

THE FAILURE OF RISK REFORM LEGISLATION IN THE 104TH CONGRESS

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Rational choice theory, true to its roots in neo-classical economics, assumes preferences to be fixed and typically avoids conjecture about how those preferences are formed.¹ This investigation of the failure of risk reform legislation during the 104th Congress illustrates both the value and the limits of a rational choice approach. Absent an investigation of the more fundamental moral conflict underlying the dialogue over risk reform, a rational choice approach is of limited value. This investigation demonstrates that the failure of risk reform is more completely explained by examining the conflicting moral discourses that underpinned the different positions adopted by politicians during the risk reform debate.

While the rational choice approach to politics can be traced back to the early twentieth century, the modern movement established itself with classic works by Kenneth Arrow,² Anthony Downs,³ and

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1. See Debra Satz & John Ferejohn, *Rational Choice and Social Theory*, 91 J. PHIL. 71, 71-73, 87 (1994) (“[T]he content of those preferences is irrelevant to the theory. It does not matter, for example, what reasons the agent has for her preferences, or indeed why she has come to hold them at all.”).

Saltz and Ferejohn argue that “rational-choice explanations are most plausible in settings in which individual action is severely constrained;” thus, rational choice theory “gets its explanatory power from structure-generated interests and not from individual psychology.” *Id.* at 72. Therefore, rational choice theory is most successful at explaining outcomes where “agents are operating in a competitive environment characterized by extreme scarcity, in which it is plausible to impute interests to the various acting parties.” *Id.* at 87. An example is “the classical theory of electoral competition which rests on the assumption that candidates are motivated to seek office rather than pursue policy goals.” *Id.* However, Saltz and Ferejohn argue that “in the absence of strong environmental constraints . . . rational choice is a weak theory, with limited predictive power.” *Id.* at 72.

2. See KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951).

3. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

Mancur Olson.⁴ Arrow, Downs, Olson and others generally agree on three key principles.⁵ First, the utility maximizing individual represents the sole focus and fountain of all rational choices, whether made in politics or the supermarket.⁶ Second, the choices of these rational individuals are based on a fixed, hierarchical set of preferences. Third, given sufficient empirical, scientific observation, rational choice theorists assume that universal laws and predictions can be developed based on the rational activity (or inactivity) of political individuals. By applying these principles, much can be learned about the failure of risk reform legislation by assuming that the leading protagonists, President William J. Clinton and Senator Robert J. Dole, had simple and fixed preferences. Each wanted to win the 1996 presidential election. Thus, the rational choice explanation of the failure of risk reform hinges upon how Dole and Clinton perceived their chances to be affected by the risk reform debate.

While such an approach to the study of politics is not without merit, it frequently fails to provide sufficient causal understanding in empirical applications. As John Ferejohn suggests, “[U]nless we substantially enrich the concept of rationality itself, or supplement it with extra assumptions about human nature, rationality by itself cannot fully account for the selection of one outcome rather than another.”⁷ Rational choice analysis alone begs a more fundamental question: if Clinton and Dole were influenced by public opinion, why and how was that opinion formed? We argue, that, to a considerable extent, public opinion about this issue was formed in response to arguments framed on the basis of competing and mutually exclusive realms of moral discourse. By examining the underlying moral conflict that informed the creation, debate, modification and eventual defeat of the 1995 risk reform legislation, we hope to demonstrate

4. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

5. See DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 14-17 (1994).

6. As Gordon Tullock, an early leader in a more scientific understanding of political behavior, suggests, “[v]oters and customers are essentially the same people. Mr. Smith buys and votes; he is the same man in the supermarket and in the voting booth.” GORDON TULLOCK, *THE VOTE MOTIVE: AN ESSAY IN THE ECONOMICS OF POLITICS, WITH APPLICATIONS TO THE BRITISH ECONOMY* 5 (1976).

7. See GREEN & SHAPIRO, *supra* note 5, at 26 (quoting John Ferejohn from his article *Rationality and Interpretation: Parliamentary Elections in Early Stuart England*, in *THE ECONOMIC APPROACH TO POLITICS: A CRITICAL REASSESSMENT OF THE THEORY OF RATIONAL ACTION* 284 (Kristen R. Monroe ed., 1991)).

that a purely rational choice approach offers too limited a perspective on an otherwise profound clash of ethical and political values.

