

Summer 2011

When Responsive Legislation Ignores the Forest for the Trees

Matthew G. Curtis
University of Richmond

Follow this and additional works at: <http://scholarship.richmond.edu/law-student-publications>



Part of the [Environmental Law Commons](#)

Recommended Citation

Matthew G. Curtis, *When Responsive Legislation Ignores the Forest for the Trees*, 10 Rich. J. Global L. & Bus. 387 (2011).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Student Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

WHEN RESPONSIVE LEGISLATION IGNORES THE FOREST FOR THE TREES

*Matthew G. Curtis*¹

I. UNINTENDED CONSEQUENCES IN LEGISLATION THAT HASTEN A RETURN TO THE STATUS QUO

Large-scale financial disasters have resulted in equally large-scale overhauls of the system responsible for financial industry regulation.² Choice over responding parties to these disasters is minimal, and the public inevitably looks to the government for assistance and explanation.³ The increasingly globalized economy causes any nationwide financial regulation in the U.S. to be felt throughout international markets.⁴ U.S. environmental regulation, while not felt immediately abroad, can have drastic impacts on business planning, environmental risk-management, and human rights in the developing world.⁵

Quick-fix responses by Congress—applying band-aid solutions to what really are deep-rooted problems—may overlook opportunities

¹ 2012 J.D. Candidate, University of Richmond School of Law. This article is the winning entry of the 2011 Daniel T. Murphy International Law Writing Competition.

² See Federal Securities Act, 15 U.S.C. §77a (2006) (requiring companies to publicly disclose material information about securities); The Securities Exchange Act of 1934, 15 U.S.C. § 78a (2006) (creating the SEC, the principal federal agency responsible for securities and market oversight); Sarbanes-Oxley Act of 2002, Pub L. 107-204, 1116 Stat. 745 (hereinafter “SOX”); the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, (H.R. 4173) (July 21, 2010) [hereinafter Dodd-Frank] (resulting out of Great Depression, Enron/Worldcom, and Subprime Mortgage crises, respectively).

³ See FINANCIAL CRISIS INQUIRY COMMISSION, FINANCIAL CRISIS INQUIRY REPORT, at 291 (2011) [hereinafter FCIC report].

⁴ Cf. Douglas Kysar, *Symposium of Waterbanks, Piggybanks, and Bankruptcy: Changing Directions in Water Law: IV. Market Misgivings: The Role of Private Global Governance*, 83 TEX. L.REV. . 2109, at 2112 (2005).

⁵ See David Konisky, *Regulatory Competition and Environmental Enforcement: Is There a Race to the Bottom?*, 51 AM. J. POL. SCI. 853, at 854 (2007) (discussing reasons and repercussions that state regulatory behavior is interdependent with other states). Cf. *The 2011 Oil Shock: More of a Threat to the World Economy than Investors Seem to Think*, ECONOMIST, Mar. 3, 2001, available at <http://www.economist.com/node/18281774> (noting “America’s economy is needlessly vulnerable” to unrest in the Middle East and North Africa thanks to its addiction to and light taxation of oil).

to implement legislation to address the systematic causes of such disasters.⁶ This paper will compare the broad principles of the most recent financial responsive legislation to patterns present in U.S. environmental regulation. Financial and environmental regulation share similar root causes, which often arise through policy gaps revealed in the regulatory schemes.⁷ A major flaw contributing to the creation and exploitation of gaps in both areas of enforcement is the failure to look beyond traditional accounting practices and measures.⁸ This begins with an erroneous view that our macroeconomic system is separate or superior to the ecological system we occupy and inhibits progressive responses in both areas of regulation.⁹ The macroeconomy:

is an open subsystem of the ecosystem and is totally dependent upon it, both as a source for inputs of low-entropy matter-energy and as a sink for outputs of high-entropy matter-energy. Given such a conception, an inescapable question arises regarding how much the economic subsystem can grow before it places an unsustainable burden on the natural ecosystem. Conventional economists fail to address this issue because the macroeconomy is conceived of as the superstructure—conceptually; nothing exists “around” the macroeconomy.¹⁰

Increased penalization through top-down sanctions, in an attempt to bring companies into compliance, has repeatedly failed in

⁶ See FCIC report, *supra* note 3, at ch. 16.

⁷ Politicians frequently inform citizens of the various policy gaps in the aftermath of such disasters. See, e.g., Alan Kovski, *Salazar Agrees With Rahall On Mandating New Regulatory Offices for Offshore Drilling*, [July] Daily Envtl. Rep. (BNA) No. 125, at A-9, (July 1, 2010). (“Industry does not have the ability to deal with this kind of blowout scenario.”); *Obama Calls For Update To Oil Pollution Laws After Meeting With Congressional Leaders*, [June] Daily Envtl. Rep. (BNA) No. 111, at A-11, (June 11, 2010) (“The Oil Pollution Act was in 1990, and it didn’t foresee deepwater drilling.”).

⁸ These practices fail to account for sources of discounting, exploitation, and market-manipulation. See, e.g., Herman Daly, *A Marxian-Malthusian View of Poverty and Development*, 25 *POPULATION STUD.*, 25, 28 (1971) (“the word exploitation has been virtually banished from polite economics. ”); Douglas Kysar, *Discounting .on Stilts* 74 *U. CHI. L. REV.* 119 (2007).

⁹ See Konisky, *supra* note 5.

¹⁰ Douglas Kysar, *Sustainability, Distribution and the Macroeconomic Analysis of Law*, 43 *B.C. L. REV.* 1, at 22 (2001).

many different enforcement contexts.¹¹ Legislation often yields unintended consequences, especially when the relationships between justice, freedom, and responsibility are ignored, and opportunities to create incentives promoting sustainable economic growth and sound environmental policy are trivialized or ignored entirely.¹² The most effective form of government regulation uses transparency and public accountability assurance as a means of control.¹³

The most recent large-scale legislative responses to economic crises have primarily aimed to ensure accounting transparency and heightened protections for consumers and investors.¹⁴ The contents of these two bills are part of a broad pattern in federal legislation that attempts to account for unintended consequences of the legislation and the incentives they create for economic exploitation.¹⁵ The incentives created by US environmental and economic regulatory activity have a global impact, particularly through business planning incentives to avoid domestic regulations by outsourcing or leaving the country altogether.¹⁶ The unintended consequences of domestic job loss, corporate

¹¹ See Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT. ORG., 479-526 (1990); Jose Antonio Marina, *Genealogy of Morality and Law*, 3 ETHICAL THEORY AND MORAL PRACTICE (2000).

¹² AMARTYA SEN, DEVELOPMENT AS FREEDOM 3(Random House, 1999, First ed. 1996)(discussing the role of freedom as both the ends and means of economic development in economically depressed, natural resource-rich nation-states)(In his introduction, Sen makes the essential argument that ties the root causes of financial and environmental sustainability in the developing world.).

¹³ Id., at xiii. "In line with the importance I attach to the role of public discussion as a vehicle of social change and economic progress. .this work is presented for open deliberation and critical scrutiny."

¹⁴ See SOX and Dodd-Frank, *supra* note 2. See also *infra* notes 19 and 20(developing the connection between lack of political freedom and developing world's perpetual economic distress.).

¹⁵ See David S. Huntington, *Summary of Dodd-Frank Financial Reform Legislation*, THE HARVARD LAW SCHOOL FORUM ON CORP. GOVERNANCE AND FIN. REFORM, available at <http://blogs.law.harvard.edu/corpgov/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/> (discussing Dodd-Frank attempts through these pieces of legislation to assure transparency and protection); Lisa McCauley Parles & Susan A. O'Sullivan, et al., *Sarbanes-Oxley: An Overview of Current Issues and Concerns*, REVIEW OF BUSINESS (Spring-Summer 2007), available at <http://www.entrepreneur.com/tradejournals/article/165359568.html>.

