

ARTICLES

INTEREST GROUPS AND ENVIRONMENTAL POLICY: INCONSISTENT POSITIONS AND MISSED OPPORTUNITIES

BY

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This Article examines and explains the positions of the principal interest groups over the past four decades with respect to two central questions of environmental policy: the appropriate policy goal and the instrument that should be used to carry out the policy. With respect to the first question, this Article observes that, at the beginning of the contemporary period of environmental law, industry groups strongly supported setting the stringency of environmental standards by reference to cost-benefit analysis. At the same time, environmental advocacy organizations strongly opposed the use of cost-benefit analysis. As environmental regulators gained greater proficiency in the quantification and monetization of environmental benefits, industry groups came to see that, when properly conducted, cost-benefit analysis could justify stringent environmental protection. Consequently, they have abandoned their original enthusiasm for the technique. Similarly, over the same period of time, environmental groups came to see the promise of cost-benefit analysis, for similar reasons.

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With respect to instrument choice, industry groups were originally attracted to marketable permit schemes as a lower-cost means of achieving pollution reduction, while environmental groups were skeptical of these approaches. First with the Clean Air Act Amendments of 1990, and then when faced with the daunting challenge of climate change, environmental groups acknowledged that market mechanisms are more economically and politically viable than command-and-control regimes because they impose far lower aggregate costs on society. And industry groups realized that by attacking marketable permit schemes they might defeat greenhouse gas regulation altogether. While environmental groups and industry have largely switched positions on the two central questions of environmental policy, there was a brief time when their positions largely overlapped. As a result of the fleeting nature of this consensus, however, the opportunities to make substantial progress in rationalizing the system of environmental regulation have been unrealized.

I.	INTRODUCTION.....	2
II.	COST-BENEFIT ANALYSIS.....	5
	A. <i>Putting a Price on Life</i>	6
	B. <i>A Tentative Embrace</i>	7
	C. <i>Turning Away from Cost-Benefit Analysis</i>	8
III.	MARKETABLE PERMITS.....	10
	A. <i>Market Environmentalism</i>	10
	B. <i>A Moment of Consensus</i>	12
	C. <i>From Theory to Praxis, to Debacle</i>	14
IV.	CONCLUSION.....	16

I. INTRODUCTION

When designing environmental policy, decision makers must address two principal questions: What are the policy's goals? What instrument should be used to carry out the policy? In the United States, these questions have principally been translated into a set of binary choices. First, should the government use cost-benefit analysis instead of alternative risk management frameworks? Second, should the government favor market-based instruments over command-and-control regulation as the principal regulatory instrument?

In the 1970s and 1980s, when U.S. environmental policy was in its infancy, the position of interest groups with respect to these questions, particularly on issues affecting public health, was clear and predictable. On the first question, industry groups—principally trade associations representing polluters—favored the use of cost-benefit analysis, arguing that environmental benefits needed to be weighed against the resulting

undesirable economic consequences.¹ In contrast, environmental groups vigorously opposed cost-benefit analysis, claiming in part that it would systematically lead to weak protections.²

On the second question, industry groups favored marketable permit schemes on the grounds that they led to the least-cost way to meet a given environmental standard and that they provided desirable incentives for technological innovation.³ Environmental groups, in contrast, argued that such schemes were “licenses to pollute” and therefore unethical, and that they would compromise the effectiveness of environmental controls.⁴

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

On cost-benefit analysis, many industry groups have largely abandoned their commitment to weighing environmental benefits against economic costs. Instead, they spend considerable energy casting doubt on the economic models that they themselves had advocated only a few decades earlier, calling them unreliable and manipulable.⁵ In contrast, many industry groups vigorously embrace the mantra of “job-killing regulations,” arguing that any regulation that has a negative impact on jobs should not be undertaken, regardless of how large the benefits—including saving tens of thousands of lives—and how small the number of jobs it might eliminate.⁶ And, to calculate the impact of regulations on jobs, they use economically

¹ See Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 34 (1998) (arguing that “in the real political world the strongest advocates of cost-benefit analysis are large corporations, trade associations and associated think tanks”).

² See David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 4 (2005) (noting environmentalists’ claims that adoption of cost-benefit standards greatly weakens the effectiveness of environmental laws).

³ See Susan E. Leckrone, *Turning Back the Clock: The Unfunded Mandates Reform Act of 1995 and Its Effective Repeal of Environmental Legislation*, 71 IND. L.J. 1029, 1040 n.69 (1996) (noting that “marketable permit schemes” have been promoted by industry).

⁴ John M. Broder, *From a Theory to a Consensus on Emissions*, N.Y. TIMES, May 16, 2009, <http://www.nytimes.com/2009/05/17/us/politics/17cap.html> (last visited Feb. 14, 2015) (quoting Democratic Representative Jim Cooper: “Our [cap-and-trade] proposal was at first ridiculed by environmentalists as little more than a license to pollute”).

⁵ See *infra* text accompanying notes 22–23.

⁶ See OFFICE OF AIR & RADIATION, U.S. ENVTL. PROT. AGENCY, *THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020*, at 5-25 tbl.5-6 (2011), available at http://www.epa.gov/cleanairactbenefits/feb11/fullreport_rev_a.pdf (estimating that the Clean Air Act Amendments of 1990 prevented approximately 160,000 premature deaths in 2010 and will prevent 230,000 deaths in 2020); Motoko Rich & John Broder, *A Debate Arises on Job Creation vs. Environmental Regulation*, N.Y. TIMES, Sept. 5, 2011, at B1, B5 (explaining that business groups oppose environmental regulations, arguing that they are “job killers,” despite the beneficial effects of regulation, including reducing infant mortality, and that the proposed regulation would cause minimal, if any, job loss); see also *infra* text accompanying notes 24–25 (describing the media’s use of “job killing”).

questionable methodologies that have no support in the peer-reviewed literature.⁷

The position of environmental groups has also shifted, though less dramatically. A number of significant groups now engage in methodological discussions of how cost-benefit analysis should be conducted, and participate effectively in the types of administrative proceedings that they would have eschewed decades earlier. And while other groups still view cost-benefit analysis with suspicion, overall the opposition by environmental groups has softened considerably.

