government actors routinely manipulate public opinion to justify increased federal power and increased budgets. Recent episodes might include the health care "crisis," the "epidemic" of black church burnings, the "alar scare," and the ongoing battle over unproven human contributions to global warming. In each of these situations, government has asserted the presence of a fictional or unproven danger which can only be solved by aggressive government action. Rarely does government respond to a purported crisis by taking a hands-off policy.

197. See McGee, *supra* note 45, at 176.

198. See Jonathan R. Macey, *Public Choice and the Law*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 171, 174 (Peter Newman ed., 1998) (discussing political entrepreneurship).

At this point, rational ignorance rears its head yet again. Given that politicians and regulators are actively asserting the presence of a crisis and the urgent need for government action to respond to it, the average rationally ignorant voter lacks the time and resources to attempt to see behind this self-serving rhetoric and determine whether it is true, partly true, or even completely fabricated. Even if the voter turns out to be incorrect about the threat, individual voters will rarely learn of the error and will suffer a trivial amount of the costs from the error.¹⁹⁹ Where a voter has no incentive or reasonable ability to ascertain the truth of certain statements, individual preferences for government action are likely to be highly malleable and manipulable.²⁰⁰

Once in office, politicians garner direct benefits from speaking and appearance honoraria and expenses-paid junkets to posh locales.²⁰¹ On top of these direct payments, private interests also supply generous in-kind benefits, such as celebrity appearances, private planes, and meeting facilities.²⁰² Much of the day-to-day currency of political influence includes meals at gourmet restaurants, rounds of golf, gifts, and entertainment.²⁰³ Indeed, many of these benefits now trickle down to Congressional staffers, who actually carry out many of the functions nominally performed by Congressmen.²⁰⁴

Bureaucrats seek larger budgets and greater power for themselves.²⁰⁵ In order to sustain large payrolls and expansive powers, the EPA must actually be doing something. An EPA that simply oversaw the implementation of common law and market remedies would be a humble and limited EPA. On the other hand, an EPA that

199. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 392 (1983).

200. See *id.*; see also Bryan Caplan, *The Logic of Collective Belief* (George Mason University Dep't Econ. Jan. 1999) (unpublished manuscript on file with author) (arguing that marginal cost of holding incorrect political views is zero because of no private benefit from being correct).

201. See FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* 50-51 (1997) [hereinafter MCCHESENEY, *MONEY FOR NOTHING*].

202. See *id.* at 51.

203. See Franklin G. Mixon, Jr. et al., *Rent Seeking and Hidden In-Kind Resource Distortion: Some Empirical Evidence*, 78 PUB. CHOICE 171, 172 (1994).

204. See MCCHESENEY, *MONEY FOR NOTHING*, *supra* note 201, at 52-53. One study estimates that politicians retain about five percent of the wealth they transfer. See John D. Jackson et al., *Instant Winners: Legal Change in Transition and the Diffusion of State Lotteries*, 80 PUB. CHOICE 245 (1994).

205. See generally WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (discussing general characteristics of bureaus and setting forth a model of bureau budget and output behavior).

relentlessly seeks to expand its authority and is engaged in an ongoing review of existing and potential technologies, reconsidering and rewriting existing regulations in light of changing technology and market conditions, is a much more powerful and lucrative agency. From 1970 to 1994, EPA staff increased four-fold and its budget increased from \$205 million in 1970 to over \$4 billion in 1992, measured in current year dollars.²⁰⁶ By 1997, its budget was listed as \$7 billion and it employed over 19,000 people.²⁰⁷ As Robert Hahn notes, "EPA recognizes [that] the key to its continued growth lies in expanding the list of environmental issues that need attention, and writing regulations in such a way as to provide a greater need for EPA's services."²⁰⁸ An EPA scientist similarly observes, "At EPA, we're not paid not to find risks."²⁰⁹ Forest Service and Bureau of Land Management administrators face similar incentives to increase the size of their administrative budgets for logging and grazing programs.²¹⁰ As the humorist P.J. O'Rourke observes, "Government is not in the business of producing results. Government is in the business of producing government: passing laws, changing rules, setting up bureaucracies."²¹¹

The relentless "mission creep" of the EPA may be best exemplified by its belief this year that regulation of cigarette smoking and so-called second hand smoke fell within its mission. Although a federal district judge eventually disagreed with the EPA's assertion of authority, EPA's belief that cigarette smoking fell under its jurisdiction and its vitriolic response to the judge's decision illustrates the unceasing march of bureaucrats to expand their power and budgets.²¹² As Hahn observes, initiatives such as this antismoking initiative do almost nothing to improve health or the environment, but are "consistent with the interest of the bureaucracy in expanding its influence over corporations and the lives of ordinary individuals."²¹³ The EPA has also taken aggressive steps to regulate in the name of

206. See Hahn, *Environmental Policy*, *supra* note 1, at 327.

207. See Pranay Gupte & Bonner R. Cohen, *Carol Browner, Master of Mission Creep*, FORBES, Oct. 20, 1997, at 173.

208. Hahn, *Environmental Policy*, *supra* note 1, at 327.

209. Gupte & Cohen, *supra* note 207, at 173.

210. See CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 169 (1992); Oesterle, *supra* note 118, at 534; RANDAL O'TOOLE, *REFORMING THE FOREST SERVICE* 11-39 (1988).

211. O'ROURKE, *supra* note 99, at 199.

212. See *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 465-66 (M.D.N.C. 1998).

213. Hahn, *Environmental Policy*, *supra* note 1, at 327.

“environmental justice,” another assertion of power which would seem to have little to do with a reasonable understanding of EPA’s power.

The EPA’s debacle in Times Beach, Missouri, provides an especially poignant reminder of the way in which environmental regulators use their power for their own personal convenience.²¹⁴ In 1982, the government evacuated 2,232 people from their homes in Times Beach because the soil contained traces of dioxin. The EPA bought all the property for \$33 million and prepared for cleanup. It also induced Syntex, the company supposedly responsible for the dioxin contamination, to sign a consent decree promising to pay for the cleanup, estimated to cost as much as \$200 million.

Shortly after demolition of the town’s buildings began, however, it was determined that the dioxin findings had been based on faulty methodology and that the low incidence of dioxin did not actually pose a significant health threat—“certainly not enough to tear down a town or evacuate its inhabitants.”²¹⁵ Remarkably, government regulators did not view this finding as good news. Instead, it was decided that the cleanup must proceed anyway, “because,” in the words of a CDC official, “we’ve got the public so riled up.”²¹⁶ Of course, Syntex was still required to pay for the now unnecessary costs of cleanup. As McGee observes, “In other words, the company that was responsible for this ‘nonhazard’ had to continue to foot the bill for an unnecessary cleanup just because some government officials wanted to avoid a public backlash for needlessly evicting more than 2000 people from their homes.”²¹⁷ It hardly needs to be said that government regulators probably would not have been so sanguine about these unnecessary cleanup costs had they not been able to externalize the costs of their mistake on a private corporation.

When their authority is challenged, regulators strike back to protect their turf. Following the Republican capture of Congress in 1994, some Republicans threatened to cut EPA’s funding. In response, the EPA took a number of steps which did little to advance environmental safety but did much to protect its power and budget. Thus, for instance, the EPA joined hands with the national Parent Teachers Association (PTA) to thwart efforts to cut EPA’s budget.²¹⁸ *Forbes* magazine reported that, “[a]t [that] time an internal EPA memo noted: ‘The PTA could become a major ally for the Agency in

214. The following discussion is taken from McGee, *supra* note 45, at 171-72.

215. *Id.* at 172.

216. *Id.*

217. *Id.*

218. See Gupte & Cohen, *supra* note 207, at 173.

preventing Congress from slashing our budget.”²¹⁹ EPA also issued instructions to field officers to use any congressional connections that they had to fight proposed legislation that would have reduced EPA funding.²²⁰ Because this latter instruction was advanced and disseminated using government resources and government time, it blatantly violated federal law limiting the use of government resources for lobbying purposes.²²¹

Moreover, many regulators are drawn to their positions by a sense of mission.²²² Given the intensity of concerns in recent years over a perceived despoliation of the environment, such “true believers” are especially prevalent in environmental regulatory agencies. Because they personally need not consider the costs of such regulations, and are isolated from the need to consider the trade-off between environmental purity and other social goals, such as economic development, those passionately committed to the environmentalist cause will find ample room to indulge their personal preferences for environmental purity. Indeed it is apparent that the environment is an issue where politicians’ ideologies matter (as opposed to, pure pocketbook issues, such as quotas on sugar imports). Moreover, there is evidence that politicians actually use their powerful influence over policymaking to indulge their personal and ideological environmental preferences, even when their views differ from those of their constituents and the public.²²³

219. *Id.* (citation omitted).