¹⁶ See Herman Daly, *Reconciling the Economics of Social Equity and Environmental Sustainability*, 24 POPULATION & ENV'T. 47, 49-53 (Sept. 2002)(discussing the WTO, IMF, World Bank, and other international institutions which use a top down, debt based approach to "developing" countries); Douglas Kysar, *The Economic Dynamics of Environmental Law*, 31 B.C. ENVTL. AFF. L. REV. 555, 557 (2004) ("with international action on climate change currently being thwarted by the United States at least in part due to arguments premised on CBA, one sensibly

human rights, and environmental violations abroad provide support to the idea that selfishness is not the only motivating force of importance—capitalism itself requires other values.¹⁷ An entirely free market, left to regulate itself, will only do so through market incentives.¹⁸ The revised cost-benefit paradigm advocated by ecological economists such as Daly and Kysar accounts for worker's conditions and environmental externalities.¹⁹ This helps narrow a gap between the decision-making process and those adversely effected, which has been proven to be toxic to a healthy, functional democracy.²⁰

A. *Our Economy is not Removed from the Planet's Laws of Ecology*

Perhaps the biggest barriers to a sustainable economy that supports sustainable development are the antiquated basic accounting principles we use in determining economic indicators and developing economic policy.²¹ The economy is generally viewed as a self-contained system within which exchange value circulates between producers and consumers.²² This “macroeconomic loop” takes no account of the resource materials from which goods are produced, or the waste

might ask whether we are headed toward not just a cost-benefit state, but a cost-benefit globe”.

¹⁷ See SEN, *supra* note 12 (touching on business ethics, contracts, the Mafia, and corruption. “Capitalism itself requires other values”).

¹⁸ See, Douglas Kysar, *Taking Behavioralism Seriously*, 112 HARV. L. REV. 1420, at 1423-427 (1999).

¹⁹ See Daly, *supra* note 16. See generally David Driesen, *Environmentalism, Free Trade, and Democracy*, 603 ANNALS AM ACAD. POL. & SOC. SCI. 252-261 (Jan. 2006) (demonstrating how environmental laws are followed only to the extent that the benefit outweighs the cost); PAUL HAWKEN, ET. AL, *Natural Capitalism*, (Back Bay Books, 1999) (discussing the modern acceptance of waste as a byproduct of production and consumption to naturally occurring Industrial Ecology and Economics of the Steady-state.).

²⁰ See SEN, *supra* note 12. See e.g., *Compare* bottom countries on Transparency International, Corruption Perceptions Index 2010 Results, TRANSPARENCY INTERNATIONAL (Mar. 25, 2011), available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results, with UN Millineum Development Goals Indicators, UNITED NATIONS (Mar. 25, 2011 2:20 PM) <http://unstats.un.org/unsd/mdg/DataAvailability.aspx> (looking at the countries with low transparency and comparing them with countries that have lower standards of living demonstrates that the least transparent governments are nearly the same with poor standard of living indicators).

²¹ See Kysar, *supra* note 8. (discussing traditional accounting principles formed when the earth had barely anybody on it, now over 5 billion due to unprecedented growth).

²² Kysar, *supra* note 10, at 17. See also Herman Daly, *Steady State Economics: A New Paradigm*, NEW LITERARY HISTORY, Autumn 1993, at 811-16 for a comprehensive introduction to “steady-state” economics.

matter into which goods are transformed during consumption.²³ Resource depletion, environmental pollution, impairment of necessary environmental services, such as water filtration or carbon absorption, or indeed any other relationship between economic activity and factors outside of the narrow universe of value exchange are ignored by standard macroeconomics.²⁴

This leads to a warped view of the global economy where values are artificially inflated through discounting, market manipulation, and exploitation.²⁵ Daly describes globalization as a structure established by “the big three world banks” to keep “the rich to grow rapidly in order to provide markets in which the poor can sell their exports.”²⁶ He argues throughout his work that increasing overall wealth only benefits wealthy, “developed” nations by keeping impoverished nations perpetually in debt to major world development banks.²⁷ Being able to keep and use their own resources in the developing world (where they are desperately needed) and the U.S.’s inability to maintain a domestic manufacturing sector are two disturbing results that lend support to the necessity of revising our present accounting paradigm to at least take into steady-state economics and accounting practices.²⁸ The advantages of “capabilities” over narrower measures of human develop-

²³ Kysar, *supra* note 10, at 17-18. *See generally* Scott A. Davison, *A Natural Law Based Environmental Ethic*, J. ETHICS & ENV., Spring 2009 (These facts are the data for the insight into the sense and bounds of the class (persons, human beings) of “others” in “good for oneself and others.” Or again, facts about the limited supply of resources and the limited strength of human will (the need for incentives, etc.) make appropriation of resources to particular owners a normal requirement of justice to non-owners and owners alike.).

²⁴ Kysar, *supra* note 10, at 18. “It is exactly as if a biology textbook proposed to study an animal only in terms of its circulatory system, without ever mentioning its digestive tract.” *Id.* (citing Herman Daly, a major academic founder of environmental economics as an independent discipline).

²⁵ *See* Kysar, *supra* note 18, at 1423-27 (discussing discounting and exploitation). *See also*, SEN, *supra* note 12 (discussing how problems such as “the persistence of poverty, unfulfilled elementary needs, occurrence of famines and widespread hunger, violation of elementary political freedoms and basic liberties, extensive neglect of the interests and agency of women and worsening threats to our environment and to the sustainability of our economic and social lives” are worsened by the primary world development banks economic policy.).

²⁶ *See* Daly, *supra* note 16, at 47-53 (discussing the WTO, IMF, World Bank, and other international institutions which use a top down, debt based approach to finance development).

²⁷ *Id.*, at 47-49. (“It is thought that the only option poor countries have is to export to the rich, and to do that they have to accept foreign investment from corporations who know how to produce the high-quality stuff that the rich want.”).

²⁸ *See* Kysar, *supra* note 10, at 71 (“What seems needed is a body of market principles built on the assumptions that natural resources are limited, that ecosystem

ment, such as the idea of “human capital,” is a great step forward, but is still too narrow in its restriction to effect production.²⁹

Detailed economic analysis of the steps and system required to implement these changes are consistently present throughout economic and environmental policy but are outside the scope of this paper.³⁰ Government regulation should aim to protect citizens through transparency and public participation. A new combined approach must capture the direct contribution of American creativity and innovation, as well as our devotion to freedom and the impact it has on social change.³¹ Additionally, domestic economic policy that inhibits creativity and innovation in the developing world will perpetuate low standards of living and social unrest on the national security radar of American citizens and politicians.³²

B. *The U.S. Environmental Law “Pendulum”*

An analysis of U.S. environmental regulations reveals a pendulum effect, with legislation cycling between ambitious command-and-control regulation and a hands-off approach to industry regulation.³³ The recent Toxic Substance Control Act (“TSCA”) reform highlights this pattern of an industry that has used statutory loopholes to avoid government regulations, and the subsequent legislative response.³⁴ These reform efforts were triggered by heightened citizen awareness and advocacy for increased public access to chemical data and a

services have value, and that the size of the human economy is a legitimate subject for social control.).

²⁹ See SEN *supra* note 12.

³⁰ See Kysar, *supra* note 10, at 17. (“Section B. Some Fundamentals”). See also Herman Daly, *Sustainable Development: From Concept to Theory to Operational Principles*, 16 POP. AND DEV. REV., 25, 26; see generally Bill Devall, *The Deep, Long-Range Ecology Movement: 1960-2000 – A Review*, 6 J. ETHICS & ENV. 18 (We are not separate from nature; harming it is the same as harming our own bodies. Deep Ecology is the only monistic authority; our political system is secondary.)

³¹ See generally THOMAS FRIEDMAN, *HOT, FLAT AND CROWDED* (Picador 2009) (At the heart of Friedman’s argument is the notion that market demands drive innovation, using an extended comparison between the financial crisis of 2008 and global climate change, and suggests the need to transform American perception so that the “Code Green” message is seen as a key to prosperity).

³² See, e.g., CIA WAR ON TERRORISM INDEX, available at <https://www.cia.gov/news-information/cia-the-war-on-terrorism/index.html> and US STATE DEPARTMENT, ENERGY SECURITY INDEX, available at <http://www.state.gov/e/eeb/esc/index.htm>. See also FRIEDMAN, *supra* note 31.

³³ See generally ALLAN FREEZE, *THE ENVIRONMENTAL PENDULUM: A QUEST FOR TRUTH ABOUT TOXIC CHEMICALS* 4-5 (2000).

