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# IS ENVIRONMENTALISM DEAD?

BY

CHRISTOPHER D. STONE\*

*A recent widely circulated paper has pronounced environmentalism dead. There are, indeed, many reasons to be frustrated. Efforts to stanch carbon emissions appear to be moving at too glacial a pace. The seas continue to be over-polluted and over-fished. It is natural, and wise, to review what the various environmental groups have been doing the past few decades, with an eye towards identifying more realistic aims and more promising tactics. This Article tries to put the criticisms into better focus by comparing the environmental movement(s) with prior social movements. For example, the decarbonization of a global society addicted to carbon should be compared with, and insights drawn from, the history of abolitionism—the “withdrawal” from a world-wide addiction to slaves, also conducted in the face of well-financed opposition. Professor Christopher Stone identifies the criteria upon which the movement should be judged. These include: educating the public (environmental literacy), changing tastes and preferences, modifying individual behavior, fostering favorable legislation, increasing private donations, increasing public funding, successful and significant litigation, miscellaneous environmental front activities, and (the bottom line) improving the physical environment. Professor Stone proceeds to analyze data bearing upon success/failure with respect to each of those presumed goals, and concludes that, overall, the movement appears to be effectively oriented and flexible.*

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\* J. Thomas McCarthy Trustee Chair in Law, University of Southern California Gould School of Law. The author would like to thank Per Ariensen, Don Goldberg, Rosanne Krekorian, Paul Moorman, Jake Werksman, Mhairi Ransom, and Durwood Zaelke, and especially Brian Rothschild, U.S.C. Class of 2007, for research.

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## I. INTRODUCTION

A recent widely circulated paper has pronounced environmentalism dead.<sup>1</sup> The authors charge that after initial successes in public and legislative arenas, the movement has had strikingly little to show over the past fifteen years.<sup>2</sup> Much of the critique is driven by the continued failure to get the United States to move forward on climate change. But the authors consider the failure to deliver on climate change to be symptomatic of a deeper, terminal malady. They cite environmentalists for trafficking in “the fantasy of technical fixes,” such as pollution-control devices and higher vehicle mileage standards, when they should aptly be providing “an inspiring vision.”<sup>3</sup> There is a need, they say, “to rethink everything,” while “letting go of old identities, categories, and assumptions.”<sup>4</sup> “Modern environmentalism . . . must die so that something new can live.”<sup>5</sup> The authors decline to specify what this something new will be, only that it will emerge from teams, not

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<sup>1</sup> MICHAEL SHELLINGER & TED NORDHAUS, *THE DEATH OF ENVIRONMENTALISM: GLOBAL WARMING POLITICS IN A POST-ENVIRONMENTAL WORLD*, available at [http://www.thebreakthrough.org/PDF/Death\\_of\\_Environmentalism.pdf](http://www.thebreakthrough.org/PDF/Death_of_Environmentalism.pdf). But cf. Carl Pope, Response to “The Death of Environmentalism”: There is Something Different About Global Warming (Dec. 2004), available at [http://www.sierraclub.org/pressroom/messages/2004december\\_pope.asp](http://www.sierraclub.org/pressroom/messages/2004december_pope.asp); Maurie J. Cohen, *The Death of Environmentalism: Introduction to the Symposium*, 19 *ORG. & ENV'T* 74 (2006); Riley E. Dunlap, *Show Us the Data: The Questionable Empirical Foundations of “The Death of Environmentalism” Thesis*, 19 *ORG. & ENV'T* 88 (2006); Steve Kretzmann & John Sellers, *Environmentalism’s Winter of Discontent*, 35 *SOC. POL’Y* 35 (2005).

<sup>2</sup> See SHELLINGER & NORDHAUS, *supra* note 1, at 6.

<sup>3</sup> *Id.* at 4, 6–7, 16. A major theme of the authors is that environmentalism has become occupied with protecting a supposed thing—the environment—rather than advancing a vision that would relate a broad matrix of problems, and thus appeal to a broad cross-section of interests. *Id.* at 12. There may be some truth there, although no movement I can think of has a vision for everything: consider gay rights. In all events, the absence of a society-spanning vision is hardly crucial to those sounding alarm over climate change, whose message is less about protecting the environment and more about the dangers to humans of flooding, freezing, crop loss, diseases, drought, and serious social disruptions. Much action is motivated without a big vision and a core set of values. *Id.* at 16.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 10.

individuals, in the course of the dialogue that it is the authors' intention to inspire.<sup>6</sup>

Each chapter is introduced with its own portentous epigraph, mainly about death. These include: "To not think of dying is to not think of living";<sup>7</sup> "Death is not the greatest loss in life. The greatest loss is what dies inside us while we live";<sup>8</sup> and "To be empty of a fixed identity allows one to enter fully into the shifting, poignant, beautiful and tragic contingencies of the world."<sup>9</sup>

While criticism is always to be welcomed, one expects more constructive detail before writing off the whole movement—presumably including the leadership, the organizations, the broad agenda—especially when the death certificate is based so largely on the failure to deliver on climate change. Climate may be a crucial issue, but it is certainly not environmentalism's only vital sign.<sup>10</sup> There is evidence of lingering life, even strength, in the successful campaigns to sustain the oil drilling moratoria in the Arctic National Wildlife Refuge and the Western Gulf of Mexico, even in the face of public clamor over rising gas prices.<sup>11</sup> The International Whaling Commission's (IWC) moratorium on commercial whaling, widely regarded as an environmentalist trophy, remains intact, even against mounting assault.<sup>12</sup>

Domestically, on the negative side, the United States' total carbon dioxide (CO<sub>2</sub>) emissions, largely unregulated at the federal level, were seventeen percent higher in 2006 than in 1990.<sup>13</sup> On the other hand, CO<sub>2</sub> emissions in 2006 were lower than they had been in 2005.<sup>14</sup> And, between 1990 and 2002, sulfur dioxide emissions were cut by one-third and nitrogen oxides by eighteen percent.<sup>15</sup> Encouraging reductions have been recorded in emissions of other air pollutants.<sup>16</sup> Environmentalists have hardly appeared

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<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 6 (attributed to Jann Arden).

<sup>8</sup> *Id.* at 8 (attributed to Norman Cousins).

<sup>9</sup> *Id.* at 26 (attributed to Stephen Batchelor).

<sup>10</sup> See Pope, *supra* note 1.

<sup>11</sup> See JULIE HAUSERMAN, NATURAL RES. DEF. COUNCIL, FLORIDA'S COASTAL AND OCEAN FUTURE: A BLUEPRINT FOR ECONOMIC AND ENVIRONMENTAL LEADERSHIP 13–14 (2006), available at [http://www.environmentaldefense.org/documents/5456\\_FloridaBlueprint.pdf](http://www.environmentaldefense.org/documents/5456_FloridaBlueprint.pdf); Sierra Club, Just the Facts: Arctic National Wildlife Refuge, <http://www.sierraclub.org/arctic/justthefacts/> (last visited Jan. 27, 2008).

<sup>12</sup> In June 2006, a 33-32 majority of the IWC membership voted that the moratorium—instituted in 1984—was "no longer valid." *Japan and Allies Pass a Motion That Criticizes A Whaling Ban*, N.Y. TIMES, June 19, 2006, at A4. Ending the moratorium requires, however, a 75% vote. *Id.*

<sup>13</sup> OFFICE OF INTEGRATED ANALYSIS & FORECASTING, ENERGY INFO. ADMIN., U.S. CARBON DIOXIDE EMISSIONS FROM ENERGY SOURCES 13 (2007), <http://www.eia.doe.gov/oiaf/1605/flash/pdf/flash.pdf> (comparing levels of energy-related CO<sub>2</sub> emissions over time). Note that the 2006 emissions figure used is a preliminary estimate. *Id.*

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

<sup>15</sup> OFFICE OF RESEARCH & DEV., ENVTL. PROT. AGENCY (EPA), EPA'S 2007 REPORT ON THE ENVIRONMENT 2-53, 2-24 (2007) (External Review Draft), available at [http://oaspub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=465924](http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=465924).

<sup>16</sup> *Id.* at 2-13, 2-19 to -20, 2-69, 2-87 (reporting reductions in emissions for carbon monoxide, lead, mercury, and manganese).

bed-ridden—either in Congress<sup>17</sup> or in the courts<sup>18</sup>—in holding off efforts by the current Administration to lessen emissions controls.

Moreover, some consideration has to be given to the fact that in fighting climate change, environmentalists have had to take on an especially well-financed, well-entrenched opposition.<sup>19</sup> Dirty water never marshaled such powerful patrons. And, the fact is, the keystone of the climate change movement, the Kyoto Protocol, *is* subject to legitimate criticism.<sup>20</sup> Climate change is a worthy fight, but a distinctly hard one, not likely to be budged by any grand, undefined “vision.”<sup>21</sup> In fact, the movement is not skimping in the supply of visions—of drowning polar bears, melting icecaps, and storm-battered coasts.<sup>22</sup> If those visions will not work, what will? We should be no quicker to bury the environmental movement for the failure to stanch

<sup>17</sup> For example, the Clear Skies Act—opposed by most environmentalists—has been blocked. LIBRARY OF CONG., BILL SUMMARY & STATUS FILE FOR S. 131, 109TH CONG., *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.00131>: (indicating that the bill was held up in the Committee on Environment and Public Works until the end of the legislative session).

<sup>18</sup> *See, e.g.*, *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438 (2007).

<sup>19</sup> *See* Paul Krugman, Editorial, *Swift-Boating the Planet*, N.Y. TIMES, May 29, 2006, at A15 (describing specious attacks on climate scientists by organizations and individuals funded by the energy industry). *See also* Sharon Begley, *The Truth About Denial*, NEWSWEEK, Aug. 13, 2007, at 20 (examining the effect of lobbyists and public policy groups on politicians); Bill McKibben, *Climate of Denial*, MOTHER JONES, May–June 2005, at 34 (introducing a special report on “global warming, big money, [and] junk science”); Chris Mooney, *Some Like it Hot*, MOTHER JONES, May–June 2005, at 36 (reporting the existence and effect of public policy groups funded by energy companies, aimed at denying human-caused climate change); Ross Gelbspan, *Snowed*, MOTHER JONES, May–June 2005, at 42 (reporting on how energy companies have manipulated the ethic of journalistic balance to inject doubt into stories about whether human-caused global climate change exists). The keystone of anti-climate change reform goes under the name Competitive Enterprise Institute (CEI); the tenor of their work can be found on their website: <http://www.cei.org/>. *See* Begley, *supra*, at 26 (relating CEI's successful efforts to prevent President Bush from speaking about carbon caps).