As to marketable permit schemes, the industry groups that had been enthusiastic about them until the 1990s have changed their mind, referring to such schemes derisively as cap-and-tax approaches and invoking a parade of horrors that would allegedly follow their adoption.⁸ In contrast, environmental groups have embraced marketable permit schemes and have taken an active role in designing them and lobbying Congress for their adoption.

What happened? Why did the positions of the 1970s and 1980s largely become the opposite positions in the 2000s and 2010s? The best explanation is that neither side had any robust commitment to any of the positions they espoused then, and similarly has no robust commitment to the positions they are espousing now.⁹ Instead, each of the sides had—and continues to have—only a commitment to particular substantive outcomes on the stringency of environmental policy. Industry groups want laxer standards and environmental groups want more stringent standards, and they are both prepared to invoke any argument that will advance their respective positions along that spectrum.

As to cost-benefit analysis, industry groups came to see that, when properly conducted, the technique could justify stringent regulation. Similarly, environmental groups came to see the promise of cost-benefit analysis. In particular, over time the U.S. Environmental Protection Agency (EPA) refined its methodology for computing the value of statistical life, which is the benefit from averting a death from pollution. The value of statistical life is now around \$9 million,¹⁰ and can justify quite stringent regulations, especially when coupled with a growing body of research

⁷ See Michael A. Livermore & Jason A. Schwartz, *Analysis to Inform Public Discourse on Jobs and Regulation*, in *DOES REGULATION KILL JOBS?* (Cary Coglianese, Adam M. Finkel & Christopher Carrigan eds., 2013). Rigorous analyses of employment impacts from environmental regulations tend to find relatively modest effect. For some recent examples of such analyses, see generally chapters by Richard D. Morgenstern; Wayne B. Gray & Ronald J. Shadbegian; and Joseph E. Aldy & William A. Pizer, in *DOES REGULATION KILL JOBS* 33–38, *supra*.

⁸ See *infra* text accompanying notes 59–61.

⁹ For discussion of the general phenomenon of flip-flopping in the policy arena, see Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops* (U. Chi. L. Sch., Working Paper No. 501, 2015), available at <http://www.law.uchicago.edu/faculty/research/eric-posner-institutional-flip-flops>.

¹⁰ Lisa A. Robinson & James K. Hammitt, *Research Synthesis and the Value per Statistical Life* 4 (Mossavar-Rahmani Ctr. for Bus. & Gov't, Harv. Kennedy Sch., Working Paper No. RPP-2014-14, 2014), available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/RPP_2014_14_Robinson_Hammitt.pdf.

demonstrating causal links between environmental quality and mortality. Similarly, the federal government now uses an estimate for the social cost of carbon—the damage of a ton of carbon dioxide emissions—of around \$40.¹¹ This value, likewise, can justify significant regulation of greenhouse gases.

On marketable permit schemes, environmental groups came to see that they provided the best hope for a comprehensive approach to climate change regulation, in particular because the command-and-control regimes that they had previously favored would be far more expensive and therefore less likely to be adopted.¹² And industry groups realized that maligning marketable permit schemes was a potentially effective strategy to defeat greenhouse gas regulation altogether.

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

II. COST–BENEFIT ANALYSIS

Cost–benefit analysis made its appearance in the administrative state as a deregulatory tool favored by the political coalition that brought Ronald Reagan to the presidency in 1981. Not surprisingly given its genesis, groups interested in environmental protection were strongly opposed to this development. Even when cost–benefit analysis became institutionalized and not only the province of Republican Administrations, such groups absented themselves from participating in proceedings where they could have influenced the methodology, not wanting to be seen as acquiescing in its use. More recently, however, protection-oriented groups have come to see both that cost–benefit analysis was here to stay and that it could support stringent environmental regulation. But almost as soon as it appeared that consensus around the use of cost–benefit analysis might have been possible, conservative politicians and interest groups changed course, abandoning their support.

¹¹ INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, U.S. GOV'T, TECHNICAL SUPPORT DOCUMENT: TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 (May 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf.

¹² See Richard Conniff, *The Political History of Cap and Trade*, SMITHSONIAN MAG., Aug. 2009, <http://www.smithsonianmag.com/air/the-political-history-of-cap-and-trade-34711212/?all> (last visited Feb. 14, 2015) (describing how environmentalists were originally skeptical of marketable permit schemes but that such schemes have proved to be much less expensive than command-and-control alternatives); Fred Krupp, *The Making of a Market-Minded Environmentalist*, STRATEGY+BUSINESS, June 10, 2008, <http://www.strategy-business.com/article/08201> (last visited Feb. 14, 2015) (explaining how critics of marketable permit schemes have been persuaded by the results).

A. Putting a Price on Life

In our 2008 book, *Retaking Rationality: How Cost–Benefit Analysis Can Better Protect the Environment and Our Health*,¹³ we discuss the strong antipathy held toward cost–benefit analysis by protection-oriented groups, including environmentalists, and the embrace of the technique by antiregulatory groups, including industry trade associations and their ideological and political allies.¹⁴ We also argue that this interest group dynamic had deleterious effects on the development of cost–benefit methodologies, because interests that favored stronger protections absented themselves from methodological debates about how cost–benefit analysis should be carried out. As a consequence, cost–benefit analysis became biased against regulation. In essence, environmentalist opposition to cost–benefit analysis became a self-fulfilling prophecy.