³⁴ Toxic Chemicals Safety Act of 2010, H.R. 5820, 111th Cong. (2010); Safe Chemicals Act, S. 3209, 111th Cong. (2010).

heightened standard of review for hazardous substances entering the stream of commerce.³⁵ While the statute requires testing and data submission to the EPA before the use or manufacture of any new chemicals or existing chemicals with proposed new uses, in practice the TSCA has required little more of chemical production companies beyond submitting this data, usually in a redacted form.³⁶

Congress passed the TSCA into law in 1976 to regulate new and existing chemicals by compiling data regarding the effects of chemical substances and mixtures on human health and the environment.³⁷ Known for its contradictory nature, the TSCA represents the balancing act needed to reduce the risk posed by hazardous chemicals to human health and the environment while simultaneously mitigating any toll these measures may have on business and technological innovation.³⁸ The statute's frequent invocation of the "unreasonable risk" standard indicates Congress favored a prudential approach to any commercial or technological regulation over firm, safety-first enforcement.³⁹ The EPA's primary control authority under the TSCA is through testing and data submission requirements for any substance that may pose a threat to human health or the environment (or will be released in the environment in substantial quantities).⁴⁰ Congress specifically instructs the EPA to oversee data development and pro-

³⁵ 15 U.S.C.A. §§ 2601-2695d (2011). See Cheryl Hogue, *TSCA Reform: Group Rallies for an Updated Chemical Law*, CHEMICAL & ENGINEERING NEWS (April 19, 2010), <http://pubs.acs.org/subscribe/journals/cen/88/i16/html/8816gov1box.html> (referring to "Safer Chemicals, Healthy Families," a broad coalition of environmental and public health groups calling for reform) [hereinafter *Updated Chemical Law*]; Cheryl Hogue, *Naming Names*, CHEMICAL & ENGINEERING NEWS (April 19, 2010), <http://pubs.acs.org/subscribe/journals/cen/88/i16/html/8816gov1.html> [hereinafter *Naming Names*].

³⁶ H.R. 5820 § 4(a)(2)(B). Proposed reform intends to strengthen this section so that there is no risk found. See *Enhancing EPA's Chemical Management Program*, ENVIRONMENTAL PROTECTION AGENCY, (Aug. 19, 2010), <http://www.epa.gov/oppt/existingchemicals/pubs/enhanchems.html>. See also Hogue, *Naming Names*, *supra* note 35.

³⁷ TSCA §2(b), 15 U.S.C.A. § 2601 (West 2011).

³⁸ WILLIAM RODGERS, ENVIRONMENTAL LAW: HORNBOOK SERIES 489-90 & n. 11 (1994).

³⁹ TSCA §2(c), 15 U.S.C.A. § 2601(a) (West 2011) ("It is the intent of Congress that the Administrator [EPA] shall carry out this chapter in a reasonable and prudent manner.").

⁴⁰ TSCA §2(a), 15 U.S.C.A. § 2601(a) (West 2011) ("The Congress finds that human beings and the environment are being exposed to a large number of chemical substances and mixtures . . . there are some whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment; and the effective regulation of interstate commerce necessitates regulation of such chemicals and mixtures.").

vides enforcement authority only when exercised in a manner that does not “unduly impede” economic activities or technological innovation.⁴¹

The current TSCA testing requirements contain loopholes used by chemical manufactures to circumvent the testing process (for example, asserting expired test data would still be “duplicative,” and therefore exempt under Section 5(h)). After the EPA receives test data, a notice is to be published in the Federal Register within 15 days of receipt.⁴² Each notice must identify the chemical substance or mixture, list the uses or intended uses, and describe the nature of the test developed.⁴³ The EPA puts this information online for anybody to examine.⁴⁴ Because most of the TSCA actions relate to testing, the majority of exemptions found in the statute are those for testing requirements, found in Sections 4(c) and 5(h).⁴⁵ A particularly interesting carve-out in the “Imminent Hazard” response strategy is the omission of oil and petroleum products.⁴⁶

The primary vehicle for risk-management under the TSCA is to use the data submitted to the EPA by manufacturers to develop a “risk assessment” on the proposed chemical.⁴⁷ Manufacturers must notify the EPA when manufacturing a substance whether or not the chemical or the intended use is new and then wait for the Administrator to authorize production before proceeding.⁴⁸ Tests are required by rule to determine whether the activities and production of the substance pre-

⁴¹ *Id.* Compare 2(b)(2)(requiring a balance of risk of injury to health and the environment), with 2(b)(3)(requiring Administrator assurance that the authority granted in §§ 2 (the statutes “primary purpose”) does not “impede unduly” or create “unnecessary economic barriers to technological innovation”).

⁴² 15 U.S.C. § 2605(a). See RODGERS, *supra* note 38, at 516 (“Regulation”).

⁴³ 15 U.S.C. § 2603(d). See also 15 U.S.C. § 2613; See Hogue, *supra* note 2. See generally, U.S. EPA, TSCA CBI PROTECTION MANUAL, October 20, 2003.

⁴⁴ “Envirofacts Database” (available at, http://www.epa.gov/enviro/facts/tsca/tsca_search.html).

⁴⁵ Section 5 exemptions are permitted if the party applying for exemption can show the use and production of the substances will not present any unreasonable risk. The Administrator may also exempt any person from the requirement of Subsection 4(b)(2) to submit data if she concludes data has already been submitted for an equivalent chemical substance.

⁴⁶ The responsive measures under Sections 6 and 7 will experience little impact under the proposed reform. See Hogue, *supra* note 35.

⁴⁷ See RODGERS, *supra* note 38, at 492 (citing National Academy of Sciences, Commission on Life Sciences, Risk Assessment in the Federal Government)(“[risk assessment] is the use of the factual base to define the health effects of exposure of individuals or populations to hazardous materials and situations”).

⁴⁸ TSCA § 5(f).

sent a reasonable risk of injury to human health or the environment.⁴⁹ The Administrator has the authority to review the adequacy of the data development standards (required at least once a year) and can institute proceedings to make appropriate revisions to the standards if necessary.⁵⁰

The TSCA is a relatively untouched statute, believed to have done little in practice to regulate hazardous chemicals entering the stream of commerce.⁵¹ While largely unchanged since its passing in 1976, currently a host of citizens groups, legislators, and chemical industry interest groups are involved in efforts to revise the TSCA.⁵² The main EPA control under the TSCA is toxic substance regulation through the collection and dissemination of information on the hazardous nature of the chemical substances.⁵³ Regulators and workers in the chemical industry use critical confidential information for safety measures, and any information not designated as confidential is to be made available to the general public.⁵⁴

At its formation, the Council on Environmental Quality (CEQ) and the National Environmental Policy Act's (NEPA) passing marked a period of increased federal government policy dedicated to environmental protection.⁵⁵ At the request of President Nixon, Roy L. Ash took a sweeping look at organizational problems throughout the fed-

⁴⁹ See National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f) (1969) (EPA's primary statutory mandate "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment. To promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.").

⁵⁰ 15 U.S.C. § 2603(b)(2)(B); see also Toxic Substances Control Act, 15 U.S.C. §2614 ("Prohibited Acts") and § 2615 ("Penalties") (for revision proceedings and actions for failure to comply with the Administrator's rules).

⁵¹ Amended at, P.L. 99-519 (1986); P.L. 100-551 (1988); P.L. 101-637 (1990); P.L. 102-550 (1992); see RODGERS, *supra* note 38, at 493 (citing H.R.Rep No. 94-1341, 94th Cong., 2d Sess. 5 (1976))("Because of the lack of testing by manufacturers and processors of chemicals to determine their health and environmental effects, the general population and the environment now serve as the laboratory for discovering adverse health and environmental effects").

⁵² See generally Hogue, *supra* note 35.

⁵³ 15 U.S.C. § 2601(2)(c) (1976) (The statute places a congressional check on the EPA Administrator's authority to act by mandating that he shall carry out actions in a "reasonable and prudent manner," balancing environment, social, and economic impacts).

⁵⁴ 15 U.S.C. § 2613(c) (1976).

⁵⁵ 42 U.S.C. § 4321 (1969) (Two of NEPA's stated purposes are ". . .[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . .").

eral government.⁵⁶ The memo with his findings is now regarded as a pivotal component to the development of an independent agency devoted to environmental protection.⁵⁷ The Ash memo specifically recognizes “key standard-setting functions should be performed outside the agencies *whose interests may affect those standards*. . .we regard the EPA as the strongest organizational alternative.”⁵⁸ The need for independent safety standards and oversight became apparent early in the life of the EPA, especially concerning agencies with close ties to the private sector.⁵⁹

C. Failure to Prevent Conflicts of Interests from Weakening Policy

Government regulations that require harm disclosure from companies and organizations that pose a risk to citizens are necessary for public safety but have benefits for high-risk industries as well.⁶⁰ In order to make effective policy decisions, companies want and need consistency and predictability with government permitting and risk management regulations.⁶¹ The petroleum industry, for example, has reached a point where companies must perform increasingly risky and dangerous operations to satisfy the insatiable demand for crude oil.⁶² The process for oil extraction is complex and dangerous, and has evolved at a much quicker rate than the corresponding agency framework responsible for its leasing and permitting.⁶³

EPA authorizing statutes regulating large-scale risk contain exemptions for the petroleum industry stipulated in their key defini-

⁵⁶ President Nixon called for a “strong, independent agency” to establish and enforce environmental protection standards, conduct environmental research, and assist the CEQ in developing and recommending to the President new policies for environmental protection. EVNTL.PROT. AGENCY, EPA Order 1110.2., INITIAL ORGANIZATION OF THE ENVIRONMENTAL PROTECTION AGENCY (1970), available at http://www.epa.gov/history/org/origins/1110_2.htm.