Part I of this essay reviews risk reform legislation as proposed in the 104th Congress, focusing attention on the most contentious issues in the risk reform debate. It then analyzes the legislation using the tools of conventional political science.

Part II examines the interaction between congressional consideration of risk analysis in the 104th Congress and the 1996 presidential campaign. It explains the reasons for Robert Dole's choice to act as primary proponent of risk reform and the reasons for President Clinton's choice to act as risk reform's chief detractor. Part II begins by comparing and contrasting the risk reform debate with legislative battle over passage of the 1970 Clean Air Act and ends by revisiting the conventional political science approach in light of risk reform's failure.

Part III examines the problem of preference formation and its relation to public and moral debate regarding environmental risk. It explores the fundamental differences between a utilitarian and a rights-based view of the environment. This part analyzes the risk reform debate in the context of the clash between these differing regimes of moral discourse, informing both the rational choice and conventional political science explanations of risk reform's failure.

PART I: THE RISK REFORM DEBATE

A. *Risk Reform: The Legislation*

Risk reform was among the legislative priorities enumerated in the *Contract with America* to which House Republicans pledged themselves in the 1996 elections.⁸ The "Job Creation and Wage Enhancement Act of 1995," which contained the new risk assessment reform measures, passed the House of Representatives early in the first session of the 104th Congress by a vote of 277 - 141.⁹ However, the

8. See NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA* 11, 125, 131-32 (Ed Gillespie & Bob Schellhas eds., 1994) (promising to vote on the "Job Creation and Wage Enhancement Act" in the first one hundred days of a Republican House majority and explaining that the Act, in addition to requiring "each federal agency to assess the risks to human health and the environment for each new regulation," requires agencies to "also provide the cost associated with [new] regulation and an analysis comparing the economic and compliance costs of the regulation to the public").

9. See H.R. 9, 104th Cong. §§411-24 (1995).

real struggle over its passage took place in the Senate, whose Republican majority had not made a similar pledge.¹⁰

Risk reform legislation essentially sought to require federal agencies to conduct risk assessments and cost-benefit analyses of proposed new regulations and to justify their actions on the basis of those analyses.¹¹ Two of the most hotly contested issues were: the threshold above which risk analysis would be required; and the extent to which individuals could petition the government requesting either an assessment of pending regulation or peer review of a previously performed risk assessment. Such assessments and reviews could then serve as the basis for judicial review.

In the Senate deliberations, the threshold figure vacillated between fifty million and one hundred million dollars.¹² The higher threshold was estimated to sharply reduce the number of proposed regulations subject to the risk assessment requirement.¹³ The Senate Republicans, under Dole's leadership, were ultimately willing to compromise on the matter of the threshold. Late in the game, they agreed to adopt the one hundred million dollar figure.¹⁴ But their refusal to compromise on judicial review ultimately led to the bill's defeat.¹⁵

10. For the Senate version of risk reform sponsored by Senator Dole see S. 343, 104th Cong. (1995). While there were other competing regulatory reform bills in the Senate simultaneously, for example S. 291, 104th Cong. (1995), this article will focus on S. 343, the Comprehensive Regulatory Reform Act of 1995.

11. See Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. § 4 (1995); H.R. 9, 104th Cong. §§ 421-422 (1995); Bob Benenson, *Opponents Whittle Away at Dole's Overhaul Bill*, 53 CONG. Q. 2049, 2049 (1995) [hereinafter Benenson, *Opponents*] ("[T]he bill (S. 343) would require federal agencies to conduct elaborate risk assessments and cost-benefit analyses to justify many new regulations."); Bob Benenson, *GOP Sets the 104th Congress on New Regulatory Course*, 53 CONG. Q. 1693, 1695 (1995) ("H.R. 9 and S. 343 . . . would require agencies to conduct detailed analyses of the environmental risks . . . proposed regulations seek to address and then to quantify that the benefits of the regulations would exceed the economic costs to individuals and society.").

12. See Benenson, *Opponents*, *supra* note 11, at 2049 ("[T]he Senate voted 53-45 on July 11 to require agencies to conduct detailed analyses only on those regulations with an expected annual economic impact of \$100 million. The original draft set the threshold for analysis at \$50 million.").

