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## Environmental Reform in an Era of Political Discontent

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# SPECIAL PROJECT

## Environmental Reform in an Era of Political Discontent

INTRODUCTION .....	677
RECOVERING ENVIRONMENTAL CLEANUP COSTS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT: A POTENTIAL SOLUTION TO A PERSISTENT PROBLEM .....	689
SSC CORP. V. TOWN OF SMITHTOWN AND USA RECYCLING, INC. V. TOWN OF BABYLON: REINVIGORATION OF THE MARKET PARTICIPANT EXCEPTION IN THE ARENA OF MUNICIPAL SOLID WASTE MANAGEMENT .....	753
DETECTING IRRESPONSIBLE USE AND DISPOSAL OF TOXIC SUBSTANCES: THE CASE FOR LEGISLATIVE RECOGNITION OF INCREASED RISK CAUSES OF ACTION ..	789
VENUE FOR OFFSHORE ENVIRONMENTAL CRIMES: THE SEAWARD LIMITS OF THE FEDERAL JUDICIAL DISTRICTS .....	825

### INTRODUCTION

When Congress sought in 1995 to restructure the federal environmental regulatory schemes, it looked like a good fight to pick.<sup>1</sup>

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1. For a general description of the congressional agenda on this issue, see John H. Cushman, Jr., *Congressional Republicans Take Aim at an Extensive List of Environmental Statutes*, N.Y. Times A14 (Feb. 22, 1995). In addition to targeting specific environmental services for overhaul, the Republican majority in Congress has sought to provide relief for certain environmental regulations under the broader umbrella of regulatory reform. See *New Regulatory Reform Bill is Scuttled by Environmental Concerns*, 23 Wash. Beverage Insight (March 8, 1996); John H. Cushman, Jr., *House Endorses Deep Cutbacks in Regulations*, N.Y. Times § 1 at 1 (March 4, 1995).

Congress, Republican-controlled for the first time in decades, was armed with an apparent mandate to shrink the federal government.<sup>2</sup> Moreover, Americans were concerned about jobs and the economy. Environmental regulation, so the argument goes, impedes competitiveness, which in turn leads to loss of jobs.<sup>3</sup> In addition, if history is any guide, environmental concerns tend to suffer in times when the economic interest of individuals is the driving political force.<sup>4</sup> Given these dual concerns over the economy and the size of the federal government, the time seemed particularly ripe for an overhaul of the cumbersome environmental regulatory structure.

One year later, Congress is, if not licking its wounds, at least reconsidering the voting public's commitment to environmental regulation.<sup>5</sup> The Republican Speaker of the House has admitted to badly misjudging the view of Americans on the environment.<sup>6</sup> The

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2. See George Embrey, *GOP Governors Plan Own Revolt; Shrink Role of Federal Government, Group Says*, Columbus Dispatch 1A (Nov. 21, 1994) (discussing the fact that many Republican governors were "joining the chorus that the election was a mandate for cutting the federal government"); Mary Kane, *Myths Still Endure About Federal Jobs*, Cleveland Plain Dealer 1A (Nov. 25, 1994) (noting that the Republican proponents of smaller government were "backed by a voter revolution taken as a mandate to cut big government").

3. For an illuminating example of Speaker Newt Gingrich's attitude towards the competitiveness problems posed by the federal environmental regulatory system, see Timothy Nosh and Phil Kuntz, *Gingrich Blasts Environmental Policies of Past 20 Years as "Absurdly Expensive"*, Wall St. J. A5 (Feb. 17, 1995). The latest Republican reform proposals likewise emphasize job creation. See, for example, *U.S. House Republican Pushes Environmental Response*, Reuters (Feb. 6, 1996).

4. See Celine Campbell-Mohn, Barry Breen, and J. William Futrell, *Environmental Law: From Resources to Recovery* 4-5 (West, 1993) (discussing oscillations in environmental regulation between periods of public purpose and of private rights). As noted by Campbell-Mohn, Breen, and Futrell, "History suggests that the conservation agenda does not move forward in the decades when social justice is not a concurrent U.S. priority. Civil rights and environmental protection are intertwined." *Id.* at 18.