⁵⁷ Memorandum from Roy L. Ash, Chairman of Exec. Advisory Council on Exec. Org., to the President of the U.S. (Apr. 29, 1970), available at <http://www.epa.gov/history/org/origins/ash.htm> [hereinafter *Ash Council Memo*].

⁵⁸ *See id.*

⁵⁹ *Id.*

⁶⁰ *See Liability Issues Surrounding the Gulf Coast Oil Disaster:Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) (statement of Rachel Giesber Clingman, Co-Gen. Counsel, Transocean).

⁶¹ Kovski, *supra* note 7, at A-9, (July 1, 2010)(“Industry does not have the ability to deal with this kind of blowout scenario.”).

⁶² *Id.*

⁶³ *See generally* DEP’T OF INTERIOR, MINERALS MGMT. SERV., OCS STUDY MMS 2004-049, HISTORY OF THE OFFSHORE OIL AND GAS INDUSTRY IN SOUTHERN LOUISIANA, (2004)(noting specifically in Section 5.1.4. the large geologic and economic risks present in deepwater drilling).

tions while the Department of the Interior (DOI) manages petroleum extraction leasing and government oversight of the extraction process.⁶⁴ The Minerals Mining Service (MMS) was established to extract valuable minerals from federal lands to (indirectly) add revenues to the US Treasury.⁶⁵ Increased revenue and environmental safety enforcement are two essential elements of a successful mineral extraction regulatory scheme; a stronger, more functional pre-extraction regulatory system may have helped expose the rampant conflicts of interest and enforcement gaps throughout the MMS.⁶⁶ Looking at patterns throughout U.S. Environmental policy lends support to the argument that transparency and public participation assurance are the best forms of government oversight.⁶⁷

In looking at the measures taken by environmental responsive legislation, it is helpful to ask whether or not increased command and control regulation context has done anything (in TSCA's case) to reduce harmful pollution. The primary arguments for establishing a new, independent agency were that "first, the primary mission of each existing department would bias any decisions it made on a government-wide basis concerning the environment; second, the same factors might raise questions about the objectivity of any existing department as a standard-setting body for other agencies and departments."⁶⁸ It is apparent how important it is for government regulations to expose conflicts of interest and increase transparency assurance when an evaluation of a variety of economic results produced by current national accounting measures, would strike non-economists as odd.⁶⁹

⁶⁴ See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (1980) (defining the term 'hazardous substance' as and precluding petroleum, including crude or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance"), RCRA ("unless the administrator determines otherwise as may be necessary to protect human health and the environment, this subsection shall not apply to fuels produced from petroleum.").

⁶⁵ See ROBERT UTLEY & BARRY MACINTOSH, *THE DEPARTMENT OF EVERYTHING ELSE: HIGHLIGHTS OF INTERIOR HISTORY* (1989), available at http://www.nps.gov/history/history/online_books/utley-mackintosh/interior6.htm. (stating "The Minerals Management Service, established by secretarial order in 1982, handles the department's oil and gas leasing responsibilities on the Outer Continental Shelf and collects all lease and royalty revenues from both onshore and offshore mining.").

⁶⁶ See *Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) (statement of Rachel Giesber Clingman, Co-Gen. Counsel, Transocean).

⁶⁷ See *supra* note 20.

⁶⁸ *Id.*

⁶⁹ See Kysar, *supra* note 10, at 29 (noting that Superfund contributors muster \$31 billion needed to clean some of the worst locations on the E.P.A.'s list of nearly 40,000 hazardous waste sites).

The “GNP” considers views of expenditure and increases in economic welfare, but ignores basic accounting principles by treating unsustainable exploitation of natural capital as pure income.⁷⁰

D. When the Nature of an Industry’s Regulatory Body Is Set up to Mirror the Industry Itself, Conflict of Interest is Inevitable

Since 1983, the MMS has existed in order to keep valuable natural resources from sitting idle underground and to contribute royalty monies to the US Treasury.⁷¹ Environmental protection, conservation, and safety-standards for what we now know to be an enormous risk to human health and the environment were flushed out later. However, they did not function adequately to reduce the risk of a disaster arising not from an act of God, but in the normal course of business.⁷²

The MMS managed all royalties, sales, and contracts between the federal government and petroleum extraction corporations.⁷³ The incentive for a department that controls every aspect of such a lucrative process is to increase extraction capacity.⁷⁴ MMS employees were admittedly detached and disconnected from agencies responsible for oil spill disaster response and cleanup.⁷⁵ Cleanup response was handled by the EPA and other federal agencies and financed by the “responsible party.”⁷⁶ Public and private investigations revealed a

⁷⁰ *Id.* Centuries of logging and construction have resulted in the loss of all but 1% to 5% of the original forest cover of the United States, yet increased GNP has made no allowance along the way for the depreciation of scarce natural capital.”

⁷¹ See UTLEY & McINTOSH, *supra* note 65.

⁷² See *Id.* See also Diane Austin et. al., *History of Offshore Oil and Gas Industry in Southern Louisiana: Interim Report*, Vol. 1: Papers on the Evolving Offshore Industry (DEPT. OF THE INTERIOR, July, 2004).

⁷³ See Memorandum from Earl E. Devaney, U.S. Inspector Gen., to Dirk Kempthorne, U.S. Sec. of Interior (Sept. 9, 2008), available at <http://media.washingtonpost.com/wp-srv/investigative/documents/OIGcover-090908.pdf>. According to statistics maintained by the MMS, the Royalty in Kind (“RIK”) program is responsible for the sale of “over 800 million cubic feet of natural gas and 150,000 barrels of oil every day. The value of RIK, oil and gas sales in fiscal year (FY) 2006 was reported at over \$4 billion, or approximately \$11 million per day.”

⁷⁴ U.S. DEPT. OF THE INTERIOR, OFFICE OF THE INSPECTOR GENERAL, INVESTIGATIVE REPORT OF MMS OIL MARKETING GROUP – LAKEWOOD, 10 (2008) [hereinafter *Lakewood Report*] (DOI-MMS exerted control over every aspect of extraction. RIK Program employees work in four separate areas: the “Front Office” which markets and sells oil and gas; the “Mid Office,” which handles contracting, risk control, and credit issues; the “Back Office,” which handles accounting functions; and the “Economic Analysis Office,” which helps evaluate bids and measure the performance of RIK contracts.).

⁷⁵ See *id.* at 1-2.

⁷⁶ See Oil Pollution Act of 1990, Pub. L. No. 101-380, § 1006 (1990) (giving the EPA reactive authority for oil spill response and clean-up). See also *Comprehen-*

“culture of corruption” within the agency.⁷⁷ MMS employees were given money, gifts and vacations in return for assistance with streamlining the leasing process and with navigating the environmental regulations applicable to petroleum extraction.⁷⁸

A series of MMS policy decisions directly impacted the recent disaster in the Gulf Coast.⁷⁹ A particularly concerning example of MMS assistance with avoiding safety regulations is the waiver granted by the Interior Department to BP exempted the company from a detailed environmental analysis and concluded the spill risk in that part of the Gulf was “minimal or nonexistent.”⁸⁰ Additionally, the white house Council on Environmental Quality is reviewing the off-shore oil and natural gas policies and practices of the MMS under NEPA.⁸¹

Interior Secretary Ken Salazar issued an order on May 11th, 2010 breaking the MMS into three bureaus and then asked for 29 million dollars to help with the Department’s reorganization.⁸² In his

sive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (1980)(defining the term ‘hazardous substance’ . . . does not include petroleum, including crude or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance.”).

⁷⁷ Devaney, *supra* note 73, at 1-3.

⁷⁸ See *Lakewood Report*, *supra* note 74. (“Due to the nature of their responsibilities, RIK oil and gas marketers interact extensively with oil and gas industry representatives. . . Our investigation revealed that many RIK employees simply felt that federal government ethics standards and DOI policies were not applicable to them because of their “unique” role in MMS . . . many RIK employees said they felt that in order to effectively perform their official duties, they needed to interact in social settings with industry representatives to obtain “market intelligence.” Some felt their free attendance at industry functions was an absolute necessity given that it was industry’s practice to conduct business over lunch, dinner, and golf outings.”).