In a chapter on “missed opportunities,” we recount the experience of Sally Katzen, Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Clinton White House.¹⁵ Since the promulgation of an executive order by President Reagan in 1981,¹⁶ OIRA has overseen the application of cost–benefit analysis by federal agencies. During the Reagan and George H.W. Bush Administrations, OIRA was reviled by environmental groups, which viewed the office as a “black hole” for regulations, in part because of its delay in performing reviews.¹⁷ When Bill Clinton took office, there was some hope on the part of environmentalists that OIRA would be abolished, and with it, any requirement that agencies conduct cost–benefit analysis. That hope was not borne out, and President Clinton issued Executive Order 12,866, which maintained the basic architecture of OIRA review of cost–benefit analysis, but made important procedural and substantive changes, including emphasizing “distributive impacts” and setting deadlines for review.¹⁸ As we recount in the book, Katzen sought to engage environmental groups in methodological discussions about cost–benefit analysis but was consistently rebuffed.¹⁹ She characterized the position of these groups as follows: “We don’t like cost–benefit analysis, full stop.”²⁰ Indeed, the book notes, “[a]fter spending time prodding groups to participate in the discussion over how to conduct cost–benefit analysis, she became sufficiently frustrated that she ‘gave up in trying to entice them to devote energies to it.’”²¹

¹³ RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST–BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008).

¹⁴ *Id.* at 10–11.

¹⁵ *Id.* at 31–32.

¹⁶ See Stuart Shapiro, *Unequal Partners: Cost–Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REP. 10,433, 10,435 (2005); Exec. Order No. 12,291, 3 C.F.R. pt. 127 (1982).

¹⁷ REVESZ & LIVERMORE, *supra* note 13, at 26–27.

¹⁸ Exec. Order No. 12,866, 3 C.F.R. 638–39 (1994).

¹⁹ REVESZ & LIVERMORE, *supra* note 13, at 32.

²⁰ *Id.*

²¹ *Id.*

Environmental groups did not absent themselves only from OIRA's offices. An additional anecdote that we discuss in *Retaking Rationality* was a major effort on the part of EPA—a presumably more favorable forum—to revise its guidelines on conducting cost–benefit analysis. The ability to develop their own methodological guidelines is one mechanism that agencies have used to take advantage of cost–benefit analysis as a means of insulating themselves from political interference.²² In the Clinton-era revision, major updates occurred, including a calculation of the value of statistical life, the monetary measure used to value the single largest category of benefits of environmental protection, which is mortality risk reduction.²³ But during deliberations over these updates, while “the views of industry were well represented . . . [t]he environmentalists stayed away.”²⁴

B. A Tentative Embrace

In recent years, there has been a shift on the part of environmental groups toward grudging acceptance of cost–benefit analysis. In August 2008, a few months after we published our book, we launched the Institute for Policy Integrity, a think tank and advocacy organization at New York University School of Law.²⁵ In part, we sought to support protection-oriented groups that decided to participate meaningfully in debates over cost–benefit analyses.²⁶ Protection-oriented groups in general, and environmental organizations in particular, have begun to take an interest in the idea that cost–benefit analysis might advance their causes. Recently, there have been signs of a change in which protection-oriented groups are finally starting to speak confidently in the language of cost–benefit analysis.

One illustrative example of the shift in attitudes toward cost–benefit analysis is the robust partnership between the Institute for Policy Integrity and two of the country's leading environmental groups: the Environmental Defense Fund (EDF) and the Natural Resources Defense Council. This partnership focuses on providing a strong intellectual justification for the use of the social cost of carbon in regulatory proceedings. The social cost of carbon plays a key role in the regulatory impact analysis, not only with respect to the regulation of greenhouse gases under the Clean Air Act,²⁷ but also in other important regulatory contexts, such as the energy efficiency

²² Michael A. Livermore, *Cost–Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 678 (2014).

²³ See U.S. ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES 87–94 (2000), available at [http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0228C-07.pdf/\\$file/EE-0228C-07.pdf](http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0228C-07.pdf/$file/EE-0228C-07.pdf).

²⁴ REVESZ & LIVERMORE, *supra* note 13, at 34.

²⁵ Inst. for Policy Integrity, *About Us*, <http://policyintegrity.org/about/> (last visited Feb. 14, 2015).

²⁶ Inst. for Policy Integrity, *Welcome Message from Professor Revesz*, <http://policyintegrity.org/what-we-do/professors-message/> (last visited Feb. 14, 2015) (discussing the reasons for founding the Institute for Policy Integrity and the help the institute provides to advocacy organizations).