13. See *id.*

14. See Bob Benenson, *Senators Roll Back Restrictions Proposed by Regulatory Overhaul*, 53 CONG. Q. 2160, 2160 (1995) (J. Bennett Johnston's amendment, "adopted 53-45," required "that federal agencies undertake risk assessments, cost-benefit analyses and other procedures only for those new and existing regulations with an annual economic cost of \$100 million, rather than the \$50 million threshold in the bill.").

15. See Bob Benenson, *Procedural Overhaul Fails After Three Tough Votes*, 53 CONG. Q. 2159, 2159, 2161 (1995) [hereinafter Benenson, *Overhaul*] ("During the weeks of debate, Dole made concessions to opponents. But he continued to insist that the Senate . . . expand opportu-

B. *Risk Reform: Conventional Political Science Wisdom*

The demise of risk reform is particularly interesting because it goes against the grain of conventional political science interpretation. At first glance, the legislation appeared fail-proof. It met five of the most important criteria that political scientists posit when they try to explain why a bill becomes a law: it received widespread support within the expert community, it was procedural in nature rather than substantive, the business community was united in support of the legislation, it had received favorable attention within Congress, and the congressional majority party was pledged to pass it.¹⁶

First, risk reform enjoyed widespread support within the most relevant expert community. In 1987 an EPA task force issued a report, *Unfinished Business*, in which the agency seemingly espoused a view long held by environmental economists and risk scientists: the attention paid to a particular problem by the agency should correspond to the level of risk posed by that problem. The report described a shocking mismatch between what experts took to be the most serious environmental problems and what problems the agency spent its resources addressing.¹⁷ Three years later, the Agency's Science Advisory Board produced a more extensive document that came to similar conclusions.¹⁸

Second, the 1995 legislation addressed esoteric, technical aspects of procedure, not volatile substantive issues, and was therefore less likely to arouse opposition. It proposed no reductions in pollution control efforts. Rather, it mandated more extensive use of a tech-

nities for regulated parties to sue federal agencies over their adherence to administrative procedures[] and allow individuals to petition agencies to modify or revoke regulations.”).

16. Several discussions of agenda setting in policy-making as well as why policies succeed or fail are available. *See, e.g.*, JOHN KINGDON, *AGENDAS, ALTERNATIVE AND PUBLIC POLICIES* (1995); JOHN B. BADER, *TAKING THE INITIATIVE: LEADERSHIP AGENDAS IN THE CONGRESS AND THE 'CONTRACT WITH AMERICA'* (1996); FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993); MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* (1985); *THE NEW POLITICS OF PUBLIC POLICY* (Marc Landy & Martin Levin eds., 1995).

17. *See* 1 U.S. ENVIRONMENTAL PROTECTION AGENCY, *UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS* at xv (1987) (“The rankings by risk [] do not correspond well with EPA’s current program priorities Overall, EPA’s priorities appear more closely aligned with public opinion than with [] estimated risks.”).

18. *See* SCIENCE ADVISORY BOARD, U.S. ENVIRONMENTAL PROTECTION AGENCY, *REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION* 3 (1990) (“[Q]uestions of relative seriousness or urgency generally have remained unasked. Consequently, at EPA there has been little correlation between the relative resources dedicated to different environmental problems and the relative risks posed by those problems.”).

nique, risk-benefit analysis, in order to put environmental regulation on a sounder analytical footing.

Third, the business community was united in support of the legislation. Often the business community has difficulty becoming and remaining united in support of a particular piece of legislation, and ensuing rifts in the community are easily exploited by a bill's opponents. No such difficulties were encountered during the risk reform debate. Numerous organizations, such as the National Association of Manufacturers¹⁹ and trade associations representing the plastics, electric utilities, and food manufacturing industries, supported the bill.²⁰ Indeed, support extended beyond the profit-making sector to include organizations like the National School Boards Association.²¹

Fourth, the idea of risk reform had already received extensive favorable attention and deliberation within the Congress. The Senate Committee on Environment and Public Works, historically the most active and successful generator of environmental legislation, had conducted hearings on the problem, and its leadership had introduced risk reform legislation. In fact, in 1993 when Democrats enjoyed control of both Houses, the Senate passed a version of risk reform almost unanimously!²²

Fifth, the congressional majority party was pledged to pass risk reform legislation.²³ Although many Democrats were also pledged to support risk reform, the issue had historically been more popular among Republicans. When the Republicans gained control of the 104th Congress, their leaders went on record in support of it. As a key element in the *Contract with America*,²⁴ risk reform legislation received unparalleled leadership support and public prominence.

