



1-1-1996

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Recommended Citation

Victor B. Flatt, *Environmental Contraction for America: or How I Stopped Worrying and Learned to Love the EPA*, 29 Loy. L.A. L. Rev. 585 (1996).

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**ENVIRONMENTAL “CONTRACTION”
FOR AMERICA?
(OR HOW I STOPPED WORRYING AND
LEARNED TO LOVE THE EPA)**

*Victor B. Flatt**

The Republican Congress is pushing an extreme anti-environmental agenda. It would freeze all health and environmental protection, effectively repeal 25 years of health protection through a “risk assessment” bill and allow industry to hold up environmental safeguards through endless lawsuits. It would even require taxpayers to pay polluters not to pollute.

— Vice President Albert Gore¹

If someone thinks protection of the bald eagle or the northern spotted owl is important, they ought to be willing to pay for it.

— U.S. Rep. Lamar S. Smith (R-Tex.)²

The Republicans want to give you the right to sue the gummint and make all the rest of us pay for the money you say you will lose by not bein’ able to poison our drinkin’ water.

— Molly Ivins, syndicated columnist³

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1. Al Gore, *Earth Days Have Become Earth Years*, N.Y. TIMES, Apr. 23, 1995, at D17.

2. Tom Kenworthy, *House Republicans Push Property-Owner Compensation Bill Toward Vote*, WASH. POST, Mar. 3, 1995, at A7.

3. Molly Ivins, *Unintended Consequences*, S.F. CHRON., Feb. 16, 1995, at A21.

I. INTRODUCTION

With growing alarm or satisfaction, depending on which side of the fence one's bread is buttered—to mix a couple of favorite metaphors—the discussions of the Republican House legislative agenda, the so-called “Contract with America,” have dominated much of the political discourse of late 1994 and early 1995.⁴ The pitch concerning

4. During the 1994 congressional races, the Republican National Committee proposed 10 pieces of legislation under the title Contract with America. Ronald Brownstein, *GOP Congressional Primary Results Rattle Democrats: Confident Republicans Prepare for an Election Earthquake by Laying Out Alternatives to Clinton Agenda*, L.A. TIMES, Sept. 26, 1994, at A5. One such proposal was the precursor to House Bill 9. The full text can be found in Daily Rep. for Execs. (BNA) 235 d89, Dec. 9, 1994, available in LEXIS, News Library, BNA File [hereinafter Proposed H.R. 9].

Representatives Archer, DeLay, Saxton, and Smith (Wash.) introduced House Bill 9 on January 4, 1995, 141 CONG. REC. H161 (daily ed. Jan. 9, 1995), with the short title Job Creation and Wage Enhancement Act of 1995, H.R. 9, 104th Cong., 1st Sess., available in GPO Access on the Internet at URL <http://ssdc.ucsd.edu/cgi-bin/SFgpo?waisdoc=1&4=wais.access.gpo.gov:104_cong_bills/TEXT/185731/3=0%201857310%20/diska/wais/data/104_cong_bills/h9ih.txt> [hereinafter Introduced H.R. 9]. Introduced H.R. 9 contained the following titles:

Title I — Capital Gains Reform; Title II — Neutral Cost Recovery; Title III — Risk Assessment and Cost/Benefit Analysis for New Regulations; Title IV — Establishment of Federal Regulatory Budget Cost Control; Title V — Strengthening of Paperwork Reduction Act; Title VI — Strengthening Regulatory Flexibility; Title VII — Regulatory Impact Analyses; Title VIII — Protection Against Federal Regulatory Abuse; Title IX — Private Property Rights Protections and Compensation; Title X — Establishment of Federal Mandate Budget Cost Control; Title XI — Taxpayer Debt Buy-Down; Title XII — Small Business Incentives.

In February Representative Clinger introduced the Paperwork Reduction Act of 1995. H.R. 830, 104th Cong., 1st Sess. (1995). The House passed the act later that month. 141 CONG. REC. H2029 (daily ed. Feb. 22, 1995). Representative Canady introduced the Private Property Protection Act of 1995. H.R. 925, 104th Cong., 1st Sess. (1995). The House passed this bill in early March. 141 CONG. REC. H2607 (daily ed. Mar. 3, 1995).

Representative Gekas introduced the Regulatory Reform and Relief Act in mid-February. H.R. 926, 104th Cong., 1st Sess. (1995). The House passed this bill on March 1st. 141 CONG. REC. H2443 (daily ed. Mar. 1, 1995). In late February, Representative Walker introduced the Risk Assessment and Cost-Benefit Act of 1995. H.R. 1022, 104th Cong., 1st Sess. (1995). The bill passed five days later. 141 CONG. REC. H2372 (daily ed. Feb. 28, 1995).

After the House passed these four bills, Representative DeLay moved to strike all the text of Introduced H.R. 9 following the short title. *Id.* at H2623 (daily ed. Mar. 3, 1995). A new House Bill 9 was formed from the four pieces of legislation passed previously. H.R. 9, 104th Cong., 1st Sess. (1995) [hereinafter Passed H.R. 9]. House Bill 830 became Division A; House Bill 925 became Division B; House Bill 926 became Division C; and House Bill 1022 became Division D. 141 CONG. REC. H2623 (daily ed. Mar. 3, 1995). The House passed the new House Bill 9 by a vote of 277 to 141. *Id.* at H2638-39 (daily ed. Mar. 3, 1995).

the impact of the Contract with America on the environment, and particularly environmental regulations and rulemaking, has grown loud indeed. According to a *New York Times* headline of December 25, 1994, "Republicans Plan Sweeping Barriers to New U.S. Rules."⁵

In spite of the attention, uproar, and hand wringing about the disastrous effects on the environment intended by the new Republican congressional majority, there has been little serious consideration of the actual, detailed changes that the proposed Contract with America language will cause environmental programs. It is possible that speculation about the demise of environmental programs is premature.

Though the Contract with America was initially proposed as ten separate bills, the final text of any of these bills is speculative. Any bill proposed by the House must be voted on by both Houses of Congress and presented to the President for signature. Some changes are inevitable. Indeed, at the time that this paper is being written, at least one of the programs at issue to environmentalists—regulatory takings—has been explicitly modified from the proposed Contract with America language in order to secure passage in the House of Representatives.⁶

More importantly, for purposes of discussing the impact of the Contract with America, the mere passage of a bill does not ensure the creation of a policy. From the major news media's discussion of the Contract with America, one would assume that the Contract represents either an unmitigated assault on the environmental regulatory framework as we know it or a complete protection of the environment that simply lifts the burden of onerous regulations from the back of the common working people. Obviously the proposed legislation does not represent both, and as yet there has been no consensus as to which it represents. Part of the problem is that the proposals cannot be understood if seen only in the abstract. Most discussions of the bill and proposed impact have been based on the crudest understanding of how the intentions of Congress are translated into legal effect. We have long since moved from the time—if we were ever there—when federal policy was solely dictated by Congress. The policy impacts are instead a complex mixture of congressional legislation, executive branch agency implementation, and federal court

5. John H. Cushman, Jr., *Republicans Plan Sweeping Barriers to New U.S. Rules*, N.Y. TIMES, Dec. 25, 1994, at A1.

6. Kenworthy, *supra* note 2, at A7.

interpretation of that law and its implementation. This mixture makes the prediction of an outcome of a proposed law more complicated, and allows groups an opportunity to try to alter the intended, or one of the intended, consequences of the law by using the other branches of government as a check or balance on Congress.

The parts of the proposed legislation from the Contract with America that have most concerned environmentalists are found in the section with the interesting moniker "Job Creation."⁷ This proposed Act includes requirements that all federal regulations be created and administered in a cost-beneficial fashion,⁸ that the owners of property

7. Introduced H.R. 9, *supra* note 4. The unfunded mandates provision was introduced as a separate portion of the Contract with America, The Unfunded Mandates Reform Act of 1995. H.R. 5, 104th Cong., 1st Sess. (1995). The House passed this act on February 1, 1995. 141 CONG. REC. H1006 (daily ed. Feb. 1, 1995). For a discussion of the policy statement of this act, see *infra* note 141. The House then passed Senate 1, a similar measure with the same short title, after it was modified to include language from Introduced H.R. 9. 141 CONG. REC. at H1012 (daily ed. Feb. 1, 1995). The Senate agreed to a conference report. *Id.* at S3922 (daily ed. Mar. 15, 1995). The House passed the conference report the next day. *Id.* at H3313 (daily ed. Mar. 16, 1995). President Clinton signed the bill on March 22, 1995. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48.

8. Proposed H.R. 9, *supra* note 4, § 3201(a)(4)(C). The cost-benefit provision of the bill as introduced read:

SEC. 3201. ANALYSIS OF RISK REDUCTION BENEFITS AND COSTS.

(a) In General.—Except as provided in subsection (b), the President shall require each executive branch agency to prepare the following for each major rule designed to protect human health, safety, or the environment that is proposed or promulgated by the agency after the date of enactment of this Act:

....

(5) For each final rule, a certification by the head of the agency of each of the following:

....

(C) A certification that the rule will produce benefits to human health or the environment that will justify the costs incurred by local and State governments, the Federal Government, and other public and private entities as a result of implementation of and compliance with the rule.

Introduced H.R. 9, *supra* note 4, § 3201(a). See *infra* note 17 for a complete version of this section. The House passed the following provision:

(a) In General.—The President shall require each Federal agency to prepare the following for each major rule within a program designed to protect human health, safety, or the environment that is proposed or promulgated by the agency after the date of enactment of this division:

....

(3) A statement that places in context the nature and magnitude of the risks to be addressed and the residual risks likely to remain for each alternative strategy identified or considered by the agency. Such statement shall, to the extent feasible, provide comparisons with estimates of greater, lesser, and substantially equivalent risks that are familiar to and routinely encountered by the general public as well as other risks, and, where

be compensated for a regulatory reduction in the property's market value,⁹ that all federal mandates on state and local government be

appropriate and meaningful, comparisons of those risks with other similar risks regulated by the Federal agency resulting from comparable activities and exposure pathways. Such comparisons should consider relevant distinctions among risks, such as the voluntary or involuntary nature of risks and the preventability or nonpreventability of risks.

(4) For each final rule, an analysis of whether the identified benefits of the rule are likely to exceed the identified costs of the rule.

Passed H.R. 9, *supra* note 4, § 421(a)(3)-(4). For the text of the risk assessment portions of this legislation, see *infra* note 49. See *infra* notes 16-81 and accompanying text for a complete discussion of the cost-benefit analysis requirement.

9. Introduced H.R. 9, *supra* note 4, §§ 9001-9002. The protection for private property rights read:

SEC. 9001. STATEMENT OF PURPOSE.

It is the purpose of this title to compensate private property owners with respect to certain actions that are taken by the Federal Government for public purposes and that limit the use of private property by property owners.

SEC. 9002. COMPENSATION FOR FEDERAL AGENCY INFRINGEMENT OR DEPRIVATION OF RIGHTS TO PRIVATE PROPERTY.

(a) Eligibility.—

(1) In general.—A private property owner is entitled to receive compensation from the United States in accordance with this section for any agency infringement or deprivation of rights to property that is owned by the private property owner.

(2) Agency infringement or deprivation of rights to property defined.—For purposes of paragraph (1), the term "agency infringement or deprivation of rights to property" means a limitation or condition that—

(A) is imposed by a final agency action on a use of property that would be lawful but for the agency action, and

(B) results in a reduction in the value of the property equal to ten percent or more.

(3) Circumstances in which compensation not required.—A private property owner shall not be entitled to receive compensation under this subsection for any of the following:

(A) A limitation on any action that would constitute a violation of applicable State or local law (including an action that would violate a local zoning ordinance or would constitute a nuisance under any applicable State or local law).

(B) A limitation on any use of private property, imposed pursuant to a determination by the President that the use poses or would pose a serious and imminent threat to public health and safety or to the health and safety of workers, or other individuals, lawfully on the property.

(C) A limitation imposed pursuant to the Federal navigational servitude.

(4) Limitation on cumulative amount of compensation.—No payment may be made pursuant to this subsection with respect to property if the sum of such payment and all other payments made pursuant to this subsection with respect to the property would exceed the fair market value of the property (as determined at the time of the payment).

(5) State or local limitations imposed pursuant to federal mandates.—A limitation or condition shall be considered to be a Federal agency infringement or deprivation of rights to property for purposes of paragraph

(1) if it is a consequence of a limitation or condition on the use of the property by the private property owner that is imposed by a State or local government pursuant to an agency action that is intended to, or does, bind the State or local government.

(b) Request for Compensation.—Within 90 days after receipt of notice of an agency action with respect to which compensation is required under subsection (a), a private property owner may submit to the head of the agency a request in writing for compensation under this section.

(c) Agency Determination and Offer.—

(1) In general.—Upon receipt of a request for compensation, submitted in accordance with subsection (b), with respect to an agency action affecting private property as described in subsection (a), the head of the agency that took the action shall determine whether the private property owner submitting the request has demonstrated entitlement to compensation under subsection (a). If the head of the agency finds that the private property owner has so demonstrated, the head of the agency shall offer to compensate the private property owner for the reduction in the value of the property, as demonstrated by the private property owner.

(2) Timing of determination and offer.—The head of an agency shall make the determination and offer, if any, required by paragraph (1) with respect to a request for compensation not later than 180 days after receiving the request.

....

(i) Source of Payment Funds.—

(1) Use of agency funds.—Except as provided in paragraphs (2) and (3), and notwithstanding any other provision of law, any payment made pursuant to subsection (a) shall be paid from the annual appropriation of the agency or agencies taking the action for which the payment is required. For the purpose of making such a payment, the head of the agency may transfer or reprogram any funds available to the agency.

Id. The House passed a less stringent version on March 3, 1995:

SEC. 202. FEDERAL POLICY AND DIRECTION.

(a) General Policy.—It is the policy of the Federal Government that no law or agency action should limit the use of privately owned property so as to diminish its value.

(b) Application to Federal Agency Action.—Each Federal agency, officer, and employee should exercise Federal authority to ensure that agency action will not limit the use of privately owned property so as to diminish its value.

SEC. 203. RIGHT TO COMPENSATION.

(a) In General.—The Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner, the Federal Government shall buy that portion of the property for its fair market value.

(b) Duration of Limitation on Use.—Property with respect to which compensation has been paid under this Act shall not thereafter be used contrary to the limitation imposed by the agency action, even if that action is later rescinded or otherwise vitiated. However, if that action is later rescinded or otherwise vitiated, and the owner elects to refund the amount of the compensation, adjusted for inflation, to the Treasury of the United States, the property may be so used.

Passed H.R. 9, *supra* note 4, §§ 202-203. See *infra* notes 82-139 and accompanying text for a complete discussion of the Private Property Rights Protection and Compensation

paid for by the federal government,¹⁰ and that the overall "cost burden" of regulations to private parties and the states be reduced.¹¹

Act.

10. The original Contract with America proposal contained an unfunded mandate section. Proposed H.R. 9, *supra* note 4, §§ 10502, 10506. After introduction in the House, it was removed to a separate piece of legislation. See *supra* note 7 for the history of the Unfunded Mandates Act. The original statement of policy for unfunded mandates as proposed in the House read:

SEC. 10502. LIMITATION ON IMPLEMENTATION OF FEDERAL MANDATES.

A Federal agency that is responsible for implementing, enforcing, or otherwise applying a Federal mandate shall apply the Federal mandate only to the extent that the head of the agency determines that State and local governments to which the Federal mandate would apply have been provided Federal resources equivalent to the intergovernmental direct costs of the Federal mandate.