⁷⁹ See *Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) (statement of Rachel Giesber Clingman, Co-Gen. Counsel, Transocean). (In 2003, the Interior Department decided that remote-control shut-off switches would not be required as a last resort against underwater spills. The MMS then failed to suggest other “fail-safe” mechanisms after a 2004 report raised questions about the reliability of the remote-control devices.)

⁸⁰ Richard Dunham & Stewart Powell, *Critics Blame Energy Lobby for Lax Safety Rules*, THE CHRON, May 8, 2010, available at <http://www.chron.com/disp/story.mpl/business/deepwaterhorizon/6996736.html>.

⁸¹ Review of MMS NEPA Policies, Practices, and Procedures, for OCS Oil and Gas Exploration Development, 75 Fed. Reg. 29996 (May 28, 2010).

⁸² As part of the department’s reform, Salazar said the President’s 2011 budget includes a ten-percent increase in the number of inspectors and includes \$29 million to fund near-term resources for agency restructuring. See U.S. DEP’T. OF INTE-

Secretarial Order breaking up the MMS, Salazar explicitly stated the need to “separate and reassign responsibilities of MMS into structures that will improve management, oversight, and accountability of activities on the Outer Continental Shelf. . .and provide independent safety and environmental oversight and enforcement of offshore activities.”⁸³ The House and Senate Bills in response to the BP Deepwater Horizon disaster (hereinafter “BP disaster”) generally proposed increased National Oceanic and Atmospheric Administration (“NOAA”) and Coast Guard authority in response to oil spills. The Securing Health for Ocean Resources and Environment (“SHORE”) Act would require the Department of the Interior (hereinafter DOI) to respond to concerns of the Coast Guard and NOAA before a drilling permit could be granted.⁸⁴

Recent responsive legislation is now attempting to close some of the gaps in financial regulatory schemes through transparency measures and investor protection. The SOX and Dodd-Frank are examples of Congressional response to corporate scandals.⁸⁵ The most widely felt impact of Dodd-Frank was its creation of the “Consumer Financial Protection Bureau.”⁸⁶ SOX, enacted largely in response to the Enron, WorldCom (MCI), and Global Crossing scandals, has been described as the, “most sweeping and significant change in securities law since the 1930’s.”⁸⁷ The increased regulation of business and accounting practices has received negative criticism from business, especially regarding the increased regulation, increased compliance costs, corporate federalism, and lack of clarity.⁸⁸ In 2003, a study of internal audit directors anticipated many of the challenges facing the accounting pro-

RIOR, ORDER NO. 3299, ESTABLISHMENT OF THE BUREAU OF OCEAN AND ENERGY MANAGEMENT, THE BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, AND THE OFFICE OF NATURAL RESOURCES REVENUE (2010);). See also, Linda Roeder, *Newly Reorganized Agency Must Address Long-Standing Deficiencies*, [July] Daily Envtl. Rep. (BNA) No. 140, at A-21, (July 23, 2010). (“As part of the department’s reform, Salazar said the president’s 2011 budget includes a 10 percent increase in the number of inspectors and includes \$29 million to fund near-term resources for agency restructuring”).

⁸³ See ORDER NO. 3299, *supra* note 81.

⁸⁴ Lynn Garner, *Oil Spills: Senate Commerce Beefs up Authority For Coast Guard, NOAA over Oil Spills*, [July] Daily Envtl. Rep. (BNA) No. 140, at A-20, (July 23, 2010)(“The SHORE Act would require Interior to respond to concerns of the Coast Guard and NOAA before a drilling permit could be granted. It would also increase resources for the two agencies to respond to oil spills”).

⁸⁵ SOX, *supra* note 2; see also Parles et al., *supra* note 15, at 1.

⁸⁶ See Summary of Dodd-Frank, *supra* note 14.

⁸⁷ Parles et al., *supra* note 15, at 1.

⁸⁸ *Id.* at 1-2 (noting that the legislation began to regulate a profession that had previously been self-regulated by the American Institute of Certified Public Accountants (AICPA)).

fession, particularly all aspects of auditing.⁸⁹ This study predicted the role of the internal auditors would expand to evaluate, among other areas, the internal controls and interpretation of SOX and other SEC rules.⁹⁰

Following the enactment of SOX, the role of the auditor changed.⁹¹ SEC Commissioner Harvey Goldschmid emphasized this changed role when he “reminded auditors that the investing public views them as gatekeepers.”⁹² Government is and always will be needed to deal with issues that require cooperation and impact other nation-states, but the role and efficacy of quick-fix type regulation must be addressed.

II. THE MOST IMPORTANT ROLE OF THE FEDERAL GOVERNMENT IS TO ASSURE TRANSPARENCY, PROTECT AGAINST CONFLICTS OF INTEREST, AND INCREASE INDIVIDUAL AGENCY.

Success and failure of regulatory regimes can be traced to incentives, ranging from short gain to long-range sustainable preservation.⁹³ Regulatory responses that make business difficult through sanctions and regulation may provide lucrative avenues for those able to circumvent impediments to business or “progress.”⁹⁴ The 2007 crisis exposed how vulnerable the United States is to shortsighted and greedy factions.⁹⁵ Unites States citizens are becoming increasingly

⁸⁹ *Id.* at 1.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See* Herman Daly, *Steady-State Economics versus Growthmania: A Critique of the Orthodox Conceptions of Growth, Wants, Scarcity, and Efficiency*, 5 J. POL. SCI. 2, 149-167 (Jun. 1974); *See also*, Douglas Kysar, *Symposium: Intergenerational Equity and Discounting. .on Stilts*, 74 U. CHI. L. REV. 119 (Winter, 2007)(noting how discounting has the practical effect of “dramatically diminishing the apparent significance of policy effects on future generations in the context of problems such as climate change, species extenction, deforestation, and aquifer depletion.”).

⁹⁴ *See* Vincent Cable, *What is International Economic Security?*, 71 J. INT. AFF. No. 2, 305 at 321-323 (Apr. 1995)(“The emerging ‘black market’ in CFCs (circumventing the terms of the Montreal Protocol) could, in this sense, be seen as much as a security threat as narcotics smuggling”). *See generally*, Valerie Jenness, *Explaining Criminalization: From Demography and Status Politics to Globalization and Modernization*, 30 ANN. REV. SOC. 147 (2004).

⁹⁵ These factions, such as those who peddled sub-prime mortgages and toxic assets to clients and consumers, are arguably responsible for the crisis. *See* FCIC REPORT, *supra* note 2, at xvii-xix (comprehensive analysis of root causes of the 2007 disaster); *see also* FRIEDMAN, *supra* note 30 (comparing the financial crisis of

aware as a society that sustainability is a desirable aim throughout all facets of the economy, government, and banking system.⁹⁶

How we as a nation respond to this crisis will define our generation. A response stemming from a fundamental paradigm shift in how we view commodities, wealth, and progress is necessary now more than ever as we take legal and legislative steps to protect and regulate the economy. Large-scale famine has never happened in a democracy and is unlikely, because it can only happen in authoritarian systems lacking *openness of information* and *transparency*.⁹⁷ In the United States, transparency through citizens' close proximity to the decision-making process is one example of the political freedoms which keep the developed world from experiencing famine.⁹⁸ Rights such as freedom of expression and discussion "are not only pivotal in inducing social responses to economic needs, but are also central to the conceptualization of economic needs themselves."⁹⁹ Dialogue is important to support the effective functioning of a democracy; formal rules are not enough without good democratic practice.¹⁰⁰

The parallels between the root cause and connections of financial and environmental crises are visible in everything from the news to CIA national security briefings and State Department reports.¹⁰¹ Part Two of this paper will apply the analysis from Part One to the apparent progression in environmental policy to the recent reaction of the U.S. government to the 2007 financial crisis. Regulation by top-down control can be more harmful than beneficial because it creates an incentive for bad practice.¹⁰² International criminalization is com-

2008 with global climate change, which is unlikely to be realized until the next big disaster or meltdown).

⁹⁶ See, e.g., HAWKEN, *supra* note 18, at 321-22.

⁹⁷ SEN, *supra* note 11, at 16.