<sup>20</sup> *See, e.g.*, Anita M. Halvorsen, *Common, But Differentiated Commitments in the Future Climate Change Regime—Amending the Kyoto Protocol to Include Annex C and the Annex C Mitigation Fund*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 247 (2007) (describing a proposal to fix problems related to high-growth developing countries); Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1 (2007) (comparing the successful Montreal Protocol to the problematic Kyoto Protocol); Mindy G. Nigoff, *The Clean Development Mechanism: Does the Current Structure Facilitate Kyoto Protocol Compliance?*, 18 GEO. INT'L ENVTL. L. REV. 249 (2006) (suggesting solutions to the flawed Kyoto cap and trade mechanism).

<sup>21</sup> I do not doubt the virtue of environmentalists aligning with other interest groups whose highest priorities are matters other than the environment. For example, with an eye towards labor, the authors of *The Death of Environmentalism* urge a reassuring vision of a society that, by substituting renewable for fossil fuel sources of energy, could lead to a net increase of jobs in a more robust economy. SCHELLENBERG & NORDHAUS, *supra* note 1, at 17. If that is a vision for which a case can plausibly be made, then of course it should be made, but to my knowledge it has not been. *But see* DANIEL M. KAMMEN, KAMAL KAPADIA & MATHIAS FRIPP, *PUTTING RENEWABLES TO WORK: HOW MANY JOBS CAN THE CLEAN ENERGY INDUSTRY GENERATE?* (2004), *available at* <http://rael.berkeley.edu/files/2004/Kammen-Renewable-Jobs-2004.pdf>.

<sup>22</sup> *See, e.g.*, Nat'l Geographic News, *Climate Change: Pictures of a Warming World*, [http://news.nationalgeographic.com/news/2004/12/photogalleries/global\\_warming](http://news.nationalgeographic.com/news/2004/12/photogalleries/global_warming) (last visited Jan. 27, 2008); Natural Res. Def. Council, *Issues: Global Warming*, <http://www.nrdc.org/globalWarming/fcons.asp> (last visited Jan. 27, 2008).

greenhouse emissions than to bury the human rights movement for the failure to stanch genocide.

Nor can an imminent death be foretold by a flight of resources.<sup>23</sup> While environmental group membership and focus varies from country to country, on a global scale membership is thriving.<sup>24</sup> One study concludes that in eighteen countries for which the authors collected longitudinal data beginning in the early 1980s, membership had more than doubled.<sup>25</sup> Between 1990 and 2004, philanthropic giving to environmental and wildlife groups in the United States increased from \$2.5 billion to \$7.6 billion, a pace faster than the average of all recipient categories.<sup>26</sup>

On the other hand, one cannot reliably read proof of *success* from fluctuations in interest group *membership*.<sup>27</sup> Standing alone, membership and contribution figures are ambiguous. A decline in membership of any nonprofit sector may signal the groups' collective failure, or it may indicate that the originally motivating circumstances have been brought under control, reducing the demand; presumably contributions to suffragettes dried up with passage of the Nineteenth Amendment. Conversely, an increase in membership is not inconsistent with, and might even be fueled by, organizational shortcomings. It might indicate that a worsening environment is falling behind the public's demand; hence, the critics might say, a sign that the groups are not doing their job.

As a result, one cannot dismiss the critics' challenge that the movement's leaders should have more to show for the added bucks, although the authors might have done themselves a service by phrasing the charge more temperately: Is environmentalism *misguided* or *faltering*?

But however we phrase the charge, the appropriate starting point is to ask: what are the criteria of success and failure by reference to which the movement should be judged? My response takes the form of identifying a set of specific goals activists appear to have embraced. I ask, for each, whether the goal is worthy, and if so, can we say, based on the available data, whether it is being reasonably met. I do not claim thoroughness. Hopefully, this small effort will help steer the dialogue along more productive lines. It

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<sup>23</sup> The authors of *The Death of Environmentalism* recognize increased membership, but construe it in the light of slowed progress. They argue that slowed progress implies the resources are poorly deployed, supplying further support for a radical revision of the movement. SCHELLENBERG & NORDHAUS, *supra* note 1, at 11.

<sup>24</sup> Schellenberg and Nordhaus do not deny the trends, but lament having little to show for all of the increased resources. *Id.*

<sup>25</sup> Russell J. Dalton, *The Greening of the Globe? Cross-National Levels of Environmental Group Membership*, 14 ENVTL. POL. 441, 453 (2005).

<sup>26</sup> The total giving went from \$101 billion to \$249 billion during this period. U.S. Census Bureau, Statistical Abstract of the United States, <http://www.census.gov/compendia/statab/> (last visited Jan. 27, 2008) (summarizing IRS data and household surveys by the Independent Sector and the Center on Philanthropy at Indiana University).

<sup>27</sup> Membership is reported differently; membership can be reported in terms of the number of persons donating, those only on mailing lists, or those who simply log on to websites. The 1999–2002 World Values Survey used self-reporting to measure membership. Dalton, *supra* note 25, at 442. For a discussion of membership reporting for U.S. charities, see Peter Panepento, *Behind the Numbers*, CHRON. PHILANTHROPY, Aug. 4, 2005, at 33.

does not reach conclusions on a number of issues that have rightly been raised, but may clarify them. These include: have environmentalists been pitching the wrong cases in wrong ways to wrong audiences? Should they seek more alliances with other interest groups? Should they work within existing political parties, or break away as American Greens? Has the movement an image problem? Should environmentalists be fostering new technology or a new vision of the human spirit?

## II. WHAT MOVEMENT, EXACTLY, IS FALTERING, AND WHAT SHOULD OUR EXPECTATIONS BE?

But first, what is the “*environmental movement*,” the state of which we are to examine? There is no monolithic environmental movement. Even the boundaries are unclear. Do we count the campaign against malaria in the environment column or in the health column? Is the banning of nuclear weapons tests in the atmosphere to be chalked up to the environment or the peace lobby? Anywhere we draw the boundaries of environmentalism, the “movement” is destined to include an assortment of factions, including various conservationists (each with its own potentially conflicting clients), sportsmen, animal rights advocates, and people whose primary concern is with resource sustainability or public health. The conservationist-hunters wing is destined to clash with the animal rights wing. Those who set out to save seals also menace fish stocks.<sup>28</sup> Indeed, why should anyone expect *unity* on such controversial issues as nuclear energy (given nuclear’s advantages carbon-wise)<sup>29</sup> or genetically modified crops (given the advantages of reduced pesticide applications)?<sup>30</sup> We should therefore not be surprised to find different—even conflicting—goals, agenda, and tactics.

Even if, for purposes of discussion, we postulate a general, overall movement, those who judge it a failure ought to consider: *a failure relative to what?* A thorough evaluation of environmentalism would have to draw comparisons with other progressive social movements; for example, the labor and civil rights movements, abolitionism, universal suffrage, tax reform, and abortion. Among the insights, one would discover a number of reasons to judge environmentalists with some lenience.

To begin with, all these movements vary in *the clarity of the goal sought*. Both the suffragettes and the abolitionists enjoyed the advantage of rallying for well defined and realizable endpoints. Because the finish line was more or less clear, the advocates knew when they had succeeded and

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<sup>28</sup> See *Should We Save the Seals or Cull Them?*, ORCADIAN (Scot.) Nov. 30, 2000, available at <http://www.orcadian.co.uk/archive/sealcont.htm> (describing the conflict between Scottish wildlife lovers trying to save orphaned seal pups and the local fishermen who say seals are decimating fish stocks).

<sup>29</sup> Nuclear Energy Inst., Clean-Air Benefits of Nuclear Energy, <http://www.nei.org/keyissues/protectingtheenvironment/cleanair/> (last visited Jan. 27, 2008) (describing the clean air benefits of nuclear energy and stating that nuclear power plants do not emit carbon dioxide).

<sup>30</sup> See Deborah B. Whitman, *Genetically Modified Foods: Harmful or Helpful?* (Apr. 2000), available at <http://www.csa.com/discoveryguides/gmfood/overview.php>.

could turn their efforts elsewhere.<sup>31</sup> By contrast, environmentalism's goals typically have no finish line. The fight to preserve species and glaciers has to be sustained forever,<sup>32</sup> and is fated therefore to deal with distraction and fatigue.

The comparison with the suffragettes and abolitionists reveals another comparative advantage of the predecessor movements: *the moral clarity of discourse*. Both projects could be advocated in the appealing language of universal rights. By contrast, the movement to decarbonize the global economy cannot really rest on an appeal to rights and therefore must face up to complex and fractious issues of risk, relative costs and benefits, and the allocation of burdens.<sup>33</sup> Indeed, one might recall that even with all the moral clarity on the side of the suffragettes and abolitionists,<sup>34</sup> neither battle was won without considerable pain, and, indeed, in the case of slavery, bloody uprisings and war. There is no "other side" to genocide. But environmentalism is full of other sides. Preserving lions and owls often threatens the livelihoods of blameless and struggling humans.<sup>35</sup>

Furthermore, environmental proposals typically implicate public goods, and thus coordination of effort among many independent actors. A movement aimed at ending the death penalty has only one target: the state. But not so for pollution, which faces many targets with many different

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<sup>31</sup> Abolition in fact had at least two steps: abolition of the slave trade, then abolition of slavery. The two movements also had add-ons, including assuring full civil rights, dignity, social equality, and so on. One could say the movements did not *end* so much as *veer*. See, e.g., Am. Abolitionism Project, A Brief History of the Abolitionist Movement, <http://americanabolitionist.liberalarts.iupui.edu/brief.htm> (last visited Jan. 27, 2008) (describing various milestones in the abolition movement, ending with a short paragraph describing the Civil War and beyond); The Civil Rights Movement, <http://www.cnn.com/EVENTS/1997/mlk/links.html> (last visited Jan. 27, 2008) (listing milestones of the civil rights struggle); E. Susan Barber, Nat'l Am. Woman Suffrage Ass'n Collection, One Hundred Years Toward Suffrage: An Overview, <http://memory.loc.gov/ammem/naw/nawstime.html> (last visited Jan. 27, 2008) (providing a timeline of the women's suffrage movement, ending after the ratification of the 19th Amendment in 1923 with the first proposal of the Equal Rights Amendment).

<sup>32</sup> Although the delisting of a particular species might be taken as a sort of partial end-point, the struggle continues to conserve wildlife and natural areas in general. See, e.g., The Endangered Species Act of 1973, 16 U.S.C. §§ 1531, 1533 (2000) (describing Congressional goals and policy to protect and conserve endangered and threatened species and the listing and delisting process); U.S. FISH & WILDLIFE SERV., DELISTING A SPECIES (2004), *available at* <http://www.fws.gov/endangered/pdfs/delisting.pdf> (describing the delisting process and its significance).