220. *See id.*

221. *See id.*

222. *See* Hahn & Stavins, *supra* note 4, at 35 n.186 (noting that “people in [regulatory] offices tend to ‘self-select’ on the basis of their commitment to federal regulation of industrial activity. Thus, their interests and policy preferences tend to coincide with those of mainstream environmental lobbying groups.”); Richard L. Stroup & Jane S. Shaw, *Environmental Harms from Federal Government Policy*, in *TAKING THE ENVIRONMENT SERIOUSLY* 51, 61-62 (Roger E. Meiners & Bruce Yandle eds., 1993); *see also* DANIEL H. HENNING & WILLIAM R. MANGUN, *MANAGING THE ENVIRONMENTAL CRISIS: INCORPORATING COMPETING VALUES IN NATURAL RESOURCE ADMINISTRATION* 59-60 (1989); Walter A. Rosenbaum, *The Bureaucracy and Environmental Policy*, in *ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE* 212, 235 (James P. Lester ed., 1989).

223. *See* Kalt, *supra* note 78, at 912; Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 *AM. ECON. REV.* 279 (1984). Political ideology can be understood, in part, as a consumption good that politicians indulge in at the public’s expense. *See* Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 *J.L. & ECON.* 103, 104-07 (1990).

2. Political Benefits of Environmental Regulation

The era of the federal regulator has proven to be a tremendous boon for politicians. Most obviously, selling environmental regulations that benefit discrete parties can be a lucrative source of campaign fundraising. For example, just since 1988, Archer Daniels Midland (ADM), the primary beneficiary of ethanol subsidies and pro-ethanol regulations, contributed more than \$3 million in "soft money" contributions to the Republican and Democratic parties combined.²²⁴ During approximately the same period, ADM contributed \$1.2 million directly to specific candidates. Of course, this total investment is quite small when weighed against the fact that Congress's decision to extend ethanol's tax subsidy to the year 2007 is worth \$3.8 billion to the ethanol industry.

The interests of regulators and legislators in sustaining demand for their services may also explain the complexity and detailed specifications of current command-and-control approaches. Creating detailed and complex statutes means that the rules provided will become obsolete more quickly, thereby requiring subsequent rewriting by legislators and regulators.²²⁵ Reliance on command-and-control regulations will reinforce this bias by adding technological obsolescence and advancement to that of the rules itself. For instance, if regulations mandate the use of particular pollution filtering devices, these rules will have to be rewritten every time a new device comes onto the market.²²⁶ Each technological advancement will set in motion a conflict among numerous special interests, some seeking to preserve the status quo and others seeking that the government mandate use of the new technology. Government legislators and regulators are central to this process of rewriting command-and-control rules.

Command-and-control rules also give politicians greater control over the distributive consequences of law. Under decentralized market-based regimes, politicians quickly lose control over the activities of private firms. Thus, for instance, under a tradable permit scheme, a business might have the incentive to close down a local plant and move it to another area where pollution rights are not so

224. The figures reported in this paragraph were compiled by Common Cause and reported, among other places, in CHEMICAL MARKET REP., June 22, 1998, at 35.

225. See Zywicki, *Unanimity-Reinforcing*, *supra* note 3, at 997-99, 1014.

226. See Hahn & Noll, *Tradable Air Pollution Permits*, *supra* note 60, at 65 ("With source-specific regulation, every new abatement technology and every new source must obtain specific regulatory approval.").

expensive.²²⁷ While this result would increase efficiency, a politician is more likely to be concerned about protecting the interests of her specific constituents.²²⁸ Specific command-and-control regulations will also tie the hands of subsequent regulators who may seek to implement the law according to different distributional goals from the congressmen who wrote the regulations.²²⁹ Thus, to the extent that the intent of regulation is to redistribute wealth to particular interest groups, command-and-control regulations aid politicians in carrying out these legislative contracts. This reduces the uncertainty of the stream of rents that will be forthcoming under the legislative contract, thereby increasing the price that the politician can charge for her services.²³⁰

The interests of regulators also helps to explain the transition in recent decades from "industry-specific" regulation to "function-specific" regulation.²³¹ As compared to industry-specific regulation, function-specific regulation permits expansion and separation of regulatory markets, which increase the power of regulators.

Industry-specific regulation is exemplified by the Interstate Commerce Commission, established to regulate a specific industry, the railroad industry. The CAB and FCC are also examples of industry-specific regulation. By definition, the reach of such a regulatory body is limited to the industry it was established to regulate and its customers, placing inherent limitations on the power of regulators.²³² Moreover, the bargaining between the regulator and the regulated parties under an industry-specific regime is characterized by bilateral monopoly, thereby limiting the amount of wealth that the regulator can extract and complicating the bargaining process.²³³

Function-specific regulation, however, is not subject to such limitations. "Function-specific" regulation is defined with reference to the regulatory body's scope and function. Thus, the authority of the

227. See Robert W. Hahn & Roger G. Noll, *Environmental Markets in the Year 2000*, 3 J. RISK UNCERTAINTY 351, 358 (1990).

228. See Kenneth A. Shepsle & Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417, 418-20 (1984).

229. See Keohane et al., *supra* note 4, at 361.

230. See Zywicki, *Senators*, *supra* note 98, at 1026-28.

231. See Bruce Yandle & Elizabeth Young, *Regulating the Function, Not the Industry*, 51 PUB. CHOICE 59, 59 (1986). The interests of regulators is noticeably absent from the theory of statutory evolution advanced by Elliott, Ackerman, and Millian. See Elliott et al., *supra* note 6, at 314-15. Professor Farber also seems to have misunderstood this point in his assertion that the broad scope of environmental regulation tends to undermine the public choice model of environmental regulation. See Farber, *supra* note 47, at 62.

232. See Yandle & Young, *supra* note 231, at 62-63.

233. See *id.* at 62.

EPA, OSHA, and EEO cuts across industry boundaries, focusing instead on the function of the regulatory body.²³⁴ It significantly increases the regulators' scope of action and increases the number of interest groups under their control. "In a sense," write Yandle and Young,

function-specific regulation allows an expansion and diversification of the market for regulation. By adopting function regulation, legislators can gain additional political power that enables them to extract resources from all affected groups. Competition among the groups for regulation or relief from it enables the regulatory decision maker to maximize total gains from the regulatory process.²³⁵

Function-specific regulation typically combines broad, generalized ranges of standards that cut across industries, with opportunities for variation from industry to industry. This allows the regulator to act as a monopolistic price discriminator, setting a general market-clearing price but allowing variances from customer to customer. Like a private monopolist that can discriminate across markets, a function-specific regulator will be expected to maximize its return from each individual industry that it regulates. As Yandle and Young observe, "[t]hroughout social regulation, one finds industry viability as the ultimate limit of regulatory stringency. That is, regulation is alternatively imposed and relaxed as if it were being sold at the maximum price the traffic would bear."²³⁶ Moreover, these variances across industries reduce the ability of those regulated to arbitrage across markets and to compare their treatment relative to one another. Each industry will require different technological standards, and it will rarely be the case that what is required for one industry will be appropriate for another. This allows the regulator to engage in a great deal of market separation.²³⁷

Incentive-based regulations such as tradable pollution permits or general taxes, by contrast, are highly fungible and not industry-specific. As a result, private arbitrage across industries becomes readily possible, thereby undermining the regulator's market power to price discriminate across industries.

Superfund again provides an excellent example of how politicians and legislators benefit from the current system of environmental regulation, and how environmental regulation is used to funnel wealth to particular interest groups. Superfund revenues can be

234. *See id.* at 59.

235. *Id.* at 62.

236. *Id.* at 63.

237. *See id.* at 64.

a great financial boon for waste treatment companies and great publicity for politicians, thus it would be expected that politicians would want their part of the Superfund pie. When Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980, it required that the EPA specify at least 400 cleanup sites—or approximately one for each congressional district.²³⁸ By also specifying that each state would have its worst site included within this 400, regardless of how risky it was in a relative sense, each Senate district was also guaranteed a site. “Put differently,” Yandle observes, “the law had the immediate and politically valuable effect of generating excess demand for congressional services. This inspired new local interest groups to organize lobbying efforts.”²³⁹ The culmination of Superfund’s political purpose was revealed in the conviction of the EPA director of Superfund programs for perjury before Congress, after being charged with allocating Superfund dollars in ways that promoted the political fortunes of Republican candidates for Congress.²⁴⁰

Compare this with common law or market-based schemes of control. Once a decentralized market-based approach is implemented, government actors have little left to do. Rights to use these valuable rights flow by an invisible hand to their highest-valued users, rather than according to government’s visible hand. Subsequent technological innovations are adopted or rejected according to their usefulness and cost-effectiveness as compared to other methods of conserving these valuable rights, not according to the judgment of legislators and bureaucrats. Market solutions run on their own; there is simply no need for repeated interventions by legislators and regulators. Legislators can threaten to undo the entire mechanism and replace it with, say, command-and-control regulations instead. But legislators cannot make repeated forays into this market, and they cannot constantly tinker with the allocation of rights. Needless to say, eliminating the need for legislators’ services also eliminates their ability to raise money from special interests seeking changes in regulations.