19. See Margaret Kriz, *Risky Business*, 27 NAT'L J. 417, 418 (1995) [hereinafter Kriz, *Risky Business*] ("At a . . . hearing of the House Commerce Committee . . . the president of the National Association of Manufacturers . . . asserted that government regulation has a domino effect. He argued that every dollar spent on pollution abatement translates into \$3-\$4 of lost productivity.").

20. See John H. Cushman Jr., *Backed by Business, G.O.P. Takes Steps to Overhaul Environmental Regulations*, N.Y. TIMES, Feb. 10, 1995, at A22.

21. See Kriz, *Risky Business*, *supra* note 19, at 418 ("A representative of the National School Boards Association, for example, told the House Commerce Committee that the nation's school systems have been forced to spend \$10 billion to remove asbestos . . . because of a rule adopted in 1982 by the [EPA] The regulation was based on scientific studies that some regulators now say were riddled with errors.").

22. See S. 171, 103th Cong. § 123 (1993).

23. See GINGRICH ET AL., *supra* note 8, at 131-32, 135.

24. See *id.*

Given risk reform's support among experts, its procedural nature, endorsement by the business community, a history with former Congresses, and a prominent place on the legislative dance card, how could it fail to pass? The answer is two-fold. The proximate cause was the intrusion of presidential election politics. Rational choice theory remains sufficient to understand such political dynamics. However, a more fundamental cause concerns the nature of the discourse surrounding the idea of risk analysis and its application to environmental problems.²⁵

PART II: CONGRESSIONAL DELIBERATION AND PRESIDENTIAL POLITICS

A. *Presidential Politics and the 1970 Clean Air Act*

Presidential electoral politics defeated a seemingly invincible risk reform bill in 1995; however, political contests have not always had a negative effect on legislation. Indeed, the most ambitious of all environmental laws, the Clean Air Act Amendments of 1970,²⁶ owe their *passage* to presidential politics.²⁷ Senator Edmund Muskie of Maine had established himself as Congress' leading environmental expert.²⁸ He had overseen the drafting of the 1967 Air Quality Act (AQA),²⁹ a modest affair in which the federal government delegated much of its regulatory power to the states.³⁰ That approach proved ineffective,³¹ and Muskie proposed to improve its performance by making incremental changes, thereby balancing air quality with economic concerns about the regulation's effect on state employment

25. See discussion *infra* Part III.

26. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified and amended at 42 U.S.C. §§ 7401-671(q) (1994)).

27. See MARC K. LANDY ET AL., *THE ENVIRONMENTAL PROTECTION AGENCY FROM NIXON TO CLINTON: ASKING THE WRONG QUESTIONS* 26-30 (expanded 2d ed. 1994).

28. See *id.* at 27-28.

29. Pub. L. No. 90-148, 81 Stat. 485 (1967) (codified and amended at 42 U.S.C. §§ 7401-671(q) (1994)).

30. The 1967 Air Quality Act, which was to be reauthorized in 1970, required the states to establish and enforce air quality standards while the federal government's role was limited to review and approval. Senator Muskie had resisted efforts to create national uniform emission limits in his belief that states should bear the primary responsibility for formulation and implementation of pollution control. See LANDY ET AL., *supra* note 27, at 28.

31. See *id.* at 28-29 ("Progress had been disappointing. As of 1970, not a single state implementation plan had been approved by the federal government. More seriously, the act's reliance on the states led some to doubt as to whether it could succeed. Critics feared that states would compete for new industry by keeping standards permissive and enforcement lax.").

levels.³² Ralph Nader responded to Muskie's modest initiative by denouncing Muskie as a tool of industry and proposing a much more ambitious plan in which national clean air standards would be set by the federal government.³³ President Richard Nixon, not previously known as an ally of environmentalists, responded with his own initiative that resembled Nader's version.³⁴