<sup>33</sup> See, e.g., GLOBAL ROUNDTABLE ON CLIMATE CHANGE, THE EARTH INST. AT COLUMBIA UNIV., THE PATH TO CLIMATE SUSTAINABILITY: A JOINT STATEMENT BY THE GLOBAL ROUNDTABLE ON CLIMATE CHANGE 3-10 (2007), *available at* [http://www.earth.columbia.edu/grocc/documents/GROCC\\_statement\\_2-27\\_1.pdf](http://www.earth.columbia.edu/grocc/documents/GROCC_statement_2-27_1.pdf) (describing the complexities of efforts to combat global climate change, including decarbonization, and providing detail on how various entities might take responsibility).

<sup>34</sup> Even rights discourse is rarely one-sided. Slave-owners, in polemics to their contemporaries, appealed to rights of property and biblical passages. See Jeffery H. Richards, *Religion, Race, Literature, and Eighteenth-Century America*, 5 AM. LITERARY HIST. 578, 582 (1993).

<sup>35</sup> ESSAYS IN WILDLIFE CONSERVATION §§ 9.2.4, 9.3.3 (Peter B. Moyle ed., rev. ed. 1997), *available at* <http://www.meer.org/chap9.htm>.



sovereigns. The United States might make further cuts in mercury emissions from its own factories,<sup>36</sup> only to find domestic progress simply overwhelmed by airborne pollutants floating in from China and elsewhere.<sup>37</sup>

This is not to dismiss the charge that we should be doing something better. But considering the handicaps environmentalism (in its various branches) faces, is it really doing *so badly* that it ought to be taken out and shot?

Comparative studies would have other things to teach, perhaps on tactics. The global economy two hundred and fifty years ago was as addicted to slavery as we are to oil.<sup>38</sup> The abolitionists had their own vested interests and disinformers to contend with.<sup>39</sup> Anyone who took up the cause of slaves faced hostile debunking<sup>40</sup> and the widely-mouthed claims of plantation owners and traffickers that slaves were happy with their lot. To overcome the opposition, a hopelessly small band of British abolitionists developed tactics many of which have since become standard strategies for social movements even today. Their first job was to make sure Britons understood what horrors lay behind the sugar they ate, the tobacco they smoked, the coffee they drank.<sup>41</sup> They organized consumer boycotts<sup>42</sup> and gave voters report cards on how their representatives voted on the issues.<sup>43</sup>

### III. INDICATORS OF SUCCESS AND FAILURE

Putting aside questions as to exact boundaries and internal divisions within environmentalism, there are several aims they all seem to embrace in common. We can ask whether each goal, given available data, is being carried out well or poorly. The goals may include: educating the public (environmental literacy), changing tastes and preferences, changing individual behavior, fostering favorable legislation, increasing private donations, increasing public funding, successful litigation, miscellaneous environmental front activities, and (the bottom line) improving the physical environment.<sup>44</sup>

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<sup>36</sup> U.S. EPA, Clean Air Mercury Rule, Basic Information (2007), <http://www.epa.gov/oar/mercuryrule/basic.htm> (last visited Jan. 27, 2008).

<sup>37</sup> See Matt Pottinger, Steve Stecklow & John J. Fialka, *Invisible Export: A Hidden Cost Of China's Growth: Mercury Migration; Turning to Coal, Nation Sends Toxic Metal Around Globe; Buildup in the Great Lakes; Conveyor Belt of Bad Air*, WALL ST. J., Dec. 17, 2004, at A1 (explaining that clouds of pollutants, originating in China, have been found to cause problems within the United States).

<sup>38</sup> Howard Dodson, *How Slavery Helped Build a World Economy*, in JUBILEE: THE EMERGENCE OF AFRICAN-AMERICAN CULTURE (2003), available at [http://news.nationalgeographic.com/news/2003/01/0131\\_030203\\_jubilee2\\_2.html](http://news.nationalgeographic.com/news/2003/01/0131_030203_jubilee2_2.html).

<sup>39</sup> See ADAM HOCHSCHILD, BURY THE CHAINS 324, 353–53 (2005).

<sup>40</sup> See *id.* at 111 (discussing the venomous hounding of an Anglican minister who corroborated abolitionist allegations).

<sup>41</sup> See *id.* at 6 (because the citizens of London were so disconnected from the places where these goods were produced, they were unaware of the human suffering their purchases were facilitating).

<sup>42</sup> *Id.* at 192–96.

<sup>43</sup> *Id.* at 6.

<sup>44</sup> This list is not complete, nor is it always true that improving the environment is the

Evaluating progress in these areas yields, at best, only a partial basis for evaluating the movement, because the advancement of each is subject to independent factors. For example, what the public knows about environmental issues—and how it feels and votes—is swayed not by environmentalists alone, but by other groups (consider evangelicals),<sup>45</sup> and media, including films and books, often for children.<sup>46</sup> The public even gets an environmental message from manufacturers who tout the eco-friendliness of their products.<sup>47</sup> One savvy study of environmental attitudes cites fluctuations in economic conditions, including energy costs, as *a* or perhaps *the* primary determinant of the success of environmental referenda.<sup>48</sup> With that caveat, let me offer some comments on each of the movement's presumed goals and highlight representative data that may influence a critique of the movement's performance.

### *A. Indices of Public Knowledge: Environmental Literacy*

Most environmental groups seek to emphasize particular perils and values when educating the public on environmental issues.<sup>49</sup> To judge whether they have succeeded, one might consult polls reflecting the public's environmental literacy. An example is *Environmental Literacy in America*, published by the National Environmental Education and Training Foundation.<sup>50</sup> The report suggests that only one to two percent of Americans could be considered "environmentally literate,"<sup>51</sup> and that despite the

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bottom line. Some regard mobilizing support for a better environment part of a larger movement to change the human spirit.

<sup>45</sup> See Michael Janofsky, *When Clean Air Is a Biblical Obligation*, N.Y. TIMES, Nov. 7, 2005, at A18 (crediting evangelicals with increasing pressure for environmental action, including defeat of efforts to weaken the Endangered Species Act).

<sup>46</sup> See Ellen Gamerman, *Family: Inconvenient Youths*, WALL ST. J., Sept. 29, 2007, at W1 (describing environmental messages directed at children through books and movies affecting parents' purchasing decisions). For a list of films and books, see Ellen Gamerman, *The Littlest Eco-Warriors*, WALL ST. J. ONLINE, Sept. 29, 2007, [http://online.wsj.com/article/SB119090528485241374.html?mod=moj\\_latest\\_n](http://online.wsj.com/article/SB119090528485241374.html?mod=moj_latest_n) (last visited Oct. 8, 2007).

<sup>47</sup> See, e.g., Toyota, Prius 08, <http://www.toyota.com/Prius/> (last visited Jan. 27, 2008) (advertising the "ECO-nomic savings" available to prospective Prius purchasers); Honda, Civic Hybrid, <http://automobiles.honda.com/civic-hybrid/environment.aspx> (last visited Jan. 27, 2008) (selling Honda's "commitment to positive environmental change").

<sup>48</sup> DEBORAH LYNN GUBER, *THE GRASSROOTS OF A GREEN REVOLUTION* 131–32 (2003); see also *id.* at 63, 69–70 (exploring reasons for vacillation in public environmental interest).

<sup>49</sup> Most environmental groups' mission statements illustrate this point. See, e.g., People for the Ethical Treatment of Animals, PETA's Mission Statement, <http://www.peta.org/about/index.asp> (last visited Jan. 27, 2008); Audubon Society, Issues & Action, <http://www.audubon.org/campaign/index.html> (last visited Jan. 27, 2008); Waterkeeper Alliance, Mission, <http://www.waterkeeper.org/main/aboutus.aspx> (last visited Jan. 27, 2008).

<sup>50</sup> KEVIN COYLE, *ENVIRONMENTAL LITERACY IN AMERICA: WHAT TEN YEARS OF NEETF/ROPER RESEARCH AND RELATED STUDIES SAY ABOUT ENVIRONMENTAL LITERACY IN THE U.S.* (Sept. 2005). The sampling was derived from random digit dialed telephone interviews with 1500 adults in the continental United States. *Id.* at 100.

<sup>51</sup> *Id.* at xii.

environmental movement, the public's knowledge since the 1970s has not kept apace.<sup>52</sup>

The latter conclusion—that there has been a failure to advance the public's knowledge about the environment since the 1970s—is hard to substantiate.<sup>53</sup> We can compare the relative popularity of presidents over decades, because there are standard, widely used questions that are stable over time (“Do you approve or disapprove of the job X is doing as President?”). But in the environmental area, both the items we expect people to be literate about (DDT, smog, ozone depleting agents), and the polling questions keep shifting over time.<sup>54</sup>

Nonetheless, public literacy on major contemporary issues appears impressive. Notwithstanding the well-financed denial campaign, between 2004 and 2007, the percentage of Americans who said global warming was a “serious problem” rose from seventy to eighty-three percent;<sup>55</sup> those who would label it “very serious” rose from forty to fifty-six percent over the same period.<sup>56</sup> Surely the movement deserves some credit for this.

As a general matter, such literacy polls might provide environmentalists useful cues for focusing their efforts. For instance, such polls can identify public misperceptions that are particularly germane to political action. We need not brood to discover how few Americans (thirteen percent) know what portion (one percent) of the earth's water is potable.<sup>57</sup> Such data might be classed with quiz-show factoids. Truly worrisome, however, is that only seventeen percent of Americans know that in the past ten to fifteen years, the average miles per gallon achieved by motor vehicles has decreased,<sup>58</sup> a

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<sup>52</sup> *Id.* at 3.

<sup>53</sup> The conclusion appears to be based on rather general findings that “there was no appreciable difference in knowledge levels between people who finished high school prior to 1970 and those who graduated after 1990.” *Id.* To make such claims about changes in environmental literacy, one would want to know whether those asked question *q* in 1990 did no better than those asked the same question in 1970. In all events, inter-temporal judgments about the environment are hard to construct because some of the things we are expected to be literate about have shifted over the past decades.

<sup>54</sup> To illustrate how the phrasing of questions can alter responses, even in regard to a single subject, compare a 1997 and a 2001 Harris Poll. In 1997, Americans were asked whether they believed in the “theory that increased carbon dioxide and other gases released into the atmosphere will” lead to global warming, and 67% said yes. Humphrey Taylor, *74% to 21% Majority (Of Those Who Know About It) Support Kyoto Global Warming Treaty; If Anything It is “Not Strict Enough,”* Harris Poll #6 (Dec. 17, 1997) available at <http://www.net.org/proactive/newsroom/release.vtml?id=17112> (last visited Oct. 10, 2007). In 2001, the question had morphed to whether those sampled had “heard about the theory of global warming” and believed it, and 75% answered yes. Humphrey Taylor, *Large Majority of Public Now Believes in Global Warming and Supports International Agreements to Limit Greenhouse Gases*, Harris Poll #45 (Sept. 12, 2001) [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=256](http://www.harrisinteractive.com/harris_poll/index.asp?PID=256) (last visited Jan. 27, 2008).