238. See Yandle, *Taxation*, *supra* note 76, at 761.

239. *Id.*

240. See *id.*; see also James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. REG. 351, 363-67 (1986).

3. Rent Extraction

Once a favorable piece of legislation is delivered to a special interest group, the same politicians or subsequently elected politicians have an incentive to threaten to withdraw that legislation, especially if confronted with a counteroffer from a rival interest group. The politician may then return to the original group and seek further payments simply to retain the current legislation. Alternatively, a legislator can threaten negative regulation, then ask the adversely regulated party to make payments to *prevent* the imposition of the negative regulation, so-called "juice" or "milker" bills.²⁴¹

Fred McChesney has dubbed this process "rent extraction" or "rent extortion."²⁴² Rent extraction occurs when a legislator threatens to use her power either to pass legislation detrimental to a given group, or to repeal favorable legislation that is currently on the book. In essence, the legislator extorts "blackmail" payments from those special interests. Failure to pay up, it is warned, will result in actions detrimental to that special interest. As McChesney summarizes the phenomenon, "[t]he essence of . . . rent extraction . . . is thus the mounting of a credible threat of loss, then selling back to those otherwise victimized reprieve from that loss."²⁴³

The theory of rent extraction may help to explain the command-and-control structure of environmental regulation. As McChesney notes, the paradigmatic example of rent extraction is the situation where a private party makes a fixed capital investment, thereby generating "private" economic rents associated with its continued use in that location or industry, as opposed to its next most valuable use.²⁴⁴ Under such circumstances, political actors can extract those economic rents by threatening to impose regulations that will reduce the value of those capital investments.²⁴⁵ The choice of command-and-control regulations provides an exceptional mechanism for rent extraction, as legislators and regulators have broad discretion as to the initial choice of capital investments to be made, as well as whether to require new or additional investments later. In essence, politicians require the installation of nonproductive capital, and then can come back some time later and threaten to change the required technology, thereby destroying the value of the earlier capital investment.

241. See Fred S. McChesney, *Rent from Regulation*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 310, 314 (Peter Newman ed., 1998).

242. See MCCHESENEY, MONEY FOR NOTHING, *supra* note 201.

243. *Id.* at 3.

244. See *id.* at 20-42.

245. See *id.*

Yet another way that politicians and regulators have asserted power over the use of environmental resources is through the widespread policy of requiring individuals to secure permits before commencing many activities. By requiring a permit before action can go forward, the widespread use of the permit power reverses the presumptions of the common law, under which the burden was on the complaining party to meet the steep requirements necessary to secure an injunction, most notably the presence of real and irreparable harm.²⁴⁶ This effects a massive transfer of power from individual citizens to politicians and regulators. As Epstein observes, “[o]nce the permit is required, the individual citizen becomes a supplicant before the government in all cases, whether or not any real threat of harm exists.”²⁴⁷ Finally, “[t]he permit may be denied by a state regulator who does not have to show that an applicant’s conduct puts other persons at risk, and, in fact, does not require any of the showings that are necessary for obtaining private injunctions.”²⁴⁸

There is another fundamental difference between the common law injunctive process and the permit process. Under the common law, parties argue their case before a neutral, and largely disinterested, judge. Permits, however, “are typically issued by specialized bodies which often have a strong ideological position on the issues that come before them time after time,”²⁴⁹ and these regulators often are attracted to these jobs because they allow them to indulge their private preferences at the expense of others. As Epstein observes:

No longer can one be confident of going before a judge who is selected not solely for his views on the question of, for example, wetlands and environmental damages. Rather, the ostensible expertise of agency personnel is little more than a pretext for a strong one-sided commitment which results in a complete inversion of the proper distribution of power within a legal system.²⁵⁰

In short, the permit power effects a dramatic shift of power to regulators who face few constraints on the exercise of their power, and often use their power in a way to advance their private ideological interests or the interests of special interests.

246. See Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 410-12 (1995).

247. *Id.* at 412.

248. *Id.*

249. *Id.* at 413.

250. *Id.*

4. Political Incentives and Environmental Regulation

Given the personal incentives of politicians for election and reelection, it is puzzling that some scholars nonetheless argue that federal regulation is necessary to protect "future generations" and to prevent "inter-temporal pollution."²⁵¹ Because they capture the full benefit of good management and bear the full cost of mismanagement, private landowners have appropriate incentives to maximize the long-term value and viability of their lands.²⁵² Politicians and regulators, by contrast, have an incentive to maximize their political and financial support in the next electoral cycle, whether two, four, or six years down the road.²⁵³ The unborn do not vote.²⁵⁴ Nor do they contribute to campaign funds. Given this disparity in power between those currently living, voting, and contributing to campaign funds, versus those not yet born, politicians will generally sacrifice the interests of future generations for immediate political gain.²⁵⁵

By any standard, the record of the federal government in governing its own lands is abysmal.²⁵⁶ Access to these valuable resources is set by the need to maximize short-term political support, rather than revenue maximization, market forces, or environmental concerns. As a result, almost all resources on federal lands are sold at below-market prices, leading to overuse of those resources. The direct costs of running these federal programs routinely exceed the revenue

251. See Swire, *supra* note 6, at 99-100.

252. See generally TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (1991) (discussing free market incentives to land efficiency maximization).

253. See John A. Baden & Richard L. Stroup, *The Environmental Costs of Government Action*, *POL'Y REV.*, Spring 1978, at 23.

254. Even if the unborn were considered in the political process, there is still the problem of guessing the preferences of future generations and applying an appropriate discount rate. For example, it has been estimated that warmer temperatures as a result of global warming (if true) would reduce mortalities in the United States alone by 40,000 per year and reduce medical costs significantly. Indeed, measuring willingness to pay by wage rates shows that people would be willing to give up \$30-100 billion annually for such a temperature increase. See Thomas Gale Moore, *Health and Amenity Effects of Global Warming*, 36 *ECON. INQUIRY* 471 (1998).

255. This political bias in favor of current political support at the expense of unrepresented future generations is also evident in the massive federal debt. See Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 *CLEV. ST. L. REV.* 165, 230 (1997) [hereinafter Zywicki, *Beyond the Shell*] (noting that budget deficits "enable[] politicians to transfer wealth from unrepresented future generations to powerful contemporary interest groups"). The presence of this multi-trillion dollar debt belies the idea that the federal government can be an effective protector of future generations.

256. See Stroup & Shaw, *supra* note 222, at 51-61.

generated.²⁵⁷ Rampant overlogging and overgrazing of federal lands reflects this bias for short-term political gain at the expense of long-term economic or environmental viability.²⁵⁸ Miners gain similar subsidies for their operations on federal land. The Bureau of Reclamation routinely dams rivers and wrecks the environment to provide below-market electricity to consumers and to subsidize irrigation and agricultural cultivation in otherwise unfit areas.²⁵⁹ The Army Corps of Engineers has become the acknowledged expert in draining wetlands and destroying many species' natural habitats. Attempts to cull the Elk herd in Yellowstone National Park to maintain their population at sustainable rates have met with protest from the very same people who supposedly are concerned about the long-term viability of the environment.²⁶⁰ Government agricultural policy has led farmers to carpet-bomb their remaining lands with fertilizer and pesticide, thereby generating increased pollution runoff.²⁶¹ All of these stories have a common feature: government officials sacrificing the long-term viability of the environment for short-term political gain. Both theory and empirical observation rebut the argument that the government will provide either efficient or effective protection for future generations.²⁶²

The interests of politicians also belie the arguments that public choice theory justifies the concentration of environmental regulation on the national level.²⁶³ A primary justification for federalism is the role of federalism in limiting rent-seeking legislation.²⁶⁴ If regulation

257. See Oesterle, *supra* note 118, at 526-31.

258. See BETHELL, *supra* note 133, at 277-80; ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT (1995).

259. The Bureau of Reclamation charges on average less than 30% of the true cost of delivering water to irrigators, resulting in the farming of high-water-use crops, such as lettuce, on desert lands. Similarly, the recipients of power from the Hoover Dam pay rates less than 25% of the normal market prices for electric power. See *id.* at 350-51.