Proposed H.R. 9, *supra* note 4, § 10502. The definition of a federal mandate was:

(A) subject to subparagraph (B), [a federal mandate] means a requirement under Federal statute or regulation that a State or local government, or both, undertake an activity or provide a service; and

(B) does not include any Federal statute or regulation that—

(i) enforces the constitutional rights of individuals, or

(ii) establishes or enforces any statutory prohibition against discrimination on the basis of race, religion, gender, national origin, age, or handicapped or disability status.

Id. § 10506(2). An unfunded federal mandate was defined as:

(A) a Federal mandate other than one that relates to a program described in subparagraph (B)(i), and—

(i) which requires that a State or local government, or both, undertake an activity or provide a service; and

(ii) for which the Federal Government does not provide sufficient funds to undertake such activity or provide such service; or

(B) a Federal mandate—

(i) that relates to a Federal program under which \$500,000,000 or more is provided annually to State and local governments under entitlement authority (as defined in section 622(9) of title 2, United States Code),

(ii) which requires that a State or local government, or both, undertake an activity or provide a service; and

(iii) (I) with respect to which the failure to undertake such activity or provide such service would result in a reduction of Federal financial or technical assistance to the State or local government; or

(II) would impose costs on a State or local government that exceed the amount of Federal financial assistance provided to the State or local government under the program.

Id. § 10506(3). For a complete discussion of the Unfunded Mandates Bill, see *infra* notes 140-61 and accompanying text.

11. *Id.* § 4001(a). This section inserted the following section in the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of titles 2 and 31 U.S.C.):

"SEC. 321. OMB-CBO REPORTS.

"(a) OMB-CBO INITIAL REPORT.—Within 1 year after the date of enactment of this section, OMB and CBO shall jointly issue a report to the President and each House of Congress that contains the following:

In addition, the Republican majority plans new procedural rules that would allow citizens or companies affected by regulations—including environmental regulations—to challenge these regulations in different ways, and at different times, prior to final agency action.¹²

“(1) For the first budget year beginning after the issuance of this report, a projection of the aggregate direct cost to the private sector of complying with all Federal regulations and rules in effect immediately before issuance of the report containing the projection for that budget year of the effect of current-year Federal regulations and rules into the budget year and the outyears based on those regulations and rules.

“(2) A calculation of the estimated aggregate direct cost to the private sector of compliance with all Federal regulations and rules as a percentage of the gross domestic product (GDP).

“(3) The estimated marginal cost (measured as a reduction in estimated gross domestic product) to the private sector of compliance with all Federal regulations and rules in excess of 5 percent of the gross domestic product.

“(4) The effect on the domestic economy of different types of Federal regulations and rules.

“(5) The appropriate level of personnel, administrative overhead, and programmatic savings that should be achieved on a fiscal year by fiscal year basis by Federal agencies that issue regulations or rules with direct costs to the private sector through the reduction of such aggregate costs to the private sector by equal percentage increments in the 6 years following the budget year until the aggregate level of such costs does not exceed 5 percent of the estimated gross domestic product for the same fiscal year as the estimated costs that will be incurred.

“(6) Recommendations for budgeting, technical, and estimating changes to improve the Federal regulatory budgeting process.

“(b) UPDATE REPORTS.—OMB and CBO shall issue update reports on September 15th of the fifth year beginning after issuance of the initial report and at 5-year intervals thereafter containing all the information required in the initial report, but based upon all Federal regulations and rules in effect immediately before issuance of the most recent update report.

“(c) INITIAL BASELINE REPORT.—Within 30 days after the date of enactment of this section, OMB and CBO shall jointly issue a report to the President and each House of Congress that contains an initial aggregate regulatory baseline for the first budget year that begins at least 120 days after that date of enactment. That baseline will be a projection of the aggregate direct cost to the private sector of complying with all Federal regulations and rules in effect immediately before issuance of the report containing the projection for that budget year of the effect of current-year Federal regulations and rules into the budget year and the outyears based on those regulations and rules.”

Proposed H.R. 9, *supra* note 4, § 4001(a)-(c). For a complete discussion of the provision to limit the private sector's cost for regulatory compliance, see *infra* notes 162-80 and accompanying text.

12. Proposed H.R. 9, *supra* note 4, §§ 7003(a)(2), 7008, 8202-8203, 8207. The bill proposed amending the hearing requirement of 5 U.S.C. § 553 to include a new subsection (g): “If more than 100 interested persons acting individually submit comments to an agency regarding any rule proposed by the agency, the agency shall hold a public hearing on the proposed rule.” Introduced H.R. 9, *supra* note 4, § 7003(a)(2) (amending 5 U.S.C. § 553 (1994)). The original proposal contained a provision deleted from the version introduced in the House: “Whoever is adversely affected by any conduct in violation of this title may in a civil action obtain appropriate relief. The court may award a prevailing

plaintiff in an action under this section a reasonable attorney's fees as a part of the costs." Proposed H.R. 9, *supra* note 4, § 7008.

The section of Introduced H.R. 9 covering whistleblowers in the private sector contained the following provisions:

SEC. 8202. PURPOSE.

The Federal regulatory system should be implemented consistent with the principle that any person subject to Government regulation should be protected against reprisal for disclosing information that the person believes is indicative of—

- (1) violation or inconsistent application of any law, rule, regulation, policy, or internal standard;
- (2) arbitrary action or other abuse of authority;
- (3) mismanagement;
- (4) waste or misallocation of resources;
- (5) inconsistent, discriminatory or disproportionate enforcement proceedings;
- (6) endangerment of public health or safety;
- (7) personal favoritism; and
- (8) coercion for partisan political purposes; by any agency or its employees.

SEC. 8203. COVERAGE.

This subtitle shall apply to:

- (1) Any agency of the Federal Government as defined in section 551 of title 5, United States Code.
- (2) Any agency of a State government that exercises authority under Federal law, or that exercises authority under State law establishing a program approved by a Federal agency as a substitute for or supplement to a program established by Federal law.

Introduced H.R. 9, *supra* note 4, §§ 8202-8203. The same title contained a provision for citizen suits.

SEC. 8207. CITIZEN SUITS.

(a) Commencement.—Any person injured or threatened by a prohibited regulatory practice may commence a civil action on his own behalf against any person or agency alleged to have engaged in or threatened to engage in such practice.

(b) Jurisdiction and Venue.—Any action under subsection (a) of this section shall be brought in the district court for any district in which the alleged prohibited regulatory practice occurred or in which the alleged injury occurred. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to—

- (1) restrain any agency or person who has engaged or is engaging in any prohibited regulatory practice;
- (2) order the cancellation or remission of any penalty, fine, damages, or other monetary assessment that resulted from a prohibited regulatory practice;
- (3) order the rescission of any settlement that resulted from a prohibited regulatory practice;
- (4) order the issuance of any permit or license that has been denied or delayed as a result of a prohibited regulatory practice;
- (5) order the agency and/or the employee engaging in a prohibited regulatory practice to pay to the injured person such damages as may be necessary to compensate the person for any harm resulting from the practice, including damages for—

- (A) injury to, deterioration of, or destruction of real or personal property;

In this Article, I will first examine the parts of the proposed act that may affect the environment and try to predict what the actual impact of the laws—after agency and court interaction—would be on the environment if implemented. Second, from the perspective of one who believes that the impacts of the proposed law may indeed be harmful to the environment, I will explore what possibilities—that is, legal theories concerning agency implementation or direct challenges in court—might be available to temper or change the possible impacts of the proposed regulatory changes.

A true analysis of impacts and solutions must look at the actual implemented text.¹³ However, the legislative intent as represented by the original text proposal is important as well. These announced intentions represent specific policies that will likely survive into another legislative session even if this Congress fails to pass them or the President ultimately vetoes them.¹⁴ There is enough information in the form of the proposed text and the stated goals of the proposals, that it makes sense to discuss the Contract with America, its effects, and the possible responses to it.¹⁵

(B) loss of profits from idle or underutilized resources, and from business forgone;

(C) costs incurred, including costs of compliance where appropriate;

(D) loss in value of a business;

(E) reasonable legal, consulting and expert witness fees; or

(F) payments to third parties;

(6) order the payment of punitive damages, in an amount not to exceed \$25,000 for each such prohibited regulatory practice, provided that, in the case of a continuing prohibited regulatory practice, each day that the practice continues shall be deemed a separate practice.

Id. § 8207. For a complete discussion of alterations to procedural rules for challenging agency actions see *infra* notes 64-81 & 181-97 and accompanying text.

13. The final text is not currently available and, as noted in footnotes 4 and 7-12, already appears headed for a different textual incarnation.

14. The original bills have shown strong resiliency so far in the legislative arena with most of the substantive thrusts intact after textual changes.

15. This Article will try to note explicit changes from the original legislative proposals where they have occurred.

II. WHAT MIGHT THE CONTRACT WITH AMERICA DO AND WHAT CAN BE DONE ABOUT IT

A. *Requirement of Cost-Benefit Analysis and Positive Net Impact of Regulations*

The first part of the proposed Job Creation section of the Contract with America that concerns environmentalists is the requirement that all new federal regulations, and amendments to regulations,¹⁶ be subject to cost-benefit analysis. Further, environmental regulations must be certified by the federal agency that proposed them as producing "benefits to human health or the environment that will justify the costs incurred by local and State governments, the Federal Government, and other public and private entities as a result of implementation of and compliance" with the rules for determining costs and benefits.¹⁷ To ensure that agencies

16. The term "amendment" is not defined in the statutory scheme governing the Administrative Procedure Act, 5 U.S.C. § 551 (1994), but is logically seen as a substantive change in a regulation.

17. Introduced H.R. 9, *supra* note 4, § 3201(a)(5)(C). The full text as introduced in the House read:

SEC. 3201. ANALYSIS OF RISK REDUCTION BENEFITS AND COSTS.

(a) In General.—Except as provided in subsection (b), the President shall require each executive branch agency to prepare the following for each major rule designed to protect human health, safety, or the environment that is proposed or promulgated by the agency after the date of enactment of this Act:

(1) For each such proposed or promulgated rule, an assessment of incremental costs and incremental risk reduction or other benefits associated with each significant regulatory alternative considered by the agency in connection with the rule or proposed rule.

(2) For each such proposed or promulgated rule, to the extent feasible, a comparison of any human health, safety, or environmental risks addressed by the regulatory alternatives to other risks chosen by the head of the agency, including at least 3 other risks regulated by the agency and to at least 3 other risks with which the public is familiar.

(3) For each such proposed or promulgated rule, a statement of other human health risks potentially posed by implementing or complying with the regulatory alternatives, including substitution risks.

(4) For each final rule, an assessment of the costs and risk reduction or other benefits associated with implementation of, and compliance with, the rule.

(5) For each final rule, a certification by the head of the agency of each of the following:

(A) A certification that the assessment under paragraph (4) is based on an objective and unbiased scientific and economic evaluation of all significant and relevant information provided to the agency by interested parties relating to the costs, risks, and risk reduction or other benefits addressed by the rule. Such information shall have been

effectively follow this provision, the risk and cost-benefit analyses must be approved by independent peer review panels.¹⁸

subjected to peer review to the extent required by section 3301.

(B) A certification that the rule will substantially advance the purpose of protecting human health or the environment, as applicable, against the risk addressed by the rule.

(C) A certification that the rule will produce benefits to human health or the environment that will justify the costs incurred by local and State governments, the Federal Government, and other public and private entities as a result of implementation of and compliance with the rule, as determined under paragraph (1).

(D) A certification that there is no regulatory alternative that is allowed by the statute under which the regulation is promulgated that would achieve an equivalent reduction in risk in a more cost-effective manner, along with a brief explanation of why other regulatory alternatives that were considered by the head of the agency were found to be less cost-effective.

Id. § 3201(a).

18. *Id.* § 3301. The text as introduced in the House read:

SEC. 3301. PEER REVIEW PROGRAM.

(a) Establishment.—For regulatory programs addressing human health, safety, or the environment, the head of each Federal agency shall develop a systematic program for peer review of risk assessments and economic assessments used by the agency. Such program shall be applicable across the agency and—

(1) shall provide for the creation of peer review panels consisting of independent and external experts who are broadly representative and balanced to the extent feasible;

(2) may provide for differing levels of peer review depending on the significance or the complexity of the problems or the need for expeditiousness;

(3) shall not exclude peer reviewers merely because they represent entities that may have a potential interest in the outcome, provided that interest is fully disclosed to the agency; and

(4) shall provide open opportunity to become part of a peer review panel at a minimum by soliciting nominations through a Federal Register announcement.

(b) Requirement for Peer Review.—Each Federal agency shall provide for peer review of scientific and economic information used for purposes of any evaluation under section 3201(a)(5)(A) or for purposes of any significant risk or cost assessment prepared in connection with a major rule. In addition, the Director of the Office of Management and Budget shall order that peer review be provided for any major risk assessment or cost assessment that may have a significant impact on public policy decisions.

(c) Contents.—

(1) In general.—Each peer review under this section shall include a report to the Federal agency concerned with respect to each of the following:

(A) An evaluation of the technical, scientific, and economic merit of the data and methods used for the assessment and analysis.

(B) A list of any considerations that were not taken into account in the assessment and analysis, but were considered appropriate by a majority of the members of the peer review panel.

(C) A discussion of the methodology used for the assessment and analysis.

Although the proposed legislation applies generally to all regulations, environmental regulations would seem to be particularly affected because they represent the majority of regulations not currently subject to a cost-benefit analysis requirement.¹⁹ For example, in the explanatory book *Contract with America*,²⁰ the Clean Air Act²¹ is singled out as an offender.

(2) Comments and appendix.—Each peer review report under this subsection shall include—

(A) all comments supported by a majority of the members of the peer review panel submitting the report; and

(B) an appendix which sets forth the dissenting opinions that any peer review panel member wants to express.

(3) Separation of assessments.—Peer review of human health, safety, environmental, and economic assessments may be separated for purpose of this subtitle.

(d) Response to Peer Review.—The head of the Federal agency shall provide a written response to all significant peer review comments.

(e) Availability to Public.—All peer review comments or conclusions and the agency's responses shall be made available to the public and shall be made part of the administrative record for purposes of judicial review of any final agency action.

(f) Previously Reviewed Data and Analysis.—No peer review shall be required under this section for any data or analysis which has been previously subjected to peer review or for any component of any evaluation or assessment previously subjected to peer review.

(g) National Panels.—The President shall appoint National Peer Review Panels to annually review the risk assessment and cost assessment practices of each Federal agency for programs designed to protect human health, safety, or the environment. The Panel shall submit a report to the Congress no less frequently than annually containing the results of such review.

(h) Major Rule Defined.—For purposes of this section, the term "major rule" has the same meaning as provided by section 3201(c) except that "\$100,000,000" shall be substituted for "\$25,000,000".

Id. § 3301. The original text of the Contract with America included a separate section requiring a second peer review if the first panel rejected the data or methods used to compile the first report.

If a peer review panel established under this subtitle includes in a report under section 3302 for a proposed major rule a negative recommendation regarding the data or methods used for a risk assessment cost/benefit analysis on which the major rule is based, the proposed major rule may not be issued in final form unless the head of the agency which proposed the major rule—

(1) prepares a new risk assessment or cost/benefit analysis, as applicable, for the proposed major rule in accordance with this title; and (2) submits the new assessment and analysis for peer review in accordance with this subtitle.