<sup>55</sup> Memorandum from the Global Strategy Group to the Yale Ctr. for Envtl. L. & Pol’y, Yale Sch. of Forestry & Envtl. Studies, 2007 Environment Survey—Key Findings 1 (Mar. 7, 2007) available at <http://www.loe.org/images/070315/yalepole.doc> [hereinafter Memorandum from the Global Strategy Group].

<sup>56</sup> *Id.*

<sup>57</sup> COYLE, *supra* note 50, at 84.

<sup>58</sup> *Id.* at 27.

misperception that has a direct bearing on legislative and administrative action. In a like vein, it would be helpful to find out how many people can identify the principal anthropogenic sources of and threats from greenhouse gases, and name the most dangerous pollutants.<sup>59</sup> Such studies could help identify what education is needed to achieve environmental literacy and what past public presentations have been most effective in accomplishing that goal.

### *B. Indices of Attitudes and Preferences*

The environmental movement aims not just to gather and disseminate information, but also to shift public tastes and priorities. It is not enough that the public knows that species are vanishing; people have to care. Until very recently, public opinion polls consistently ranked the environment low relative to other societal challenges, and this has been interpreted as a mark against the movement. As late as 2004, less than ten percent of Americans included the environment among what they consider to be the top three most important issues, well below the number who included terrorism and health care, and slightly below taxes, crime, and drugs.<sup>60</sup> A welter of polls report similar conclusions, but these findings are not always easy to evaluate.<sup>61</sup> For example, the failure of people to identify a problem as the worst or to include it within the three worst facing the country is not inconsistent with considering the problem extremely serious. AIDS, for example, got approximately half the responses the environment did<sup>62</sup> (I consider myself an environmentalist, but am not sure I would include the environment among the three most urgent problems we face).

However, the most recent polls appear to indicate significant shifts in concern. As recently as 2003 only twenty-seven percent of those polled had heard “a lot” and only thirty-nine percent “some” about global warming.<sup>63</sup> By 2007, the numbers had risen to forty-two percent and forty-seven percent, respectively.<sup>64</sup> Forty-seven percent of those who believe we are experiencing “stranger than usual weather” (three quarters of those polled) attribute the change to global warming.<sup>65</sup> In another 2007 poll, sixty-three percent agreed that America was in as much danger from environmental hazards as it is from

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<sup>59</sup> *Cf. id.* at 83 (discussing public misperceptions about pollution sources).

<sup>60</sup> Tom Curry et al., *How Aware is the Public of Carbon Capture and Storage?*, in PROCEEDINGS OF THE 7TH INTERNATIONAL CONFERENCE ON GREENHOUSE GAS CONTROL TECHNOLOGIES, Vancouver, Can., Sept. 5-9, 2004, at 2 (Malcolm Wilson et al. eds., 2005), available at [http://sequestration.mit.edu/pdf/GHGT7\\_paper137\\_Curry.pdf](http://sequestration.mit.edu/pdf/GHGT7_paper137_Curry.pdf).

<sup>61</sup> See generally GUBER, *supra* note 48, at 19-36 (providing a thoughtful critique of polling methodologies).

<sup>62</sup> Curry et al., *supra* note 60.

<sup>63</sup> Matthew C. Nisbet & Teresa Myers, *Twenty Years of Public Opinion About Global Warming*, 71 PUB. OPINION Q. 444, 447 (2007).

<sup>64</sup> *Id.*

<sup>65</sup> The New York Times CBS News Poll, Apr. 20-24, 2007, available at [http://graphics8.nytimes.com/packages/pdf/national/20070424\\_poll.pdf](http://graphics8.nytimes.com/packages/pdf/national/20070424_poll.pdf).

terrorists.<sup>66</sup> In an April 2007 ABC News/Stanford poll, seventy percent believed the federal government should do more to deal with global warming.<sup>67</sup> Global warming, not long ago a trailing environmental issue, emerged as the single biggest environmental problem, over air pollution (thirty-three percent to thirteen percent).<sup>68</sup> Notwithstanding the well-financed campaign to deny climate change, seventy-six percent have come to agree that global warming is occurring,<sup>69</sup> and eighty percent consider it "important."<sup>70</sup> As already indicated, not all of the public's concerns can be credited to environmentalists, given the influence of so many sources. On the other hand, it is hard to come away from this data concluding that the movement has left the public unconcerned.

Particularly helpful in determining the success of the movement would be data that reveals not merely what topics the public cares about, but *how much* they care.<sup>71</sup> For instance, it would be helpful to know how answers have changed to questions like "what would you be willing to spend, through higher taxes or utility bills, to reduce the risks of climate change?"<sup>72</sup> Such a question would not only measure the change in attitudes over the years, it would inform policy debates over how far the public is willing to go to eliminate carbon emissions. The answer may be "not very." In a 2007 poll, only twenty percent were willing to pay higher taxes (unspecified level) on electricity in order to restrain use, and seventy-nine percent were opposed to the tax.<sup>73</sup> Additionally, while thirty-two percent of respondents were in favor of a tax on gasoline, sixty-seven percent were opposed.<sup>74</sup>

### *C. Indices of Willingness to Contribute to Environmental Groups*

As already noted,<sup>75</sup> the amounts that U.S. environmental groups are capable of raising—\$7.6 billion in 2004—and the fact that this fundraising rose faster than the average giving category, is surely significant. In 2006,

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<sup>66</sup> Memorandum from the Global Strategy Group, *supra* note 55.

<sup>67</sup> Of this 69%, 49% believed the federal government could do "much more" and 20% believed the federal government could do "somewhat more" to deal with global warming. Washington Post-ABC News Poll: Environmental Trends, Apr. 20, 2007, [http://www.washingtonpost.com/wp-srv/nation/polls/postpoll\\_environment-042007.html](http://www.washingtonpost.com/wp-srv/nation/polls/postpoll_environment-042007.html), at Question 15 (last visited Jan. 27, 2008) [hereinafter Washington Post].

<sup>68</sup> *Id.* at Question 2a. Interestingly, when polled to rank the two most serious environmental problems, the public ranked climate change below water pollution, destruction of ecosystems, toxic waste, and overpopulation, to just about tie with ozone pollution. See Curry et al., *supra* note 60, at fig. 2.

<sup>69</sup> Of those 76% who believe climate change is occurring, 15% are "extremely sure," 22% are "very sure," and 34% are "somewhat sure." Washington Post, *supra* note 67, at Question 8.

<sup>70</sup> Of the 80% who believe global warming is important, 17% viewed it as "extremely important," 33% as "very important," and 32% as "somewhat important." *Id.* at Question 10.

<sup>71</sup> Not to mention data that reveals whether the public cares as much as they *should*.

<sup>72</sup> See Curry et al., *supra* note 60, at fig. 4 (reporting the public's willingness to pay, on average, an additional \$6.50 a month on electric bills if it would yield a complete elimination of climate change).

<sup>73</sup> Washington Post, *supra* note 67, at Question 18(a).

<sup>74</sup> *Id.*

<sup>75</sup> See U.S. CENSUS BUREAU, *supra* note 26, at 366.

donations to the Sierra Club increased by twenty-three percent from 2005, to \$22.9 million.<sup>76</sup> The groups appear to be opening purses.

#### *D. Indices of Environmentally-Sensitized Individual Action*

A person inclined to make sacrifices for the environment has the choice to pay her marginal green dollar, not to a group, but in the form of eco-friendly consumption, such as buying a hybrid car, eating only wild-caught fish, and selecting the right diapers. In the parlance of the movement, the aim is to get individuals to limit their personal ecological footprint.<sup>77</sup>

Has the movement failed in this aspect of its agenda? Once again, there is some data, but the picture it paints is blurry. When asked which of the following environment-friendly behavior respondents had engaged in the prior year, ninety percent had recycled; eighty-three percent reported having avoided certain environmentally harmful products, and the same number used less water and energy.<sup>78</sup> By comparison, nine percent bought or sold stock based on the issuer's environmental record.<sup>79</sup>

The problem with using these data as a basis for evaluation is that, as a start, we do not know how many responders 1) actually chose to pay a premium and 2) if they did, whether they did so in consideration for the reduced demands on the earth rather than for some other reason. In some areas recycling is not a choice, but is mandated.<sup>80</sup> And even when one pays a premium for environmentally benign products, it may not be the result of a commitment to the environment. The consumer may consider organic food to be safer and wild fish to be tastier, and therefore worth the added price. Similarly, cutting back on water and energy presumably saves money. To gauge the commitment *to the environment* of those who made cuts in water and energy consumption, one would have to know how much they sacrificed in comfort (i.e. a well-heated house or more showers) for which they would have gladly paid were it not for the environmental benefits. As for "green" stock, if one believes in the random walk theory of securities markets,<sup>81</sup> it is unclear that those who bought and sold stock based on environmental

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<sup>76</sup> Holly Hall, *A Record High: Donations by Americans Reached \$295-Billion in 2006*, CHRON. PHILANTHROPY, Jun. 28, 2007, available at <http://philanthropy.com/free/articles/v19/i18/18002701.htm#giving2>.

<sup>77</sup> There are a number of organizations that have attempted to measure and promote reduced ecological footprints. Some of the more prominent include *Redefining Progress*, <http://www.rprogress.org/> (last visited Jan. 27, 2008); *Best Foot Forward*, <http://www.bestfootforward.com> (last visited Jan. 27, 2008); *Global Footprint Network*, <http://www.footprintnetwork.org/> (last visited Jan. 27, 2008); and *World Wildlife Fund*, <http://www.worldwildlife.org/index.cfm> (last visited Jan. 27, 2008).

<sup>78</sup> GUBER, *supra* note 48, at 49–51 (reporting Gallup Poll results from April 3–9, 2000).

<sup>79</sup> *Id.*

<sup>80</sup> For example, New Jersey established the first mandatory state-wide recycling program in 1987. See Anthony T. Drollas, *The New Jersey Statewide Source Separation and Recycling Act: The Nation's First Comprehensive Statewide Mandatory Recycling Program*, 12 SETON HALL LEGIS. J. 271, 284–98 (1989).

<sup>81</sup> See BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET* (1973).

records were committing to lower returns on their investments; some "green" fund managers even claim they outperform the market.<sup>82</sup>

Even if we credit environmentalists for purchases the movement has influenced, my impression is that the ambitions to influence consumer choice have been thus far disappointing. On balance, the impact of those who, for instance, buy hybrid cars in the face of higher net costs continues to be overwhelmed by those who buy big cars, big refrigerators, and big houses.<sup>83</sup> Indeed, as we will see below, it seems quite possible that over the past decades environmentalists have had less success impacting ordinary people in their ordinary lives than they have had impacting Congress.