260. See Stroup & Shaw, *supra* note 222, at 66-67.

261. See *id.* at 56.

262. As Oesterle observes:

Why are the subsidies from federal lands so pervasive and so long-lived? Our federal political system, vulnerable to organized, cohesive, private-interest groups, seems to spawn private grants of privilege. The Forest Service, for example, is pressured by local communities whose citizens work as loggers, by timber companies, and by the home building industry, whose members benefit from higher demand when home prices reflect inexpensive raw material costs.

Oesterle, *supra* note 118, at 530.

263. See discussion *supra* notes 193-262 and accompanying text.

264. See Zywicki, *Beyond the Shell*, *supra* note 255, at 210. It is notable that the advocates of greater federal control over regulation usually ignore this justification for federalism.

or taxation becomes too oppressive, people can move to a more favorable political jurisdiction. For instance, large numbers of southern blacks took advantage of this exit option to move north and escape oppressive southern governments during the Jim Crow era.²⁶⁵ Because leaving the United States is not a viable or desirable option for most people, moving the locus of regulation to the national level disintegrates these limitations on oppression. Indeed, one avowed justification for federal regulation is to prevent people from fleeing oppressive regulation at the local and state level. In turn, this means that special interests can seek greater economic rents, as northern states do in imposing regulations detrimental to the south and west. Politicians also benefit because as the rents to industry rise, the share for politicians through rent extraction also rises.

D. Lawyers

As should be apparent by now, the current system of environmental regulation is characterized by a web of highly complex regulations enforced primarily by massive quantities of litigation. Given this emphasis on litigation and complex regulation, it should not be surprising that lawyers also are a primary beneficiary of the current regulatory system. In many cases, lawyers will also be affiliated with other groups, so their interests will directly overlap.

But lawyers also comprise an interest group of their own and will seek policies that enrich themselves.²⁶⁶ Moreover, like the regulated industries described above, not all lawyers will benefit equally from all types of regulation; thus, there may be distributive consequences within the legal profession from different types of regulatory initiatives.

1. Lawyers as an Interest Group

The goals of lawyers are not unique to the environmental law setting. Lawyers will have similar preferences regardless of the substantive area of law affected. Thus, environmental regulation is simply another forum where lawyers will pursue the same goals, just as they will in the areas of bankruptcy and torts.

In general, lawyers will favor policies which increase the demand for lawyers and reduce the supply of new lawyers. The growth of

265. See generally David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781 (1998).

266. See Paul H. Rubin & Martin Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 807 (1994).

environmental law in recent decades provides a classic example of how lawyers have manipulated the lawmaking process to increase demand for their services and thereby increase the income of environmental lawyers. Most supply restrictions on entry into the legal profession, such as education and bar-membership requirements, are unrelated to the specifics of environmental law. Nonetheless, some elements of environmental policy reflect efforts to restrict the supply of lawyers into the specialized area of environmental law and to transfer wealth from small to large law firms.

The rise of environmental regulation and litigation has been a boon for lawyers. It was reported a few years ago that Superfund liability litigation was, along with bankruptcy, "the most important source of new business for major law firms."²⁶⁷ Relatively unheard of twenty years ago, many large law firms now employ multiple lawyers who specialize in environmental litigation, compliance, and often arcane areas of regulation. The Environmental Law Institute estimated in 1991 that approximately 20,000 lawyers were actively engaged in Superfund litigation.²⁶⁸ Surely that number has grown since that time. Huge amounts of the funds earmarked for Superfund clean-up actually end up in the pockets of the lawyers fighting over who will foot the bill for that clean-up.²⁶⁹ About one-third of the expenditures on Superfund have gone to clean-up; approximately the same amount has gone to lawyers.²⁷⁰ Many cases have at least three rounds of expensive law suits: first, the EPA selectively sues a small group of deep-pocket corporations for the clean-up fees; second, those tagged by the EPA for cleanup costs then sue all of the other potentially liable parties whom the EPA did not pursue; and third, those parties in turn bring suit against their insurers for reimbursement.²⁷¹ Moreover, the proliferation of private attorney general proceedings in the environmental law arena amounts to a massive public works program for lawyers. Free of the burdens of actual clients with whom they have to share their recoveries, environmental lawyers can bring actions

267. Landy & Hague, *supra* note 41, at 77.

268. *See id.* at 77-78.

269. *See generally* KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUP (1995) (analyzing liability standards that dictate who bears the cost of cleaning up hazardous substances).

270. *See* EPSTEIN, *supra* note 45, at 297. One commentator has estimated that 88% of insurance costs and 36% of the total \$11.3 billion private sector payments due to Superfund through 1991 were litigation costs. *See* John R. Boyce, Ideology, Asymmetric Information, and Campaign Contributions to Politicians 5 (Oct. 1998) (working paper on file with author and *Tulane Law Review*).

271. *See* McGee, *supra* note 45, at 174.

to enforce public statutes and pocket the fees incurred in doing so. Under most circumstances, an attorney is paid only if she can prove that her client suffered harm and that he is entitled to damages. Under a private attorney general statute, however, no harm to any person needs to be shown. All that is necessary is to prove a technical violation of a statute and the attorney is entitled to fees.²⁷²

Given the windfall to lawyers from the enactment of Superfund, it should not be surprising that trial lawyers supported Superfund's enactment²⁷³ and subsequent expansion.²⁷⁴ Ying Qiu Sun, a graduate student in economics at University of Alaska, Fairbanks, sought to determine the effect of trial lawyers as an interest group on the voting patterns of members of Congress on the expansion of Superfund in 1985-86. Sun's study revealed that the contributions of trial lawyers to members of Congress were positively and statistically significant in predicting voting patterns.²⁷⁵ Moreover, campaign contributions from trial lawyers (as with other special interest groups) were disproportionately targeted at members of Congress sitting on the relevant committees that dealt with Superfund.²⁷⁶ Moreover, having made these human capital investments in learning the ways of Superfund, lawyers will fight to protect the loss of this stock of regulations and the accompanying loss in their unique qualifications. As a result, lawyers will be likely to fight even more tenaciously to retain the status quo than they did to secure Superfund in the first place.²⁷⁷

Lawyers also have a strong preference for legal complexity.²⁷⁸ Increasing the complexity of a body of law will also increase the need for lawyers to lead clients through the maze of confusing regulations. Increased complexity also means that laws and regulations become obsolete more rapidly, requiring constant updating and requiring further legal advice to explain the new provisions.

272. See YANDLE, *COMMON SENSE*, *supra* note 3, at 152.

273. See Boyce, *supra* note 270, at 5.

274. Ying Qiu Sun, *An Investigation of Congressional Voting on Superfund Expansion* (May 1996) (unpublished Masters Thesis on file with author and Tulane Law Review).

275. *Id.* at 55-56.

276. Boyce, *supra* note 273, at 19.

277. This investment in specific capital also exposes lawyers to the problem of rent extraction, described *supra* Part II.D.3. Thus, trial lawyers will be susceptible to threats by politicians to reform Superfund in the same way that industries are susceptible to political extraction in their nontransferable capital stock.

278. See Pritchard & Zywicki, *supra* note 13, at 496. See generally Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 *INT'L REV. L. & ECON.* 381 (1992).

The desire of lawyers to increase legal complexity may also help to explain the creep of regulation from common law, and state and local legislation, to federal legislation and regulation over time. In order for lawyers to receive rents from the maintenance of excessive complexity over time, they must restrict entry. At the margin, given the choice between a jurisdiction with complex rules requiring a lot of expensive legal advice, and one with simple and predictable rules, nonlawyers will tend to choose the latter. Complexity is bad for the economy, but good for lawyers.²⁷⁹

Elevating the locus of regulation to the national level, however, prevents this interjurisdictional competition from occurring. Indeed, one important justification for federalism is to minimize the overall amount of rent-seeking activity in the economy by permitting exit from jurisdictions that extract excessive amounts of wealth through taxation and regulation.²⁸⁰ Centralizing regulation in Washington, D.C., allows lawyers to exercise market power and to restrict entry which might otherwise chip away at their rents. Where a jurisdiction exhibits market power in legal rulemaking, lawyers will often share in some of the rents generated.²⁸¹ The elevation of the locus of environmental regulation to the federal government has created market power, and unsurprisingly, lawyers have benefited.