Proposed H.R. 9, *supra* note 4, § 3303.

19. See FREDERICK ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 593 (2d ed. 1990).

20. REPUBLICAN NAT'L COMM., CONTRACT WITH AMERICA 126 (Ed Gillespie & Bob Schellhas eds., 1994).

21. 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993). For a discussion of the effect of the Unfunded Mandates Act on the Clean Air Act, see *infra* notes 146-49 and accompany-

According to those who signed the Contract with America the proposal was meant to stop regulation that does not truly provide an overall net benefit to the American people. As phrased by the proposers, while this cost-benefit analysis requirement may mean that certain environmental and health and safety regulations will be repealed, it will make more resources available to save lives or provide benefits elsewhere.

Thus the presumption is that if Congress passes the environmental reforms within the Contract with America, they will alter federal environmental regulation. However, a close examination of environmental laws as they now exist—and as the Environmental Protection Agency (EPA) and the states currently implement them—indicates that passage of this part of the Contract with America will cause little change to existing environmental regulation.

1. The law, by its own terms, does not apply to environmental regulation

Although this proposed legislation seems broad in its scope, it limits its own applicability in a way that seems contradictory to the description of the bill in the book, *Contract with America*,²² and contradictory to some of the publicly expressed purposes of the bill. Specifically, in the opening section of the proposed legislation the so-called “savings provision” provides that “[n]othing in this subtitle shall be construed to modify any statutory standard or requirement designed to protect health, safety, or the environment.”²³ This savings provision seems to say that unless an existing law that protects the environment has specifically required a cost-benefit analysis, the proposed requirements to perform a cost-benefit analysis in order to regulate under that law do not apply. Thus, even though the Contract with America singled out the Clean Air Act as one of the laws that created the need for this proposed bill because it required regulation without regard to costs,²⁴ the proposed legislation would, by its own terms, have no impact. In effect, the proposed bill would not change the procedures of executive branch agencies that are already subject

ing text.

22. REPUBLICAN NAT'L COMM., *supra* note 20, 126-41.

23. Introduced H.R. 9, *supra* note 4, § 3103(c).

24. REPUBLICAN NAT'L COMM., *supra* note 20, at 126.

to cost-benefit analysis by executive order unless such analysis is specifically forbidden by law.²⁵

This savings provision was probably designed to allow the bill's proponents to state that they are not going to harm human health, safety, or the environment, but by the same token they will not change the agency cost-benefit analysis that they have so criticized. One could argue that provisions in laws, such as the Clean Air Act, that do not allow a cost-benefit analysis are not designed to protect human life or the environment because in some general way they misallocate funds that could be used to save lives elsewhere. However, this is a very weak argument given that the preambles and legislative history of most of the environmental laws, including the Clean Air Act, specifically note that Congress passed these laws to protect human health and the environment.

Another possible argument that the proposed law would still affect environmental regulation is if one construes the savings clause to apply only in cases where prior legislation has set actual numerical standards for direct regulation in the fields of human health and the environment. Title III does not define the terms "standard" or "requirement." But the clear meaning of these words, particularly the word "requirement," would indicate that it applies more broadly than legislation merely designed to protect human health and the environment in a certain way through numerical standards. It seems that environmentalists have little to fear from the proposed law requiring cost-benefit analysis because environmental regulation will be exempted.

What then does one make of Title III and this "savings" provision? The title certainly expresses congressional intent to be more logical about cost-benefit analysis. It further provides an enforcement mechanism for ensuring such cost-benefit analysis is more onerous and perhaps more effective than what currently exists under executive orders. Perhaps the savings provision limiting the application of the proposed bill will be narrowly construed, or more likely, will be dropped altogether. In that case, Title III would require that all laws, including environmental laws, only allow regulation that is cost-beneficial. If this occurs, will the changes be

25. For further discussion of executive orders requiring cost-benefit analysis, see *infra* note 28 and accompanying text.

great? Would this kind of law, if applicable to all environmental regulation, threaten environmental protection?

Without the savings provision, the scope of the law would certainly encompass environmental regulations. Although the proposed legislation only applies to rules taking effect after the passage of the bill,²⁶ the applicability of the legislation will probably affect environmental laws with greater force than would appear at first glance. Although regulations enforcing most of the major federal environmental laws have already been implemented, very few regulations remain unchanged for long, and an alteration of standards or simply a need to introduce more cost-effective standards might trigger the requirement of a cost-benefit analysis. The only baseline criteria is that it be a major rule; however, the Administrative Procedure Act (APA) does not define a major rule. The APA defines a "rule" as:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.²⁷

Therefore, the fact that this law would only apply to new major rules does not really lessen its impact. However, even if applied fully to all environmental laws, the requirement of a cost-benefit analysis would not really change environmental regulation.

2. Even if the law covered environmental regulation, its impact would not be great because the EPA already uses cost-benefit analysis

By executive order, all federal agencies are required, and have been required for sixteen years, to prepare a cost-benefit analysis on all federal regulations absent a specific prohibition of such analysis.²⁸

26. Introduced H.R. 9, *supra* note 4, § 3201(a).

27. 5 U.S.C. § 551(4) (1994).

28. Cost-benefit analysis for executive branch agencies was first implemented by President Jimmy Carter. Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978). President Reagan issued a similar directive, Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), and

Relatively few federal environmental laws prohibit a cost-benefit analysis. However, the exceptions are important and include the Endangered Species Act of 1973²⁹ and the Clean Air Act.³⁰ The Endangered Species Act states that no animal listed as endangered should be "taken"³¹ and that no habitat crucial to species survival should be destroyed.³² The Job Creation bill makes no provision for consideration of economic hardship on these issues. Similarly, the Clean Air Act requires that the EPA consider public health, not economic hardship of compliance, when creating ambient air quality standards.³³

Yet even when these environmental laws do not allow the use of cost-benefit analysis in regulation, the EPA practices cost-benefit analysis anyway.³⁴ In the book *EPA: Asking the Wrong Questions*, authors Marc Landy, Marc Roberts, and Stephen Thomas describe how cost-benefit considerations were factored into the EPA's decision to alter the ozone standard from .08 parts per million (ppm) to .12 ppm, even though such a consideration was explicitly forbidden by statute.³⁵ The EPA's justification for considering economics in standard setting is that one can presumably equalize money spent on health maximization by shifting scarce resources to save human lives. Although the federal courts did not approve the explicit use of cost-benefit analysis in the ozone case, they did approve the final ozone ambient air quality standard.³⁶ Similarly, in *Natural Resources Defense Council, Inc. v. United States EPA*,³⁷ the D.C. Circuit determined that because scientific uncertainty exists with respect to

President Clinton issued the same directive, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

29. 16 U.S.C. §§ 1531-1544 (1994).

30. 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

31. 16 U.S.C. § 1538(a)(1)(B)-(C). The Endangered Species Act defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).

32. *Id.* § 1533(b)(2).

33. 42 U.S.C. § 7409(b)(1) (1988).

34. *See id.* (stating that the goal of the Clean Air Act is to protect human health).

35. MARC K. LANDY ET AL., *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS* 65, 70 (1990).

36. *See American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982). In so doing, they did not examine the real reasons for the EPA's final decision, but simply noted that the EPA Administrator's decision was based on a "rational" margin of safety. *Id.* at 1187. The breadth of the margin of safety was not specified. *Id.*

37. 824 F.2d 1146 (D.C. Cir. 1987) (en banc).

carcinogenic air pollutants, the EPA Administrator did not have to set the exposure level to zero and could, therefore, presumably consider economic impacts of various possible safety levels.³⁸

The EPA's regulation of sulfur dioxide production at nonferrous smelters provides another example of the EPA's current practice of cost-benefit analysis. Before Congress explicitly allowed consideration of the possible economic impact of certain sulfur dioxide control standards, the EPA had already specified dispersion of sulfur dioxide clouds as a pollution abatement technique because a steady-state control would not have been economically feasible and would have resulted in closures of plants and perhaps shutdowns of entire industries.³⁹ Even though the EPA specifically noted that the use of dispersion techniques adequately protected public health according to its statutory mandate, cost-benefit analysis clearly dictated where, on the line of uncertainty, the EPA would set its sulfur dioxide production safety standard.⁴⁰ Some of the federal courts, analyzing the standard, acknowledged that economic feasibility was considered in the determination to allow the use of dispersion techniques to temporarily meet Clean Air Act requirements.⁴¹

Because the EPA has great flexibility in setting standards, and because the health effects of so many pollutants are uncertain, the EPA can quietly use the cost-benefit impact of various regulatory alternatives to choose between two levels that could protect human health equally if both are supported by scientific studies. Since health effects are uncertain, the EPA can defend this choice by claiming that it chose to rely on or believe the evidence of one study—the one that would support less costly regulation—over another study. There are very few limits on the internal use of cost-benefit analysis in the environmental arena, and like every other federal agency, the EPA will routinely use cost-benefit analysis as its regulatory paradigm, even when such usage is not permitted. Moreover, in the case of such

38. *Id.* at 1154-55 ("Though the phrase 'to protect the public health' evinces an intent to make health the primary consideration, there is no indication of the factors the Administrator may or may not consider in determining . . . what level of emissions will provide 'an ample margin of safety.'" (quoting 42 U.S.C. § 7412(b)(1)(B))).

39. *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1010 (D.C. Cir. 1982); *Stack Height Increase Guideline*, 41 Fed. Reg. 7450 (1976).

40. *Stack Height Increase Guideline*, 41 Fed. Reg. 7452.

41. *See, e.g., Big Rivers Elec. Corp. v. EPA*, 523 F.2d 16, 21 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) (concluding that use of other measures is permitted only when specific emission reduction techniques are "unavailable or infeasible").

uncertainty, courts are very likely to approve the EPA's decision making which informally takes cost-benefit analysis into account.

3. The EPA has legitimate reasons for using cost-benefit analysis

Although scientific uncertainty makes it possible, one may ask why the EPA has been utilizing cost-benefit analysis in areas where it is clearly prohibited from doing so and why the courts have allowed such an analysis. The answer lies in the values that traditionally have been considered within the cost-benefit framework employed by federal agencies, and the attempt by Congress to alter that framework.

On the surface, the concept of strictly prohibiting cost-benefit analysis seems ludicrous. In theory at least, when considered very broadly, cost-benefit analysis is always a good paradigm to analyze a proposed decision. Shouldn't we always want benefits to exceed costs in whatever we do? Theoretically yes, but too often certain values get lost in the shuffle. There is no shortage of commentary, academic or otherwise, condemning federal agency cost-benefit analysis for failing to consider important criteria or for willfully manipulating the process to benefit a few at the expense of others.⁴² The history of the environmental movement and environmental regulations indicate that federal agencies did not understand or consider environmental values in the traditional cost-benefit analysis paradigm employed in the postwar period.⁴³ Therefore, to protect the environment from practices and decisions which continued to abuse it, Congress prohibited a seemingly logical paradigm—cost-benefit analysis—in certain environmental laws.

In the place of cost-benefit analysis, Congress essentially authorized federal agencies to conduct a crude "macro-economic" analysis, giving great weight to previously ignored but now important environmental values and making them preeminent to traditional economic values. Traditional cost-benefit analysis could not outweigh the important values Congress had recognized with respect to the

42. RICHARD O. ZERBE, JR. & DWIGHT DIVELY, *BENEFIT-COST ANALYSIS IN THEORY AND PRACTICE* 489-90 (1994).

43. Victor B. Flatt, *The Human Environment of the Mind: Correcting NEPA Implementation by Treating Environmental Philosophy and Environmental Risk Allocation as Environmental Values Under NEPA*, 46 HASTINGS L.J. 85, 86 (1994) [hereinafter Flatt, *Human Environment*].

environment, such as the value that species should not be eliminated from the earth.⁴⁴ Essentially, Congress identified some unmeasured values whose preservation was so important it outweighed any associated costs.

In reality it is very difficult for our society to place an infinite value on anything, no matter how important. This reality has forced a change in some of the original broad legislative mandates. Faced with draconian requirements to curtail their use of cars, some Americans have decided that maybe pristine air is not so important after all and have persuaded their legislators to take the same position.⁴⁵ The implicit use of cost-benefit analysis by the EPA has occurred even where it was forbidden for the same reason: because people actually value a net benefit when all values are considered. Without considering values other than human health or the environment, some of the laws would impose extreme requirements or incredible costs without a commensurate increase in benefits. The EPA has assumed, probably correctly, that in elevating environmental concerns over others, Congress was merely trying to emphasize environmental values and did not mean to shut down an entire industry or way of life, even if the legislative language prohibited considering the economic cost of regulations.⁴⁶

4. The real issue is one of values and whose values will be used in cost-benefit analysis

If the EPA is already doing a form of cost-benefit analysis, why is there a need for legislation specifically targeting environmental regulation? Why is it being pushed so hard and seen as so necessary to the economic health of our country? Similarly, why are environmentalists so scared of the proposed bill if the EPA has already been doing such a cost-benefit analysis? After all, would not everyone agree that in theory cost-benefit analysis is a good paradigm for agency decision making? Do we really want to pass legislation that is more harmful than helpful? As a society we can agree on this broad principle. What we cannot agree on is what values should be considered in a cost-benefit analysis. One person may value health

44. See 16 U.S.C. §§ 1531-1544.

45. The Clean Air Act Amendments of 1977 specifically forbid the EPA from controlling air pollution through the addition of certain costs or inconveniences to automobile travel. ANDERSON ET AL., *supra* note 19, at 257-58.

46. LANDY ET AL., *supra* note 35, at 56, 65.

or the risk of impaired health very differently than another. And this valuation depends on a whole host of considerations, including economic well-being. In a democratic, pluralistic society, people will always try to push for the type of regulation that maximizes their personal cost-benefit equation. Even if we assume people are civic-minded, the incentive still exists to push for the kind of cost-benefit equation that they perceive as better for society as a whole: "We don't need to be free from a minuscule risk of cancer, we need to be competitive so as to produce jobs." People's differences in understanding values and harms and their distinct interpretations of cost-benefit analysis seems to divide those who support the cost-benefit analysis in the Job Creation bill from the environmentalists who oppose it. Because they feel environmental harms are exaggerated, the proposers of this law favor the kind of traditional cost-benefit analysis that was done before many of the major environmental laws were passed. Environmentalists also assume that this is the intended meaning of the proposed statute, and because they see environmental harms as more genuine, they oppose a law requiring traditional "cost-benefit" analysis for environmental regulation.

The language of the proposed Job Creation bill tries to gloss over this difference in the way values and harms are understood by asserting that all cost-benefit analysis must be scientifically objective.⁴⁷ For instance, the major purpose of the legislation is to present the public and executive branch with "the most scientifically objective and unbiased information concerning the nature and magnitude of health, safety, and environmental risks."⁴⁸ The bill as originally proposed also stated that risk assessments "shall explicitly distinguish scientific findings in risk assessments from other considerations."⁴⁹ The requirements section of the proposed bill reempha-

47. Introduced H.R. 9, *supra* note 4, § 3104(a).

48. *Id.* § 3102(1).

49. Proposed H.R. 9, *supra* note 4, § 3104(b)(1). When introduced in the House, the text was altered to read:

When assessing human health risks, a risk assessment shall consider and discuss both laboratory and epidemiological data of sufficient quality which finds, or fails to find, a correlation between health risks and a potential toxin or activity. Where conflicts among such data appear to exist, or where animal data is used as a basis to assess human health, the assessment shall include discussion of possible reconciliation of conflicting information, and as appropriate, differences in study designs, comparative physiology, routes of exposure, bioavailability, pharmacokinetics, and any other relevant factor.