Of course, the fact that environmentalists could be doing better does not mean that they have "failed." Even if the ecological footprint campaigns have yet to gain strong traction, they are still nascent, and it is likely that absent their pleas, environmental quality would be even worse.

Moreover, it may be more difficult to persuade people to sacrifice for some cause on an individual voluntary basis than to donate through coerced governmental action. I am less inclined to pay \$100 for a cleaner environment (say, to eliminate a ton of carbon) on my own than to support a tax or utility bill hike under which I and my 100,000 neighbors each agree mutually to pay \$100 to eliminate 10 million tons. The latter seems both a fairer and a more effective plan.

Yet, even if we can understand the reasons why voluntary individual action is harder to motivate, there are strong reasons to invigorate the effort. For one thing, many environmental actions do not command enough consensus to authorize government action. There may be no majority to authorize public expenditures for a biodiversity reserve or the mandating of carbon-clean fuel. In those circumstances, progress requires voluntary action, rather than legal compulsion. Moreover, given all that has been done to bring industrial pollution under control, a growing share of uncurtailed emissions can now be traced to individuals and households.<sup>84</sup> Unfortunately, there are so many households (relative to farms and factories) that efforts to regulate at the household level may encounter increased costs of monitoring and enforcement per unit of emission brought under control. At these "lower" levels, efforts to change behavior have to rely less on legal commands and more on moral aspirations.

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<sup>82</sup> See *Latest Winslow Management Study Shows Environmental Responsibility Can Be Profitable*, WINSLOW ENVTL. NEWS, Apr. 2004, at 2, available at <http://edtweb20dev359.edthosting.com/admin/documents/environment/WEN%20Volume%2014,%20Number%201.pdf> (finding that an investment company index of 100 "green-screened" companies reported a cumulative increase in value of 98.5% over a four year period, as compared with the S&P 500's decrease in value of 10.69% over the same period).

<sup>83</sup> See MICHAEL BROWER & WARREN LEON, *THE CONSUMER'S GUIDE TO EFFECTIVE ENVIRONMENTAL CHOICES* 4-6 (1999) (discussing the environmental impact of the typical American consumer).

<sup>84</sup> Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 539 (2004) (using "individuals" to describe persons acting in a private capacity and not in the course of employment).

What can the movement do to facilitate a reduced footprint? Behavior modification can be promoted by making opportunities available (such as weatherization subsidies),<sup>85</sup> and by informing people how and where to do lots of little things, such as where to dispose of motor oil, paints, and old batteries. Even more ambitiously, groups have established Internet markets where people can purchase “carbon footprint” offsets.<sup>86</sup> At these sites people can calculate the amount of emissions they are responsible for and counterbalance those emissions by underwriting the planting of CO<sub>2</sub> absorbing trees.<sup>87</sup>

### *E. Indices of Influence on Lawmaking*

Whatever the impact of environmentalists on market choices, one would like to know more about their influence in the political arena.<sup>88</sup> Have activists succeeded in making political contests turn on the candidates’ environmental stances? The answer is hard to pick out from amidst all the noises of political campaigns. Some commentators maintain that the environment is a salient issue in candidate contests at various levels in California.<sup>89</sup> But even if that impression about California could be substantiated, there is some skepticism that the environment has become a strong factor generally.<sup>90</sup> For the environment to be a factor in switching votes, it is not enough that the voters have been made to care about the environment; most do. They have to discern a material distance between the candidates on issues that they can understand and which matter to them. In this light, it is easy to see why abortion, for example, becomes salient: candidates can easily identify themselves (or be identified) as being on one side or the other. But no candidate self-identifies as anti-environment, and the issues on which they divide are, or can be, muddled in detail. Analyses of

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<sup>85</sup> See Joseph P. Tomain, *Smart Energy Path: How Willie Nelson Saved the Planet*, 36 CUMB. L. REV. 417, 433 (2005–06) (discussing weatherization as a conservation promoting incentive in the context of the Energy Policy Act of 2005).

<sup>86</sup> See, e.g., Christine Larson, *A New Way to Ask, ‘How Green Is My Conscience?’*, N.Y. TIMES, June 25, 2006, at BU-6; CLEAN AIR-COOL PLANET, A CONSUMER’S GUIDE TO RETAIL CARBON OFFSET PROVIDERS 25 (2006), available at <http://www.cleanair-coolplanet.org/ConsumersGuidetoCarbonOffsets.pdf> (listing the website addresses of 30 retail offset providers).

<sup>87</sup> See Larson, *supra* note 86, at BU-6 (discussing “the many groups vying to shrink your carbon footprint”).

<sup>88</sup> In some countries, political impact can take the form of appointment of a “Green” to a cabinet post, such as Agriculture Minister Renate Kuenast in Germany. See Organic Food Quality & Health, *GMOs*, ORGANIC FOOD QUALITY NEWS 4 (Nov./Dec. 2004), available at <http://www.organicfqrsearch.org/downloads/newsletter/OFQNdec2004.pdf> (quoting Minister Kuenast’s reaction to the German parliament’s adoption of “a controversial law laying down strict rules on the cultivation of genetically modified (GM) plants”).

<sup>89</sup> See Karen Breslau, *The Mean Green Machine*, NEWSWEEK, June 19, 2006, at 40 (stating that “In California . . . 87 percent of voters say that environmental issues matter in choosing a candidate” and “[Governor Schwarzenegger] made [environmental issues] a centerpiece of his re-election campaign”).

<sup>90</sup> See GUBER, *supra* note 48, at 11, 105–23 (listing excellent sources).



the 1996 and 2000 presidential elections confirm how hard it is to make the environment count.<sup>91</sup> It is particularly striking that in 2000 George W. Bush is believed to have neutralized the environment as a swing issue,<sup>92</sup> even though his opponent, Al Gore, was almost certainly more “environmental.”<sup>93</sup> One’s “symbolically perfect” speeches became a stand-off against the other’s “language of parts per million [and of] emissions control technologies.”<sup>94</sup> President G. W. Bush does not seem to have paid a price in 2004, when his record and message on the environment had become presumably more difficult to package sympathetically.<sup>95</sup>

A failure of the public to mark sharp and significant distinctions among candidates might be cited as a failure of the movement. But to evaluate the charge one has to take campaign finance law into account. Contributions to nonprofit groups are tax-deductible as long as the funds are used to promote issues.<sup>96</sup> Thus, the movement can finance ads warning against global warming or species loss. But a group that was to place ads that sought to guide swing voters to the “right” candidate would risk forfeiting its charitable status.<sup>97</sup> In other words, the movement’s hands are not exactly tied in influencing elections. But the groups have a restricted space in which to maneuver.<sup>98</sup>

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<sup>91</sup> *Id.* at 113–22.

<sup>92</sup> *See id.* at 118–21 (discussing how the Nader campaign attracted “[w]hat attention the environment did receive” in 2000); STAN GREENBERG, *THE PROGRESSIVE MAJORITY AND THE 2000 ELECTIONS* 2, 22 (Dec. 15, 2000), *available at* [http://www.democracy.corps.com/reports/analyses/The\\_Progressive\\_Majority\\_and\\_the\\_2000\\_Elections.pdf](http://www.democracy.corps.com/reports/analyses/The_Progressive_Majority_and_the_2000_Elections.pdf) (“The Bush campaign helped push the election off of issues and on to values and trust by demonstrating a reasonableness and by creating confusion on the big issues of the day.”).

<sup>93</sup> GREENBERG, *supra* note 92, at 8.

<sup>94</sup> GUBER, *supra* note 48, at 122. Plus, in the run-up to the 2000 election Bush characterized climate change as “a serious problem” that he pledged to alleviate. Andrew C. Revkin, *Texas Takes Step on Warming; Some See Shift in Bush’s Position*, N.Y. TIMES, Aug. 24, 2000 *available at* <http://query.nytimes.com/gst/fullpage.html?res=9F0DE5D71731F937A1575BC0A9669C8B63&scp=1&sq=&st=nyt>.

<sup>95</sup> Felicity Barringer, *New Priorities in Environment*, N.Y. TIMES, Sept. 14, 2004, *available at* [http://www.nytimes.com/2004/politics/campaign/14enviro.html?\\_r=1&scp=1&sq=&st=nyt&oref=slogin](http://www.nytimes.com/2004/politics/campaign/14enviro.html?_r=1&scp=1&sq=&st=nyt&oref=slogin). For example, on many issues voters may entertain presumptions about where the candidate stands based on his or her party affiliation. Linda J. Skitka & Renee Robideau, *Judging a Book by its Cover: The Effects of Candidate Party Label and Issue Stands on Voting Behavior*, 27 J. APPLIED SOC. PSYCHOL. 967, 967–82 (1997).

<sup>96</sup> Fed. Election Comm’n v. Mass. Citizens for Life, Inc. (*Citizens for Life*), 479 U.S. 238, 249–51 (1986) (delineating issue and express advocacy); 2 U.S.C. § 441(b) (2000).

<sup>97</sup> 26 U.S.C. §§ 501(c)(3), 501(h) (2000). Also, last minute efforts to steer voters to the “right” candidate run into constraints from the McCain-Feingold Act. Issue ads do not face these constraints. *But see Citizens for Life*, 479 U.S. at 249–51 (discussing the concept of “express advocacy” and arguing that the distinction between discussions of issues and candidates often dissolves in practical application because candidates are oftentimes intimately linked to the issues they support).

<sup>98</sup> Voting is not limited to electing candidates; voters have been able to make headway on environmental issues through state and local initiatives and referendums, which have a slightly different dynamic. *See* Deborah Lynn Guber, *Environmental Voting in the American States: A Tale of Two Initiatives*, 33 STATE & LOCAL GOV’T REV. 120, 120–31 (2001).