²⁷ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

guidelines promulgated by the Department of Energy. The three organizations have been filing comments in every regulatory proceeding in which the social cost of carbon is used to justify the regulation. These comments argue that the Obama Administration's estimate is a reasonable one given the current state of scientific knowledge, but that it should be regarded as the lower bound on the actual number because many important negative consequences of climate change—such as wildfires and forced migration—have not yet been incorporated into the models. We argue that further support should be given to research in this area and that there should be a regularized, periodic process for updating the social cost of carbon. To bring attention to these issues and to act as a catalyst for further work in this area, last year the three organizations launched a “Cost of Carbon Pollution” website that focuses on damages that are omitted from the social cost of carbon calculation.²⁸

Even leading academic voices that had consistently opposed the use of cost-benefit analysis now recognize that there is some value to be had in environmentalists engaging in debates about how best to go about using it. Responding to a discussion of the Institute for Policy Integrity's work in this area, Professor Douglas Kysar of Yale Law School, and a scholar-member at the Center for Progressive Reform, stated that “assuming Livermore and Revesz are correct that cost-benefit analysis is here to stay—and [I have] no reason to doubt their prediction—then proponents of environmental, health, and safety regulation would do well to start talking the talk as best they can.”²⁹

More generally, advocates of stronger environmental protections have started to understand the importance of cost-benefit analysis as a tool. The biggest groups have hired economists³⁰ and taken steps to be involved in even the most detailed of cost-benefit questions. The value of a statistical life, once reviled as a crass manner of placing a dollar figure on the worth of a human being, is now beginning to have a place in the toolbox of progressive advocacy organizations. And arguments in defense of the social cost of carbon are now commonplace among several environmental organizations.

C. Turning Away from Cost-Benefit Analysis

Unfortunately, any seeming opportunity to build consensus over environmental policy in the common language of cost-benefit analysis has turned out to be fleeting. In the aftermath of the serious economic crisis that

²⁸ The Cost of Carbon Pollution, *About the Project*, costofcarbon.org/about (last visited Feb. 14, 2015); see also PETER HOWARD, FLAMMABLE PLANET: WILDFIRES AND THE SOCIAL COST OF CARBON 4 (2014), available at http://costofcarbon.org/files/Flammable_Planet_Wildfires_and_Social_Cost_of_Carbon.pdf (discussing adverse consequences omitted from the government's social cost of carbon estimate).

²⁹ Douglas A. Kysar, *Politics by Other Meanings: A Comment on “Retaking Rationality Two Years Later,”* 48 HOUS. L. REV. 43, 76 (2011).

³⁰ See *id.* at 55.

2015] *INTEREST GROUPS AND ENVIRONMENTAL POLICY* 9

began in 2008, the political right has been insistently calling for an end to new environmental protections. Rather than focusing on cost–benefit analysis, it has sought to reframe the debate around specific economic factors, such as employment, growth, or energy prices. For example, during the 2012 campaign, Mitt Romney addressed the issue as follows:

Where standards are put in place to constrain the issuance of regulations—such as requiring the use of cost–benefit analysis—they tend to be vulnerable to manipulation and also disconnected from the central issue confronting our country today, namely, generating economic growth and creating jobs. The end result is an economy subject to the whims of unaccountable bureaucrats pursuing their own agendas.³¹

It is telling that Romney, with his Boston Consulting Group and Bain pedigree, and who made his career in an industry that relied heavily on economic models, would turn his back on the central tool of his former trade.

Conservative academics have also become more skeptical of the value of cost–benefit analysis. Again responding to the Institute for Policy Integrity’s work, Alexander Volokh, a noted libertarian and faculty member at Emory Law School, stated that perhaps “libertarians should reconsider their tolerance of cost–benefit analysis and focus more on making their case for deregulation in moral terms.”³²

In place of promoting cost–benefit analysis, antiregulatory voices now appear to focus more intensely on labeling environmental regulations as “job killing.” From 2007 to 2011, the phrase “job-killing regulations” underwent a 17,550% increase in usage in U.S. newspapers—from just four appearances in 2007 to over seven hundred in 2011.³³ A study by Peter Dreier of Occidental College and Christopher R. Martin of the University of Northern Iowa found that the number of stories with the phrase “job killer” increased 1,156% between the first three years of the George W. Bush Administration and the first three years of the Obama Administration, from 16 stories to 201 stories.³⁴ In response to these claims, there has been increasing pressure on EPA to examine the employment effects of its rules, and although job effects will rarely affect the overall efficiency of a major rule, this type of analysis can be helpful in deflating extravagant claims about the employment effects of its rules.³⁵

³¹ ROMNEY FOR PRESIDENT, INC., *BELIEVE IN AMERICA: MITT ROMNEY’S PLAN FOR JOBS AND ECONOMIC GROWTH* 55 (2011), available at <http://grist.files.wordpress.com/2012/01/believeinamerica-planforjobsandeconomicgrowth-full.pdf>.

³² Alexander Volokh, *Rationality or Rationalism? The Positive and Normative Flaws of Cost–Benefit Analysis*, 48 HOUS. L. REV. 79, 80–81 (2011).

³³ Livermore & Schwartz, *supra* note 7.

³⁴ PETER DREIER & CHRISTOPHER R. MARTIN, “JOB KILLERS” IN THE NEWS: ALLEGATIONS WITHOUT VERIFICATION 14–15 (2012), available at http://www.uni.edu/martinc/JobKillerStudy_June2012.pdf.

³⁵ See Livermore & Schwartz, *supra* note 7, at 241–42.

While environmentalists have moved toward cost-benefit analysis, industry groups have backed away. Compared to their earlier positions, there has been an about-face, in which the opponents of the technique have become at least lukewarm supporters, while previous enthusiasts have lost their fervor and switched sides.

III. MARKETABLE PERMITS

The evolution of views about marketable permits over the past several decades has followed a similar pattern. Perhaps even more so than for cost-benefit analysis, marketable permit schemes initially found support among conservatives, were increasingly embraced by environmental groups, and were eventually abandoned by industry and other regulatory skeptics—at least in the context of greenhouse gases. Originally, proponents of marketable permits characterized the technique as they did cost-benefit analysis: as a preferable alternative to the dominant approach—here, command-and-control regulation. However, in the context of climate change, the alternative was perhaps *no* regulation, so this advantage disappeared in the minds of industry groups and their ideological allies. In addition, the fact that a nationwide marketable permit scheme must be affirmatively passed by Congress poses an additional hurdle not present to cost-benefit analysis,³⁶ which is already institutionalized and can be modified by unilateral executive order.³⁷

A. Market Environmentalism

In the 1960s and early 1970s, economists and EPA regulators proposed the use of marketable permit schemes as a tool for reducing pollution at the least cost.³⁸ The concept entered the political arena in the 1980s, when C. Boyden Gray, then a high-ranking Reagan Administration official, promoted

³⁶ See John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES, June 27, 2009, <http://www.nytimes.com/2009/06/27/us/politics/27climate.html> (last visited Feb. 14, 2015) (overviewing the difficulties of passing nationwide marketable permit scheme in 2009).