5. For example, an NBC News/Wall Street Journal poll conducted between July 29 and Aug. 1, 1995, found that 53% of Americans wanted environmental regulations strengthened. See Dori Meinert, *Back to the Drawing Board for GOP on Environment*, Bergen Record O01 (Dec. 10, 1995). The fact that "Republicans [were] getting clobbered across the country in the court of public opinion" was a factor in derailing the congressional environmental agenda. See *id.* (quoting Republican Congressman Sherwood Boehlert). See also Dori Meinert, *A Whole New Environment: GOP Deregulation Effort is Endangered Species*, San Diego Union-Tribune A-1 (Dec. 10, 1995) (discussing public discontent over the Republican environmental agenda). Of the environmental reform measures introduced in the 104th Congress, none have been enacted into law as of this date. For a general discussion of these efforts, see Kenneth Pins, *Environmental Reform in Retreat: Republicans Split, Budget Battles Sink Effort to Ease Regulations*, Des Moines Register 3 (Feb. 5, 1996) (noting that most Americans support environmental protection despite their "aversion to regulations"). See also *House Democrat Predicts GOP Assaults Against Environment, Resources in 1996*, BNA Daily Rep. for Executives A4 (Jan. 5, 1996) (listing bills pending in Congress targeted by environmentalists).

6. See Adriel Bettelheim, *GOP's Western Revolution Scaled Back: Moderate Republicans Help Open Own Rift*, Denver Post A-01 (Nov. 26, 1995) (quoting House Speaker Newt Gingrich ("We mishandled the environment all spring and summer")); Peter Fairley, *Republicans Rethink Environmental Strategy, Regulatory Reform*, 158 Chemical Week 49 (Jan. 3, 1996). The upshot

Democratic President, whose environmental credentials have always been somewhat suspect, has nonetheless taken advantage of the Republican party's blunders to promote himself as a defender of the environment.<sup>7</sup> In the aftermath of a turbulent legislative year, and in the face of what looks to be an equally contentious election year, this Special Project sheds some light on the underlying issues which animated the abortive attempt at reform.

Two basic themes motivated the congressional reform effort. First, the current mix of federal statutes imposes unnecessarily burdensome compliance costs on companies and individuals.<sup>8</sup> Second, the current federal system unfairly burdens local governments, and should be decentralized to allow states to develop their own means of solving environmental problems.<sup>9</sup> The Resource Conservation and

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of Speaker Newt Gingrich's recognition has been the toning down, rather than the abandonment, of the reform effort. The implication is that his concerns with mishandling referred to the strategic, not the substantive, aspects of the reform agenda. See Martha Ezzard, *Other Voices; Save the Earth, For Whatever Reason*, Atlanta J. & Const. A10 (Feb. 10, 1996). Thus, the creation of an environmental reform task force headed by moderate Republican Sherwood Boehlert. See Meinert, San Diego Union-Tribune at A1 (cited in note 5) (discussing the dissent within the Republican party over the environmental agenda that led to the appointment of Boehlert to head the Republican task force); *The GOP and the Environment: Polls May Pull Republicans Back from Foolish Extremes*, Buffalo News 2B (Jan. 29, 1996) (discussing the concern of moderate Republicans that they were "taking a beating" over "missteps in environmental policies"). Of course, attempts to tone down reform efforts carry risks. See, for example, David Ridenour, *Western Interest Groups Suspect Gingrich is a Closet Environmentalist*, Sacramento Bee B7 (Feb. 20, 1996).

7. Clinton was criticized during the 1992 campaign for his pro-business record as Governor of Arkansas. See, for example, John Arundel, *Sizing Up the Field: Where the Candidates Stand on the Environment*, States News Service (March 6, 1992); Thomas B. Resenstiel, *Bush Hits Clinton Record as Governor*, L.A. Times A31 (Oct. 30, 1992). The choice of Senator Al Gore as his running mate was in part to allay the concerns of environmental groups in this regard. See generally Margaret E. Kriz, *Gore: An Environmental Plus or Minus*, 24 Natl. J. 1864 (Aug. 8, 1992). Nonetheless, Clinton has used the recent Republican missteps on the environment to his advantage. See *Misstep on the Environment*, Wash. Post A18 (Jan. 29, 1996).