Arguments that the movement is losing its grip more often allege the environmentalists' declining influence in the Congress than at the ballot box. Specifically, it is common to contrast the spate of legislation that passed in the 1970s, including, in 1970 to 1973 alone, the National Environmental Policy Act,<sup>99</sup> the Coastal Zone Management Act,<sup>100</sup> the Marine Protection, Research and Sanctuaries Act,<sup>101</sup> the Ocean Dumping Act,<sup>102</sup> the Clean Water Act,<sup>103</sup> and the Endangered Species Act.<sup>104</sup> The 1980s saw the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>105</sup> and few narrower undertakings, including the Nuclear Waste Policy Act,<sup>106</sup> and the Asbestos School Hazard Abatement Act.<sup>107</sup> The 1990s gave us little beyond the Clean Air Acts Amendments<sup>108</sup> (which were material in the fight against acid rain) and the National Environmental Education Act.<sup>109</sup>

This undeniable petering out of federal legislation might reflect popular dissatisfaction with environmentalism or strategic miscalculations among its leaders. The authors of *Death of Environmentalism* cite as "[p]erhaps the greatest tragedy of the 1990s" the inability of the environmental community to "come up with . . . a legislative proposal . . . that a majority of Americans could get excited about."<sup>110</sup>

A more plausible explanation than declining imagination or clout is a shrinking pool of urgently needed and pragmatically passable legislation. The first laws to be driven through Congress, such as acts cleaning water and air, were those that commanded the strongest consensus.<sup>111</sup> Proposals still unenacted are those for which there is a lower demand and more concentrated resistance.<sup>112</sup>

A review of the Congressional Record substantiates the dwindle. Of the forty-odd bills relating to the environment proposed in the 108th and 109th Congresses, only three passed, two of which were appropriations for

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<sup>99</sup> National Environmental Policy Act, 42 U.S.C. §§ 4321–4370e (2000 & Supp. 2004).

<sup>100</sup> Coastal Zone Management Act, 16 U.S.C. §§ 1451–1465 (2000 & Supp. 2004).

<sup>101</sup> Marine Protection, Research and Sanctuaries Act, 32 U.S.C. §§ 1401–1445 (2000).

<sup>102</sup> Ocean Dumping Act, 32 U.S.C. §§ 1401–1445 (2000).

<sup>103</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000 & Supp. 2004).

<sup>104</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000 & Supp. 2004). State laws, often mirroring the federal, passed in their wake. *E.g.*, OR. REV. STAT. §§ 468.005–468.997 (2005).

<sup>105</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2000 & Supp. 2004).

<sup>106</sup> Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101–10108, 10121, 10131–10145, 10151–10157, 10161–10169, 10171–10175, 10191–10204, 10221–10226, 10241–10251, 10261–10270 (2000).

<sup>107</sup> Asbestos School Hazard Abatement Act of 1984, 20 U.S.C. §§ 4011–4021 (2000).

<sup>108</sup> Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7429–7431, 7592, 7505a, 7506a, 7509–7509a, 7511–7515, 7552–7554, 7581–7590, 7651–7651o, 7661–7661f, 7671–7671q, 29 U.S.C. § 1662e (2000).

<sup>109</sup> National Environmental Education Act, 20 U.S.C. §§ 5501–5510 (2000).

<sup>110</sup> SHELLENBERGER & NORDHAUS, *supra* note 1, at 16.

<sup>111</sup> See 117 CONG. REC. 38,865 (1971) (indicating that the Federal Water Pollution Control Act of 1972 passed the Senate by a vote of 86 votes to 0, with 14 not voting).

<sup>112</sup> See, *e.g.*, Chemical Security Act of 2003, S. 157, 108th Cong. (2003) (a bill requiring safety assessments for chemical plants, which was never considered by the full senate).

existing agencies,<sup>113</sup> and the other an amendment to an existing program regarding the U.S.-Mexican Border Environment Cooperation Commission.<sup>114</sup> Thirty-four of the bills were referred to committee and allowed to die without further action, including such symbolic gestures as proposals for a constitutional amendment assuring a clean environment.<sup>115</sup> Not all of the unsuccessful proposals can be dismissed as undeserving of environmental lobbying. They included the Mercury Emission Act of 2005<sup>116</sup> and a Freedom to Establish State High Air Quality (Fresh Air Quality) Act,<sup>117</sup> which would enable states to set their own standards regardless of actions by the Environmental Protection Agency (EPA). But the impact of most of the proposals would have been marginal. For instance, a bill to amend the Federal Insecticide, Fungicide, and Rodenticide Act would have required local educational agencies and schools to implement integrated pest management systems.<sup>118</sup>

Granted, there is little in these proposals that could be considered dramatic. Yet the diminished flow of environment-protecting legislation can be portrayed as a sign of success: unless a shift in Administration sweeps in ultra-sympathetic allies, much of what realistically can be expected from Congress, the environmentalists have already gotten. Moreover, some of Congress' own influence has migrated to the White House, given presidential leadership (or nonleadership) over the treaty-making powers and the agencies (principally the Environmental Protection Agency). With the most crucial federal laws already on the books, and the current White House beyond their reach, some of the activists' time and resources has been redeployed towards states and localities, with an eye towards making progress selectively, in the most congenial jurisdictions.<sup>119</sup> Even with the redeployment however, there remains resistance at both local and state levels.<sup>120</sup>

#### *F. Public Sector Funding*

The number of environmental bills legislatures pass is perhaps less indicative of environmentalist influence on those bodies than the levels of appropriations for environment-protecting activities. The budget record, however, like much else, is ambiguous. Critics have pointed out that over the past forty years federal support for natural resources and the environment

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<sup>113</sup> H.R. 2673, 108th Cong. (2004) (authorizing appropriations for the Environmental Protection Agency); H.R. 3378, 108th Cong. (2004) (authorizing appropriations for a newly created marine turtle conservation fund).

<sup>114</sup> H.R. 254, 108th Cong. (2004) (enacted).

<sup>115</sup> H.R.J. Res. 33, 109th Cong. (2004).

<sup>116</sup> Mercury Emission Act of 2005, S. 730, 109th Cong. (2005).

<sup>117</sup> H.R. 3133, 108th Cong. (2003).

<sup>118</sup> H.R. 3275, 106th Cong. (1999).

<sup>119</sup> See generally DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON* (2005).

<sup>120</sup> See, e.g., John M. Broder, *Rule to Expand Mountaintop Coal Mining*, N.Y. TIMES, Aug. 23, 2007 (describing the failure of environmentalists to influence a proposed surface mining regulation), available at <http://www.nytimes.com/2007/08/23/us/23coal.html>.

(NRE) fell nearly in half, which is true when viewed as a *percentage* of the total budget.<sup>121</sup> On the other hand, there were increases over this period both in *total* appropriations for NRE (from \$14.5 to \$27.8 billion),<sup>122</sup> and in NRE's share of the proportionately declining *discretionary* budget (from 2.8 percent to 4 percent).<sup>123</sup> Moreover, there are environmental-benefiting appropriations which are not included in the budget's NRE tabulation. Much of the spending on climate change, for example, is spread among many agencies, and is independently reported by the Office of Management and Budget to have increased fifty-five percent, from \$3.28 billion to \$5.09 billion (adjusted for inflation) between 1993 and 2004.<sup>124</sup>

If we focus directly on the EPA, as the key agency, we find that in its first ten years (1971 to 1980) its budget bounded from \$700 million to \$5.6 billion, and gradually worked up to \$7.2 billion in 2000. After peaking at \$8.3 billion in 2004, it thereafter began a gradual descent and is slated to taper to \$7.8 billion (estimate) in 2008.<sup>125</sup>

I am not sure what to make of these figures. Relative to other claims on funds, are they "too high" or "too low"? Should we expect some tapering off of budget outlays as air and water quality have improved? Perhaps rather than examining gross budget trends, environmentalists should try to identify and publicize particular areas that are most credibly underfunded.

### G. Litigation

A shift towards the courts has proven fruitful. The number of citizen suits, many instigated by environmental groups,<sup>126</sup> has had a far reaching and expanding influence. One study reports that:

Since 1995, citizens have filed . . . about one lawsuit a week, and have earned 315 compliance-forcing judicial consent orders, under the CWA and CAA alone.

<sup>121</sup> See Gerry Gray, *Big Picture Needed, Please*, AM. FORESTS, Spring 2005, at 5 ("For every dollar of federal spending in the early 1960s, 2.4 cents went toward these important programs; in 2004, it's just 1.3 cents.").

<sup>122</sup> *Id.* (comparing, in constant FY2000 dollars, an increase in overall annual federal spending with increases in spending for natural resources and environmental programs).

<sup>123</sup> R. Neil Sampson, *Where Do the U.S. Dollars Go?: U.S. Spending on the Environment and Natural Resources*, CONSERVATION IN PRACTICE, Spring 2003, at 26.

<sup>124</sup> Some of the spending attributed to climate change may be counted in the budget's tabulation of NRE, but other spending, such as by Health and Human Services and Agriculture, is not. See U. S. GOV'T ACCOUNTABILITY OFFICE, CLIMATE CHANGE: FEDERAL REPORTS ON CLIMATE CHANGE FUNDING SHOULD BE CLEARER AND MORE COMPLETE (2005), available at <http://www.gao.gov/new.items/d05461.pdf>. The summary page summarizes OMB's budget numbers on climate change but also expresses reservations about their reliability on account of changes in reporting methods over time.

<sup>125</sup> OFFICE OF MGMT & BUDGET, THE BUDGET FOR FISCAL YEAR 2008, HISTORICAL TABLES 73 (2007), available at <http://www.gpoaccess.gov/usbudget/>.

<sup>126</sup> But not all—one in three citizen suits are brought by nontraditional citizens, including companies, landowners, developers, industry, and, ever more frequently, states and faith-based organizations. See James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 3 (2003).

During the same period, under all environmental statutes, citizens have submitted more than 4,500 notices of intent to sue, including more than 500 and 4,000 against agencies and members of the regulated community, respectively. This is an astonishing pace over eight years of about two notices of intent to sue every business day, which easily outpaces EPA referrals for enforcement to the U.S. Department of Justice (DOJ).<sup>127</sup>

The author of this report associates the increased flow of private suits with a diminishing flow from the government.<sup>128</sup>

This certainly jibes with my own impression that environmental groups are increasingly watch-dogging the efforts to purge emissions, protect species, and safeguard environmentally sensitive areas. Environmental litigators have been consistently vigilant, professional, and creative. If this view is mistaken, it demands correcting; but it should be up to the critics to point out the good cases that are not being brought, or the failures in litigating tactics.<sup>129</sup>

#### *H. Indices of Miscellaneous Actions*

Environmental groups do not seek merely to foster preferences and to influence laws and their enforcement. Their activities extend to a wide range of miscellaneous functions around the world. These include reducing uncertainty around science, proposing solutions, disseminating technological options, and capacity building: training cadres of environmental lawyers, organizing workshops and clinics, and supporting the proliferation of like-minded groups. Nor have the environmental groups been unable to exploit the Internet in gathering and transmitting data.<sup>130</sup> Efforts have been made to reach out and gain support among shareholders and industry leaders.<sup>131</sup> No one can claim that each of these activities has been conducted optimally. Each should be appraised with a critical, constructive eye. But anyone who would dismiss the environmental movement as moribund is brushing aside quite a slew of current activities.

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<sup>127</sup> *Id.* at 4–5.

<sup>128</sup> *Id.* at 5.