2. Intraindustry Effects

Not all lawyers have benefited equally from the migration of power to the federal government. The movement of power to the federal government will not only affect the total amount of rent-seeking activity that takes place, but will also have distributive consequences.²⁸² Some special interests benefit when power remains on the state level, while others benefit from elevation to the federal level; lawyers are no different.

Casual empiricism suggests that state legislatures tend to be dominated by small firm lawyers. Traditional state law areas of tort, property, and domestic relations law are the bread-and-butter of small firm practice. State judges and state legislators tend to be drawn from the ranks of small firm practitioners.

279. See Todd J. Zywicki, *Epstein and Polanyi on Simple Rules, Complex Systems, and Decentralization*, 9 CONST. POL. ECON. 143 (1998).

280. This is discussed in more detail in Part II.B, *supra*.

281. See Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 506 (1987) (discussing the Delaware bar's interest and consequential financial gain in development of Delaware corporate law).

282. See Zywicki, *Senators*, *supra* note 98, at 1012.

In general, large firms tend to benefit from elevating the locus of law-making authority to the federal level. This is for several reasons. First, as compared to smaller firms and practitioners, large firms will have marginally greater influence on the federal level. Because of the federal government's expansive reach and market power, the start-up costs of lobbying the federal government are larger. Larger, wealthier law firms will be at a competitive advantage in lobbying at the federal level relative to small firms. Clearly, large firms also lobby at the state level, but their marginal return from lobbying is probably greater at the federal level. Virtually every large law firm in the country, regardless of its home location, now has a significant permanent office in Washington, D.C. In part this is sociological: predominantly graduates of elite law schools, large firm lawyers simply prefer the enhanced prestige and status of practicing in federal court and interacting with federal lawmakers. Laboring in state courts and state capitols simply does not provide the same degree of status as similar activities on the federal level. Casual empiricism also suggests that whereas state judges tend to be drawn from the ranks of small firm lawyers, federal judges are almost exclusively alumni of large law firms, the federal government, or the law school professoriate.

Second, lawyers at large firms have a higher opportunity cost of engaging in government activity. Many large firm lawyers now bill in the neighborhood of \$350 per hour or more. As noted above, the potential returns of lobbying or working in the federal government will tend to be larger than in the state government. Thus, lawyers with a higher opportunity cost will tend to gravitate towards the area where the returns are potentially the largest. In turn, federal judges and congressmen generally are paid more than their state counterparts, thereby attracting large firm lawyers to the federal government.

Third, all lawyers benefit to some degree from increased complexity, but large firm lawyers will tend to benefit to a disproportionately large degree. This is a result of a change in the nature of the practice in large law firms, which enables large firms to take greater advantage of the returns to complexity than small firms. Large law firms are increasingly oriented around the provision of highly sophisticated levels of expertise in arcane and complicated areas of law.²⁸³ Legal "entrepreneurs" skilled in narrow subsets of

283. See Frederick W. Lambert, *A Preliminary Inquiry into the Transcendence of Value Creation*, 74 OR. L. REV. 121, 129 (1995) (observing that large law firms primarily specialize in large, important, heterogeneous matters where they can offer resources of unique experience and large numbers of lawyers, and in return can "justify a high billing rate and deployment of many lawyers").

sophisticated areas of law and regulation sell their skills to corporations who need such representation and can afford it. More complexity both permits and requires greater specialization of lawyers within firms.²⁸⁴

Although the complexity of tort law has increased in recent decades through the migration towards comparative negligence and other procedural and substantive changes, the common law remains quite simple in comparison to the maze of regulations issuing from the federal government on a daily basis. Common law litigation involving nuisance, property, and tort law is difficult in its own way, but it does not require the same level of technical and detailed knowledge as federal regulation. The massive numbers of highly specialized lawyers needed to understand this impenetrable body of rules and regulations issuing from Congress and the EPA creates barriers to entry that exclude small firms from competing in this market.

Indeed, there may be inherent limitations on lawyers' ability to use the common law and litigation as a mechanism to capture rents through manipulation of legal doctrine. For instance, if common law doctrine and rules become too complex, parties will settle more disputes rather than engage in costly litigation.²⁸⁵ Use of legislation and regulation to expand complexity, however, may not be subject to these same limitations. Legislation and regulation applies to all parties, regardless of whether there has been any tangible harm to anybody. In general, there is a prohibition against "contracting around" legislation and regulation.²⁸⁶ Thus, the government could still prosecute a paper mill for violating the Clean Water Act, even if all those actually affected by the use voluntarily bargained to allow the use. The violation of the statute is itself a harm punishable by the government, *even if* all private harm is fully compensated and bargained for. Moreover, the market power of federal regulators eliminates many of the constraints on wasteful complexity which limit the ability to manipulate tort law doctrine on a state-by-state basis. This cluster of reasons may help to explain the findings of some scholars that lawyers are more effective in bringing about doctrinal expansion through legislation, rather than judicially.²⁸⁷

284. See Spence, *supra* note 1, at 172 n.105 (noting that "[i]ncreasingly, environmental lawyers must sub-specialize" in order to keep up with the changes in the law).

285. See White, *supra* note 278, at 386.

286. See Zywicki, *Unanimity-Reinforcing*, *supra* note 3, at 998-1000.

287. See Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evaluation*, 45 EMORY L.J. 523, 576 (1996). This is not to deny that lawyers can bring about doctrinal expansion judicially as well. See Rubin & Bailey, *supra* note 266, at 807-09, 814-21. Indeed, it may be easier to do so judicially because judges and lawyers share a similar

Thus, while all lawyers tend to benefit from increased complexity, beyond a certain point large firm lawyers will benefit to a disproportionate degree over small firm lawyers. Some small firms simply lack the resources and capacity to come to grips with law as complex as modern federal regulation. Thus, there are barriers to entry which limit the ability of some small firms to enter into the market of large firms who perform this sort of work. Of course, environmental law is not alone in this: banking regulation, securities regulation, pension law, international trade, and many other areas of law have exhibited a similar evolution and domination by large law firms. But the increasing complexity and large firm orientation of environmental regulatory practice suggest that large firms have been the primary beneficiary of the rise of environmental regulation and the demise of the common law.

3. Lawyer Culture

The high percentage of legislators and regulators who are also lawyers will also increase the influence of lawyers in the regulatory process. More state legislators are drawn from the ranks of lawyers than from any other profession.²⁸⁸ The dominance of lawyers is even more pronounced at the federal level where an overwhelming majority of both houses of Congress are lawyers. At the current time even the President and the First Lady are lawyers. Moreover, a large number of regulators are also lawyers. Given this, it is little wonder that lawyers exert a disproportionate influence over public policy.²⁸⁹

This general influence is heightened with respect to environmental law. The centrality of lawyers at every stage of the lawmaking, regulation, and enforcement process gives a disproportionate amount of power to lawyers to operate the system of environmental regulation for their own benefit. There is a "lawyer culture" that predisposes lawyer-regulators to issue highly specific rules, regulations, and edicts to control behavior, and makes them suspicious of decentralized incentive-based guides for action.²⁹⁰

financial, intellectual, and ideological outlook. See Pritchard & Zywicki, *supra* note 13, at 497-501.

288. See ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* 82 (1981).

289. See Stephen P. Magee, *The Optimum Number of Lawyers: A Reply to Epp*, 17 *LAW & SOC. INQUIRY* 667, 677 (1992).

290. See ALLEN V. KNEESE & CHARLES L. SCHULTZE, *POLLUTION, PRICES, AND PUBLIC POLICY* 116-17 (1975).

In turn, this tendency of politicians and regulators to rely on “lawyerly” solutions increases the value of the human capital investments made in writing and interpreting those types of regulations, further entrenching the current mindset.²⁹¹ Technical command-and-control regulations both reflect the dominant influence of lawyers on public policy as well as further reinforce their importance in helping private parties weave their way through the subsequent web of regulations.