8. Federal statutes that set technology-based or ambient-based targets for businesses to comply with are referred to as "command-and-control" statutes. See Campbell-Mohn, Breen, and Futrell, *Environmental Law* at 130-31 (cited in note 4). While the present federal environmental framework contains many command-and-control regulations, some reformers would supplant these with a more market-based approach. See, for example, Marshall J. Berger, Richard B. Stewart, E. Donald Elliott, and David Hawkins, *Providing Economic Incentives in Environmental Regulation*, 8 Yale J. Reg. 463, 466 (1991). In fact, Republicans presented much of the 1995 congressional agenda as an effort to introduce market-based criteria into the environmental regulatory system. See Nosh and Kuntz, Wall St. J. at A5 (cited in note 3).

9. Whether the Republican leadership sought to transfer power to the states because they viewed the states as better equipped to address such problems, or because they hoped states would not do anything at all is a source of some controversy. See Dori Meinert, *Gingrich Offers City Relief from Sewage Bind: House Speaker Takes Aim at "Stupid" U.S. Regulations*, San Diego Union-Tribune A1 (Feb. 1, 1995) (discussing Newt Gingrich's concern with "costly" federal sewage treatment standards). Regardless of motive, as a strategic matter the House leadership may have set back this effort as a result of the tactics it used in the first session of

Recovery Act (RCRA) provides concrete examples of these two types of burdens, both of which are addressed by pieces in this Special Project.<sup>10</sup>

The first Note addresses an unusual gap in the federal regulatory scheme governing the cleanup of hazardous materials—a gap which has resulted in significant costs to non-polluting landowners. RCRA, as amended in 1984, authorizes the use of citizen suits to abate imminent, as well as already-existing environmental threats.<sup>11</sup> The prospective nature of the statute has led courts to the conclusion that RCRA does not authorize recovery from past polluters of cleanup costs incurred in the remediation of a contaminated site.<sup>12</sup> Defendants nonetheless typically recover such costs from past polluters under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>13</sup> A provision in CERCLA, however, excludes petroleum from the definition of hazardous materials.<sup>14</sup> As a result, non-polluting landowners have been saddled with enormous liabilities and are unable to recover cleanup costs from past petroleum polluters.<sup>15</sup> The first Note addresses the circuit split that resulted from efforts of courts to stretch RCRA's imminence requirement to fill this gap in the regulatory structure, and the Supreme Court's resolution of this split.<sup>16</sup> The Note proposes an interpretation of RCRA that would allow citizen-plaintiffs to recover reasonable response costs in certain circumstances and yet adhere to the statute's preliminary requirements.<sup>17</sup>

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the 104th Congress. See *House GOP Members Fault Clinton for Politicizing Environment*, BNA Daily Rep. for Executives A55 (March 21, 1996) (discussing the mishandling of environmental reform efforts by Republicans and their subsequent attempts to depoliticize the issue). However, the fact that the Republican Congress sought to preempt states from establishing public safety requirements on hazardous waste cleanups and supported such federal initiatives as the National Institute on the Environment and a national biological survey suggests that Congress did not intend to cede its role in environmental policy making to the states.

10. See Randall James Butterfield, *Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem*, 49 Vand. L. Rev. 689\_\_ (1996); David L. Johnson, *SSC Corp. v. Town of Smithtown and USA Recycling, Inc. v. Town of Babylon: Reinvigoration of the Market Participant Exception in the Arena of Municipal Solid Waste Management*, 49 Vand. L. Rev. 753 (1996).

11. 42 U.S.C. §§ 6901-09 (1988 ed. & Supp. V).

12. See Butterfield, 49 Vand. L. Rev. at 693 (cited in note 10).

13. 42 U.S.C. §§ 9601-75 (1988 ed. & Supp. V).

14. *Id.* § 9601(14).

15. Butterfield, 49 Vand. L. Rev. at 693 n.14 (cited in note 10).

16. *Id.* at 695.

17. *Id.* at 696, 751.

Much as the federal circuit courts struggled to address the burdens placed on innocent purchasers of contaminated sites due to this gap between RCRA and CERCLA, the specter of landowners and businesses facing crippling liability prompted Congress's recently proposed amendments to CERCLA—the pollution tax credit and the abolition of retroactive liability.<sup>18</sup> Both proposals were roughly criticized as providing unwarranted relief to polluters,<sup>19</sup> and because they failed to address the underlying problems of CERCLA, such as runaway litigation costs.<sup>20</sup> Instead of forcing polluting parties to pay for the environmental damage they have caused, these proposals shift the regulatory burden to the shoulders of taxpayers. The proposal for a tax credit thus looks more like a giveaway to corporate polluters than an economically sound respite from regulation.