Introduced H.R. 9, *supra* note 4, § 3104(b)(1). The final version that passed the House read:

sized the importance of scientific underpinnings by stating that the risk assessment shall be based on a "scientific evaluation of the risk addressed."⁵⁰

By basing all of the criteria on science, an attempt is made to avoid grappling with any difference in interpretation of values and harms, and instead to look for both an objective and universally acceptable level of safety. Unfortunately there is no scientifically objective level of safety for any person or the environment.⁵¹ Risk assessment is always a matter of statistics, and even if all the statistics are known, someone still has to make a value judgment as to what it is worth to protect human life or the environment. There is no absolute protection. In many cases the scientific studies will not be certain. This uncertainty requires a value judgment as to which study or formula seems most reasonable or which would support values that are more important to us as a society. The ultimate decision before the agency is not how to calculate what the mathematical studies show, but how to determine what value society places on various aspects of our environment. Scientific analysis will not alleviate the need to determine this.

In the same vein, the proposed peer review requirement seems to indicate that the problem with agency health and safety regulation is that it is sloppy or not scientifically accurate when in fact the

When discussing human health risks, a significant risk assessment document shall contain a discussion of both relevant laboratory and relevant epidemiological data of sufficient quality which finds, or fails to find, a correlation between health risks and a potential toxin or activity. Where conflicts among such data appear to exist, or where animal data is used as a basis to assess human health, the significant risk assessment document shall, to the extent feasible and appropriate, include discussion of possible reconciliation of conflicting information, and as relevant, differences in study designs, comparative physiology, routes of exposure, bioavailability, pharmacokinetics, and any other relevant factor, including the sufficiency of basic data for review. The discussion of possible reconciliation should indicate whether there is a biological basis to assume a resulting harm in humans. Animal data shall be reviewed with regard to its relevancy to humans.

Passed H.R. 9, *supra* note 4, § 414(b)(1).

50. Proposed H.R. 9, *supra* note 4, § 3201(a)(4)(A). As introduced in the House the clause stated, "scientific and economic evaluation of all significant and relevant information provided to the agency by interested parties relating to the costs, risks, and risk reduction or other benefits." Introduced H.R. 9, *supra* note 4, § 3201(a)(5)(A). The final version read, "scientific and economic evaluations of all significant and relevant information and risk assessments provided to the agency by interested parties relating to the costs, risks, and risk reduction and other benefits." Passed H.R. 9, *supra* note 4, § 422(a)(1).

51. Lynton K. Caldwell, *Environmental Policy as a Political Problem*, POL'Y STUD. REV., Autumn/Winter 1993, at 104, 107.

problem is that people do not agree on the values used. At most, the peer review requirement⁵² will slow down the ability of agencies to promulgate regulations quickly.

5. Because the EPA is in charge of implementation, its values will be utilized in the cost-benefit analysis, and thus the real impact of the proposed law will be minimal

Given that the major conflict in the law is really one of values, what will happen if this law is implemented? Given that the EPA is already doing cost-benefit analysis for environmental regulations, is there any reason to think that if this bill passes, the proposed law will change the way the analysis is done? Will the EPA's regulatory interpretation change? I believe that the answer is no.

Because of the focus in environmental laws on environmental values, the EPA has from the beginning been attuned to and considerate of those values that are at risk when we degrade our environment. Even though the EPA has conducted cost-benefit analysis, it appears to have done so with great deference to the intentions of Congress to give weight to environmental values and harms. The EPA has yet to allow the regulatory costs to *significantly* endanger human health. Although the EPA may fail to recognize some values in its cost-benefit paradigm,⁵³ for the most part it is in tune with the values expressed in the major environmental laws passed by Congress.

In order to assure the EPA's continued sensitivity, the agency has also improved its ability to use, compare, and manipulate these values more fully. Using tools such as contingent valuation methodology, the EPA can quantify some previously unquantifiable environmental values, such as existence values.⁵⁴ The federal courts have approved

52. Proposed H.R. 9, *supra* note 4, §§ 3301-3302; Introduced H.R. 9, *supra* note 4, § 3301; Passed H.R. 9, *supra* note 4, § 431.

53. This author argues in two separate articles that environmental philosophy and environmental risk allocation are important elements to consider when interpreting federal environmental legislation and accompanying regulations. *See generally* Flatt, *Human Environment*, *supra* note 43 (arguing that governmental decision makers fail to consider environmental philosophy and environmental risk allocation as values important to the NEPA assessment of environmental impacts); Victor B. Flatt, *Should the Circle Be Unbroken?: A Review of the Hon. Stephen Breyer's Breaking the Vicious Circle: Toward Effective Risk Regulation*, 24 ENVTL. L. 1707 (1994) [hereinafter Flatt, *Unbroken?*] (arguing that cost-benefit comparisons of dollars spent per human life saved overlook other prominent values that many environmental laws are designed to protect).

54. W. Michael Hanemann, *Valuing the Environment Through Contingent Valuation*,

the use of such studies to determine values.⁵⁵ In *Ohio v. United States Department of the Interior*, the D.C. Circuit thoroughly analyzed the contingent valuation methodology and determined that the Department of the Interior could use it to calculate reliable economic data on natural resource damages.⁵⁶ Therefore, a return to the glorious days of "progress" wherein we only counted "real" or "traditional" economic costs and benefits is no longer possible by simply requiring agencies to conduct a cost-benefit analysis. Cost-benefit analysis has grown up and now can at least recognize—and in most cases quantify—almost all important values of the environment. Indeed, the future may hold even greater value for environmental amenities than the EPA currently assigns.⁵⁷

There is no reason to assume that if this law passes the EPA will not continue to use the broad cost-benefit analysis that it currently uses. Moreover, the federal courts are likely to approve the EPA's understanding of its statutory duty and its method of cost-benefit analysis, since the courts apply a very deferential standard of review to an agency's interpretation.⁵⁸

In reviewing an agency's interpretation and implementation of a statute, a court must first look at whether Congress has *directly* spoken on the issue in question.⁵⁹ In order to directly control an agency's interpretation of a statutory charge, Congress must have "had an intention on the precise question at issue."⁶⁰ If it did not, then a court must assume that Congress has given an agency *broad* discretion to deal with the issue, and the court must defer to the agency's interpretation if it is reasonable and consistent with the statute.⁶¹ This deference to an agency's discretion, under the so-

J. ECON. PERSP., Fall 1994, at 19, 20. The value of the mere existence of a nonmarketable commodity—for example, the existence of a fish in a stream—may be measured by asking the public how much they would be willing to pay for an increase in the quantity of that commodity. *Id.*

55. See *Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 478 (D.C. Cir. 1989).

56. *Id.* at 474-78.

57. According to John Loomis, an economist at Colorado State University, by requiring rigorous cost-benefit analysis, Congress may be "opening a Pandora's box" of stronger valuation of the environment. Eric Pryne, *Figuring Price for Priceless Assets is No Idle Exercise*, SEATTLE TIMES, Apr. 9, 1995, at B1.

58. *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980) (holding that an agency's interpretation is ordinarily accorded "great deference").

59. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

60. *Id.* at 843 n.9.

61. *Id.* at 844-45.

called *Chevron* rule, has clearly curtailed a court's power to overturn an agency's interpretation of a law. Thus, Congress's power to control an agency's discretion is also greatly limited. The D.C. Circuit recently reviewed the deference due an agency's decisions and held that "*Chevron* commands that unless it is absolutely clear that an agency's interpretation of a statute, entrusted to it to administer, is contrary to the will of Congress, courts must defer to that interpretation so long as it is reasonable."⁶² Thus, the EPA should be able to continue its method of valuation and cost-benefit analysis with the approval of the federal courts.

Even where values are uncertain, the EPA can consider them in conjunction with cost-benefit analysis to make estimates. Certainly, cost-benefit analysis has had a long history of being manipulated to emphasize the values most important to the decisionmaker.⁶³ There is no reason to think this manipulation will change, and the manipulator will be the EPA, not Congress. Therefore, unless the EPA's philosophy changes, it will continue to place a high value on at least some of those things important to environmentalists.

6. The procedural changes in the proposed cost-benefit bill may be unenforceable

The procedural changes proposed in this cost-benefit legislation could be more onerous than the requirement of a cost-benefit analysis itself, but may not be enforceable under doctrines of administrative law. Even if the procedural changes are utilized, they will have no real substantive effect.

Section 3401 of House Bill 9 as proposed in the Contract with America (Proposed H.R. 9) states that whoever is "adversely affected by any conduct in violation of this title may in a civil action obtain appropriate relief."⁶⁴ Relief includes an award of reasonable

62. Sweet Home Chapter of Communities for a Greater Or. v. Babbitt, 1 F.3d 1, 11 (D.C. Cir. 1993) (Mikva, J., concurring) (citing *Chevron*, 467 U.S. at 844), *aff'd in part and rev'd in part*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 115 S. Ct. 2407 (1995).

63. ZERBE & DIVELY, *supra* note 42, at 489-90.

64. Proposed H.R. 9, *supra* note 4, § 3401. The House eventually passed the following:

CIVIL ACTION.—An owner who does not choose arbitration, or who does not receive prompt payment when required by this section, may obtain appropriate relief in a civil action against the agency. An owner who prevails in a civil action under this section shall be entitled to, and the agency shall be liable for, a reasonable attorney's fee and other litigation costs (including appraisal fees).

attorney's fees.⁶⁵ Those individuals adversely affected presumably would be those who could now challenge agency action after its implementation under the APA.⁶⁶ This provision of Proposed H.R. 9 allows a challenge before a final or emergency rule is implemented by an agency.⁶⁷ The challenge could apparently attack the kind of cost-benefit analysis conducted by the agency—was it truly scientific?—or the use or failure to use scientifically approved methods or an appropriate peer review panel.⁶⁸

Federal courts might use the standing doctrine to preclude any attempt to allow such a challenge before the final rule is issued. Although the section states that it would only apply to those adversely affected—for the most part adopting the APA's standing language⁶⁹—before a rule is issued in final form, it would be very difficult for a party to prove that it had been adversely affected in order to satisfy the standing requirement.⁷⁰

The problem with section 3401 is that it would be very difficult for a plaintiff to develop a concrete factual scenario wherein the alleged harm resulted from the perceived failure to do a correct cost-benefit analysis before final agency action. Even if it appears that the incorrect cost-benefit analysis would lead to regulations which might be costly to a potential litigant, there is no guarantee that the agency would issue such a regulation until it has completely proceeded through a rule-making procedure. The agency might not implement

Passed H.R. 9, *supra* note 4, § 206(e).

65. Proposed H.R. 9, *supra* note 4, § 3401. There is no comparable section in either Introduced H.R. 9 or Passed H.R. 9.

66. Under the APA, actions are reviewable at "final agency action" by persons suffering legal wrong by agency action or adversely affected by agency action. 5 U.S.C. §§ 702, 704.

67. *Id.* § 704.

68. See Proposed H.R. 9, *supra* note 4, §§ 3104, 3201, 3301-3302; Introduced H.R. 9, *supra* note 4, §§ 3104, 3201, 3301; Passed H.R. 9, *supra* note 4, §§ 414, 421, 431.

69. Section 702 of the APA states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

70. As noted by Justice Breyer and Professor Stewart:

Federal courts, however, traditionally have not recognized the "public action." They have insisted that the plaintiff establish that he or she has suffered some specific, tangible injury as a direct result of government conduct in order to secure judicial review of its legality. A traditional justification for this requirement is that only plaintiffs with a concrete personal stake will litigate a case with sufficient adversary vigor

STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1056 (3d ed. 1992).

the expected rule based on the challenged cost-benefit analysis or it might make exceptions for certain individuals or industries.

It is true that a litigant need only show that the litigant is "likely to be financially injured" in order to maintain standing.⁷¹ However this requirement means only that a potentially aggrieved party need not wait for an enforcement action to begin before challenging a newly-issued rule. The proposed legislation authorizes a challenge one step before that: a plaintiff could challenge an analysis that would lead to a regulation that might lead to an enforcement action against the plaintiff. Whereas an issued rule states something definite about an agency's enforcement expectations, a cost-benefit analysis does not. Therefore, there is insufficient agency action to show a definite adverse impact on an agency.

The problems with standing also indicate that the concept of ripeness might prohibit this type of challenge to the EPA's cost-benefit analysis.⁷² Under the test in *Abbott Laboratories v. Gardner*,⁷³ in considering the ripeness of an issue a court should consider the "fitness" of the issue for review, and the "hardship" of the parties in withholding consideration.⁷⁴ The Court in *Abbott Laboratories* noted that the issue was fit for review because it was purely legal and did not require the consideration of factual circumstances.⁷⁵

A court does not have to wait for an agency to proceed against someone in a final enforcement action before an issue is ripe for review or the court can offer relief. In many cases, facts are fully present before enforcement begins. In *Columbia Broadcasting System, Inc. v. United States*,⁷⁶ the Supreme Court held reviewable a Federal Communications Commission (FCC) regulation setting forth proscribed contractual arrangements even though the FCC had not yet acted upon the rule.⁷⁷ In that case, the agency had actually adopted a formal rule outlining its intentions and the applications of those intentions to the parties. In the case of section 3401 of the Proposed H.R. 9, on the other hand, whether a cost-benefit analysis

71. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940)).

72. *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967).

73. *Id.* at 149.

74. *Id.*

75. *Id.*

76. 316 U.S. 407 (1942).

77. *Id.* at 425.

has been done properly is much more a factual question that has yet to be considered by the agency, and one in which even the potential application to the parties has not even been decided. Although if this legislation passes, Congress would have clearly intended for litigants to be able to challenge the cost-benefit analysis directly, there would be little way in which a court could offer definite relief. If a court were to defer to Congress to allow this kind of review, the ripeness analogy indicates why standing would not be present. Due to the many factors that the EPA is to use in making decisions and its discretion in weighing them, simple determination of what is cost-beneficial does not automatically determine what regulation will be adopted. Ultimately, because the agency would not have issued any basic rule or intention, the courts would not consider the issue to be ripe for review, and therefore there would also be no definite harm to satisfy the standing requirement.

Even if judicial review were to occur at this stage, a litigant would not be receiving a particularly new right, just a change in the timing of that right's execution. Challenging an agency analysis of a regulation's merits can already occur when a litigant attacks the final agency action. If a challenge to the cost-benefit nature of the regulation were to be made at an earlier time, collateral estoppel would prohibit a second consideration of that issue. Thus section 3401 would simply move up the timing of consideration of the issue. That collateral estoppel applies to agency action is not in dispute.⁷⁸ If the circumstances had changed factually between the first challenge of the analysis and the final rule, thereby limiting the applicability of collateral estoppel, this same factual alteration would argue for the inability to consider the issue at the time proposed in this legislation because of ripeness.