⁹⁸ See *id.*

⁹⁹ *Id.* at 154. Sen maintains that the opposition between economic needs and political freedoms are illusory and reminds us that democracy, as well as being an end result of individual freedom, plays an instrumental role in giving people a voice and constructive role in shaping values and norms. See *generally id.*

¹⁰⁰ See *id.* at 168-69. Sen's notable work on famine explains how they are rarely caused by food shortage, and how these are usually caused by a lack of purchasing power or entitlements. *Id.* at 168-69. Sen argues these are easy and cheap to avoid through state employment schemes, an example of a particularly straightforward approach. *Id.* at 160-88.

¹⁰¹ See *supra* note 32 (noting the environmental components on the CIA WAR ON TERRORISM INDEX and the US STATE DEPARTMENT, ENERGY SECURITY INDEX).

¹⁰² See Cable, *supra* note 94. See, e.g., Kysar, *supra* note 17, at 1423.

plex, and criminal enforcement on an international level is nearly impossible.¹⁰³

A. *Citizen Gap Closing: Freedom, Transparency, Individual Agency*

The key component of the TSCA is how the testing requirements ultimately shift the burden of proof regarding the safety of a substance (necessary in order to move forward with production or use) permanently on to the manufacturer.¹⁰⁴ The data is ultimately compiled to make a formal risk assessment for EPA review. If the EPA requires more information, or makes a finding of unreasonable risk, the manufacturer must produce additional evidence of the substance's safety to discharge the burden of proof to move forward.¹⁰⁵ The Administrator may take measures against such risk using the "least burdensome requirement" and require the manufacturer to notify the local state authorities where the required disposal may occur. Any person is entitled to a hearing if there is a dispute of any material fact.¹⁰⁶

Industry has historically found ways to avoid releasing specific information on a chemical or a company, contrary to Section 5(b) and 8 requirements.¹⁰⁷ Using a Section 8(e) claim, companies routinely make "Confidential Business Information" ("CBI") claims to maintain confidentiality of the actual chemical identity, manufacturer's name, and chemical structure.¹⁰⁸ The proposed policy reform aims to end the practice of using the CBI exemption for information already available to the public on the TSCA inventory.¹⁰⁹ The statute contains written measures to promote awareness and a democratic process regarding potentially hazardous substances that may enter the stream

¹⁰³ See Jamie Mayerfeld, *Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, 25 HUM. RTS. Q. 93, 121 (2003).

¹⁰⁴ See RODGERS, *supra* note 38, at 493; see also Lisa P. Jackson, Adm'r, Env'tl. Prot. Agency, Remarks to the Commonwealth Club of San Francisco (Sept. 29, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/fc4e2a8c05343b3285257640007081c5!OpenDocument> (proposing an increase in the burden of proof to manufacturers in that the manufacturers must prove that the substance is safe, instead of proving does not propose an immediate threat to safety).

¹⁰⁵ Toxic Substances Control Act § 4, 15 U.S.C. § 2603 (1976).

¹⁰⁶ See Hogue, *Naming Names*, *supra* note 35.

¹⁰⁷ See RODGERS, *supra* note 38, at 493. The data reports are the crux of the act and are responsible for establishing a prima facie case on the safety of a proposed substance. *Id.*

¹⁰⁸ TSCA § 8(e). See Hogue, *Naming Names*, *supra* note 35.

¹⁰⁹ See Enhancing EPA's Chemical Management Program, *supra* note 36.

of commerce.¹¹⁰ With information and technology paving the present political landscape, the public needs and demands access to this information more than ever.

The proposed reform addresses this loophole by empowering citizens to strengthen the regulatory intent present in the findings and policy language of the TSCA. Increasing accountability through citizen awareness and involvement is a more holistic approach which aims beyond pollution permit writing and data collection to preemptively reduce pollution.¹¹¹ Public activism and awareness is helping to close a long-standing gap between the statute's intended purpose and the actual industry practice.¹¹² Current incentives encourage companies to claim that a proposed substance is not new or for new use or to label their submitted data as CBI.¹¹³ This way, they only have to submit a redacted report (i.e., a report without the exact chemical content and the company name) to the EPA in order to be published in the Federal Register.¹¹⁴

These reform efforts, lead by Congressman Rush and Senator Waxman, have received a good deal of media coverage and helped spread awareness of the amount toxic substances that permeate our daily lives.¹¹⁵ The TSCA generally aims to increase EPA authority in hazardous chemical regulation, and evaluate chemicals by their effect on human health and safety before allowing their insertion in the

¹¹⁰ *Id.*

¹¹¹ The procedure and steps necessary to collect and report data are enumerated in Sections 8 and 14. Companies may claim a range of sensitive, proprietary information as CBI in order to protect intellectual property rights and trade secrets. Under Section 8(e), companies that manufacture, process, or distribute chemicals are required to immediately provide notice to EPA if they learn that a chemical presents a substantial risk of injury to health or the environment. *See* TSCA §§ 8, 14.

¹¹² *See* Hogue, *TSCA Reform*, *supra* note 35.

¹¹³ *See* Hogue, *Naming Names*, *supra* note 35.

¹¹⁴ *Id.* This is one of the most important elements to transparency assurance under TSCA. With no testing expenses, there is a quicker production time frame.

¹¹⁵ *See* Cheryl Hogue, *Chemicals Regulation: Legislation: Industry, Activists Seek Changes to Congress' Proposals for the Toxic Substances Control Act*, CHEMICAL & ENGINEERING NEWS, Apr. 26, 2010, at 7, available at <http://pubs.acs.org/isubscribe/journals/cen/88/i17/html/8817notw1.html>. *See generally* Charles Duhigg, *Debating How Much Weed Killer Is Safe in Your Water Glass*, N.Y. TIMES (Aug. 23, 2009) (discussing how the popular weed killer atrazine may be more dangerous than previously thought); Hogue, *Naming Names*, *supra* note 35 (regarding group protests over "company sanitized" data reports on new chemicals which frequently lack the name and company of the substance); Green Product Innovation Institute, <http://gpinnovation.org/about.html> (last visited Mar. 15, 2011) (referencing GPII Green Products Innovation Institute, a California non-profit that extends the "Cradle to Cradle" framework and administers the certification standard).

stream of commerce. The Waxman-Rush legislation would require all chemicals to which people are exposed to be reviewed for safety, expand EPA authority to compel chemical testing, and “[e]stablish an expedited process for EPA to reduce exposure to chemical substances that are known to be persistent, bioaccumulative, and toxic.”¹¹⁶ In an attempt to increase incentives for innovation and investment in the chemical industry, the EPA Administrator seeks to create a review process for safer alternatives to existing chemicals, promoting innovation, and investment in green chemistry.¹¹⁷ The driving force behind the proposed legislation was public disclosure and awareness of the true content of hazardous chemicals, in a similar vein to the push for accounting transparency in the SOX legislation.¹¹⁸

B. Financial Legislative Response

The public access to chemical content, intended use, and testing methods, provide a check on the industry by influencing consumer demand for safe products from reliable companies.¹¹⁹ There is limited EPA authority regarding pre-emptive regulation. Their role is primarily delegated to controlling and collecting data on the chemicals in the stream of commerce, than collecting and disseminating the information.¹²⁰ These specific regulations and sanctions for noncompliance are secondary to concerns over chemical industry innovation and production.¹²¹ However, increasing media and citizens’ group attention on the importance of public chemical safety awareness indicate that the industry accountability measures already existing in the statute were meant as regulating measures by providing transparency for the general public.¹²² Increased public information access is just one issue

¹¹⁶ Committee on Energy and Commerce, H.R. 5820: “The Toxic Chemicals Safety Act of 2010,” <http://democrats.energycommerce.house.gov/index.php?q=bill/hr-5820-the-the-toxic-chemicals-safety-act-of-2010> (last visited 4/08/11). See Toxic Chemicals Safety Act of 2010, H.R. 5820, 111th Cong. § 32 (2010).

¹¹⁷ See Jackson, *supra* note 104.

¹¹⁸ See TCSA § 2.

¹¹⁹ See generally Hogue, *Naming Names*, *supra*, note 35.

¹²⁰ See LINDA-JO SCHIEROW, CONG. RESEARCH SERV., THE TOXIC CONTROL ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 1 (2009). The PCB regulations under 6(e) impose specific regulation plans for asbestos (Title II), radon (Title III), and lead exposure (Title IV).

¹²¹ See RODGERS, *supra* note 37, at 493, note 31 (citing H.R.Rep No. 94-1341, 94th Cong., 2d Sess. 5 (1976), in *Legis.Hist.* at 413 (“Because of the lack of testing by manufacturers and processors of chemicals to determine their health and environmental effects, the general population and the environment now serve as the laboratory for discovering adverse health and environmental effects.”).