³⁷ See Shapiro, *supra* note 16, at 10,435.

³⁸ At that time, the concept was most commonly referred to as “emissions trading.” The initial idea is most often credited to John Dales, but several others contributed to the early development of, and theoretical support for, the framework. See generally J.H. DALES, *POLLUTION, PROPERTY & PRICES* (1968) (proposing the use of market mechanisms as policy tools to efficiently address pollution); see also Thomas D. Crocker, *The Structuring of Atmospheric Pollution Control Systems*, in *THE ECONOMICS OF AIR POLLUTION* 61–85 (Harold Wolozin ed., 1966) (advocating a marketable permit program to address air pollution); J.H. Dales, *Land, Water, and Ownership*, 1 CANADIAN J. ECON. 791, 801–02 (1968); W. David Montgomery, *Markets in Licenses and Efficient Pollution Control Programs*, 5 J. ECON. THEORY 395, 396 (1972) (providing a theoretical framework for the use of allowance markets to address pollution). Economists continued to explore the framework, attempting to quantify its potential cost savings over traditional regulation. See, e.g., T.H. TIETENBERG, *EMISSIONS TRADING: AN EXERCISE IN REFORMING POLLUTION POLICY* 42–44 (1985) (estimating that some command-and-control systems cost twice as much as a theoretically pure tradable permit system).

it as a preferable approach to the traditional method of addressing air pollution.³⁹ Its supporters preferred emissions markets because they were predicted to accomplish desired environmental goals in a less burdensome fashion by not prescribing exactly how firms needed to reduce their emissions and by allowing market mechanisms to allocate that burden most efficiently.

Industry responses to marketable permit schemes appear to have been more diverse than its almost-uniform early support for cost-benefit analysis. This reaction can be attributed to two reasons: the value placed on certainty,⁴⁰ and the fact that markets create winners and losers. Unlike cost-benefit analysis, which was uniformly regarded by industry as reducing regulatory burden—and supported enthusiastically as such—early emissions trading-type options were not embraced by industry to the same degree. One such *loser* resulting from the Clean Air Act Amendments of 1990 was American Electric Power Company (AEP), the operator of a large power plant in the Ohio Valley that contributed to acid rain in New England.⁴¹ AEP fought the acid rain trading program, claiming that it would result in “the potential destruction of the Midwest economy.”⁴² Numerous other utility companies initially opposed the amendments. But over time the position of prominent industry groups changed. They came to appreciate the success and cost-saving measures of the acid rain trading program, and many endorsed the cap-and-trade approach during the lead up to the Waxman-Markey climate change legislation two decades later.⁴³ Mike Morris, the CEO of AEP, attributed this shift to the recognition that marketable permits “turned out to be a beautiful idea,” saving industry a significant amount of money in compliance costs while benefitting the environment.⁴⁴

On the other hand, environmental groups initially greeted the concept of marketable permits with suspicion.⁴⁵ Their opposition to emissions trading fell into three categories: moral objections to the concept that clean air is “for sale”; concerns about prioritization of goals—specifically, that environmental quality would be sacrificed for economic efficiency; and negative reactions to the symbolic message sent by a system that allows the polluters—not the government—to make decisions about tradeoffs between economics and the environment.⁴⁶ Seemingly motivated by these concerns,

³⁹ See Conniff, *supra* note 12.

⁴⁰ See Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109, 142 (1989) (attributing part of industry resistance to emissions trading to the uncertainty of environmental regulations).

⁴¹ See Michael Kranish, *A Clean Water Revival*, BOSTON GLOBE, Oct. 17, 2010, http://www.boston.com/yourtown/malden/articles/2010/10/17/washing_away_of_acid_rain_offer_s_lesson/ (last visited Feb. 14, 2015).

⁴² *Id.* (internal quotation marks omitted).

⁴³ *Id.*

⁴⁴ *Id.* (internal quotation marks omitted).

⁴⁵ See Krupp, *supra* note 12 (describing that when Krupp became executive director of EDF in 1984, most of his colleagues did not share his interest in using market mechanisms to combat environmental problems, preferring to stick to a litigation strategy instead).

⁴⁶ Hahn & Hester, *supra* note 40, at 142.

environmental groups opposed early forms of trading such as bubbling and offsets.⁴⁷ The only major environmental organization that showed a strong interest in developing market-based solutions to environmental problems—EDF, under the new leadership of Fred Krupp—was reviled by the left as “cynical and gutless.”⁴⁸

B. A Moment of Consensus

Despite these criticisms, Krupp’s early support for marketable permit schemes placed him at the center of a brief moment of consensus over market-based mechanisms in U.S. environmental policy. In 1986, Krupp received a call from C. Boyden Gray, who was then counsel to Vice President George H.W. Bush, in response to an op-ed Krupp had published in the *Wall Street Journal*.⁴⁹ Gray’s interest in addressing environmental issues was perhaps not mainstream for the Reagan Administration staff,⁵⁰ but when George H.W. Bush was elected President in 1988, Gray turned to Krupp and EDF for ideas on how to address the growing problem of acid rain and the related foreign policy implications for the United States’ relationship with Canada. Gray sought to provide the new President with a legacy issue on the environment, an issue that was still largely bipartisan at that time.⁵¹ Accounts of the passage of the Clean Air Act Amendments of 1990—which included the landmark emissions trading program that capped the output of sulfur dioxide, a precursor to acid rain—describe the initial response of many stakeholders as skeptical of the framework.⁵² However, it passed Congress with remarkably bipartisan vote counts and was quickly lauded as an innovative policy, and especially touted after its implementation was largely viewed as successful.⁵³

As a result, more Republicans, industry leaders, and environmental groups embraced marketable permit schemes as viable alternatives to command-and-control regulation in appropriate contexts. The success of the

⁴⁷ See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 840–41 (1984).