As noted above, the second main theme underlying the congressional environmental reform movement was the problematic relationship between federal and state power. Once again, an example of this tension can be seen by reference to RCRA. As part of the effort to regulate the handling and disposal of hazardous waste, RCRA establishes national technology standards, which states may adopt or exceed.<sup>21</sup> One of the effects of these standards has been the gradual phasing out of open dumps and landfills, and their replacement by costly incinerators and waste treatment facilities.<sup>22</sup> States initially financed these facilities through the use of flow control ordinances which required waste collection within a region to be deposited at cer-

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18. Reform of CERCLA was proposed under H.R. 2500 but was stalled because of concerns about cost and preemption of state environmental laws. See *Browner Calls HR 2500 Unaffordable; Estimates Annual Costs at \$2.6 Billion*, BNA Daily Rep. for Executives (Nov. 3, 1995); note 19 (discussing criticisms of the CERCLA reform effort).

19. *Senate Democrats, EPA, Interest Groups Criticize New Language in CERCLA Bill*, BNA Natl. Envir. Daily (March 25, 1996) (quoting Karen Florini of the Environmental Defense Fund) ("This amounts to Christmas in July for the chemical industry"). See *GOP Proposals Would End Cleanups, House Democrats Say at Briefing*, BNA Daily Rep. for Executives A236 (Dec. 8, 1995) (discussing criticisms of the Superfund reform bill).

20. It is estimated that over half of the \$25 billion spent on cleanups to date has gone to litigation costs. See *Public Supports Reform of Superfund; Knows Little About Program, Poll Finds*, BNA Daily Rep. for Executives (Jan. 25, 1995). A poll conducted on December 12, 1995, suggested public support for an overhaul of CERCLA. *Id.* However, general public distrust of the Republican environmental agenda and concerns of states over the costs imposed on them under the House reform bill have stalled the reform effort. See *Saving the Environment; GOP Leadership's Agenda Has Stalled*, Bergen Record O02 (Jan. 28, 1996) (noting that Americans trust Democrats to protect the environment by a two-to-one margin over Republicans); *Certain Provisions in Republican CERCLA Bills Could Burden States, Official Says*, BNA State Envir. Daily (Dec. 15, 1995) (discussing state concerns with CERCLA's reform measure).

21. States may also refuse to adopt standards at all, but then they become subject to a federal plan. 42 U.S.C. § 6926.

22. See Johnson, 49 Vand. L. Rev. at 754 n.3 (cited in note 10).

tain designated facilities.<sup>23</sup> Such ordinances essentially created a captive market for waste produced in a particular region, and ensured that municipal waste facilities received a predictable stream of revenues.<sup>24</sup>

The Supreme Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown, New York*,<sup>25</sup> however, held that flow control ordinances violated the Dormant Commerce Clause and that municipalities could not shield themselves from commerce clause scrutiny under the market participation exception. The Recent Development addresses two second circuit decisions that shed some light on possible limits of *Carbone*.<sup>26</sup> It argues that the Supreme Court's decision in *South-Central Timber Development, Inc. v. Wunnicke*<sup>27</sup> muddied the market participation doctrine, but warns that an expansive reading of the market participant exception could nonetheless expose a municipality to antitrust liability.<sup>28</sup>

It is arguably unfair to force states into costly compliance with RCRA's waste disposal standards and then deprive them, through the Dormant Commerce Clause, of the means by which to finance such compliance.<sup>29</sup> Congress has sought to address this type of federal/state tension through legislation transferring authority from the federal government to the states.<sup>30</sup> Translating the abstract desire for greater state autonomy into practice, however, has proved problematic. For example, congressional proposals to transfer responsibility for the regulation of endangered species and wetlands to the states exposed some of the biggest rifts in the Republican regulatory front.<sup>31</sup> With regard to wetlands protection, the bulk of the

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23. See Eric S. Peterson and David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 Fordham Urban L. J. 361, 364-65 (1995).

24. See Johnson, 49 Vand. L. Rev. at 755.

25. 114 S. Ct. 1677, 1681-84, 128 L. Ed. 2d 399 (1994). As a result of *Carbone*, municipalities have scrambled to find alternative means of financing such ventures. See Peterson and Abramowitz, 22 Fordham Urban L. J. at 395-407 (cited in note 23).