¹²² Cf. RODGERS, *supra* note 38; Hogue, *TSCA Reform*, *supra* note 35.

addressed by current reform efforts, but is critical to the overall success of hazardous chemical regulation.¹²³

Throughout regulation on corporate responsibility, conflicts of interest, and criminal penalties, transparency requires that public companies have audit committees that will take charge of the audit and the selection of the auditors.¹²⁴ Two controversial SOX provisions (section 302 and section 906) require CEOs and CFOs to certify that the company's SEC filings are accurate.¹²⁵ Failure to do so carries criminal penalties.¹²⁶ In addition, Congress authorized increased criminal penalties for existing crimes and created new securities crimes.¹²⁷ Title VII of SOX is "entitled 'The Corporate Criminal Fraud Accountability Act of 2002,' and creates criminal liability for alteration of documents."¹²⁸

BP obtained its lease from an MMS service that admittedly felt it was their duty to streamline extraction, increase capacity, navigate petroleum lease markets, and avoid environmental regulations.¹²⁹ The part of the MMS responsible for streamlining the BP lease believed itself to act as an extension of the industry itself.¹³⁰ "The MMS develops environmental impact statements on each five-year offshore oil and gas program, and it developed a multi-lease sale environmental impact statement covering a group of 11 lease sales that included the BP site where the spill occurred.¹³¹ A relatively short environmental statement for the specific lease won by BP followed. In that "tiered" system, MMS decided the BP project, like other individual projects, needed no separate environmental analysis, so it was given a categorical exclusion."¹³²

¹²³ *Id.*

¹²⁴ See e.g., SOX § 301, *supra* note 2; Parles et al., *supra* note 15.

¹²⁵ SOX §§ 302, 906. See Parles et al., *supra* note 15 (noting that these sections require CEOs and CFOs to sign two separate certifications in their companies' reports to the SEC).

¹²⁶ *Id.* (noting that SOX § 601 authorized large budgetary increases for the SEC, particularly in enforcement).

¹²⁷ Parles et al., *supra*, note 15.

¹²⁸ *Id.*

¹²⁹ See Kempthorne, *supra*, note 73.

¹³⁰ *Id.*

¹³¹ Alan Kovski and Lynn Garner, *Gulf Spill Brings Calls for Better Safeguards, Criticism of NEPA Categorical Exclusions*, [May] Daily Envtl. Rep. (BNA) No. 89, at A-10, (May 11, 2010).

¹³² *Id.*

C. The Pollution Prevention Act as an Example of an Alternative Statutory Attempt at Control by Encouraging Voluntary Reporting, Information Gathering, and Public-Private Partnerships

The passage of the Pollution Prevention Act in 1990 marked a shift from command and control regulation to the use of market mechanisms and incentives intended to encourage voluntary compliance.¹³³ The broad scope of the policy section suggests Congress intended to leave room for interpretation within state and local government pollution control measures (requiring only that pollution be reduced or prevented “whenever feasible”).¹³⁴ Increasing difficulty in federal grants acquisition combined with the broad statutory language has helped foster creativity and innovation in state and local pollution prevention schemes.¹³⁵ The PPA contains no explicit language granting the EPA power to enforce compliance and issue sanctions.¹³⁶ As the action in the statute moves from the state-level up, information dissemination and state-matching grants are the main objectives of EPA authority.

The statute’s language calls for voluntary commitment to pollution reduction across media, government, and private sector divisions.¹³⁷ The EPA is required to compile and disseminate strategic information to help prevent pollution “at the source through cost-effective changes in production, operation, and raw materials use.”¹³⁸ The language acknowledges a historical lack of emphasis on multi-media management of pollution in existing statutes and calls on the EPA to address pollution as a whole.¹³⁹ Early EPA enabling statutes relied primarily on command-and-control mechanisms and less on voluntary

¹³³ Pollution Prevention Act of 1990, § 6604 (b)(10) Pub. L. No. 101-508, 104 Stat. 1388 (1990) (codified at 42 U.S.C. § 13101) [hereinafter PPA] (stating that the EPA Administrator shall “identify and make recommendations to Congress to eliminate barriers to source reduction including the use of incentives and disincentives”). See generally CELIA CAMPBELL-MOHN ET AL., ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY 40-46 (1993).

¹³⁴ PPA §§ 6602-6604.

¹³⁵ Telephone Interview with Dianne Wilkins, Env’tl. Programs Manager, Okla. Dep’t of Env’tl. Quality (June 29, 2010) (discussing state pollution prevention measures efforts and issues arising from lack of federal funding).

¹³⁶ PPA §6604(b) (“The Administrator shall develop and implement a strategy to promote source reduction.”).

¹³⁷ *Id.*

¹³⁸ *Id.* § 6602(a)(2).

¹³⁹ *Id.* § 6602(a)(3-4) (“The Environmental Protection Agency needs to address the historical lack of attention to source reduction.”).

measures and partnerships for pollution control.¹⁴⁰ The PPA is written to address the policy gaps arising between pollution command-and-control regulation and the need for pre-emptive pollution reduction strategy.

Information and funds are dispersed to state and local businesses, governments, and organizations to ensure progress is being made under the federally funded schemes.¹⁴¹ Although innovative strategies may arise through resource scarcity in statewide programs, the success and failure of these pollution prevention programs depends on adequate funding.¹⁴² Measurable goals are essential to the PPA federal grant application process because they provide an objective standard for the federal government when evaluating these programs and providing grants.¹⁴³

The Source Reduction Clearinghouse in Section 6602 assists information exchange about the different source reduction techniques, ensures that the information is extended to businesses, and provides technical assistance to businesses.¹⁴⁴ At the same time, it also considers the capabilities of various businesses to make use of the techniques.¹⁴⁵ Federal grants are more difficult to obtain under the PPA than under other waste management statutes such as Resource Conservation and Recovery Act ("RCRA")¹⁴⁶ and Comprehensive Environ-

¹⁴⁰ See, e.g., RODGERS, *supra* note 38, at 58-61 (discussing the Freedom of Information Act and the balance of "trade secrets" with the transparency of company practices).

¹⁴¹ The EPA's primary function under the PPA is to provide resources (namely grants under Section 6605) and information to states about the implementation of voluntary, pre-emptive, pollution source reduction strategies. See PPA § 6605.

¹⁴² See Wilkins interview, *supra* note 135 (noting how pollution prevention professionals tend to be forward thinking and innovative, likely resulting from having to always work with limited support and funding. "Much of the discussion arising in the larger Environmental Community frequently comes up in P2 communities 3-5 years beforehand.").

¹⁴³ Funding for pollution prevention schemes are available to states, businesses, and local governments in the form of "state matching grants" pursuant to Section 6604(b)(5). PPA § 6604(b)(5). Section 6 is especially important because it requires proposed reduction methods applying for federal grants to indicate measurable pollution reduction goals. *Id.* § 6604(b)(6).

¹⁴⁴ The "Source Reduction Clearinghouse" contains data on the success and failure of pollution prevention programs funded by the State matching grants. See *id.* § 6602(b)(5) (stating that the Administrator shall "[d]evelop improved methods of coordinating, streamlining and assuring public access to data collected under Federal environmental statutes.").

¹⁴⁵ *Id.*

¹⁴⁶ Resource Conservation and Recovery Act, 42 U.S.C. § 6931 (2002) (stating that the EPA must "make grants to the States for purposes of assisting the States in

mental Response, Compensation, and Liability Act ("CERCLA").¹⁴⁷ Under the PPA, the EPA is required to collect and make readily available information to state governments and the private sector.¹⁴⁸ The recipients of the state matching grants are "State Technical Assistance Programs," which then collect and distribute information and thus help foster technological innovation and increase efficiency.¹⁴⁹

D. A Shift in Regulatory Focus as Seen in the Use of Multi-Media Management

The success or failure of the PPA in reducing pollution at the source depends upon gathering and reporting information. By looking at the pollution problem as a whole, the PPA addresses the problems with traditional single-medium pollution control measures, which some claim simply moves waste from one medium to another.¹⁵⁰ The multi-media approach looks at the issue as a whole to address our throwaway culture through measureable reduction progress. Collecting and disseminating data on the success and failure of individual reduction programs ideally enables the EPA to trace gradual behavioral changes and eventually compile statistical indicators to measure increased awareness of pollution reduction options. The information provided aims to satisfy industry's demand for information and technical assistance to overcome institutional barriers to the adoption of source reduction practices.¹⁵¹

Pollution prevention techniques and information spread beyond the EPA when submitted to the Pollution Prevention Information

the development and implementation of authorized State hazardous waste programs.").