⁴⁸ Krupp, *supra* note 12 (quoting Citizens Party co-founder Barry Commoner’s criticism of EDF’s willingness to work on market-oriented incentives and collaborate with the Republican Administration) (internal quotation marks omitted).

⁴⁹ See *id.* (outlining Krupp’s vision for the next wave of the environmental movement, in which environmentalists collaborate with policy makers and industry on creative and flexible solutions).

⁵⁰ See Conniff, *supra* note 12 (describing the Reagan White House as a place “where environmental ideas were only slightly more popular than godless Communism”).

⁵¹ See *id.* (discussing Bush’s campaign promise to be the “environmental president”).

⁵² See *id.* (describing initial skeptics as including environmentalists, and staff of the EPA, the White House, and Congress); Krupp, *supra* note 12 (recalling opposition from the media, environmental groups, Congress, and the Bush Administration).

⁵³ See Michael A. Livermore & Richard L. Revesz, *Cap and Trade Was Republicans’ Good Idea*, HUFFINGTON POST, May 25, 2011, http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/cap-and-trade-was-republi_b_489863.html (last visited Feb. 14, 2015) (“Only ten senators (five Democrats and five Republicans) vote[d] against the final bill—as bipartisan as it gets.”).

Montreal Protocol,⁵⁴ which used a trading mechanism to phase out the use of ozone-depleting chlorofluorocarbons, further boosted the credibility of marketable permit schemes. Alongside these policy successes, academic commentators continued their general support for market-based approaches.⁵⁵

By the 2000s, support for market mechanisms gained the status of bipartisan consensus. In 2005, George W. Bush's Administration promulgated a trading scheme under the Clean Air Interstate Rule,⁵⁶ in order to address interstate pollution spillovers. As a result, three Republican presidents in a row had enacted some form of emissions trading program: Reagan had overseen a phasedown of lead in gasoline; George H.W. Bush had signed the acid rain legislation and negotiated the Montreal Protocol for the reduction of chlorofluorocarbons; and George W. Bush had promulgated regulations controlling interstate pollution.⁵⁷

Even Newt Gingrich, the House Speaker who had railed against regulation during the 1994 elections with his Contract for America,⁵⁸ spoke in favor of cap-and-trade approaches for greenhouse gases in a 2007 interview, and appeared in a television commercial with then-House Speaker Nancy Pelosi in support of immediate action on climate change.⁵⁹ In the 2008 presidential election, the presidential nominees from both parties—Barack Obama and John McCain—supported a cap-and-trade scheme for reducing greenhouse gases,⁶⁰ so that this matter was not a point of contention during the course of the general election. While environmentalists largely opposed

⁵⁴ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201522/volume-1522-I-26369-English.pdf>.

⁵⁵ See, e.g., Alan J. Krupnick et al., *On Marketable Air Pollution Permits: The Case for a System of Pollution Offsets*, in *BUYING A BETTER ENVIRONMENT: COST-EFFECTIVE REGULATION THROUGH PERMIT TRADING* 7, 12 (Erhard F. Joeres & Martin H. David eds., 1983); TIETENBERG, *supra* note 38, at 38; Robert W. Hahn, *Innovative Approaches for Revising the Clean Air Act*, 28 NAT. RESOURCES J. 171, 174 (1988).

⁵⁶ Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005) (codified at 40 C.F.R. pts. 72–74, 77).

⁵⁷ Richard Schmalensee & Robert Stavins, *The Power of Cap and Trade*, BOSTON GLOBE, July 27, 2010, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/07/27/the_power_of_cap_and_trade/ (last visited Feb. 14, 2015).

⁵⁸ See Frank Clifford, *Bill Would Limit Federal Power over Environment*, L.A. TIMES, Dec. 28, 1994, http://articles.latimes.com/1994-12-28/news/mn-13769_1_federal-government (last visited Feb. 14, 2015) (explaining that the Job Creation and Wage Enhancement Act, part of the Contract with America, “declare[s] war with the nation’s environmental laws”).

⁵⁹ See Pub. Broad. Serv., *Hot Interviews Newt Gingrich*, <http://www.pbs.org/wgbh/pages/frontline/hotpolitics/interviews/gingrich.html> (last visited Feb. 14, 2015) (“I think that if you have mandatory carbon caps combined with a trading system, much like we did with sulfur, and if you have a tax-incentive program for investing in the solutions, that there’s a package there that’s very, very good. And frankly, it’s something I would strongly support.”).