<sup>129</sup> For example, David Schoenbrod criticizes the suit brought by the National Resources Defense Council to enjoin the EPA to regulate carbon dioxide. He argues that empowering the EPA is inferior to fostering state-by-state strategies. See John Tierney, *The Environmental Procrastination Agency*, N.Y. TIMES, July 8, 2006, at A13.

<sup>130</sup> See Tessa Spencer, *The Potential of the Internet for Non-Profit Organizations*, FIRST MONDAY, June 22, 2002, [http://www.firstmonday.org/issues/issue7\\_8/spencer/index.html](http://www.firstmonday.org/issues/issue7_8/spencer/index.html) (last visited Jan. 27, 2008) (discussing the challenge nonprofits face in effectively using technology).

<sup>131</sup> See, e.g., *Nonprofits are Flexing Stock Proxy Muscles*, THE NONPROFIT TIMES, Nov. 8, 2004, [http://www.nptimes.com/enews/Nov04/news/news-1104\\_2.html](http://www.nptimes.com/enews/Nov04/news/news-1104_2.html) (last visited Jan. 27, 2008) (discussing shareholder activism by nonprofit groups); Press Release, Sierra Club, Strong Support Among ChevronTexaco Shareholders for Sensitive Areas Resolution (Apr. 27, 2005), available at <http://www.sierraclub.org/pressroom/releases/pr2005-04-27b.asp> (discussing ChevronTexaco shareholders voting to ask the company to produce a report on environmental risks of oil drilling).

### *I. Actual (Direct) Indicators of Environmental Health*

Of course, the most important criteria of success is the bottom line. Putting aside the tallying of laws passed and budgets appropriated, has the environment gotten better or worse? What has the movement got to show for itself? There are some prominent deteriorations. In the atmosphere, the congestion of greenhouse gases is continuing.<sup>132</sup> In the oceans, coral is dying,<sup>133</sup> pollution accumulating,<sup>134</sup> and fish stocks deteriorating.<sup>135</sup> On land, deserts are expanding,<sup>136</sup> tropical forests shrinking,<sup>137</sup> habitats disappearing,<sup>138</sup> and species vanishing.<sup>139</sup> As against these losses, the thinning of the ozone shield has been checked.<sup>140</sup> Some highly valued species, such as the American Bald Eagle and gray whale, have been removed from endangered lists.<sup>141</sup> But overall, from 1980 to 2005 the number of species listed as endangered or threatened quadrupled.<sup>142</sup> Forest cover in temperate zones has increased.<sup>143</sup> In the United States, the principal

<sup>132</sup> U.S. EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2005 ES-3 (2007), available at <http://epa.gov/climatechange/emissions/usinventoryreport.html>.

<sup>133</sup> See, e.g., Cornelia Dean, *Coral is Dying. Can it be Reborn?*, N.Y. TIMES, May 1, 2007, at F1, available at <http://www.nytimes.com/2007/05/01/science/earth/01coral.html?emc=eta1>.

<sup>134</sup> See, e.g., Li Daoji & Dag Daler, *Ocean Pollution from Land-Based Sources: East China Sea, China*, 33 AMBIO 107, 109 (2004).

<sup>135</sup> See, e.g., Rosamund L. Naylor et al., *Effects of Aquaculture on World Fish Supplies*, 8 ISSUES IN ECOLOGY 2, 2 (2001).

<sup>136</sup> MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: DESERTIFICATION SYNTHESIS 1 (2005), available at <http://www.inweh.unu.edu/inweh/MA/Desertification-Synthesis.pdf>.

<sup>137</sup> FOOD & AGRIC. ORG., GLOBAL FOREST RESOURCES ASSESSMENT 2005: PROGRESS TOWARDS SUSTAINABLE FOREST MANAGEMENT 19 (2006), available at <ftp://ftp.fao.org/docrep/fao/008/A0400E/A0400E00.pdf> [hereinafter GLOBAL ASSESSMENT].

<sup>138</sup> JONATHAN E.M. BAILLIE ET AL., 2004 IUCN RED LIST OF THREATENED SPECIES: A GLOBAL SPECIES ASSESSMENT 35 (Jonathon E.M. Baillie et al. eds., 2004), available at [http://www.iucn.org/themes/ssc/red\\_list\\_2004/GSA\\_book/Red\\_List\\_2004\\_book.pdf](http://www.iucn.org/themes/ssc/red_list_2004/GSA_book/Red_List_2004_book.pdf).

<sup>139</sup> *Id.* at 46.

<sup>140</sup> See D.W. Fahey, *Scientific Assessment of Ozone Depletion: Twenty Questions and Answers About the Ozone Layer: 2006 Update* Q.45 (2006), available at <http://www.esrl.noaa.gov/csd/assessments/2006/chapters/twentyquestions.pdf> (projecting that the first two stages of Antarctic global ozone recovery will be reached before 2020).

<sup>141</sup> U.S. FISH & WILDLIFE SERV., *Bald Eagle Soars Off Endangered Species List*, <http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=72A15E1E-F69D-06E2-5C7B052DB01FD002> (last visited Jan. 27, 2008); U.S. Fish & Wildlife Serv., *Endangered Species Gray Whale, Eschrichtius robustus*, <http://www.fws.gov/endangered/i/A1Q.html> (last visited Jan. 27, 2008).

<sup>142</sup> In 1980, the U.S. Fish and Wildlife Service had listed 280 plant and animal species as “threatened or endangered.” Council on Env’tl. Quality, U.S. Fish & Wildlife Serv., Environmental Quality Statistics: Table 4.7 U.S. Threatened and Endangered Species, 1980–2002, <http://www.nepa.gov/nepa/reports/statistics/tab4x7.html> (last visited Jan. 27, 2008). That number included 36 mammals. *Id.* By 2007, those numbers jumped to 1351 threatened or endangered plant and animal species, including 81 mammals. U.S. Fish & Wildlife Serv., Threatened and Endangered Species System: Summary of Listed Species, [http://ecos.fws.gov/tess\\_public/Boxscore.do](http://ecos.fws.gov/tess_public/Boxscore.do) (last visited Jan. 27, 2008).

<sup>143</sup> GLOBAL ASSESSMENT, *supra* note 137, at 20 (noting increases in forest cover in Europe and northern Asia).

indicators of air quality have generally improved over the past three decades.<sup>144</sup> The same is probably true of water quality, overall, although inventorying of water conditions is not as thorough as with air, and different pollutants, such as pesticides and mercury, undoubtedly present different, and not consistently comforting, biographies.<sup>145</sup>

**Figure 1: Percent Change in Air Quality**

	1980 vs 2006	1990 vs 2006
NO <sub>2</sub>	-41	-30
O <sub>3</sub> (1-hr)	-29	-14
(8-hr)	-21	-9
SO <sub>2</sub>	-66	-53
PM <sub>10</sub> (24-hr)	—	-30
PM <sub>2.5</sub> (annual)	—	-15
PM <sub>2.5</sub> (24-hr)	—	-17
CO	-74	-62
Pb	-95	-54

The PM data indicate percentage changes between 1999 and 2006. U.S. E.P.A., Air Quality and Emissions—progress continues in 2006, *available at* <http://www.epa.gov/airtrends/sixpoll.html>.

No signs of the feared regulatory “roll-back” have shown up in the EPA data. In 2000 to 2006, the tenure of the current administration, the agency’s benchmark of six principal air pollutants declined fourteen percent even in the face of increased domestic product, energy use, and vehicle miles traveled.<sup>146</sup>

Even were we able to combine the various gains and losses into a single index of “environmental quality,” we would be hard pressed to draw an unambiguous evaluation of the movement’s influence. There are simply too many inputs determining policy outcomes to allocate credit or blame among environmentalists and other actors and forces. Even where there have been setbacks, one can only surmise how much worse the situation would have

<sup>144</sup> See *supra* text accompanying notes 14–16.

<sup>145</sup> See U.S. EPA, EPA WATER QUALITY CONDITIONS IN THE UNITED STATES: A PROFILE FROM THE 2000 NATIONAL WATER QUALITY INVENTORY (Aug. 2002), *available at* <http://www.epa.gov/305b/2000report/factsheet.pdf> (reporting that about 33% of U.S. waters were assessed for the inventory, and that while the country has made significant progress in cleaning up polluted waters over the past 30 years, much remains to be done to restore and protect the nation’s waters).

<sup>146</sup> U.S. EPA, *Air Trends*, <http://www.epa.gov/air/airtrends/sixpoll.html> (last visited Jan. 27, 2008).

been had environmentalists not been agitating for improvement. Is anyone claiming that there are risks the environmentalists have *missed*?

### *J. Efficient Pollution*

One could want more of the movement including a reduction in the quantity of pollutants emitted (and wildlands converted, species lost, and so on). A more rigorous demand would be for the environmentalists to persist in their efforts until the efficient levels have been attained. The theory is clear enough. As more and more units of pollution are removed, the marginal benefits of any further reductions goes down (the worst stuff has been taken out first); at the same time, the marginal costs of incremental removal go up (assuming that the stuff that is least costly to remove has already been eliminated). Even the environmental skeptic will grant that abatement should be pursued until the marginal costs of any further reductions equate with the marginal benefits.<sup>147</sup>

As a basis for critiquing the movement, efficiency is unfortunately a hard indicator to track. Measuring physical qualities, such as tons emitted or accumulated in the air, is fairly straightforward. But figuring the marginal costs and benefits of moving away from those figures is inevitably conjectural. What will it really cost, in the long term, to eliminate a gigaton of carbon (much less to restore emissions to 1990 levels)? And how can we put a price on the benefits one can expect in return, which relate to such things as discomfort, wilderness areas, species, and the welfare of remote descendants?

With so much uncertainty, no one can say with confidence that various emissions should be cut further, more wetlands protected, and so on. It may well be that certain pollutants have already been reduced to efficient levels—that is, to a point where the social benefits of further reductions would not be warranted by the costs. Wherever this is so, environmentalism is alive as long as the gains are protected. But there is reason to suspect present levels are inadequate, if only because of the strength of industry's hands in, for example, formulating energy policy<sup>148</sup> and in installing allies into key government roles.<sup>149</sup> Opinions of scientists supporting further regulation have been ignored or rewritten.<sup>150</sup> The government's own cost-benefit analysis procedures, increasingly managed from within the shadows of the Office of Management and Budget (OMB), have drawn scathing charges of regulatory capture.<sup>151</sup>

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<sup>147</sup> Nor should they press too far.

<sup>148</sup> Don van Natta Jr. & Neela Banerjee, *Bush Policies Have Been Good to Energy Industry*, N.Y. TIMES, Apr. 21, 2002, at A22.

<sup>149</sup> *Id.*

<sup>150</sup> Andrew C. Revkin, *Bush Aide Edited Climate Reports*, N.Y. TIMES, June 8, 2005, at A1 (reporting that an energy industry lobbyist hired as a White House staffer was shown to have rewritten climate change warnings).