26. Johnson, 49 Vand. L. Rev. 758 (cited in note 10).

27. 467 U.S. 82 (1984).

28. Johnson, 49 Vand. L. Rev. at 759 (cited in note 10).

29. In *Carbone*, the City of Clarkstown argued that flow control was necessary to ensure the proper treatment of waste. 114 S. Ct. at 1683.

30. See Meinert, San Diego Union-Tribune at A1 (cited in note 9); Norm Brewer, *GOP, On Budget Defensive, Retrenching to Seek Higher Ground*, Gannett News Service (Feb. 1, 1996).

31. See John H. Cushman, Jr., *Conservatives Tug at Endangered Species Act*, N.Y. Times § 1 at 26 (May 28, 1995) (noting that the most important debate was not between the proponents and defenders of the Endangered Species Protection Act, but among "conservatives of different stripes quarreling over how much to revise it"); Robert Hennelly, *Battle Over Wetlands Exposes a G.O.P. Fault Line*, N.Y. Times § 13NJ at 6 (May 28, 1995) (discussing opposition within the GOP to leaving protection of wetlands to the states).

New Jersey delegation—Republicans and Democrats alike—argued fiercely against transferring authority to the states for fear of a resulting race to see which state could have the lowest standards in order to attract businesses.<sup>32</sup> Similarly, congressional conservatives have split over whether to give primary responsibility to the states for the conservation of endangered species.<sup>33</sup>

The federal/state tension in the aftermath of *Carbone* is not entirely unresolvable. One way for a municipality to finance a waste disposal facility without having to navigate the intricacies of the market participation exception would be to levy a tax.<sup>34</sup> Of course, this option carries a political cost. Scholars and policy makers generally agree that Americans will not willingly support a new tax unless it is somehow disguised.<sup>35</sup> Perhaps environmental regulation illustrates this theory: only because the costs of environmental regulation are disguised do Americans support them.

Much of the current congressional environmental agenda represents an attempt to expose these costs.<sup>36</sup> With the costs of the regulations exposed, Americans could better decide for themselves whether to support them. When viewed in this light, the opposition to cost/benefit proposals seems strange; who would object to exposing the costs of a regulation? On the other hand, the reluctance to replace technology- and ambient-based standards with cost/benefit analysis suggests a fundamental suspicion of attempting to convert environmental values to hard numbers. This in turn suggests that opponents

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32. See Hennelly, N.Y. Times § 13NJ at 6 (cited in note 31). A number of commentators have pointed out the irony that the same rationales of public health and aesthetics that justified the draining of swamps one hundred years ago are now being urged for their protection under the much more palatable euphemism of "wetlands." See Richard A. Walker, *Wetlands Preservation and Management on Chesapeake Bay: The Role of Science in Natural Resource Policy*, 1 Coastal Zone Mgmt. J. 75, 76 (1974); Mark Sagoff, *Settling America or the Concept of Place in Environmental Ethics*, 12 J. Energy Nat. Res. & Envir. L. 349, 375 (1992) (discussing the evolution of wetlands protection).

33. Cushman, N.Y. Times § 1 at 26 (cited in note 31). In a statement which stands in sharp contrast to the economic analysis language often used by conservatives in this year's environmental debates, Senator Slade Gordon of Washington noted that there was a place for governmental regulation "in connection with values that are not easily reduced to dollars." *Id.*

34. Justice Kennedy explicitly made this point in his opinion in *Carbone*. 114 S. Ct. at 1684 (noting that "the town may subsidize the facility through general taxes or municipal bonds").

35. See, for example, Edward J. McCaffery, *Cognitive Theory and Tax*, 41 U.C.L.A. L. Rev. 1861, 1876-82 (arguing that Americans support FICA taxes largely because they are disguised).

36. Note, for example, congressional efforts to require strict cost/benefit analysis of environmental statutes and to require compensation for environmental takings that diminish the value of land by more than 20%. In addition, much of Speaker Newt Gingrich's rhetoric throughout the year was based on the notion that environmental regulations were imposing extraordinary costs in relation to their benefit.



of these provisions were motivated by more than a mere anticipated disagreement over price. Rather, there seemed to be an underlying unwillingness to sell.