In any event, a challenge to the merits of a regulation is difficult to pursue in court at any time. Courts are loath to review an agency's discretionary rulings. Although Congress would, with the passage of this statute, clearly provide for judicial review, the courts have been reluctant through the years to overturn agency actions where they have no basis on which to review the decision.⁷⁹ Here Congress says that cost-benefit analysis should be scientifically supportable. If a court is looking for scientific certainty, however, and the agency does

78. WARREN FREEDMAN, *RES JUDICATA AND COLLATERAL ESTOPPEL* 69-70 (1988).

79. *Hahn v. Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970).

not bear the burden of proof, the court has no structure with which to analyze whether the agency has correctly identified the values that are subject to scientific uncertainty or how the agency has resolved the differences in studies that may result from scientific uncertainty.⁸⁰ Such a requirement might even be overturned as an unconstitutional delegation of power to an agency because of the lack of standards to guide the agency's substantive discretion when faced with scientific uncertainty.⁸¹

In the face of uncertainty and the need for substantive analysis, such issues are still committed to the discretion of the agency. Congress has given the courts no more direction on how to resolve such conflicts than they had before, leaving such decisions in the agency's discretion.

7. Summary

The impact of the cost-benefit analysis requirement on environmental regulation has probably been overblown. Even if the requirements are fully implemented, the agency's own regulatory interpretation of cost-benefit analysis and problems with the procedural changes proposed could ensure that current environmental regulation will remain relatively unchanged.

B. Compensation of Parties for Reductions in the Value of Property Brought About by Federal Regulation— "Private Property Rights Protection and Compensation" Title

The next part of Proposed H.R. 9 that has caused concern to environmentalists is the so-called "Private Property Rights Protections and Compensation" title.⁸² This provision seeks to require an agency

80. For a discussion of how different standards of proof would allow the same set of evidence to support different health conclusions, see Victor B. Flatt, *OSHA Regulation of Low-Exposure Carcinogens: A New Approach to Judicial Analysis of Scientific Evidence*, 14 U. PUGET SOUND L. REV. 283, 293-304 (1991).

81. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 687-88 (1980) (Rehnquist, J., concurring). Justice Rehnquist would have invalidated as an impermissible delegation of power the first sentence of the Occupational Safety and Health (OSH) Act, 29 U.S.C. § 655(b)(5) (1988), which provides that the Secretary shall select a standard which provides for human health, because in the face of scientific uncertainty such a grant is broad and has no standards to guide the Secretary. See *Industrial Union Dep't*, 448 U.S. at 675 (Rehnquist, J., concurring).

82. Proposed H.R. 9, *supra* note 4, §§ 9001-9002; Introduced H.R. 9, *supra* note 4, §§ 9001-9004. The division as passed by the House was retitled the "Private Property

to reimburse a party for any lost market value of that party's land—greater than ten percent—resulting from agency action. Specifically, this section provides that

[a] private property owner is entitled to receive compensation in accordance with this section for any reduction in the value of property owned by the private property owner, that —(A) is a consequence of a limitation on an otherwise lawful use of the property imposed by a final agency action; and (B) is measurable and not negligible.⁸³

Although the bill has been limited since the original proposal to only apply to certain environmental laws, this discussion will examine the impact of the full proposed law on environmental regulation.⁸⁴ The discussion of general environmental impacts applies equally to the impacts on specific areas of environmental regulation that might be covered by any successor proposal to the original Contract with America.

1. What is the potential impact of such required compensation on environmental regulations?

Under current constitutional law regarding "takings," if a regulation advances legitimate state interests—without constituting a physical invasion of the property—a compensable taking occurs only if no marketable value remains in the property, and then only if the

Protection Act of 1995." Passed H.R. 9, *supra* note 4, §§ 201-210. See *supra* note 9 for the text of this proposed legislation.

83. Proposed H.R. 9, *supra* note 4, § 9001. The version introduced in the House stated that "[a] private property owner is entitled to receive compensation from the United States in accordance with this section for any agency infringement or deprivation of rights to property that is owned by the private property owner." Introduced H.R. 9, *supra* note 4, § 9002(a)(1).

The House passed a more limited version:

The Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner, the Federal Government shall buy that portion of the property for its fair market value.

Passed H.R. 9, *supra* note 4, § 203(a).

84. In order to assure passage in the House, the bill was limited to certain environmental laws, such as the Endangered Species Act, wetlands regulation, and water rights compacts. See Kenworthy, *supra* note 2, at A3.

regulation is not an exercise of a traditional police power.⁸⁵ If the regulation is a particular exaction against an individual property or a physical invasion of property, the Fifth Amendment may require compensation for any reduction in economic value of the property.⁸⁶ Thus, under current constitutional doctrine, legitimate government regulation of a general nature may lessen the value of land without the action being a "taking" that would require compensation. In theory at least, this proposed bill seeks to expand the rights of individuals not to have private property taken without just compensation by legislatively providing reimbursement for any major diminution in the market value of land caused by regulation.⁸⁷

The theory behind this and other proposals of the Contract with America is that while environmental protection is a worthy goal, the government should only allow cost-beneficial levels of environmental regulation. The government should only allow regulation that we—the public—are willing to pay for based on an expectation of benefits from the regulation. According to the logic behind the proposed bill, to do otherwise is an inefficient use of our nation's public and private resources. In that sense, the proposed compensation legislation is seen as a companion to the requirement of a cost-benefit analysis. Presumably if our government is forced to purchase environmental, or health and safety, regulations, it will only purchase those that are cost-effective or cost-beneficial. In a democracy the people will decide whether it is worth raising taxes in order to gain environmental protection. The theory that people should receive compensation for what government takes away from them is a good and a fair one. Certainly, our founders were concerned enough about the issue that they passed the Fifth Amendment to prohibit takings without compensation.

The problem is that the reality behind the compensation provision does not work as well as the theory. Defining a reduction in value attributable to regulation is difficult, and, if the law is interpreted broadly, all kinds of regulations, including important environmental regulations, may require compensation even if fairness would not require it. Depending on the definition of market value, most regulations controlling any land use could potentially diminish the market value of that property. As the Supreme Court reaffirmed

85. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).

86. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994).

87. Proposed H.R. 9, *supra* note 4, § 9001(a)(1).

in *Dolan v. City of Tigard*, “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁸⁸

Land has little or no intrinsic value; its value stems from the bundle of rights for its use granted by the state.⁸⁹ Historically, this has brought little conflict in market-valued restriction because the uses to which most people wished to put their land did not infringe on the rights of others, so the state did not limit these rights of use. However, increasing urbanization and higher population density has resulted in heightened control over land use. Nevertheless, this control has historically been exercised in a way to benefit all people by controlling externalities of land usage. The theory of zoning is that separating incompatible uses, or controlling the externalities of land use, will increase the value of all parcels.

Despite the beneficial nature of such controls overall, these controls do change the potential uses and market value of land. However, this is not the kind of regulation that requires compensation for purposes of fairness. Property limitations designed to control externalities do not normally cheat anyone out of property without just compensation. In purchasing land, the uses to which it can be put are generally reflected in the market price. Thus, if a couple purchases a plot of land in a single family zone for \$60,000, they are not cheated simply because if they could build a high-rise on the plot, the land would be worth \$300,000. Of course, people may believe that the uses of land may change in the future, and they may purchase land based upon this speculation. The market will reflect some amount of speculation, and the market price may go up or down based on the fate of that speculation. But fairness does not require compensation for a failed speculation.

Although the price of land has not always reflected the environmental restrictions to which land is subject, those restrictions existed in some form—at least philosophically—because of limitations on the use of land due to the nuisance doctrine, which prohibits the use of land in a way that is detrimental to others. Most environmental laws

⁸⁸. *Dolan*, 114 S. Ct. at 2316 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

⁸⁹. *Lucas*, 112 S. Ct. at 2899; Victor B. Flatt, *A Brazen Proposal: Increasing Affordable Housing Through Zoning and the Eminent Domain Powers*, STAN. L. & POL'Y REV., Spring 1994, at 115, 119.

can be justified as providing protection to the public from activities of others.

Unfortunately, though environmental insults are similar to nuisances, they are not always captured by the theory of private nuisance law. Sometimes it is difficult to determine which particular person or group of persons is responsible for the environmental injury to another, making it nearly impossible to prove the "causation" element necessary for tort recovery in nuisance actions.⁹⁰ For instance a party might, by constructing impermeable surfaces or filling a wetland, cause flooding on his neighbors' property. But when so many people do the same thing it would be very difficult to prove causation of the flooding which would lead to a recovery in a nuisance action.

Under the proposed legislation, however, payment would be required to compensate for a control of this type of nuisance.⁹¹ If the government tries to regulate the filling of wetlands, it would have to pay the landowner who forgoes the filling of the wetlands for the "loss" in value that occurs by preventing this fill.⁹² This is true even if the owner should have known that developing the land might cause harm to others and if that knowledge was reflected in the price of that land.⁹³

Thus, this law essentially provides property owners the maximum value of their land because it prohibits regulation which would lower that value without compensation, even if the regulation were already in place and were simply to control harmful externalities of land use. In essence, this is no different from saying that if any government

90. Flatt, *Unbroken?*, *supra* note 53, at 1717; *see also* Lettie M. Wenner, *Environmental Policy in the Courts*, in *ENVIRONMENTAL POLICY IN THE 1990S*, at 189, 190 (Norman Vig & Michael Kraft eds., 1994) (stating that the plaintiff's burden of proof—to show that each injury is the fault of a particular polluter—is extremely difficult to prove).

91. The Contract for America proposed that "[a] private property owner is entitled to receive compensation . . . for any reduction in the value of property . . . that . . . is a consequence of a limitation on an otherwise lawful use of the property imposed by a final agency action." Proposed H.R. 9, *supra* note 4, § 9001(a)(1)(A). As introduced, the legislation entitled the private property owner to compensation from the federal government for "any agency infringement or deprivation of rights . . . that . . . is imposed by a final agency action on a use of property that would be lawful but for the agency action." Introduced H.R. 9, *supra* note 4, § 9002(a). The bill as passed, however, states that "[i]f a use is a nuisance as defined by the law of a State . . . no compensation shall be made . . . with respect to a limitation on that use." Passed H.R. 9, *supra* note 4, § 204.

92. *See* Proposed H.R. 9, *supra* note 4, § 9001(a).

93. *Id.*

regulation had an impact on the price of a stock, the government should compensate the owner of that stock.⁹⁴

Not only would this legislation require compensation for regulations for which fairness would not require compensation, but this legislation might also give a windfall to wealthy individuals and *overcompensate* them at the expense of the community. The way the market works at the moment, environmental harms—and environmental laws and controls or potential environmental laws and controls dealing with those harms—are already incorporated into the value of real property.⁹⁵ If compensation were to be required for environmental regulations, the market would no longer necessarily value these certain environmental harms as bad, increasing the value of land and giving a windfall to current property owners or restoring the value of the land of property owners too ignorant to recognize the presence of an environmental hazard on the property at the time of purchase.⁹⁶

This system of required compensation creates a paradox in the market that is unfair to the community. The very act of compensating the public inflates the market value. Anything that has historically lowered the market value of a property may require compensation, thus skewing the market that is supposed to ensure just compensation and, in turn, making environmental protection more expensive than it should be.⁹⁷

The impact of this law on environmental regulation could be devastating. It seems to go beyond the intentions of fairness to landowners. By requiring compensation for costs attributable to regulation, compensation could apply to all environmental regulations,

94. For example, if the FDA does not approve a drug from Company *D* because the compound is found to be toxic, and the stock market reacts to that news by dropping the price per share of *D*'s stock from \$55 to \$10, the impact of a law such as this one might be that the government would owe all shareholders \$45 per share.

95. These environmental harms include drainage problems, steep slopes, and sewer and water service.

96. It is possible that the value of land might not go up. If incompatible uses were allowed to mingle, total value might go down, resulting in everyone being worse off. See discussion of zoning theory, *supra* note 89 and accompanying text.

97. Since the law interferes with internalization of external market factors that should be reflected in the price of land—that is, environmental harms that are attributable to the use of land—the land is “overpriced” and encourages environmental overuse to the detriment of all, thereby increasing the “cost” of environmental protection from the economic optimum. See the discussion of the “tragedy of the commons,” ANDERSON ET AL., *supra* note 19, at 28-29.

even those designed to require landowners to pay for external environmental harms caused by their use of the land. Correct economic incentives to control environmental harms will be skewed, and even environmental regulation that society is willing to pay for may cost far more than necessary.

2. Reducing the legislation's potential impact on environmental regulations

Agency and court interpretations may reduce the potentially broad impact of this bill on environmental regulations.

a. environmental regulations may control "unlawful activities"

It may be possible to lessen the impact of this law on environmental regulations by arguing that environmental regulations aim only to control unlawful activities as that term is used in the proposed statute.⁹⁸ The proposed statute specifically states that compensation would only be provided for a reduction in value occurring from any lawful activity.⁹⁹ Although this phrase might be interpreted as

98. See, e.g., *Lucas*, 112 S. Ct. at 2921 (Stevens, J., dissenting) (noting that "a regulation that renders property valueless is not a taking if it prohibits uses of the property that were not 'previously permissible under relevant property and nuisance principles.'" (citation omitted)).

99. Proposed H.R. 9, *supra* note 4, § 9001(a)(1).

A private property owner is entitled to receive compensation in accordance with this section for any reduction in the value of property owned by the private property owner, that—

(A) is a consequence of a limitation on an otherwise lawful use of the property imposed by a final agency action; and

(B) is measurable and not negligible.

Id. The version introduced in the House read:

A private property owner is entitled to receive compensation from the United States in accordance with this section for any agency infringement or deprivation of rights to property that is owned by the private property owner.

(2) Agency infringement or deprivation of rights to property defined.

—For purposes of paragraph (1), the term "agency infringement or deprivation of rights to property" means a limitation or condition that—

(A) is imposed by a final agency action on a use of property that would be lawful but for the agency action, and

(B) results in a reduction in the value of the property equal to ten percent or more.

Introduced H.R. 9, *supra* note 4, § 9002(a). The final version as passed read:

The Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner,

simply avoiding compensating a party for carrying on an illegal, traditionally criminal activity—for example, growing marijuana—if unlawful activity is interpreted broadly, it is obvious that many of our environmental regulations control activities that are prohibited by our environmental laws. For instance, it is unlawful to take a member of an endangered species.¹⁰⁰ Therefore, are regulations designed to prohibit that taking also precluding the exercise of any otherwise lawful activity? No, because the activity is unlawful.

The language *passed* by the House seems to anticipate that argument by requiring compensation for a regulation specifically taken pursuant to a regulatory law.¹⁰¹ Although not in the version of this legislation passed by the House, if this law is ultimately enacted, it will almost certainly include a provision allowing regulation that controls “otherwise unlawful activity.” It is still possible that the activities controlled by environmental regulations would not otherwise be considered lawful activities because it is possible to characterize them as public nuisances, which are by definition “unlawful” activities.¹⁰² Even if language excusing regulation that controls otherwise unlawful activity is not ultimately included, because environmental laws do control some activities that could be considered a nuisance, one could argue that environmental regulations may be created to curb traditionally “unwanted” activities, not simply to enforce a “regulatory” law.

Environmental insults have often been equated with public nuisances.¹⁰³ Prior to the enactment of environmental laws, public nuisance law provided causes of action for emissions from an asphalt plant¹⁰⁴ and for municipal water pollution.¹⁰⁵ As early as 1972, scholarly articles theorized that most of the then newly discovered environmental harms would be actionable as public nuisances.¹⁰⁶

the Federal Government shall buy that portion of the property for its fair market value.

Passed H.R. 9, *supra* note 4, § 203(a).

100. See 16 U.S.C. § 1538(a)(1)(B) (1994).

101. See *supra* note 99.

102. See John W. Wade, *Environmental Protection, the Common Law of Nuisance and the Restatement of Torts*, 8 FORUM 165 (1972).

103. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 619-20 (5th ed. 1984).

104. *Karpisek v. Cather & Sons Constr.*, 117 N.W.2d 322 (Neb. 1962).

105. *New Jersey v. City of New York*, 283 U.S. 473 (1931).

106. John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241, 275-76 (1972).

Indeed, the range of public nuisance has been described as "co-extensive with the police power itself."¹⁰⁷

Nothing in the legal definition of nuisance would preclude its application to these traditional environmental harms. The finding of a nuisance requires physical invasion of the property.¹⁰⁸ Although this requirement may preclude suits for aesthetic harm, physical invasion is present in most environmental insults. For instance, broad interpretations of the physical invasion requirement have included invasion by air pollution particles.¹⁰⁹

The traditional view also holds that a public nuisance must not be merely an unlawful activity, but actually a criminal one.¹¹⁰ But as early as the 1970s, academic discussions speculated that deleterious impacts on the community do not have to be explicitly "criminal" under state law to constitute a public nuisance;¹¹¹ it is sufficient if a statute, ordinance, or regulation bars the activity.¹¹² Prior to the enactment of major federal environmental laws, an understanding existed that there could be a federal common law of nuisance for environmental harms.¹¹³ Federal environmental laws have taken the place of these federal common laws.¹¹⁴ Since environmental harms were considered nuisances prior to the enactment of these laws, however, these harms have always been prohibited or illegal activities. Therefore, environmental regulations may be the kind of regulations that do not restrict otherwise lawful activity and therefore do not have to compensate for the restrictions under the proposed law. Certainly the courts would have to extend great deference to an EPA interpretation of otherwise lawful activities as excluding polluting activities.¹¹⁵

Arguably the legislation might be void because the government has an affirmative responsibility to control public nuisances or to exercise its police power when the public good requires it. Public nuisances are not particular to any one individual but instead may

107. John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 12 (1993).

108. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1977).

109. ANDERSON ET AL., *supra* note 19, at 709.

110. KEETON ET AL., *supra* note 103, at 617-18.

111. Bryson & Macbeth, *supra* note 106, at 247-48.

112. *Id.*

113. *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972).

114. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

115. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

affect the community as a whole.¹¹⁶ Theoretically, individuals cannot sue in court to enjoin public nuisances unless they have suffered special damages, because the defendant would face numerous lawsuits for the same conduct.¹¹⁷ Presumably, the community as a whole can act through its government to enjoin those nuisances. However, under the proposed legislation, the government can only enjoin those nuisances by paying for them, financially burdening citizens to vindicate their rights to be free from nuisances. To the extent that this policy enjoins or limits the discretion of a state to counter environmental hazards, it may be an impermissible infringement on the police power of the state. Public trust doctrine implies that the state has a duty to prohibit harm to the community as a fiduciary for the public good, and this theory includes protection of natural resources.¹¹⁸ Many commentators have suggested that the public trust doctrine compels the government to protect the environment.¹¹⁹ One might argue that this doctrine prevents any proposed legislation from interfering with that requirement.

Moreover, considering environmental harms as unlawful nuisances that do not require compensation would not be unfair to landowners. In terms of the constitutional takings doctrine, if an activity is a nuisance normally regulated by the police power of a state, a party is presumed to be on notice that the activity could be regulated or prohibited without compensation.¹²⁰ Landowners who have notice of a historically regulated activity presumably will suffer no serious market loss as a result of the exercise of that regulation, because they obtained the property conscious of possible governmental limitations on its use.

*b. the benefits of environmental regulations may offset
the accompanying costs*

Even if these nuisance theories would not render the law inapplicable to environmental regulations, the EPA might try to preserve its regulatory power without compensating for any impact on

116. See RESTATEMENT (SECOND) OF TORTS § 821B (1977).

117. See *id.* § 821C.

118. Bryson & Macbeth, *supra* note 106, at 275-76.

119. See, e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (arguing for the use of the public trust doctrine for resource management).

120. *Lucas*, 112 S. Ct. at 2899-2900.

the property's market value by *offsetting* the purported costs of the regulation by the economic benefit received. Under the state's power of eminent domain, the theoretical model for this legislation, any special increase of or benefit to land value resulting from a taking is offset from the loss caused by the taking when calculating just compensation.¹²¹ How special the value increase must be is the subject of some contention. Environmental laws that benefit many people would not be of special or particularized benefit; nevertheless, the concept has been applied to regulations that give reciprocal benefits from mutual restrictions.¹²² Richard Epstein, a strong proponent of governmental compensation for regulatory diminution in value, argues that any number of use restrictions and regulations may not require compensation because of implicit "in-kind" compensation.¹²³

The wording of the proposed bill also suggests a broad understanding of offsetting benefits: It explicitly states that the fair market value is to be determined by subtracting the value of the property if the agency action were implemented from the value of the property if the agency action were not implemented.¹²⁴ In certain circum-

121. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1342 n.10 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991); *United States v. Trout*, 386 F.2d 216, 221-23 (5th Cir. 1967); see also Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 846-47 (1989) ("When a portion of a tract of land is condemned by the federal government and the remaining land is increased in value as a result of the government action, courts will frequently require that the compensation paid to the landowner for the portion taken be decreased by the value of the benefit to the remainder.").

122. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting) ("[I]t is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefitted by another.").

123. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 195-215 (1985).

124. Proposed H.R. 9, *supra* note 4, § 9001(c). The compensation would be: "the difference between—(1) the fair market value of the property determined based on the value of the property if the agency action were not implemented; minus (2) the fair market value of the property determined based on the value of the property if the agency action were implemented." *Id.* As introduced in the House, the bill defined the reduction in the value of private property as:

the difference, if greater than zero, between—

(A) the fair market value of property, as determined based on the value of the property if an agency action referred to in paragraph (2) or (5) of section 9002(a), as the case may be, were not implemented; minus

stances the market is well-attuned to taking all sorts of value into account; for instance, the market could recognize the value of land with and without pollution control.¹²⁵

The practice of requiring a special assessment for a special benefit, well-accepted in our jurisprudence, also supports the use of offsets.¹²⁶ If a local improvement enhances the neighborhood, the neighborhood should pay for it.¹²⁷

An environmental regulation such as a prohibition against filling wetlands may harm the property value by limiting the amount of buildable space. Conversely, the regulation could help preserve property values by protecting wetlands as a source of drainage on other properties, which would possibly restrict flooding on the burdened property.

Would this be a close enough benefit from the regulation to qualify the allowance of offsets? It depends on the meaning of the language of the proposed bill referring to impacts on values. If one is simply referring to market values, the proven value of a program does not have to relate exactly to the restrictions it imposes as long as the marketplace recognizes the value increase. Under takings jurisprudence, recognition of a legislative action as a legitimate exercise of police power and not an illegal uncompensated taking requires a relationship in kind and in proportion between the proposed development and the exaction imposed.¹²⁸ However, this exact specificity has not yet been imposed upon mere general regulatory burdens, and in any event it relates more to the issue of whether the regulation is a legitimate exercise of the police power, not to the value of compensation.

Certainly, allowing any offset that can be reflected and proven in market value is logical. Moreover, such an interpretation does not oppose congressional intent concerning this part of the proposed law.

(B) the fair market value of property, as determined based on the value of the property if an agency action referred to in paragraph (2) or (5) of section 9002(a), as the case may be, were implemented.

Introduced H.R. 9, *supra* note 4, § 9004(7). No similar provision appears in Passed H.R. 9.

125. Although if land were broadly harmed by loss of pollution controls, the market might not reflect this since the supply of dollars to purchase land might be relatively unchanged, and might bid up the price of available land to its current, environmentally protected level.

126. See *Illinois Cent. R.R. v. Decatur*, 147 U.S. 190, 199 (1893).

127. *Id.* at 198.

128. *Dolan*, 114 S. Ct. at 2318-21.

Therefore, the EPA could and should have the flexibility under *Chevron* to interpret the law to allow offsets in calculating total reduction in value.¹²⁹ This interpretation would preserve the fairness in regulation which was the purported driving force behind the proposal of this law.

Regulatory agencies could try an even larger offset theory by considering all environmental restrictions as part of a general environmental protection scheme. In such a case, the EPA might claim—and presumably environmentalists and the EPA actually believe—that the sum total benefit of all environmental regulations exceeds their cost, and therefore benefits would more than compensate for burdens. The difficult practical issue would be tying the benefits to the particular market value of a property as the market may have difficulty accounting for a theoretical reduction in value. It is not difficult to see, however, that a piece of land in a location with huge amounts of air pollution might have little value because it is uninhabitable. Michelman has suggested that such a broader offset theory has been used to justify regulations without compensation under the eminent domain statute:

Efficiency-motivated collective measures will regularly inflict on countless people disproportionate burdens which cannot practically be erased by compensation settlements. In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed evenly enough so that everyone will be a net gainer.¹³⁰

Proving this broader offset in a court challenge requesting compensation would be difficult. Many of these benefits accrue to the parties who do not pay the costs. Moreover, explicit studies tying benefits to the market value of land would be very difficult to produce because few markets exist in a completely unregulated environment. The approach would be difficult for an agency to implement. Besides the difficulty in calculations, it also would require some procedural creativity to discuss all environmental regulations as one joint-related regulation. Nevertheless, it might be worth an attempt by the EPA to try and limit the so-called reduction in market

129. *Chevron*, 467 U.S. at 843.

130. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1225 (1967).

value occurring from a regulation by considering all regulations together.¹³¹

A similar agency approach would involve the agency charging customers for their services to make up any monetary payouts caused by the proposed bill. This charge might be a waiver of compensation rights in order to receive benefits from other environmental laws or a direct assessment on parties that benefit from environmental controls, similar to special assessments.

Local jurisdictions often require impact fees from new developments or tie some services, such as sewer treatment, to the cost of environmental controls.¹³² Similarly, the EPA might be able to secure an impact fee of a waiver of market value compensation in order to allow someone to commit an environmentally polluting act that is otherwise legally prohibited. If a company wanted to expand a coal-fired plant in a dirty air area requiring a new air permit, the EPA might be able to secure a waiver of compensation for the benefit of its overall air pollution control scheme as the price of granting the new permit. The EPA might even secure a waiver of compensation for restricting development on wetlands as the price of a new air permit. Such a plan would not really short circuit the point of this law because the companies or individuals would presumably enter into it willingly and recover the market value in another arena. The total benefit to a company from an action must be higher than without it or the company would not have entered into the particular transaction. If companies enter into this plan voluntarily to seek market profits, the arrangement is not unfair. Congress has not addressed this issue particularly, and nothing within the proposed legislation seems to forbid such an interpretation. Therefore, under *Chevron*, the EPA could interpret the rule in this way.¹³³

An agency could also directly assess benefit impact fees on companies and individuals in order to compensate others for market value losses that would accompany regulation. Local jurisdictions often use such a scheme in the form of public improvement districts to assess the cost of a public improvement to the people who benefit

131. In addition, it has the added benefit of focusing the agency on cross-media and related forms of pollution and its effects on the environment and livability.

132. Daniel S. Huffens, *Dolan Meets Nollan: Towards a Workable Takings Test for Development Exactions Cases*, 4 N.Y.U. ENVTL. L.J. 30, 35 (1995).

133. *Chevron*, 467 U.S. at 842-43.

even when the benefits cannot be determined exactly.¹³⁴ Assuming that the proposed improvement is cost-beneficial, there should be sufficient revenue from those benefitting from an improvement, such as cleaner air, to subsidize any of the costs of the program required to pay for the loss of market value for another. This approach has the advantage of directly having those who benefit from a regulation, or at least some of those who benefit, pay for it. Unfortunately, agencies such as the EPA do not directly have the legal power to impose such assessments, making it difficult to impose assessments on all who benefit from a program. However, many agencies do have the power to impose fees for administrative costs of their programs,¹³⁵ and if the new market differential payouts could be considered regulatory costs or costs of administering the program, then perhaps fees could be assessed against some of the people who benefit.

For instance, under the Federal Water Pollution Control Act,¹³⁶ all point sources of water pollution must be permitted.¹³⁷ There is a charge for such a permit to reflect the benefits of providing the clean water permit system,¹³⁸ and the charge could also reflect the administrative costs of a payout to reduce market impact.

Of course all of these schemes suffer from the difficulty of matching the benefits of a program to those individuals or companies that would bear the cost. Theoretically, even if agreeing to an environmental regulatory scheme were profitable for a company or individual, or even if a landowner receives benefits from a regulation, is it fair to force only the parties who are subject to regulation to pay for the benefits to society as a whole? It seems that this is one of the purposes behind the proposed bill—to make the public pay for the environmental protection it wants and not to have the costs fall disproportionately on one group.

This again poses a question of societal values, and ultimately, of course, the people decide upon the values. Implementation of this bill as proposed, without allowing agencies to use offsets in calculating the

134. Nancy J. Hoffmeier Zamora, Comment, *New Financing Strategy for Rapid Transit: Model Legislation Authorizing the Use of Benefit Assessments to Fund the Los Angeles Metro Rail*, 35 UCLA L. REV. 519, 520-21 (1988).

135. See, e.g., 42 U.S.C. § 7661a(b)(5)(E) (Supp. V 1993) (authorizing the EPA to impose permit fee requirements under the Clean Air Act).

136. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

137. *Id.* § 1342(a).

138. See *id.* § 1342(a)(5).

market value, presents the American people with a direct choice of how much environmental protection is wanted. As proposed, this law would have required compensation even for zoning, which has partial takings impacts implicit in every regulation, and it may provide an unexpected windfall depending on the method of calculating the market price.¹³⁹ The Republican majority was probably not elected for its position on the environment, and if this legislation is out of sync, such a proposal may be repudiated. Thus, there may be a closer examination of which values are important. This proposed legislation strongly values the rights of individuals to go beyond the just compensation required by the Constitution in order to compensate individuals without requiring a duty to the community. Ultimately, the effectiveness of this proposal will depend on whether our society values this duty to the community.

c. Limitation on Unfunded Federal Mandates—Title X

The first part of the Job Creation portion of the Contract with America to pass both the House and Senate was the limitation on unfunded federal mandates.¹⁴⁰ This portion of the bill specifies that a federal agency can only enact a federal mandate limiting or dictating the activities of local government to the extent that the federal government pays the costs of the mandate.¹⁴¹ Federal mandates are

139. Richard L. Robbins, *Introduction—Land Use and Zoning: Illinois' LaSalle National Bank Criteria and Municipal Constitutional Liability*, 60 CHI.-KENT L. REV. 1, 7 (1984).

140. John H. Cushman, Jr., *Congress Limits Federal Orders Costly to States*, N.Y. TIMES, Feb. 2, 1995, at A1, B8. See *supra* note 7 for a history of the unfunded mandates provision.