¹⁴⁷ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9628 (2002).

¹⁴⁸ PPA § 6604.

¹⁴⁹ PPA § 6602(a)(3) ("The opportunities for source reduction are often not realized because existing regulations, and the industrial resources they require for compliance, focus upon treatment and disposal, rather than source reduction; existing regulations do not emphasize multi-media management of pollution; and businesses need information and technical assistance to overcome institutional barriers to the adoption of source reduction practices.").

¹⁵⁰ *Id.* § 6604(a) (stipulating that the pollution prevention office to be established in the EPA "shall be independent of the Agency's single-medium program offices but shall have the authority to review and advise such offices on their activities to promote a multi-media approach to source reduction").

¹⁵¹ The information allows proper identification and evaluation of program results such as: measurable goals reflecting overall PPA policy and the tasks necessary to achieve the goals, dates at which the principal tasks are to be accomplished, required resources, organizational responsibilities, and means by which progress in meeting the goals will be measured. *Id.* § 6604.

Clearinghouse (“PPIC”), a “free, non-regulatory service of the U.S. EPA dedicated to reducing or eliminating industrial pollutants through technology transfer, education, and public awareness.”¹⁵² The Pollution Prevention, or P2, program also aims to create incentives for partnerships between the EPA and partnership organizations.¹⁵³ While state-level officials and the private sector perform much of the fundraising and strategy development necessary for program implementation, the PPA provides a broad framework supporting a holistic approach to pollution source reduction using results measurement and reports submitted by state level grantees.¹⁵⁴ The Clearinghouse serves as a readily available source for reduction technology to any member of the public, providing outreach and education programs for states to assist with source reduction technology implementation.¹⁵⁵

The PPA encourages policy innovation and creativity by preemptively addressing pollution prevention as a whole.¹⁵⁶ By requiring the EPA to establish a comprehensive source reduction program, distribute grants for qualifying innovative strategies, utilize multi-media pollution management, and make reporting and data easily accessible to the public, the PPA’s approach to pollution reduction exemplifies a holistic approach to reducing pollution at the source.

E. The Best Regulation

The Dodd-Frank Act established the Consumer Protection Bureau within the Federal Reserve to act as a consumer “watchdog.”¹⁵⁷ Led by an independent director appointed by the President, the Bureau has the authority to write rules for consumer protections governing all financial institutions that offer consumer financial services and to enforce regulations for banks and credit unions with more than ten billion dollars in assets.¹⁵⁸ The Bureau oversees the “enforcement of federal laws intended to ensure the fair, equitable and nondiscrimi-

¹⁵² EPA, Pollution Prevention Information Clearinghouse, <http://www.epa.gov/opptintr/ppic/pubs/ppicarchive.html> (last visited Mar. 20, 2011).

¹⁵³ *Id.*

¹⁵⁴ PPA § 6606(a). *See generally* EPA, 2010-2014 POLLUTION PREVENTION PROGRAM STRATEGIC PLAN (2010) *available at* <http://www.epa.gov/p2/pubs/laws.htm>.

¹⁵⁵ PPA § 6606.

¹⁵⁶ *Id.* § 6602(b) (“Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible.”).

¹⁵⁷ Press Release, U.S. Senate Comm. on Banking, Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 1, 2010) *available at* http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf.

¹⁵⁸ *Id.*

natory access to credit for individuals and communities.”¹⁵⁹ In addition to a systematic regulation and emergency power increase, the Act created the Office of Financial Research, which is charged with collecting financial data and delivering to Congress annual assessments of systematic financial risk.¹⁶⁰

Public knowledge and awareness are critical for policy decision-making and enhance rule writing by filling gaps that exist between a statute’s stated goals and its actual implementation.¹⁶¹ The EPA’s authorizing statutes regulating petroleum industry actions, however, are watered down and contain oil industry-friendly exemptions.¹⁶² These exemptions are found throughout the authorizing statutes, namely the OPA and CWA, which are primarily for cleanup and response.¹⁶³ Proposed reform of the TSCA intends to increase public participation in chemicals regulation and raise the safety standard, which ideally leads to increased overall public participation.¹⁶⁴ Authority requiring companies to provide the public access to chemical information is found in Section 8, but has historically taken advantage

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* See also Richard Schmidt, *The Treasury’s New Research Office*, BUS.WK., Sept. 2, 2010, available at http://www.businessweek.com/magazine/content/10_37/b4194026970590.htm. The Office of Financial Research will have a director appointed by the President and confirmed by the Senate for six-year terms. Schmidt, *supra*. Additionally, the Office will have authority to issue regulations supporting its own data collection and also will have the power to issue subpoenas to financial companies to collect information necessary to carry out its mandated functions. *Id.*

¹⁶¹ *Cf.* Hogue, *supra* note 34 (in *Naming Names*, noting the pivotal role of an informed public in promoting toxic chemicals control reform).

¹⁶² See *e.g.* RCRA § 31: (2) The term “regulated substance” means “. . . any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (but not including any substance regulated as a hazardous waste under subtitle (C), and(B) *petroleum*.” Also see CERCLA § 101(14) The term “hazardous substance” means “. . . (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act. *The term does not include petroleum*, including crude oil or any fraction thereof.” (emphasis added).

¹⁶³ The OPA created a process that enables anyone damaged by an oil spill to obtain compensation from a “responsible party” as defined by the statute. The Clean Water Act requires the President, and not the EPA, to issue regulations establishing procedures, methods, equipment, and other requirements to prevent and contain discharges of oil to navigable waters or adjoining shorelines from vessels and facilities. Clean Water Act § 311(j)(1)(C).

¹⁶⁴ See Hogue, *TSCA Reform*, *supra* note 35 (referring to “Safer Chemicals, Healthy Families,” a broad coalition of environmental and public health groups calling for reform). See generally Hogue, *Naming Names*, *supra* note 34.

of a Confidential Business Information (“CBI”) clause to minimize potentially harmful information released to the public.¹⁶⁵

Different kinds of freedoms and individual agency must be strengthened and protected when developing new responsive policy.¹⁶⁶ On the other hand, the freedom of agency that we have individually is inescapably qualified and constrained by the social, political, and economic opportunities that are available to us.¹⁶⁷ Hasty government regulations may aim to increase overall wealth and freedom in theory, but when the government tries to provide freedom for one group of citizens, the end result frequently is a system only capable of taking freedom from others.

III. CONCLUSION

There is a deep connection between individual agency and social arrangements. It is important to give simultaneous recognition to the centrality of individual freedom and to the force of social influences on the extent and reach of individual freedom.¹⁶⁸ To counter the problems we currently face, we must see individual freedom as a social commitment. Expansion of freedom is “viewed, in this approach, both as the primary end and as the principal means of development.”¹⁶⁹ Development consists of the removal of various types of non-freedoms that leave people with little choice and little opportunity to exercise their reasoned agency.

In general, the intrinsic importance of human freedom, as the preeminent objective of development, must be distinguished from the instrumental effectiveness of freedoms of particular kinds to promote freedoms of other kinds. The links between different types of freedoms are empirical and causal, rather than constitutive and compositional. For example, there is strong evidence that economic and political freedoms help to reinforce one another, rather than being hostile to one another (as they are sometimes taken to be).¹⁷⁰ Similarly, social opportunities of education and health care, which may require public action, complement individual opportunities of economic and political

¹⁶⁵ Toxic Substances Control Act § 14(c), 15 U.S.C. § 2613(c) (1976).

¹⁶⁶ See SEN, *supra* note 12 (noting the importance of individual agency to a functional democracy).

¹⁶⁷ See *id.* (explaining the notable illustration regarding womens’ literacy and employment levels as the best predictors of both child survival and fertility rate reduction).

¹⁶⁸ See *id.*

¹⁶⁹ *Id.*

¹⁷⁰ Compare SEN, *supra* note 12 (noting how freedom is both an ends and a means of development) with Daly *supra* note 93 (criticizing traditional notions of development and economic progres).

participation and also help to foster our own initiatives in overcoming our respective deprivations.¹⁷¹ If the point of departure of the approach lies in the identification of freedom as the main object of a governing body, the reach of the policy analysis lies in establishing the empirical links that make the viewpoint of freedom a coherent and cogent guiding perspective.¹⁷²

¹⁷¹ See SEN, *supra* note 12 (discussing the social costs of environmental harm).

¹⁷² *Id.*