The failure of the congressional leadership's agenda suggests widespread support for the notion that polluters, not taxpayers, should bear the cost of pollution. This theory underlies the movement in the early 1980s to supplement the traditional command-and-control regulatory framework with a number of liability-based statutes.<sup>37</sup> As a result of this change, citizen's suits have become an important means of enforcing compliance with federal environmental statutes.<sup>38</sup> Many citizens exposed to toxic chemicals, however, have borne the cost of this exposure themselves due to judicial unwillingness to recognize "increased risk" causes of action.<sup>39</sup> The third piece analyzes why such causes of action have failed to gain acceptance.<sup>40</sup> Arguing that lack of scientific information and a fear of overcompensation have kept courts from recognizing such causes of action, the Note suggests that deterring irresponsible behavior leading to toxic substance exposure should become the primary concern.<sup>41</sup> To this end, the Note proposes a statutory framework to incorporate increased risk causes of action sensibly into the current regulatory scheme.<sup>42</sup> Notwithstanding the salutary effects of such a system, however, particularly in promoting information flow about environmental risks, the hostility of the current Congress to personal injury lawsuits as expressed in proposed tort reform legislation suggests that Congress would not be willing to entertain the expansion of tort liability in this way.<sup>43</sup> Such reform may have to await new congressional leadership or be enacted at the state level. Indeed, one territorial legislature has already mandated the use of increased risk causes of action in the context of toxic substance exposure.<sup>44</sup>

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37. See Adam Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. Rev. 733, 734-36 (1990).

38. For a discussion of the rapid growth in environmental litigation, see Campbell-Mohn, Breen, and Futrell, *Environmental Law* at 35 (cited in note 4).

39. Tamsen Douglass Love, *Deterring Irresponsible Use and Disposal of Toxic Substances: The Case for Legislative Recognition of Increased Risk Causes of Action*, 49 Vand. L. Rev. \_\_\_\_\_ (1996).

40. *Id.* at 801-02.

41. *Id.*

42. *Id.* at 813-17.

43. Speaker Newt Gingrich expressed his concerns with the litigious nature of society, remarking that "the entire cycle of a conflict-ridden, litigation-oriented system is, frankly, crippling this culture." Newt Gingrich, *Remarks at the National Newspaper Association Conference* (March 21, 1996). See Edmund L. Andrews, . . . *but GOP Falters on Pro-Business Laws*, N.Y. Times § 1 at 39 (Dec. 23, 1995) (describing proposed tort-reform legislation).

44. Guam Code Ann. §§ 41101-07 (1993).

The past three decades have also seen explosive growth in the use of criminal environmental prosecutions.<sup>45</sup> The fourth piece addresses a potential barrier to the prosecution of offshore environmental crimes that has arisen due to the difficulty of applying criminal venue provisions to crimes committed in the territorial seas.<sup>46</sup> Although American seaward boundaries have expanded over the centuries, it is not clear to what degree the states can claim, for venue purposes, that state boundaries have expanded as well.<sup>47</sup> The Note concludes that the best resolution of this problem would result from untying the concept of judicial districts from the more limited notion of state sovereignty.<sup>48</sup>

As the above pieces suggest, much can be done short of a complete overhaul to improve the existing environmental regulatory structure.<sup>49</sup> Indeed, the widespread concern expressed by the voting public—the same voting public that ushered in the current Republican Congress—and the resultant gridlock in the first session of that Congress, suggests that there is little hope for change unless Congress works within the existing regulatory structure.<sup>50</sup> It is telling that, notwithstanding the apparent mandate for change which the 1994 elections represented and the aforementioned concern about jobs,<sup>51</sup> the public has expressed a sudden resistance to change on the environmental front. This resistance can be explained by examining how Americans view not only the environment, but the political and private institutions that affect it.

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45. Only 15 environmental crimes had been prosecuted in the century between 1881 and 1981. Since 1982, prosecutors have obtained over 590 indictments and more than 450 plea bargains and convictions. Campbell-Mohn, Breen, and Futrell, *Environmental Law* at 450 (cited in note 4). See also Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 *Loyola of L.A. L. Rev.* 867, 868-71 (1994) (discussing the increase in the use of criminal sanctions in furtherance protection).

46. See M. Benjamin Cowan, *Venue for Offshore Environmental Crimes: The Seaward Limits of the Federal Judicial Districts*, 49 *Vand. L. Rev.* 825 (1996). The territorial sea is the area of the sea over which a coastal nation claims sovereignty. See *id.* at 834-35.

47. See *id.* at 829-34.

48. *Id.* at 867-68.