But it is not just that most politicians and regulators are drawn *from* the ranks of lawyers; after completing their stints in the government, many politicians and regulators return *to* their legal practices. While in the government, legislators and regulators write laws; upon leaving the government, clients call upon these same people to interpret those same laws. As Michelle White has observed:

[L]awyers working for the government write the rules and regulations interpreting and applying statutory law. But these same lawyers often go through the revolving door to the private sector, where they become leading experts interpreting “their” regulations to clients. In this situation, lawyers have a direct interest in making particular legal doctrines complex, since then they are the only ones who fully understand the rules and regulations. Legislators similarly return to the private sector when they retire or are not reelected, and they often become private lawyers or lobbyists whose expertise is in their area of specialization when they were legislators.²⁹²

This “revolving door” phenomenon explains why legislators and regulators are so receptive to the demands of lawyers for greater complexity. Because legislators and regulators eventually return to private practice as lawyers, they share with lawyers generally an interest in increasing legal complexity. But more fundamentally, legislators and regulators profit even more than the average lawyer as a result of their expertise gained while writing those complex laws. The presence of this expertise means that demand for their services in those areas will be more inelastic than for lawyers generally and their familiarity with the legislation will increase their productivity and the rate they can charge. As a result, former legislators and regulators will capture a disproportionately large amount of the rents generated for lawyers as a result of these overly complex regulations. Because they will gain personally when they leave the government, increasing complexity while in government will increase their long-term income

291. See Hahn & Stavins, *supra* note 4, at 36.

292. White, *supra* note 278, at 394.

stream after leaving government. As McCormick and Tollison observe, "even though [lawyers] may have high opportunity costs for serving, they also have a unique ability to internalize the outside returns from passing laws."²⁹³ Pursuit of their individual self-interest will lead legislators and regulators who are also lawyers to advance the interest of lawyers as a whole, but this is purely an incidental consequence of the pursuit of their own self-interest.²⁹⁴

4. Clients and Legal Complexity

Finally, not all increases in legal complexity will come at the expense of lawyers' clients or without their knowledge. In advancing their own interests in legal complexity, lawyers may also be advancing the interests of the clients they serve. As Peter Pashigian has observed, large companies spend proportionately less on legal services, as a percentage of sales, than do small companies.²⁹⁵ Large companies also can better afford to maintain large in-house legal staffs to monitor the activities of outside counsel than can smaller companies.²⁹⁶ As a result, even though the costs of legal complexity fall on both large and small corporations, large corporations have a comparative advantage in bearing these costs. In this sense, the costs of legal complexity have an intraindustry wealth transfer effect similar to that relating to the installation of specific command-and-control technologies.²⁹⁷

III. THE POLITICAL ECONOMY OF REGULATORY REFORM

This Article has identified an intricate web of special interests that benefit from the current centralized, command-and-control system of environmental regulation. Environmental regulation is conventionally portrayed as a struggle between "industry" seeking to

293. MCCORMICK & TOLLISON, *supra* note 288, at 80.

294. The "revolving door" phenomenon also answers Professor Cross's criticism that lawyer-legislators and lawyer-regulators seem to lack a discernible incentive to respond to lawyers' demands for greater complexity. See Cross, *supra* note 287, at 534 n.37. Cross has the analysis backward. Legislators and regulators are primarily concerned about advancing their own individual self-interest. The larger benefit to lawyers as a class is an unintended by-product of this fact. For instance, no one would be surprised to find a dairy farmer-legislator voting for milk price supports, or a teacher-legislator voting for higher teacher salaries. Lawyer-legislators, vote for increased legal complexity for similar reasons.

295. See Pashigian, *supra* note 75, at 261.

296. See DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 147 (1974); Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 411-12, 424 (1985).

297. See *supra* notes 72-83 and accompanying text (discussing intraindustry wealth effects of command-and-control).

avoid regulation and environmentalists acting on behalf of the public to enact regulation. This Article has demonstrated this dichotomy to be false. Some members of some industries benefit from regulation, while others do not. Large, politically connected corporations and industries are winners in this political struggle, using regulation as a method to impose costs on and create barriers to entry for new, smaller businesses. Older industrial interests of the country are aligned with environmentalists to try to choke off the migration of industry to the faster growing southern and western regions of country.

Environmental interest groups benefit directly from the current Washington-centered, command-and-control, litigation-based system of environmental regulation. Few private interest groups in any area of law can claim to exercise the degree of power that environmental interests exercise over environmental regulation. Moreover, this conflict-of-interest is heightened by the indirect benefits that environmentalists gain from the current system, benefits that would disappear from a transition to a more decentralized incentive-based system.

Nor are politicians and regulators merely pursuing the public interest. Politicians sell favorable legislation to certain corporations and industries by passing favorable legislation, receiving numerous benefits in return. By later threatening to remove this same legislation, they can receive further payments merely to retain the status quo. Regulators have the opportunity to use environmental regulation to expand their budgets and pursue their personal preferences for environmental purity at the public's expense. Finally, legislators and regulators have ample opportunity to enrich themselves by writing technical and complex regulations, then leaving the government and touting themselves to private clients as experts in those same areas.

Lawyers also benefit from the current system of complex command-and-control regulation. Large firm lawyers probably benefit disproportionately from the demise of simple common law actions and the rise of complex federal regulations. Some aspects of current environmental law, such as Superfund litigation, almost appear to have been intended primarily to enrich lawyers. Lawyers obviously have no interest in adopting a system that would alleviate paperwork and litigation.

Developing accurate understanding of the dynamics that support the current regulatory regime is important for several reasons. First, it should now be evident that on every program or piece of legislation, "the devil is in the details." It is not enough simply to ask whether someone is "in favor of" environmental regulation. In many cases,

environmental regulation is merely a fig leaf for some other interest, such as enriching lawyers or raising prices in a given industry. *How* the legislation is written and carried out is probably even more important than the mere fact that legislation is passed which purports to "protect the environment." Thus, President Nixon and Senator Muskie's posturing and credit claiming is an important part of the regulation story, as their political entrepreneurship created the conditions under which the federal government could step in to seize control over environmental resources, and thereby use those valuable assets to create economic rents for themselves and for favored interest groups. This credit claiming process, however, merely created the conditions for regulation to go forward—the important part of the story is the rapid capture of the regulatory agenda by special interests.

Second, legal scholars must stop railing about environmental externalities without also considering the political externalities inherent in the regulatory process. Buchanan and Tullock noted thirty years ago that majoritarian democracy creates political externalities the same way as polluters create environmental externalities.²⁹⁸ In both cases, those favoring a particular use for property are entitled to use it without having to pay the full opportunity cost for it.

Once it is realized that political externalities are at least as prevalent as environmental externalities, numerous implications arise. For instance, the idea that most environmental regulation should emanate from the national level simply vaporizes. Most pollution is local in its source and impact; thus, most environmental externalities are also best dealt with by local action. Elevating the locus of regulation to the federal level does little to deal with these environmental externalities, except for the rare circumstance of large interstate or international forms of pollution.²⁹⁹ But federal action creates massive political externalities. In particular, national regulation creates the opportunity for some regions to use regulation as a method to transfer wealth to themselves at the expense of other regions. By disintegrating the protections created by federalism, national regulation also eliminates many of federalism's constraints on the ability of special interests to seek rents and the ability of politicians to extract them. Thus, as Professor Revesz has argued, there should be a

298. See *supra* notes 11-12 and accompanying text.

299. I say "large" pollution problems because for small pollution problems the political externalities associated with using the federal government will usually outweigh any corrections made for environmental externalities.

presumption of decentralization in regulation, but not necessarily for the reasons he has articulated.³⁰⁰

Third, these findings have critical implications for the political feasibility of regulatory reform, such as common law or incentive-based systems. The fundamental characteristic of systems, such as taxes and the common law, is that they largely run on their own, with minimal interference from politicians, lawyers, industry special interests, or environmentalists. Of course, this also means that there are limited economic rents to be generated for any of these groups. Thus, each of these groups will be staunch opponents of deregulation schemes. As Michael Greve has written:

The tendency of environmental statutes to become playing fields for interest groups and politicians has disturbing implications. As a practical matter, it means that environmental regulation becomes ever more rigid and immune to reform. Even as we learn from the failures of the past, and even as the need for reform becomes more urgent, we will be stuck with statutes and regulations that are no longer sustained by any plausible environmental rationale.³⁰¹

The modest attempt to privatize some federal lands in the 1980s shows the extent to which these various interest groups are established in their support of the current system of environmental regulation. As Dale Oesterle describes the scene:

To the astonishment of privatization advocates, ranchers and other traditional western land use groups banded together with environmentalists to defeat the program. Ranchers feared paying full value for grazing; miners feared paying more for mineral deposits; environmental groups feared large-scale development on sold land; local communities feared losing free access to federal land; private landowners worried about the short-term depression of property values caused by the sale; and recreational enthusiasts feared having to pay for their pursuits.³⁰²

The current environmental regulatory regime creates large economic benefits to many wealthy and politically powerful interests. Does this mean that deregulation and decentralization of the

300. See Richard L. Revesz, *The Race to the Bottom and Federal Environment Regulations: A Response to Critics*, 82 MINN. L. REV. 535, 536 (1997).

301. Greve, *Environmental Politics*, *supra* note 136, at 12; see also Roger G. Noll & Bruce M. Owen, THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS 155 (1983) ("[B]ecause regulation tends to create new special interests whose survival depends on its continuation, deregulation and other regulatory reforms appear least likely to succeed in the very areas where policy has departed most from serving a more general public purpose.").