141. Proposed H.R. 9, *supra* note 4, § 10502. This provision was removed to the Unfunded Mandates Bill. Unfunded Mandates Reform Act of 1995, 104 Pub. L. No. 104-4, § 2, 109 Stat. 48, 48-49. The new statement of policy reads:

The purposes of this Act are—

(1) to strengthen the partnership between the Federal Government and State, local, and tribal governments;

(2) to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities;

(3) to assist Congress in its consideration of proposed legislation establishing or revising Federal programs containing Federal mandates affecting State, local, and tribal governments, and the private sector by—

(A) providing for the development of information about the nature and size of mandates in proposed legislation; and

(B) establishing a mechanism to bring such information to the attention of the Senate and the House of Representatives before the Senate and the House of Representatives vote on proposed legislation;

defined as any federal program—not related to statutes regarding discrimination or constitutional provisions—that requires a state or local government to “undertake an activity or provide a service.”¹⁴²

(4) to promote informed and deliberate decisions by Congress on the appropriateness of Federal mandates in any particular instance;

(5) to require that Congress consider whether to provide funding to assist State, local, and tribal governments in complying with Federal mandates, to require analyses of the impact of private sector mandates, and through the dissemination of that information provide informed and deliberate decisions by Congress and Federal agencies and retain competitive balance between the public and private sectors;

(6) to establish a point-of-order vote on the consideration in the Senate and House of Representatives of legislation containing significant Federal intergovernmental mandates without providing adequate funding to comply with such mandates;

(7) to assist Federal agencies in their consideration of proposed regulations affecting State, local, and tribal governments, by—

(A) requiring that Federal agencies develop a process to enable the elected and other officials of State, local, and tribal governments to provide input when Federal agencies are developing regulations; and

(B) requiring that Federal agencies prepare and consider estimates of the budgetary impact of regulations containing Federal mandates upon State, local, and tribal governments and the private sector before adopting such regulations, and ensuring that small governments are given special consideration in that process; and

(8) to begin consideration of the effect of previously imposed Federal mandates, including the impact on State, local, and tribal governments of Federal court interpretations of Federal statutes and regulations that impose Federal intergovernmental mandates.

Id.

142. Proposed H.R. 9, *supra* note 4, §§ 10506(2)(A)-(B), 10506(3)(A)(i); Unfunded Mandates Reform Act of 1995, § 101, 109 Stat. at 50-60 (amending 2 U.S.C. § 658 (1994)). The new law defines a federal mandate as either a “Federal intergovernmental mandate” or a “Federal private sector mandate.” § 101, 109 Stat. at 51-52. Those terms are defined as:

(5) **FEDERAL INTERGOVERNMENTAL MANDATE.**—The term “Federal intergovernmental mandate” means—

(A) any provision in legislation, statute, or regulation that—

(i) would impose an enforceable duty upon State, local, or tribal governments, except—

(I) a condition of Federal assistance; or

(II) a duty arising from participation in a voluntary Federal program, except as provided in subparagraph (B)) [sic]; or

(ii) would reduce or eliminate the amount of authorization of appropriations for—

(I) Federal financial assistance that would be provided to State, local, or tribal governments for the purpose of complying with any such previously imposed duty unless such duty is reduced or eliminated by a corresponding amount; or

(II) the control of borders by the Federal Government; or reimbursement to State, local, or tribal governments for the net cost associated with illegal, deportable, and excludable aliens, including court-mandated expenses related to emergency health care, education or criminal justice; when such a reduction or

In addition, the bill requires study of past federal mandates with the objective of altering or suspending current unfunded federal mandates that "are not vital to public health and safety."¹⁴³ Thus, in theory, the bill prevents any agency enforcement of federal mandates, past or present, that are not funded.

3. How does this bill affect environmental regulations?

This bill has a mixed impact on environmental regulations. Where federal programs impose requirements on states to enforce laws against private polluters, the impact should not be too great due to the way these programs are structured. Some environmental laws and regulations allow a state to set up a bureaucracy to tailor enforcement.¹⁴⁴ These laws and regulations would not necessarily

elimination would result in increased net costs to State, local, or tribal governments in providing education or emergency health care to, or incarceration of, illegal aliens; except that this subclause shall not be in effect with respect to a State, local, or tribal government, to the extent that such government has not fully cooperated in the efforts of the Federal Government to locate, apprehend, and deport illegal aliens;

(B) any provision in legislation, statute, or regulation that relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority, if the provision—

(i)(I) would increase the stringency of conditions of assistance to State, local, or tribal governments under the program; or

(II) would place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding to State, local, or tribal governments under the program; and

(ii) the State, local, or tribal governments that participate in the Federal program lack authority under that program to amend their financial or programmatic responsibilities to continue providing required services that are affected by the legislation, statute, or regulation.

....
(7) FEDERAL PRIVATE SECTOR MANDATE.— The term "Federal private sector mandate" means any provision in legislation, statute, or regulation that—

(A) would impose an enforceable duty upon the private sector except—

(i) a condition of Federal assistance; or

(ii) a duty arising from participation in a voluntary Federal program; or

(B) would reduce or eliminate the amount of authorization of appropriations for Federal financial assistance that will be provided to the private sector for the purposes of ensuring compliance with such duty.

Id.

143. Proposed H.R. 9, *supra* note 4, § 10503(a)(2)(E); Unfunded Mandates Reform Act of 1995, § 302(a)(3)(D), 109 Stat. at 68.

144. *See, e.g.*, National Pollutant Discharge Elimination System, 33 U.S.C. § 1342 (1988

fall under the provisions of this bill. Even though these provisions require state outlays to operate the state enforcement programs, these laws and regulations merely allow a state to run a program, they do not require it.¹⁴⁵ Of course, there are incentives for a state to take on this responsibility—primarily the expectation that federal enforcement programs by an agency such as the EPA would be much more draconian and expensive for citizens of the state. But merely because it may be preferable for a state to take on a costly program does not elevate the statutes or regulations allowing such programs into mandates. Moreover, the provisions allowing for state enforcement seek to preserve flexibility at the local level, a concept generally favored by the authors of the Contract with America, and these provisions would likely be seen as voluntary flexibility, not unfunded federal mandates.

Unlike the Clean Water Act or the Resource Conservation and Recovery Act, the Clean Air Act includes more stringent provisions requiring state enforcement of programs and does *require* each state to propose and carry out an air pollution permitting plan.¹⁴⁶ However, since statutory authorization and requirement of application fees for state services provide funding, this type of program is not likely to receive criticism as an unfunded federal mandate.¹⁴⁷

Other required state enforcement provisions in the Clean Air Act probably would be considered unfunded federal mandates. The Clean Air Act requires the creation of a state implementation plan (SIP) for controlling air pollution, with only partial funds granted to a state to create the plan.¹⁴⁸ However, even though this could technically be considered an unfunded federal mandate, it is not clear that the states would desire a change in this program because most states presumably want to maintain flexibility of enforcement to avoid more rigorous enforcement plans by the EPA. Nevertheless, this proposed bill might ultimately allow many states to drop SIPs unless subsidized by the federal government. Of course, the environmental health of these

& Supp. V 1993) (regulating storm water discharge through a permit program); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1988 & Supp. V 1993) (mandating cradle-to-grave ownership of hazardous waste).

145. See 33 U.S.C. § 1344; 42 U.S.C. § 6926.

146. See 42 U.S.C. § 7410(a) (1988 & Supp. V 1993).

147. *Id.* § 7661a(b), (d).

148. 42 U.S.C. §§ 7405, 7410 (1988).

states might be better served by federal enforcement, but the burden on federal funds will make meaningful enforcement problematic.¹⁴⁹

This bill will probably most affect the regulation of state and local governments as polluters in their own right. A requirement that localities undertake specific sewage treatment seems to be an "activity" required by the federal government that might require funding.¹⁵⁰ Newspaper commentators have seen a similar potential effect.¹⁵¹

In this instance, the impact of the unfunded mandates provision is particularly harmful to environmental health because it requires the federal government to pay states and localities not to pollute even though pollution may be an externality associated with voluntary activity. Like the requirement that the government compensate all people for regulations which lower the value of property, this unfunded mandates provision enshrines the principle that individuals or entities, in this case state and local governments, have a "right" to pollute regardless of the harm to others. Just as in the private compensation scheme, this policy also lessens market efficiency by subsidizing pollution and changing pollution levels from the optimum level suggested by a market that internalizes all costs and benefits.

But the effects of the unfunded mandates provision go even farther than the fair compensation provisions of the Contract with America discussed in part II.B. Unlike the requirement for compensation of private landowners for lower property values, there is no opportunity here for the government to offset the benefits of pollution control on costs to the state or local government because market value is not a consideration.¹⁵² Any required costs simply must be paid. Thus, unless paid for by the federal government, this provision

149. When this provision is considered with other provisions of the Contract with America, such as the limitation on regulatory costs to the private sector, it becomes clear that direct federal enforcement of environmental regulations on the private sector may be impossible, amplifying the impact of any reduction in state regulation.

150. 33 U.S.C. § 1311(a) (1988). Although there were grants for treatment plants, *id.* §§ 1281-1299, and some potential waiver of these requirements by statute which ended in 1994, *id.* § 1311(h), federal funding has not been complete for purposes of applying for the sewage treatment facilities required to be in compliance with regulations passed in compliance with the Clean Water Act. Passage of the unfunded federal mandates bill would presumably require funding by the federal government for sewage treatment facilities of localities even though those localities are creating the pollution to be controlled.

151. Ivins, *supra* note 3, at B5.

152. See *supra* part II.B.

ensures no requirement controlling state and local government pollution. Since states and localities are often the biggest polluters in some mediums such as water,¹⁵³ any lessening of the pollution control provisions over these entities could have serious consequences.¹⁵⁴

4. How can the potential impact of the bill on environmental regulation be lessened?

The alternatives for blunting the impact of this provision are limited. The EPA might assert that the regulations requiring states and localities to control pollution may not meet the definition of unfunded federal mandates set out in the statute. As noted above, regulations or statutes that enforce the constitutional rights of individuals are not federal mandates as defined in the proposed bill.¹⁵⁵ Federal statutes and regulations that control governmental pollution might be seen as enforcing individual constitutional due process rights. Prohibiting the federal government from passing laws that internalize harmful externalities to those who cause them might violate the right to due process guaranteed by the Fifth and Fourteenth Amendments.¹⁵⁶

Laws prohibiting the complete compensation of individuals for damages caused by torts against them, which is an externality of an action, may violate due process rights. In *Duke Power Co. v. Carolina Environmental Study Group*,¹⁵⁷ a case which considered this proposition, the Supreme Court held that the Price-Anderson Act's \$560 million limitation on tort damages liability for operators of nuclear power plants in the event of a nuclear accident did not violate due process rights to recovery.¹⁵⁸ The Court's decision was based on the extremely remote likelihood of such an accident and because if the harms caused by such an accident exceeded the established damages limit, Congress would presumably step in to make plaintiffs

153. ANDERSON ET AL., *supra* note 19, at 334-35.

154. Of course, certain federal requirements may not lead to the most efficient control of pollution. Serious questions have been raised about the effectiveness of sewage treatment facilities, particularly given their very high cost.

155. Proposed H.R. 9, *supra* note 4, § 10506(2)(B)(i); Unfunded Mandates Reform Act of 1995, § 4(1), 109 Stat. at 49.

156. U.S. CONST. amends. V, XIV.

157. 438 U.S. 59 (1978).

158. *Id.*

whole.¹⁵⁹ Although the majority stated that it was unsure that a limitation on recovery in tort would raise constitutional due process questions, it did recognize that prior limits on tort recovery had been coupled with a tradeoff of another benefit for potential plaintiffs, presumably because of due process concerns.¹⁶⁰ In capping tort awards in worker's compensation schemes, state courts have noted that to avoid constitutional challenges the limitations must be reasonable and there must be a fair trade off.¹⁶¹

Similarly, the disallowance of control of public nuisance by government entities also interferes with the ability of a person "to be made whole," and may violate the right to due process, an individual constitutional right. Therefore, the proposed bill might be inapplicable to environmental regulations under its own terms.

Nevertheless, this is an unusual interpretation of individual constitutional rights and may not be the interpretation of this bill by an agency or a federal court, leaving the full impact of the bill unchanged. As noted above, if such a bill does go into effect with full force, it will shift much of the cost of pollution control to the federal government. Because it alters appropriate economic incentives for pollution control at the state and local level, it will probably increase the overall costs of the same level of pollution control.

*D. Limitation on the Total Amount of Regulation
Allowed—Title IV—"Establishment of
Federal Regulatory Budget Cost Control"*

Another related part of the Contract with America that has particular implications for the environment and environmental regulatory agencies is the section that seeks to limit the overall cost to the private sector of complying with all federal regulations.¹⁶² Although the general Contract with America discussion proposes to limit the amount of regulation to a certain percentage of the gross domestic product (GDP), the proposed legislation does not make that restriction explicitly.¹⁶³ Instead, the proposed legislation requires (1) that the aggregate cost of private sector compliance with all regula-

159. *Id.* at 84-87.

160. *Id.* at 88-90.

161. See 99 C.J.S. *Workmen's Compensation* § 19 (1958).

162. REPUBLICAN NAT'L COMM., *supra* note 20, at 126, 132.

163. *Id.* at 132.

tions be calculated as a percentage of gross domestic product;¹⁶⁴ (2) that any budget passed after enactment of this bill specify changes in laws and regulations

necessary to reduce the aggregate direct cost to the private sector of complying with all Federal regulations by 6.5 percent for the budget year (as measured against the aggregate regulatory baseline for the first budget year to which this part applies) and by equal percentage increments for each of the outyears (until the aggregate level of such costs does not exceed 5 percent of the estimated gross domestic product for the same fiscal year as the estimated costs that will be incurred);¹⁶⁵

(3) that the aggregate total dollar value that can be imposed as compliance costs on the private sector in any budgetary cycle be allocated between house subcommittees to parcel out to executive branch agencies as total amounts of compliance costs that their regulations can impose on citizens;¹⁶⁶ (4) that it will be out of order for any chamber to propose a law that would impose a cost on the private sector that exceeds the allotted cost of regulation for that sector, unless consideration of that law receives three-fifths approval by that chamber;¹⁶⁷ and (5) that any House committee which imposes costs on the private sector in excess of its allotted totals may face a bill given preferential procedural treatment in the House to "prohibit the issuance of regulations and rules by any agency under the jurisdiction of that committee for the fiscal years covered by that allocation."¹⁶⁸

This bill establishes a maximum regulatory cost burden on the private sector which will be reduced every budget cycle until it is only five percent of the GDP.¹⁶⁹ It requires House subcommittees to

164. Introduced H.R. 9, *supra* note 4, § 4001(a) (adding § 321(a)(2) to the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297). For the text of this section see *supra* note 11.

165. *Id.* (adding § 323(a)(1) to the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297).

166. *Id.* (adding § 323(b) to the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297).

167. *Id.* (adding § 323(c) to the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297).

168. *Id.* (adding § 323(e) to the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297).

169. *Id.* (adding §§ 321(a)(5), 323(a)(1) to the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297).

divide the aggregate regulatory cost burden allowed between them and the executive branch agencies under their jurisdiction. Whether or not existing laws and regulations are specifically cut—and only recommendations are required by this law—if regulations proposed by agencies under the jurisdiction of the various subcommittees will impose compliance costs on the private sector in excess of the assigned allotment, the House alone will be able to vote on a highly privileged bill, subject to little debate, which will prohibit the issuance of *any* new rules and regulations of *any* agency under the jurisdiction of that subcommittee. Moreover, in order to *consider* any new law calling for regulations imposing costs on the private sector in excess of the aforementioned allotment, the consideration must receive three-fifths approval from both Houses.