49. As moderate Republican Senator John Chafee, Chairman of the Senate Public Works Committee, recently noted:

The basic laws we have—the Clean Water Act, the Clean Air Act, the Endangered Species Act—are sound laws. Now, does that mean they're perfect? Of course, it doesn't mean that. Can there be some improvements to them? Of course, there can be. But basically, the laws are very, very sound laws and extraordinarily durable over many years.

Bob Edwards, *Morning Edition*, National Public Radio (Feb. 2, 1996) (interviewing, among others, Senator Chafee).

50. See Notes 5-6 and accompanying text (discussing public support for the environment and distrust of the Republican environmental agenda).

51. See notes 1-4 and accompanying text.

It has been suggested that the public's concept of the environment and the concept of the American dream are connected by the notion of a sense of place.<sup>52</sup> As people see the places where they have lived despoiled, they take a more personal interest in the environment.<sup>53</sup> The resulting public attitude is at odds with the classical American view towards the environment—that it is a raw product to be chopped down, rechannelled, or otherwise manipulated into productive use.<sup>54</sup> It is also at odds with the radical attitude of deep environmentalists who view human input on the environment at any level as destructive.<sup>55</sup> Current public attitude regarding the environment thus treads a middle ground between two extremes—it views human life as part of, not apart from, the environment.<sup>56</sup>

With regard to the public and private institutions that affect the environment, the voting public is feeling both marginalized by the political process and skeptical of the ability of the private sector to look out for its interests. This mistrust of business has crystallized

52. Mark Sagoff argues that "place" is derived from connections with a surrounding community and the strength of a person's sense of place depends on the cultural and political forces within those communities. Sagoff, 12 J. Energy Nat. Res. & Envir. L. at 353-60 (cited in note 32). Our instinctive desire for a sense of place has led to the creation of human habitats through the transformation of raw nature into towns and cities. *Id.* at 392-93. The cultural forces behind this transformation largely viewed nature as a wilderness to be conquered. *Id.*

Sagoff argues that the sense of place derived from the creation of these habitats is under increasing stress from a number of forces including globalization and technology. *Id.* at 365-69. Sagoff argues that a diminished sense of place poses not only environmental, but cultural risks. Sagoff concludes that recapturing a sense of place will require a cultural change which emphasizes cultivation of nature as a habitat, rather than its use as a mere economic input. *Id.* at 417.

53. Hence the outcry over environmental disasters such as the Exxon Valdez spill, in a place most people in the country have likely never visited.

54. The early American view towards natural resources was largely shaped by a frontier notion of abundance. See Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 U.C.L.A. L. Rev. 77, 95-97 (1996) (noting that the "vastness and platitude" of the American frontier encouraged a "consumptive, aggrandizing culture"). The closing of the American frontier substantially changed this view. As historian Lawrence Friedman noted:

What really passed was not the frontier, but the idea of the frontier. This inner sense, this *perception*, of change, was perhaps one of the most important influences on American law. Between 1776 and the Civil War, dominant public opinion exuberantly believed in growth, believed that resources were virtually unlimited, that there would be room and wealth for all. . . . By 1900, if one can speak about so slippery a thing as dominant public opinion, that opinion saw a narrowing sky, a dead frontier, life as a struggle for position, competition as a zero-sum game, the economy as a pie to be divided, not as a ladder stretching out beyond the horizon. By 1900 the theme was: hold the line.

Lawrence M. Friedman, *A History of American Law* 338 (Touchstone, 2d ed. 1985). One can easily see shades of Friedman's observations in the current transition from the economic exuberance of the 1980s to the more tentative times of corporate downsizing and retooling in the 1990s.

55. Sagoff, 12 J. Energy Nat. Res. & Envir. L. J. at 407-10 (cited in note 32).

56. *Id.* at 417.

into what has come to be known as “the politics of fear,” a deep-rooted economic insecurity brought about by corporate downsizing and a concern over the economic upheavals attendant with our participation in an increasingly global economy.<sup>57</sup> The growing recognition that corporations are not tied to any particular geographic location has in turn had an impact on the notion of place by severing the link between jobs and geographic location.<sup>58</sup>

The importance of this development in the environmental context is that the pervasive distrust of corporate America means that voters are even more unwilling to entrust environmental protection to market mechanisms than they were when Reagan was elected in

57. In the 1996 presidential campaign these concerns have been most forcefully addressed by Republican presidential contender Patrick Buchanan. See Steve Neal, *Preaching Fear and Hope*, Chicago Sun-Times 27 (March 1, 1996) (discussing Buchanan’s success at winning blue-collar votes by emphasizing economic insecurity). Buchanan’s comments in a recent New Hampshire Republican debate are emblematic of these concerns:

No one’s got to tell me how bad it was up here in New Hampshire in 1991 and ‘92, because I came up here to protest the economic policies of my own administration, which were responsible for what was going on here. . . .