⁶⁰ See Andrew C. Revkin et al., *On the Issues: Climate Change*, N.Y. TIMES, <http://elections.nytimes.com/2008/president/issues/climate.html> (last visited Feb. 14, 2015).

such mechanisms in the mid-1980s, by the 2008 election they were described as “ador[ing]” cap and trade.⁶¹

C. From Theory to Praxis, to Debacle

But when the time came to turn this theoretical cap-and-trade consensus into policy reality, things began to fall apart. When the Waxman–Markey climate bill—with a cap and trade greenhouse gas program at its heart—passed the House of Representatives, shifting the debate to the Senate, Republican pundits were quick to recast the bill as a tax on energy.⁶² The Republican Party’s “Pledge to America” in 2010 included language expressly opposing cap and trade, which it called an “energy tax.”⁶³ Republicans retook the House in 2010, running partly against what they called “cap-and-tax,” characterized as a job-killing big government program.⁶⁴ This shift between the 2008 presidential election and the 2010 midterms had solidified by 2012, when Republican candidates for the presidential nomination attempted to back away from their almost-universal previous support of cap and trade.⁶⁵

Industry involvement in the greenhouse gas cap-and-trade debate surrounding the unsuccessful attempt to pass legislation during the 111th Congress was mixed and contentious.⁶⁶ The U.S. Chamber of Commerce opposed the bill,⁶⁷ but several of its members joined the U.S. Climate Action

⁶¹ See Matt Negrin, *Whatever Happened to Cap and Trade?*, ABC NEWS, July 17, 2012, <http://abcnews.go.com/Politics/OTUS/environment-happened-cap-trade-global-warming/story?id=16790018> (last visited Feb. 14, 2015) (describing cap and trade as “the system environmentalists adored for regulating gases that trap heat in the atmosphere”).

⁶² See Jeremy P. Jacobs, *Barrasso Knocks Cap and Trade in GOP Response*, THE HILL, May 23, 2009, <http://thehill.com/blogs/blog-briefing-room/news/lawmaker-news/35441-barrasso-knocks-cap-and-trade-in-gop-response> (last visited Feb. 14, 2015).

⁶³ HOUSE REPUBLICANS, A PLEDGE TO AMERICA: A NEW GOVERNING AGENDA BUILT ON THE PRIORITIES OF OUR NATION, THE PRINCIPLES WE STAND FOR & AMERICA’S FOUNDING VALUES 43 (2010), available at <http://pledge.gop.gov/resources/library/documents/solutions/a-pledge-to-america.pdf>.

⁶⁴ See Chris Good, *Almost Every 2012 Republican Has a Cap-and-Trade Problem*, THE ATLANTIC, May 13, 2011, <http://www.theatlantic.com/politics/archive/2011/05/almost-every-2012-republican-has-a-cap-and-trade-problem/238776/> (last visited Feb. 14, 2015) (internal quotation marks omitted).

⁶⁵ See David Weigel, *Pretty Much Every Republican Front-Runner Used to Support Cap and Trade*, SLATE.COM BLOG (May 11, 2011), http://www.slate.com/blogs/weigel/2011/05/11/pretty_much_every_republican_front_runner_used_to_support_cap_and_trade.html (last visited Feb. 14, 2015) (listing six candidates who had previously expressed support for cap and trade, with the only exception in the field being Mitch Daniels).

⁶⁶ See John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES, June 26, 2009, http://www.nytimes.com/2009/06/27/us/politics/27climate.html?_r=2&hp& (last visited Feb. 14, 2015) (“Industry officials were split, with the United States Chamber of Commerce and the National Association of Manufacturers opposing the bill and some of the nation’s biggest corporations, including Dow Chemical and Ford, backing it.”).

⁶⁷ See WILLIAM L. KOVACS, U.S. CHAMBER OF COMMERCE, STATEMENT OF THE U.S. CHAMBER OF COMMERCE ON: JOINT CAUCUS HEARING ON “CAP AND TRADE: IMPACT ON JOBS IN THE WEST, AND THE NATION” 2, 5 (2009), available at https://www.uschamber.com/sites/default/files/legacy/testimony/090730_capandtrade_testimony.pdf; Michael Burnham, *U.S. Chamber of Commerce*

2015] *INTEREST GROUPS AND ENVIRONMENTAL POLICY* 15

Partnership (USCAP), a coalition of industry and environmental stakeholders that attempted to hammer out a workable compromise that could attract the necessary votes to become law.⁶⁸ Opponents of cap and trade lambasted the USCAP member companies in the blogosphere as turncoats, losers, and bald-faced rent seekers aiming to profit through a classic “Baptists and Bootleggers” coalition.⁶⁹ Meanwhile, the National Association of Manufacturers announced that a study it had commissioned “confirm[ed] that the Waxman-Markey bill is an ‘anti-jobs, anti-growth’ piece of legislation,”⁷⁰ and the National Mining Association warned of “devastating [job] losses” and a reduction in household disposable income of \$1,800 per year.⁷¹ The collaboration between centrist environmental groups and industry players ultimately disintegrated with the pressure. One prominent industry member began joining other opponents of the bill by labeling it as a “cap and tax” measure.⁷² After the Waxman–Markey bill passed the House, momentum slowed and several key members of USCAP—BP, ConocoPhillips, and Caterpillar—left the group, citing disappointment over the details of the bill.⁷³ Senator Mitch McConnell placed the epitaph: “I think cap-and-trade, which is also known as the national energy tax, is dead in the United States Senate.”⁷⁴

Sharpens Critique of House Climate Bill, N.Y. TIMES, May 15, 2009, <http://www.nytimes.com/gwire/2009/05/15/15greenwire-us-chamber-of-commerce-sharpens-critique-of-ho-19116.html> (last visited Feb. 14, 2015).