302. Oesterle, *supra* note 118, at 572.

environmental regime is impossible? Most regulation has been moving in the incessant direction of greater centralization and greater command-and-control regulation.

In the rare exceptions where incentive-based regulations have been installed, such as for tradable emission permits under the 1990 Clean Air Act, the initial allocation of emission rights has almost been established by a grandfathering approach, where emission rights are allocated according to the amount of pollution emitted immediately preceding the new market-based regime. As a practical matter, this created a large scarcity rent for incumbent polluters, which they could use themselves or sell to highest-valued users.³⁰³ Put more directly, the drafters of the Clean Air Act "bought off" the opposition of industry to the implementation of the tradable permit scheme. The loss of industry's long-term rents through regulation was compensated for by a one-time lump sum payment in the form of valuable pollution rights.

Given the intangible nature of these rights and the presence of "thick" markets for trading them, transaction costs of reallocating these rights should be quite low.³⁰⁴ If transaction costs are relatively low, then these valuable pollution rights should eventually flow to their highest valued users, thereby increasing economic efficiency.³⁰⁵ Of course, if the rights were auctioned to the highest-valued user from the outset, rather than allocated on political grounds, then these transactions could be avoided, along with various other wasteful aspects of the grandfathering approach.³⁰⁶ Moreover, an auction arguably would have the preferable consequence of distributing the value of these property rights to the government, rather than resulting in a windfall for the lucky grandfathered recipients.³⁰⁷ In turn, some small percentage of this auction revenue might actually be applied toward the public good. On the whole, however, the net efficiency

303. See Donald N. Dewees, *Instrument Choice in Environmental Policy*, 21 *ECON. INQUIRY* 53, 59 (1983); Gary W. Yohe, *Polluters' Profits and Political Response: Direct Control Versus Taxes: Comment*, 66 *AM. ECON. REV.* 981, 981-82 (1976).

304. In practice, however, politicians and interest groups have interfered substantially with these markets, thereby reducing the efficiency gains that have actually been realized.

305. See Coase, *supra* note 51, at 15; Robert W. Hahn & Roger G. Noll, *Designing A Market for Tradeable Emissions Permits*, in *REFORM OF ENVIRONMENTAL REGULATION* 119, 120-21 (Wesley A. Magat ed., 1982); W. David Montgomery, *Markets in Licenses and Efficient Pollution Control Programs*, 5 *J. ECON. THEORY* 395, 409-17 (1972).

306. For instance, it has been argued by some that grandfathering, if accepted as general practice, could lead unregulated firms to increase their emissions in order to maximize the pollution rights that they obtain if there is a transition to a market-based system. See Dewees, *supra* note 303, at 62-63.

307. See Keohane et al., *supra* note 4, at 364 ("Like command-and-control standards, tradable permits create rents; grandfathering distributes those rents to firms, while auctioning transfers the rents to government.").

gains may make it worthwhile to create this one time distributional windfall for incumbent polluters. Thus, while these distributional consequences may be somewhat distasteful, they may be a necessary price to pay to enable a transition to a more efficient system.

Further light on the problem is shed by Paul Joskow and Richard Schmalensee's recent article on the allocation of tradable permits, which found that the most significant variable in determining the amount of emissions rights a state received was the political "clout" of that state: specifically, large states that were swing states in the 1988 presidential election, states with competitive gubernatorial campaigns in 1990, or states that had representatives in the House Energy and Commerce Committee leadership.³⁰⁸ This suggests that key politicians will also have to share in the gains from moving to a more efficient regulatory system.

Deregulation, therefore, may come about only if the distributive consequences to entrenched interest groups and politicians is large enough to offset the rents they are sacrificing. As Buchanan and Tullock advised in 1975, "For economists who continue to support [market-based regulations and taxes], the analysis suggests that they had best become good Wicksellians and begin to search out and invent institutional arrangements that will make the [market-based regulations and taxes] acceptable to those who are primarily affected."³⁰⁹ On the other hand, the analysis of this Article predicts that the decision to implement a tradable permit scheme may be short-lived or at least will be subject to ongoing analysis and review with constant pressures to abandon it in favor of traditional command-and-control regulation with its resultant benefits to discrete interest groups. Indeed, where tradable permit schemes have been tried, their efficacy has routinely been undermined by the government's unwillingness to accord full property rights protection to emission rights, thus burdening them with significant limitations on their resale.³¹⁰

Alternatively, politicians may be induced to deregulate if the gain to themselves from doing so exceeds the loss. Consider, for instance, the deregulation of telecommunications. Since the founding of federal regulation of the airwaves, politicians have allocated rights in a blatantly politically manner, using such rubrics as diversity allocation

308. See Joskow & Schmalensee, *supra* note 5, at 79.

309. Buchanan & Tullock, *Polluters' Profits*, *supra* note 47, at 147.

310. See Robert W. Hahn, *Economic Prescriptions for Environmental Problems: How the Patient Followed the Doctor's Orders*, 3 J. ECON. PERSP. 95, 97-103 (1989); Robert N. Stavins, *Policy Instruments for Climate Change: How Can National Governments Address a Global Problem?*, U. CHI. LEGAL F. 293, 312 (1997).

and public interest reviews to cover a system of awarding licenses to political supporters.³¹¹ This allocation system only began to change when federal budget deficits grew so large and demand for the licenses became so strong that the opportunity cost to politicians of foregoing this vast revenue stream overwhelmed the old system. In short, politicians decided that they would rather have this vast pool of money to spend on political projects, and thus were finally willing to surrender their power to make an in-kind distribution to political supporters.³¹² Thus, politicians may be willing to surrender their property right if the opportunity cost of continuing to exercise it becomes too large. The one-time gain of selling those rights may be sufficiently large to make up for the loss of power to allocate those rights on their own. Similarly, politicians may be more inclined to adopt pollution taxes than tradable permits precisely *because* taxes create a pool of money that politicians can then transfer to favored groups.³¹³ Where emission taxes have actually been tried, they have been implemented in a way so as to maximize tax revenues, rather than to seek the efficient tax level.³¹⁴ Moreover, politicians' desires to get their hands on an ever-increasing pool of tax revenues creates a conflict of interest that invariably causes them to accede to the demands of environmentalists on unproven dangers such as global warming, and to fund research that supports such hypotheses.³¹⁵

Gary Becker has suggested an alternative scenario for deregulation and reform. Becker argues that reform may come about if the deadweight costs of the current inefficient regime become so overwhelming that competing pressure groups arise with a reform agenda.³¹⁶ But even in Becker's model, there still needs to be a

311. See *supra* note 17.

312. A similar political opportunity cost explanation has been offered for the repeal of Prohibition during the Great Depression. See Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 2-3 (1994).

313. See Dwight R. Lee, *Rent-Seeking and Its Implication for Pollution Taxation*, 51 S. ECON. J. 731, 731-32 (1985) (arguing that the efficient level of pollution-abatement tax should consider deadweight loss of subsequent rent-seeking activity to redistribute tax revenues).

314. See Richard B. Stewart, *Environmental Law in the United States and the European Community: Spillovers, Cooperation, Rivalry, Institutions*, 1992 U. CHI. LEGAL F. 41, 75 ("Some Member States have used effluent charges and pollution taxes, although the prime objective has generally been to raise revenues rather than create incentives for pollution reduction.").

315. See Roger Bate, *Science Under Siege: The De-Coupling of Science from Climate Policy*, 7 ENERGY & ENV'T 323 (1996).

316. See Becker, *supra* note 199, at 390-91; Gary S. Becker, *Pressure Groups and Political Behavior*, in CAPITALISM AND DEMOCRACY: SCHUMPETER REVISITED 120, 135 (Richard D. Coe & Charles K. Wilber eds., 1985).

coherent pressure group that can organize the public and overcome free rider problems. Moreover, it may be that such a pressure group might be more likely to arise where there are appropriable economic rents for members of the emergent pressure group to capture. Thus, MCI was rewarded for its persistence by being in a position to be the first entrant into the deregulated long-distance market, capturing rents during the transition to a more competitive market structure. In addition, local telephone companies came to find it more profitable to seek access to new markets, such as long distance, cable, and online services, and were willing to give up their stranglehold on local telephone services if necessary.³¹⁷ Similarly, in some markets, deregulation often leads to an initial period of consolidation as less efficient firms exit the market or are absorbed by more-efficient firms. The more efficient firms may be able to capture rents during the period of transition to a more competitive market. Consumers, of course, benefit in the end from deregulation and increased competition. In essence, MCI's pursuit of early-entrant rents into the market dovetailed with the interest of the dispersed public in deregulation generally. This model means that consumers are never required to conquer their collective action and free rider problems, as MCI's pursuit of profits rendered public participation largely irrelevant.³¹⁸ Even though obtaining deregulation may require the expenditure of some resources, these costs may be offset by post-deregulation transitional rents.³¹⁹

There also may be offsetting interest groups who may be able to lobby for deregulation. For example, while trucking companies favored rent-producing regulation of the trucking industry that maintained high prices and limited entry, those who shipped products via trucks did not. Thus, shippers provided a pressure group to lobby for deregulation.