<sup>151</sup> See ROBERT F. KENNEDY JR., *CRIMES AGAINST NATURE* 58–68, 93–94 (2004) (criticizing the risk assessment procedures consolidated within OMB's Office of Information & Regulatory Affairs (OIRA)); see also Rena Steinzor, *The Legacy of John Graham: Straight-Jacketing Risk*



Nonetheless, it is not easy to substantiate the hunch that the government, even in adopting industry positions, is straying far from what most people would in fact prefer (as distinct from the more presumptuous but conjectural standard, the policies the public would select if fully informed). When asked 'how willing would you be to pay much higher prices to protect the environment,' nearly half (forty-seven percent) were "willing," but slightly more were either "neutral" (twenty-four percent) or "unwilling" (twenty-eight percent).<sup>152</sup> Thirty-four percent would be willing to pay "much higher taxes" and thirty-two percent would "accept cuts in [their] standard of living" to protect the environment.<sup>153</sup> But on the same issues, about twenty-two percent were "neutral" and forty-five percent were "unwilling."<sup>154</sup> In other words, those who want to go further in protecting the environment are pretty fairly balanced against those who do not. If these figures are reliable and remain valid today (the poll was taken in 1994), it would suggest that the level of environmental regulation is not far from the level the public is willing to pay for and that the government, therefore, is not being unresponsive.<sup>155</sup>

#### IV. SELF-PRESENTATION

Not all criticism of environmentalism alleges misconceived goals or flubbed efforts. Some criticism goes to style—not so much to what the environmentalists are doing but to how they go about it.

##### *A. Alarmism*

One common charge is that environmentalists have undermined their credibility by adopting alarmism as their basic strategy;<sup>156</sup> the "politics of chicken little" it has been called.<sup>157</sup> I am not sure that is fair. Most of the literature I receive from the environmentalist camps, while designed to warn (that is, after all, their job), are nonetheless sober. Certainly, one can find a few calamitous predictions, going back to Malthus, that have proved, thankfully, overly pessimistic (thus far?). Every forecast that fails to pan out

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Assessment, Inside EPA's Risk Policy Report (May 23, 2006) (critiquing the OMB's Proposed Risk Assessment Bulletin for trying to limit and control any risk assessments), *available at* [www.progressiveregulation.org/articles/steinzor\\_risk\\_052406.pdf](http://www.progressiveregulation.org/articles/steinzor_risk_052406.pdf). But see OFFICE OF MGMT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, PROPOSED RISK ASSESSMENT BULLETIN (2006) (stating that the proposed bulletin's purpose is to "enhance the technical quality and objectivity of risk assessments prepared by federal agencies"), *available at* [http://www.whitehouse.gov/omb/inforeg/proposed\\_risk\\_assessment\\_bulletin\\_010906.pdf](http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf).

<sup>152</sup> GUBER, *supra* note 48, at 24 tbl.1.1.1.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> However, the Washington Post-ABC poll could be read as an indicator of increased willingness to take additional measures over the past 12 years. See COYLE, *supra* note 50.

<sup>156</sup> Piotr C. Brzezinski, *Requiem for Environmentalism*, HARV. CRIMSON, Apr. 20, 2006, *available at* <http://www.thecrimson.com/article.aspx?ref=512890>.

<sup>157</sup> Guber reviews some of the "chicken little" literature. See GUBER, *supra* note 48, at 3–4.

makes it harder to hold public attention. But there are several things to consider.

First, while the record may be marred, I would guess there have been far more right calls than wrong. Among the many heralded perils that have not materialized there must be a substantial number that were headed off precisely because the warnings were heeded. Consider ozone depleting agents—indeed, someone might try to determine how many dangers were under-estimated by their first alarm-sounders and turned out to be *worse* than predicted.

Second, of course, no one should make charges recklessly. Stridency has gained ground in every corner of the public arena. Environmentalists, who are continually faced with galvanizing diffuse interests, may be no exception. But sounding alarms—if that means accentuating high magnitude events, even if of a low probability—is an important part of the environmentalists' watchdog function. Of course, they should not be irresponsible. But I no more want environmentalists to be "balanced" than I want civil liberties advocates to be balanced in providing early warnings about losses of liberty. There is no shortage of balancers from outside the movement to step in and give their side.

Third, some of the threats environmentalists point to, including climate change, invasive species, and toxic and nuclear waste, merit a degree of alarm.<sup>158</sup>

### *B. Image*

If being thought "alarmist" were the sum and substance of the image problem, the movement, and environmentalists as individuals,<sup>159</sup> could probably mount a defense. But some critics claim that the environmentalists labor under a public image that is more multi-faceted, more negative, and harder to overcome than just being "alarmist." The charge here is that the leaders of U.S. environmental groups are strikingly unrepresentative of the general population they are trying to move. One commentator complains that most of the leaders are wealthy white males who style themselves "politically liberal" (sixty-three percent of environmentalists, as compared with eighteen percent of the population, adhere to this label).<sup>160</sup> The author continues:

Asked whether 'I would fight for my country, right or wrong,' 57 percent of all Americans but only 9 percent of environmentalists say yes. Environmental activists support causes like race preference, easy abortion, and gay rights at

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<sup>158</sup> If the movement's messaging needs cleaning up, I suspect that alarmism is less of a problem than saturation with what the public may consider trivial.

<sup>159</sup> Just as feminists may be regarded less favorably than feminism, there is no reason to assume that the public holds the same image of the movement as it does of its movers and members.

<sup>160</sup> *Environmentalists vs. Scientists*, AM. ENTERPRISE, May-June 1999, at 19 (drawing from a survey of leaders at 16 environmental organizations).

rates of 70–80 percent, versus 34–40 percent among the public at large. And fully 47 percent of environmental activists say they have “no” religion—compared to 6 percent of all Americans.<sup>161</sup>

Some might imagine from such poll results that environmentalists, especially the most active, would be widely regarded negatively, or at least as out-of-step. Indeed, the author of the paragraph quoted above proceeds to depict the movement as a sort of playground in which “disaffected,” “anti-growth,” and “counterculture” citizens can “act out opposition to modern society and technology.”<sup>162</sup> Granted, some share of the public probably connects the movement to the sixties and seventies, and thus to flaky hippies and impractical, preachy idealists. But there is considerable evidence undercutting claims that environmental activism is associated with markers of “elitism,” such as income and education. Support for environmental causes appears to be strikingly broad based and populist.<sup>163</sup> In fact, public opinion polls are hard to square with calls for a major image facelifting. When asked, “[do] you think [environmentalists] are having mainly a good influence on the ways things are going in this country or mainly a bad influence[?]” seventy-five percent responded “good influence” and only fifteen percent “bad influence.”<sup>164</sup> Eighty-one percent believe the movement has had “a large positive impact on the values and beliefs of people today,” and only thirteen percent answered in the negative.<sup>165</sup> A 2002 Gallup Poll asked, “Do you think of yourself as an active participant in the environmental movement; sympathetic towards the movement, but not active; neutral; or unsympathetic towards the environmental movement?”<sup>166</sup> The results were striking: nineteen percent answered “active participant;” fifty-one percent said “sympathetic, but not active;” twenty-five percent “neutral;” and only five percent reported themselves “unsympathetic.”<sup>167</sup> Surveys that reveal affective feelings of warmth or coolness (as distinct from cognitive judgments) are similarly positive.<sup>168</sup>

Thus, while environmentalists might do well to keep image in mind, I doubt they have an image they need run away from, or for that matter could run away from, without sacrificing much of what they offer as our preachy, nervous, and noisy lot of “back-packing tree huggers.”

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<sup>161</sup> *Id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See* GUBER, *supra* note 48, at 87.

<sup>164</sup> The Pew Research Ctr., *Campaign '92: Survey VIII* at 101 (July 8, 1992), available at <http://people-press.org/reports/pdf/19920708.pdf>.

<sup>165</sup> *See* Roper Center Public Opinion Archives, *NBC News/Wall Street Journal Poll* (Dec. 1996), available at <http://www.ropercenter.uconn.edu/ipoll.html> (last visited Jan. 27, 2008).

<sup>166</sup> Riley E. Dunlap, *Show Us the Data*, 19 ORGS. & ENV'T 88, 94 tbl.4 (Mar. 2006).

<sup>167</sup> *Id.*

<sup>168</sup> *See* GUBER, *supra* note 48, at 82 (discussing the 1996 National Election Study).

## V. CONCLUSION

The environmental movement continues to apprise, train, advise, motivate, and sue. To label the whole operation dead is silly. But asking environmental activists to consider what they might be doing better, or may be underemphasizing, is not. Such an evaluation, however, is difficult. The "movement" consists of a wide range of independent groups with understandably varying aims, tactics, and competencies. The standards of success are often hard to define, and when defined, hard to prove one way or the other.

As far as "educating" the public is concerned, apparently the U.S. public, on which this Article concentrates, is getting the message. Most people agree that we face serious environmental problems and know what they are. Getting people to change their behavior is more challenging. To change course we have to amend "lifestyle," a formidable obstacle; consider how hard it is to change preferences and behavior even in the face of AIDS. And to the general public, the environment is one bundle of problems among many others that command higher priority, including health care and a sputtering war. Moreover, even people who want to take action on the environment are unsure what they can do about it. If we cut back on carbon, but China and India do not, will our sacrifices make any material difference? Indeed, the movement, in its totality, warns about so many dangers that many people must be saturated, particularly where the warnings are broadcast with no practical solutions attached.

As we have seen, solutions—or, at any rate, steps in the right direction—need not take the form of collective action, such as general laws and regulations. People are being advised on measures they can take at the household level. These efforts have not taken the hold one might wish, but they are a start. And worsening weather could prove to be a significant motivator.

No one doubts, however, that substantial progress will require more than bad weather and heart-wrenching photographs of polar bears. There have to be changes in "values"—in how we assess our impact on drought-stricken lives on the other side of the world; on future generations; on the other living things with which we share the planet. Such changes entail reforms of the spirit that are rightly part of many environmentalists' aspirations. But there is no reason to believe that the particular competencies of environmentalists make them best or even well suited to take the lead. Accordingly, they need not berate themselves for coming up short. Their barrage of facts and warnings and action plans lay a foundation. Beyond that, transformations may simply lie in the province of (broadly speaking) literature. When it comes to spiritual reform, what scientific study or legal brief can compete with "Free Willy" or "March of the Penguins"?<sup>169</sup>

Environmentalists? They are at their best doing the many things they do (more or less uniquely) well, from educating to suing. To me they appear very much alive.

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<sup>169</sup> Note, however, that there is a synergistic effect not to be denied.

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