As written, the bill could have enormous impacts on the effectiveness of federal environmental regulation, but it is probably not constitutional. The bill does not itself specifically force an annual reduction in imposed regulatory burdens on the private sector. Instead the bill requires subcommittees to propose reductions, eliminates all regulation of agencies which fail to meet these goals, and prohibits normal *consideration* of laws that would exceed these burdens. These sections may be unconstitutional because they seek to create changes in the law without going through the constitutionally required process of voting by both Houses and presentment to the President.¹⁷⁰

In *INS v. Chadha*, the United States Supreme Court examined the legislative veto, a process wherein one or both Houses of Congress could overturn a decision by an executive branch agency with which it disagreed.¹⁷¹ Chadha, an Indian national fighting a deportation action, received special permission to remain in the country from an immigration judge, acting on behalf of the Attorney General.¹⁷² Congress subsequently overturned this executive action based on a provision in the law governing immigration decisions stating that if “either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien.”¹⁷³

170. See *INS v. Chadha*, 462 U.S. 919, 944-52 (1983).

171. *Id.* at 923-24.

172. *Id.*

173. *Id.* at 925 (citing 8 U.S.C. § 1254(c)(2) (1988)).

The Supreme Court overturned this provision of the United States Code as unconstitutional, holding it constituted an attempt by the legislature to exercise its legislative authority without having the law approved by both Houses of Congress and presented to the President for signing.¹⁷⁴ The Court reasoned that whether actions of the legislature are "an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'"¹⁷⁵ The Court determined that the action was legislative because it "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch."¹⁷⁶

Here the proposed legislation does not contain an overt legislative veto such as the one at issue in *Chadha*. However, it does not avoid the constitutional problem entirely. Although the proposed legislation is designed to thwart administrative action by apparent procedural, as opposed to legislative, measures of Congress, these procedural measures effectively alter legal rights established previously by the legislative process.

For instance, under the provisions of this bill, a law may have been passed by both Houses and signed by the President, but it might not be enforced at the executive branch level because the implementation would add to the private sector's aggregate compliance cost. If an agency implemented a regulation, in compliance with the validly passed law anyway, thus exceeding its private sector impact allotment and forcing the House subcommittee that has jurisdiction over it to exceed its allotment as well, the House alone could vote to prohibit passage of that regulation and any other new regulations from that agency and any other agencies under the House subcommittee that would exceed its private sector impact allotment.¹⁷⁷ This unilateral veto retained by the House, which prohibits new regulations called for by law, is probably unconstitutional: as in the legislative veto in *Chadha*, this veto allows one house to unilaterally override the legal effect of a validly passed law.

Moreover, the very *consideration* of such a law causing an agency or subcommittee to exceed its allotment cannot take place under the proposed bill without the support of three-fifths of both houses.

174. *Id.* at 952.

175. *Id.* (citing S. REP. NO. 1335, 54th Cong., 2d Sess. 8 (1897)).

176. *Id.*

177. Introduced H.R. 9, *supra* note 4, § 4001(a).

Although this requirement is defined as "procedural," its effect is substantive, therefore it may also be unconstitutional because it is not consistent with the proper procedure specified in the Constitution for passage of laws. Instead of the constitutionally required passage by both houses on majority votes with presentment to the President, this law, by requiring a three-fifths vote for *consideration*, requires that three-fifths of both houses pass certain bills or laws before the President can sign them into law.

A congressional subcommittee's legislative act of altering regulations that affect the private sector by suspending their enforcement may also render the proposed bill unconstitutional. In a concurrence in *Bowsher v. Synar*,¹⁷⁸ Justice Stevens observed that giving control of budgetary reductions or restrictions that could alter national policy to a "component" or "agent" of Congress violated the procedural requirements of Article I— "passage by both Houses and presentment to the President."¹⁷⁹

Here, by forcing congressional agencies to select which validly passed laws they will give effect to based on executive branch agency priorities, Congress is allowing policy to be made by a subagency of the Congress, and not the Congress as a whole. Congressional power under the proposed bill has been limited to an overruling of these provisions by a three-fifths vote, a provision accentuating the true legislative power given to the congressional subcommittees.

To rein in the costs imposed on the private sector by the federal agencies in a constitutional manner, Congress may have to specifically look at regulations to cut them in a particular way. Forcing Congress to make these hard decisions is very difficult and may be the reason behind the allocation of such power to congressional subcommittees and the agencies themselves. But the Constitution requires that laws, or in this case the effective repeal of laws, be made in specific ways.¹⁸⁰ As now constituted, the manner in which this bill seeks to reduce the regulatory burden on the private sector appears unconstitutional.

Even if the law is not unconstitutional, it is potentially a very unwise and blunt instrument from an environmental standpoint

178. 478 U.S. 714, 737 (1986) (Stevens, J., concurring). The Court in *Bowsher* declared the "Gramm-Rudman-Hollings Act" unconstitutional. *Id.* at 736 (holding unconstitutional the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 901 (1988)).

179. *Id.* at 737 (Stevens, J., concurring).

180. *Chadha*, 462 U.S. at 954.

because it fails to distinguish between true outside regulatory costs added to the private sector and the forced internalization of costs which should have been on the private sector in the first place. If a law and accompanying regulations simply forbid a company to pollute the air with recognized hazardous air chemicals like arsenic, under the proposed bill the company's cost of controlling its pollution might be calculated in the aggregate total amount of regulatory compliance cost that can be put on the private sector, even though the company arguably has no right to put toxic chemicals into the air. Since it is an externality of production, economists would argue that such a cost is more properly seen as one that ought to be considered a cost of production, not a regulatory cost from outside.

Nevertheless, this proposed bill does not make that distinction, and, just as with the provisions dealing with compensation for takings and the prohibitions on unfunded federal mandates, this has the effect of giving polluters the *right* to pollute. It is like saying that a law prohibiting a person from stealing costs that person all of the money that could have been stolen, and that the government should therefore reimburse the person for that amount.

However this distinction may provide a way for the subcommittees or oversight agencies such as the Office of Management and Budget (OMB), which may initially calculate compliance costs, to exempt from the calculation all of those costs that could be fairly ascribed to the internalization of costs that should be paid by the private sector. It is not easy to predict whether the OMB or congressional subcommittees would be inclined to view costs in this way, but it is logical, and it makes a distinction between costs imposed to comply with regulations that control lawful activities solely for the benefit of others and costs imposed to internalize effects of activities which would rise to the level of a public nuisance if not controlled. This interpretation would then preserve environmental regulation that simply requires the private sector to control its pollution.

E. Alteration of Procedural Rules and Challenges

In addition to the procedural provisions that deal specifically with agency actions and costs upon the private sector, several separate parts of the Contract with America would alter the procedural rules for challenging or commenting on proposed or final agency action.¹⁸¹

181. I have already referred to the special procedural dispensation given to citizens to

These proposed rule changes will also affect environmental regulations. For lack of a better term, and in recognition of the placement in the Job Creation section, these could be considered collectively as "Lawyer Employment Bills."

1. Creation of additional opportunities for public input

The "Administrative Procedure Reform Act of 1995"¹⁸² alters public interaction with agencies.¹⁸³ Section 7003(a)(2) amends the APA by requiring that public hearings be held on a proposed rule if 100 persons "acting individually" comment on the rule.¹⁸⁴ Also, if 100 people acting individually request an extension of the comment period for a proposed rule, the comment period is to be extended by thirty days.¹⁸⁵ This change to the APA probably has very little substantive impact. More than likely, it may simply delay rules or add costs to the commenting period. Adding costs to the regulatory process may seem odd in a section that is designed to lessen the impact of costs overall, but it shows an apparent distrust for the responsiveness of the executive branch agencies to the general public. On a more cynical note, it is simply a way to hamper the agencies from doing their regulatory jobs effectively.

2. Expansion of regulatory impact analysis

Of greater probable effect is that part of the bill that expands regulatory impact analysis requirement to anything affecting more than 100 persons or totalling more than one million dollars.¹⁸⁶ This

challenge the application of cost-benefit analysis to certain bills and to challenge whether the bills are themselves cost beneficial. See *supra* text accompanying notes 64-81.

182. Introduced H.R. 9, *supra* note 4, §§ 7001-7008. For a further discussion of these sections see *supra* note 12.

183. Proposed H.R. 9, *supra* note 4, § 7003; Introduced H.R. 9, *supra* note 4, § 7003; Passed H.R. 9, *supra* note 4, § 323.

184. Proposed H.R. 9, *supra* note 4, § 7003(a)(2); Introduced H.R. 9, *supra* note 4, § 7003(a)(2); Passed H.R. 9, *supra* note 4, § 323(a).

185. Proposed H.R. 9, *supra* note 4, § 7003(b); Introduced H.R. 9, *supra* note 4, § 7003(b); Passed H.R. 9, *supra* note 4, § 323(b).

186. Introduced H.R. 9, *supra* note 4, § 7004(b). Passed H.R. 9 would amend title 5 of the U.S.C. to define a major rule for regulatory impact analyses as one:

"likely to result in—

"(A) an annual effect on the economy of \$50,000,000 or more;

"(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or

"(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and

provision is also enforceable individually by a civil action.¹⁸⁷ Regulatory impact analysis examines the total cost impact of regulations, presumably so agencies can do a better job of cost-benefit analysis. By requiring such an analysis for many more regulatory decisions, this provision requires a major study for what have in some instances been common administrative decisions. This provision could hold up environmental protection responsiveness in cases which require decisions on an almost individual level and could increase the cost of environmental regulation overall. The additional requirement of more regulatory impact analysis, particularly to more routine agency actions, will slow the pace of environmental regulations. President Reagan's Executive Order No. 12,291 created the original requirement for a regulatory impact analysis.¹⁸⁸ This executive order is credited with restraining the scope and volume of new environmental regulations since that time.¹⁸⁹

Of course federal agencies might be able to play with the definition of costs somewhat, just as they might in interpreting other sections of the Contract with America. If a regulation simply internalizes costs that should be borne by a party in any event, or if an agency proscribes unlawful activity, the cost might not be counted in the total cost of an agency rule which determines the applicability of regulatory impact analysis.

3. Requirement of impact analysis for indirect effects

Section 6002 of Title VI expands the definition of what is to be considered an impact in determining the effect of regulation on small entities, stating that "[i]n determining . . . whether or not a rule is likely to have a significant impact on a substantial number of small entities, an agency shall consider both the direct and indirect effects of the rule."¹⁹⁰ Indirect effects of rules are not defined, but certainly this provision intends to expand those kinds of costs which can be attributed to regulation. This definitional change will provide information allowing an agency to consider costs and benefits more

export markets. . . ."

Passed H.R. 9, *supra* note 4, § 321.

187. Proposed H.R. 9, *supra* note 4, § 7008. Neither Introduced H.R. 9 nor Passed H.R. 9 contained this provision.

188. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194 (1981).

189. Richard Andrews, *Risk Based Decisionmaking*, in ENVIRONMENTAL POLICY IN THE 1990s, *supra* note 90, at 211.

190. Introduced H.R. 9, *supra* note 4, § 6002 (substituting for 5 U.S.C. § 611 (1994)).

fully and, depending on how costs are calculated or allocated, will also provide information that will make regulations appear more burdensome on small entities. The focus on costs to the private sector resembles the effect of the other provisions of the Contract with America, and it can be seen as either good or bad, depending on whether one thinks costs are being imposed unfairly on the private sector or whether one thinks members of the private sector must simply internalize costs that they generate.

4. Requirement of agency consistency

The last general procedural provision affecting environmental regulation is found in the "Private Sector Whistleblowers Protection Act of 1995."¹⁹¹ The Whistleblowers Act seeks to protect members of the private sector from retaliatory agency action if they complain about certain prohibited agency activities, such as arbitrary action, mismanagement, waste or misallocation of resources, endangerment of public health or safety, coercion, personal favoritism, or other kinds of discriminatory acts and enforcement.¹⁹² A challenge under this act may be brought in court and if an agency loses, it will have to pay attorney's fees and costs.¹⁹³

On its surface, the Whistleblowers Act sounds eminently fair, as in general we have objective and consistent regulations to avoid the kind of favoritism that accompanies arbitrary, individually-based decisions. The problem is that such a law may take away *any and all* flexibility from an agency trying to do its job in the most efficient manner possible.

One of the greatest complaints about agency action today is that it is too bureaucratic and costly and applies rules so technically as to create absurdities in regulation. Certainly, many of those who support the passage of the Job Creation section of the Contract with America would agree to this premise. But in order to avoid regulations that seem absurd or overly bureaucratic, some flexibility must be maintained in regulation. That flexibility is usually seen in the agencies' approach to enforcement actions of previously enacted rules. At the level of individual enforcement, an agency may often be able to look at the particular circumstance of a violation of a rule and may make individual enforcement decisions based upon the unique factors of

191. *Id.* §§ 8201-8209.

192. *Id.* §§ 8202-8203.

193. *Id.* § 8207(b)(5)(E).

that case. Since an agency is prohibited both constitutionally and statutorily from taking an action that is arbitrary and capricious, such creative enforcement is usually fair given the circumstances of the case.¹⁹⁴

Nevertheless, it may outwardly appear that an agency that has specifically tailored enforcement to the facts of an individual violation deals with citizens in an inconsistent or discriminatory manner. The Whistleblowers Act prohibits this and thus may limit the flexibility of agency enforcement.¹⁹⁵ This proposed provision of the Whistleblowers Act effectively states that agencies may not regulate at all or must regulate with a very big and a very broad brush.¹⁹⁶

Agency interpretation might lessen the impact of this provision. It is possible that an agency could cite distinguishing features of individual cases to justify a difference in treatment, and this usually satisfies the arbitrary and capricious standard as long as the action does not appear to be malicious or in bad faith.¹⁹⁷ But it is dangerous to take on such challenges when attorney's fees are also at risk. If this provision passes and the agency still chooses to regulate, the provision will impede the agency's flexible and efficient response. This provision then will lessen agency enforcement overall, which could have a negative impact on environmental regulation and ultimately on environmental health and safety.

III. CONCLUSION

An examination of the Contract with America does indeed reveal that certain provisions of the Contract might have deleterious impacts on current environmental regulation. Many parts of the Contract with America seek to make it very difficult or costly to pass new regulations, and current regulations are subject to diminishment over time. In theory, the motivation may be seen as noble; indeed, the authors claim that they do not intend to reduce environmental safety or protection of human health, just to make it more balanced and sane. However, many provisions slash overall programs or make them more costly without conducting an in-depth examination of their true costs and benefits. Even where this legislation tries to support its view of

194. See 5 U.S.C. § 706(2)(A); *Gadsden v. United States*, 78 F. Supp. 126, 128 (Ct. Cl. 1948).

195. Introduced H.R. 9, *supra* note 4, §§ 8204-8205.

196. *Id.*

197. BREYER & STEWART, *supra* note 70, at 476-77.

balanced regulation by insisting that the proper amount of environmental regulation will come about from impartial scientific judgment, the foregoing analysis indicates that science also does not provide the answers or the most beneficial level of environmental regulation.

At the crux of the conflict over the Contract with America's impact on the environment is a competition among visions of the way life should be lived and of the way our society may value certain amenities, including environmental ones. The Contract with America represents one vision. But because our courts have given regulatory agencies great authority in how they interpret many of their provisions,¹⁹⁸ it is not clear whether Congress's vision of environmental values will prevail. There are constitutional challenges that can be brought against the proposed legislation as well as possible ways that the EPA can lessen the apparent impact of the changes proposed in the Contract with America by how it defines costs and benefits.

To the extent that the EPA or environmental organizations fail to blunt the changes which the Contract with America may bring, it will force the American people to confront how they want to proceed with environmental protection. Although the system is imperfect, presumably that confrontation will move us toward the type of environmental protection and environmental enforcement that we as a society need and want.

198. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).