Nixon's "conversion" is explicable only with resort to the politics of the 1972 presidential election.³⁵ Nixon's willingness to address the popular issue of pollution control was strongly influenced by a desire to out-rival Muskie.³⁶ Muskie was the front runner for the Democratic nomination, and based on his impressive showing as the 1968 Democratic vice-presidential candidate, he posed a serious threat to Nixon's re-election.³⁷ Nixon recognized that Nader's attack on Muskie presented him with an opportunity to both tarnish Muskie's image and to improve his own standing with the growing middle class environmental constituency. Muskie responded by tearing up his modest bill and proposing a version that was even stronger than Nixon's.³⁸ This competition for the environmental mantle between the two most prominent leaders of their respective parties secured passage of a clean air act far more stringent than seemed conceivable just a few months earlier.

The key differences between the Clean Air Act Amendments of 1970³⁹ and the Comprehensive Regulatory Reform Act of 1995⁴⁰ stem from the different roles played by intra-party politics, Congressional rules, and the dynamics of public opinion. In the first instance, intra-party politics did not play a significant role. Nixon was assured re-election and felt free to adopt whatever position on the Clean Air Act would most enhance his general election prospects.⁴¹ Although Muskie would ultimately lose his nomination bid, his intra-party problems did not stem from his adoption of a more ambitious clean air act position. Indeed, had he stuck to his earlier moderate position

32. *See id.* at 29.

33. *See id.*

34. *See id.*

35. *See* Marc K. Landy, *The New Politics of Environmental Policy*, in *THE NEW POLITICS OF ENVIRONMENTAL POLICY* 209, 209-10 (Marc K. Landy & Martin A. Levin eds., 1995).

36. *See id.*

37. *See* LANDY ET AL., *supra* note 27, at 28.

38. *See id.* at 30.

39. *See supra* note 26.

40. *See* Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. § 4 (1995).

41. *See* Landy, *supra* note 35, at 209, 211.

he would have probably faced intense criticism from McGovern. Both Muskie and Nixon perceived that public opinion was strongly and consistently in favor of stringent environmental regulation.⁴²

The risk reform case does bear one striking similarity to the Clean Air Act case. In both instances a senator of great stature was simultaneously the front runner for the nomination to oppose an incumbent president *and* the leader of the congressional forces seeking to pass the legislation in question. But here the analogy ends. Unlike Muskie, Senate Majority Leader Dole was most concerned with the legislation's impact on his nomination, not his election. Unlike Nixon, Bill Clinton came to see opposition to the legislation as more in his electoral interest than support of it.

B. *Bob Dole and Intra-Party Dynamics*

Robert Dole had emerged as his party's clear front runner for the 1996 nomination, but his nomination was far from certain.⁴³ Both his age and his image as a "Washington insider" mitigated against him.⁴⁴ But even more damaging was that in field of presidential candidates which leaned inexorably to the right, he was viewed as excessively moderate.⁴⁵ His very skill as a legislative tactician was being turned against him on the grounds that he would rather enjoy the satisfaction of crafting a successful compromise than remain true to conservative principles.⁴⁶

42. See *id.* at 209-11.

43. See Larry J. Sabato, *Presidential Nominations: The Front-loaded Frenzy of '96*, in TOWARD THE MILLENNIUM: THE ELECTIONS OF 1996 37, 39-40 (Larry J. Sabato ed., 1997) (explaining that "Dole became the clear party favorite and early front-runner in the 1996 campaign" due to his own shrewdness in seizing "the mantle of the loyal opposition" and due to the fortuitous non-candidacies of many of his potential rivals).

44. See Scott Keeter, *Public Opinion and the Election*, in THE ELECTION OF 1996: REPORTS AND INTERPRETATIONS 107, 123 (Gerald M. Pomper ed., 1997) ("Dole's age troubled a minority of voters. Numerous polls asked about the age issue, with an average of 28-35 percent of respondents saying that Dole was too old to be president When asked by a CBS News/*New York Times* poll why Dole's age was a problem, more respondents (41 percent) said that it was because he was out of touch with the younger generation").

45. See Ronald D. Elving, *Dole Turns GOP Majority Status Into Front-Runner Position*, 53 CONG. Q. 2011, 2012, 2018 (1995) ("Conservative purists call [Dole] a pragmatist who lacks an overarching ideology Dole will never be the champion of those conservatives who have been described over the years as the New Right The very qualities professionals appreciate most—such as the ability to reach in all directions crafting a deal—arouse suspicion among the partisans who decide who gets the party nomination.").