So there are economic problems then and there are problems now. But the new problems are different, and let me tell you what they are. It is the economic insecurity of the middle class and the falling wages of working-class Americans. . . . And for heaven’s sakes, stand with me and do something to put a stop to it and end what’s going on.

*Transcript: New Hampshire Primary Debate*, Federal News Service (Feb. 15, 1996).

In contrast to Buchanan, Speaker Newt Gingrich seems to relish the idea of a rapidly changing future. See E. J. Dionne, Jr., *Back to the Future; If you want to know where Newt Gingrich is headed, you have to understand two things: (1) He wants the Republicans to be the party of capitalism’s cutting edge, and (2) his role model, William McKinley, tried the same thing a hundred years ago*, Wash. Post W14 (Jan. 28, 1996) (contrasting ways in which Buchanan and Gingrich react to the notion of a new global economy, and noting that Gingrich “often speaks and writes with disdain for those who warn of the perils and problems of change”). Dionne characterizes Gingrich’s agenda as “not to avoid change but speed it up.” *Id.* As noted above, political reality seems to have slowed the pace of that change for the present time. See notes 5-7 and accompanying text.

58. Technological advances have for decades worked to create a separation between corporations and the environment in which they are located. As Professor Sagoff notes in his discussion of the Chicago meatpacking industry at the turn of the century:

The stockyards Upton Sinclair described in his 1906 novel, *The Jungle*, whatever else you might say about them, were located in Chicago for reasons that had to do with nature and natural resources. When the refrigerator car and other innovations made it possible for corporations to produce meat products anywhere and deliver them virtually anywhere, Chicago lost its geographical advantage and to that extent lost its relation to nature. If the industries one finds there today—insurance, education, software . . .—could as well be anywhere else, then Chicago has become part of McWorld and ceased to be nature’s metropolis. The city that timber and cattle and pigs created lost its place and its relation to nature.

Sagoff, 12 J. Energy Nat. Res. & Envir. L. at 363 (cited in note 32).

The ability and willingness of corporations to restructure or relocate in response to economic pressures has carried this separation a step further, resulting in economic dislocations.

1980.<sup>59</sup> In this sense, there is no great inconsistency between the current public concern about the economy and concern for protection of the environment. They are both rooted in a distrust of the rapidly changing global marketplace as an effective regulatory mechanism.<sup>60</sup> While the existing environmental regulatory structure is certainly in need of reform, the reform must proceed from this broad consensus in favor of environmental protection<sup>61</sup>—a consensus, ironically enough, that may have been forged in reaction to the very same competitive pressures that have been used to defeat environmental agendas in the past. The fundamental mistake of the Republican leadership was to assume that Americans were paying for something they did not want, when the real problem was that they were paying for something they were not getting.

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Special Project Editor

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59. See Mohn-Campbell, Breen, and Futrell, *Environmental Law* at 41-46 (cited in note 4) (discussing Reagan-era attempts at environmental reform); *Misstep*, Wash. Post at A18 (cited in note 7) (comparing the Reagan Administration's unsuccessful efforts to reduce the federal regulatory burden).

60. E. J. Dionne, Jr., argues that these forces of change will lead to an era of political activism as voters demand more governmental intervention to shield them from the turbulence of a global market. See Dionne, Wash. Post at W14 (Jan. 28, 1996) (cited in note 57).

61. As Professor Daniel Farber notes, "Environmentalism has been remarkably durable. . . . Indeed, environmentalist attitudes are nearly omnipresent in American society." Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 *Loyola of L.A. L. Rev.* 791, 792 (1994). It is apparent that this message got through to the House leadership by year's end. See John H. Cushman, Jr., *Moderates Soften G.O.P. Agenda on Environment*, N.Y. Times A1 (Oct. 24, 1995) (discussing the role of moderate Republicans in promoting "centrist compromises" on environmental issues).

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