For environmental law, however, efficiency appears to be an end in itself, not merely a by-product of a struggle among pressure groups for influence. As a result, there do not appear to be any significant appropriable transition rents to be gained by advocating reform. There

317. See Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996: Comment on Krattenmaker*, 29 CONN. L. REV. 217, 223-33 (1996).

318. As a result, this model of reform differs from models of reform which depend on active and ongoing monitoring of public officials and political affairs. See, e.g., Terry W. Frazier, *Protecting Ecological Integrity Within the Balancing Function of Property Law*, 28 ENVTL. L. 53, 71 (1998) (advocating more aggressive pressure by diffuse grass-roots public to offset influence of concentrated special interests).

319. Of course, once MCI or local Bells has fully captured all possible rents from entering the previously regulated market, it will have an incentive to throw up new barriers to entry to protect its market from future intrusions.

do not appear to be any analogies to MCI or local Bells that can serve as an interested proxy for consumer preferences. Thus, the inability of consumers to effectively organize as a pressure group on environmental issues will likely prove fatal to their cause. Moreover, there do not appear to be any parties directly injured by regulation that could serve as the catalyst to form an offsetting pressure group, as in the trucking scenario. Thus, reform under a Becker model might prove elusive.

In the meantime, some minor reforms may be available immediately by circumventing the political process. For instance, David Schoenbrod has argued that the courts should reinvigorate the nondelegation doctrine and should place constitutional limits on the ability of Congress to delegate lawmaking authority to executive and independent agencies.³²⁰ Limiting delegation could be enforced by the courts, an institution that may be less prone to manipulation by the particular special interest groups that dominate the legislative process.³²¹ Limiting delegation would not be a panacea for rent-seeking activity, but it might have a salutary effect on moderating some of the most overt forms of rent extraction. For instance, it is often the case that EPA threatens to regulate a given activity, only to have Congress step in and prevent the regulation from going forward³²²—in return, of course, for financial or political support for that Congressman.³²³

IV. CONCLUSION

Business is becoming ever more cognizant that environmental regulation can be used as a tool to raise competitors' costs and effectively cartelize a given industry. Writing in *Business Strategy Review*, a journal aimed at educating businesspeople as to strategic business tips, economist Scott Barrett provided the following advice:

320. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 20-21 (1993).

321. Of course, the courts respond to different special interest groups, such as intellectuals. See Pritchard & Zywicki, *supra* note 13, at 497-501. In this situation, however, this should not present a barrier to reform, and might, in fact, create a predisposition towards incentive-based reforms, as they traditionally have been popular with intellectuals.

322. It is apparent that even "independent" regulatory bodies remain under Congress's tight control, largely due to Congress's control over agency budgets. See Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 *CORNELL L. REV.* 43, 55-56 (1988) (arguing that regulatory bodies do not regulate as strongly in the districts of representatives who can influence them as they do in other representatives' districts).

323. See MCCHESENEY, *MONEY FOR NOTHING*, *supra* note 201, at 37.

The public's increasing demand for environmental protection will inevitably increase the demands for environmental regulation. But this need not be bad news for industry. Companies will often find that their interests coincide with those of the regulators, and astute players will try to shape the regulation accordingly.³²⁴

In particular, Barrett recommends the following course of action:

How should business react to the public's demand for increased environmental protection?

In the past, business leaders would probably have opposed the introduction of new laws, lamenting the consequent burden of higher costs and reduced competitiveness. Today, business leaders are taking a more positive attitude to new regulation. This is not just because they are concerned citizens; there is now also the recognition that environmental controls—such as those which compel all firms in an industry to meet some minimum standard of emissions—do not generally reduce competitiveness across the board. . . . [S]ome regulations can even benefit firms . . . directly, possibly by restricting entry to their industry, or by limiting output in a way that raises prices.

So the business response to the imposition of regulations should not be to argue for easier standards. . . . The challenge for business is to identify how regulation will affect them, and then to influence the shape of regulation that is imposed accordingly. At least some firms will find that they can influence the form of the regulations that are introduced in such a way to enhance their competitive advantage and also to improve the environment.³²⁵

Barrett is not alone in pointing out to businesses the competitive advantages they can gain through environmental regulation. Two management scholars provide similar advice:

In general, firms have largely assumed that there are numerous costs and few, if any, strategic benefits associated with environmental regulations. . . . However, plausible arguments and indirect empirical evidence exist to support the contrary view, that some firms may acquire strategic benefits from environmental regulations. . . . From a strategic perspective, an asymmetrical influence that favors firms already operating in an industry, called incumbents herein, confers advantage on them by increasing barriers to the entry of new firms, and may imply that some firms should reconsider their traditional perspective on environmental regulations. Indeed, incumbents may be

324. Scott Barrett, *Environmental Regulation for Competitive Advantage*, 2 BUS. STRATEGY REV. 1 (1991).

325. *Id.*

able to use environmental regulations to their advantage, and the regulations may even create economic benefits in certain contexts.³²⁶

It is doubtful that these scholars are telling industry something new, and one suspects that their sense of the degree of industry opposition to regulation is overstated.³²⁷ Clearly Weyerhaeuser did not need to be informed that finding spotted owls on public land would increase the value of Weyerhaeuser's own lumber.³²⁸ DuPont did not need to be told that international regulation through the Montreal Protocol would both increase the value of DuPont's existing CFC stock by reducing CFC supply, while simultaneously increasing demand for DuPont's new CFC substitutes.³²⁹ Nor did the waste treatment industry need to be informed that Superfund would create an unprecedented boom for their companies.³³⁰ As this Article has shown, many businesses have already known for some time that regulation can be used to generate economic rents and impose disproportionate costs on market rivals. Indeed, logic suggests that the firms that have survived and prospered under the current regime have acted in a manner consistent with this advice, even if unconsciously.³³¹ It seems that it is only law professors who have remained reluctant to accept the rent-seeking behavior that underlies the current inefficient structure of environmental regulation.

Unfortunately, prospects for reform are bleak. Despite widespread and long-accepted knowledge of the inefficiencies of the current system, it remains oblivious to change. Absent effective constitutional constraints on Congress, regulatory agencies, and the national government generally, environmental regulation will continue to be centered in Washington in the hands of rent-extracting politicians and bureaucrats servicing the needs of rent-seeking special interest groups. In the end, the solution may lie in constitutional reforms that reinvigorate federalism and separation of powers, protect private property rights, and that enforce limitations on the ability of special interests to use the might of the federal government to transfer wealth

326. Dean & Brown, *supra* note 65, at 288-90, 299.

327. See Hahn & Stavins, *supra* note 4, at 25 (expressing surprise at "curious resistance" of industry lobbyists to incentive-based reforms). Indeed, public statements by industry lobbyists may differ from their private preferences.

328. See *supra* notes 113-120 and accompanying text.

329. See *supra* notes 102-106 and accompanying text.

330. See *supra* notes 40-46 and accompanying text.

331. See generally Armen A. Alchian, *Uncertainty, Evolution and Economic Theory*, 58 J. POL. ECON. 211 (1950). Indeed, such express coalitions appear to be routine. See ADLER, CROSSROADS, *supra* note 126, at 72-76 (describing several such coalitions covering over two decades).

from the public to themselves.³³² Only binding constitutional constraints will make it possible to minimize both environmental and political externalities simultaneously.

332. See Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 471-75 (1988); Pritchard & Zywicki, *supra* note 13 (arguing that purpose of constitutions is to constrain rent-seeking activity by special interests and minimize agency costs of political officials). The rise of the federal government may accurately be traced to the Progressive Era and the constitutional changes made at that time, most notably the passage of the Seventeenth Amendment, which destroyed the states' institutional protection of federalism and paved the way for increased special interest activity on the federal level. See Zywicki, *Beyond the Shell*, *supra* note 255, at 217; Zywicki, *Senators*, *supra* note 98, at 1055. Possible constitutional reforms that would potentially revitalize federalism are discussed in Zywicki, *Beyond the Shell*, *supra* note 255, at 226-34.