⁶⁸ See U.S. Climate Action P’ship, *About Us*, <http://www.us-cap.org/about-us/> (last visited Feb. 14, 2015) (declaring USCAP’s “pledge to work with the President, the Congress, and all other stakeholders to enact an environmentally effective, economically sustainable, and fair climate change program”); see also ERIC POOLEY, *THE CLIMATE WAR: THE BELIEVERS, POWER BROKERS, AND THE FIGHT TO SAVE THE EARTH* 142, 170 (2010) (quoting Duke Energy executive Jim Rogers, a member of USCAP, responding to criticism of his participation by coal mining executive Robert Murray of Murray Energy: “Legislation is coming. We can help shape it, or we can sit on the sidelines and let others do it”).

⁶⁹ POOLEY, *supra* note 68, at 168–69 (quoting statements made by various opponents of climate action, such as Steven J. Milloy of Junkscience.com, Senator James Inhofe, and Competitive Enterprise Institute founder Fred Smith).

⁷⁰ Erin Streeter, *State-by-State Analysis of Waxman-Markey Cap and Trade Legislation Paints Dour Picture for Nation’s Economy: NAM-ACCF Study Concludes Bill Will Cost 2.4 Million Jobs*, NAT’L ASS’N OF MFRS., Dec. 3, 2009, <http://www.nam.org/Communications/Articles/2009/08/StatebyStateAnalysisofWaxmanMarkeyCapAndTrade.aspx> (last visited Feb. 14, 2015) (quoting Jay Timmons, executive vice president of the National Association of Manufacturers).

⁷¹ *House Committee Approves Sweeping Climate Change Legislation*, NMA MINING WK., May 22, 2009, at 1, available at http://nma.org/pdf/mining_week_archives/mw052209.pdf; Press Release, National Mining Association, NMA Urges House to Reject Waxman-Markey Climate Proposal (May 20, 2009), available at http://maplight.org/files/map_research/NMA.pdf.

⁷² See Eric Pooley, *The Smooth-Talking King of Coal—And Climate Change*, BLOOMBERG BUSINESSWEEK, June 3, 2010, http://www.businessweek.com/magazine/content/10_24/b4182058740829.htm (last visited Feb. 14, 2015) (describing Jim Rogers of Duke Energy’s frustration with President Obama’s proposal to auction 100% of the permits, rather than allocate a significant amount for free).

⁷³ See MICHAEL J. GRAETZ, *THE END OF ENERGY: THE UNMAKING OF AMERICA’S ENVIRONMENT, SECURITY, AND INDEPENDENCE* 239 (2011).

⁷⁴ Jordan Fabian, *McConnell: Cap-and-Trade “Dead”*, THE HILL, Aug. 24, 2010, <http://thehill.com/blogs/blog-briefing-room/news/115501-mcconnell-pronounces-cap-and-trade-dead> (last

IV. CONCLUSION

We end with two observations. First, why did the positions of interest groups change so dramatically? In large part, the choice set changed over the decades. In the 1970s and 1980s, the choice on the stringency of standards was between health-based standards favored by environmental groups, and cost-benefit analysis favored by industry. The choice now is between further standard setting—however it might be conducted—and essentially a moratorium on standards. Environmental groups have embraced the first position and are often prepared to accept cost-benefit analysis, and industry groups have embraced the second, with jobs analysis as the code word for a moratorium on regulation. And the appropriately robust valuations of statistical life and the social cost of carbon help make environmental groups comfortable with the methodology. On regulatory tools, in the 1970s and 1980s, the choice was between command-and-control standards favored by environmental groups, and marketable permit schemes favored by industry groups. Now, the choice is often between marketable permit schemes and no regulation at all, with environmental groups favoring the former and industry groups supporting the latter. An analysis of why this shift occurred is beyond the scope of this Article. Reasons for the shift include the changing nature of the Republican Party, with the moderate wing becoming far less influential; the vast increase of money in politics, and the economic crisis that began in 2008.

Second, we have paid a high price for the missed opportunity of a consensus around cost-benefit analysis and marketable permit systems. The failure to pass climate change legislation is the most significant loss. But there was also a great cost in terms of the loss of rationality in environmental policy. Richard Schmalensee, a distinguished economist, pleaded with fellow Republicans: “[M]arket-based policies should be embraced, not condemned by Republicans (as well as Democrats). After all, these policies were innovations developed by conservatives in the Reagan, George H.W. Bush, and George W. Bush administrations (and once strongly condemned by liberals).”⁷⁵ Together with his co-author Robert Stavins, Schmalensee admonishes politicians on the dangers of abandoning principle for short-term political gain:

To reject this legacy and embrace the failed 1970s policies of one-size-fits-all regulatory mandates would signify unilateral surrender of principled support for markets. If some conservatives oppose energy or climate policies because of disagreement about the threat of climate change or the costs of those policies, so be it. But in the process of debating risks and costs, there should be no tarnishing of market-based policy instruments. Such a scorched-earth

visited Feb. 14, 2015); *see also* Ezra Klein, *Cap-and-Trade Is Dead*, WASH. POST, July 19, 2010, http://voices.washingtonpost.com/ezra-klein/2010/07/were_not_getting_a_price_on_ca.html (last visited Feb. 14, 2015).

⁷⁵ Schmalensee & Stavins, *supra* note 57.

2015] *INTEREST GROUPS AND ENVIRONMENTAL POLICY* 17

approach will come back to haunt when future environmental policies will not be able to use the power of the marketplace to reduce business costs.⁷⁶

Similarly, the rejection of cost–benefit analysis by industry groups and conservatives has important consequences. Jobs impact analysis, which focuses on a very limited band of regulatory consequences, is not a legitimate substitute for cost–benefit analysis, with its comprehensive examination of the effects of regulatory choices. If an approach along these lines gains legitimacy, the quality of our environmental decision making will be considerably poorer.

⁷⁶ *Id.*