46. See Benenson, *Opponents*, *supra* note 11, at 2049-51; Benenson, *Overhaul*, *supra* note 15, at 2159-62; John H. Cushman Jr., *Democrats Force the G.O.P. to Pull Anti-Regulation Bill*, N.Y. TIMES, July 19, 1995, at A1, A13 ("Mr. Dole's difficulty in winning his way in the Senate is the latest illustration of the balance he is trying to strike between his Presidential ambition

In particular Dole was worried about the rival candidacy of Philip Gramm, a Republican senator from Texas. Gramm's conservative credentials were impeccable, and he had begun to criticize Dole for being too moderate.⁴⁷ Although Gramm would eventually prove to be an inept campaigner, he appeared quite formidable at the time of the risk reform debate. In the words of William Lacy, Dole's campaign manager at that time: "We felt that Phil Gramm was our principal opponent from day one. . . . And so the campaign was geared mainly towards dealing with him. *As long as we hugged Gramm and kept him close to us philosophically, we felt we couldn't lose the nomination.*"⁴⁸

During the congressional risk reform debate, securing the presidential nomination seemed a far more formidable hurdle than winning the general election.⁴⁹ The President, having so recently suffered the humiliation of the 1994 congressional defeats, seemed to have been weakened beyond repair. Therefore, it made sense for Dole to err on the side of excessive conservatism in order to secure a nomination that appeared tantamount to victory.⁵⁰ Allying himself with a key element of the *Contract with America*, which had recently carried Republicans into power in 1994, was a reasonable strategy for Dole at the time.⁵¹

As Majority Leader, Dole had significant discretion concerning how deeply to involve himself, and how closely to identify himself, with a particular piece of legislation. His decision to become the principal Senate spokesman on risk reform appears to have stemmed from his desire to demonstrate to the business community how concerned he was with their regulatory problems and what a staunch de-

and his role as majority leader, compromising here, shepherding there Mr. Dole is the leading candidate for the Republican nomination, but to win it, he must maintain a strongly conservative posture."); Walter D. Burnham, *Introduction - Bill Clinton: Riding the Tiger*, in THE ELECTION OF 1996: REPORTS AND INTERPRETATIONS, *supra* note 44, at 1, 14; William G. Mayer, *The Presidential Nominations*, in THE ELECTION OF 1996: REPORTS AND INTERPRETATIONS, *supra* note 44, at 21, 52, 62; Sabato, *supra* note 43, at 38-39.

47. See Benenson, *Overhaul*, *supra* note 15, at 2162 ("Phil Gramm, R-Texas, [tried] to portray Dole as more interested in legislative deal-making than in standing for conservative principles.").

48. Sabato, *supra* note 43, at 41 (quoting from a personal interview with William Lacy on August 5, 1996) (emphasis added).

49. See generally DAN BALZ & RONALD BROWNSTEIN, *STORMING THE GATES: PROTEST POLITICS AND THE REPUBLIC REVIVAL* 23-28 (1996).

50. See Elving, *supra* note 45, at 2011 ("[T]he Republican presidential nomination in 1996 . . . may well be the inside track to the White House.").

51. The public backlash at the GOP and Congressional Republicans over the budget impasse and subsequent government shutdown remained several months in the future.

fender of their interests he was.⁵² Passage of Dole's strong bill, S. 343, would show business interests how much they had to gain from a president who was both their strong advocate and a skilled manager of the legislative process.

Although Dole did agree to tone down the bill in an effort to gain the support of moderate Republicans and Democrats,⁵³ he refused to yield on the most controversial issue, judicial review, and this intransigence doomed the bill to defeat. Dole prided himself on his mastery of the legislative process and on his keen ability to know when compromise was necessary to save a bill from defeat. Yet, Dole stood firm during the risk reform battle and allowed the bill to be defeated. Had he been more willing to yield on the matter of judicial review, he would in all likelihood have garnered the necessary Democratic votes to gain cloture, the two-thirds majority required to end debate, and therefore secured passage. Indeed, judicial review was the most controversial issue within the expert community; thus, retreating on this point still would have enabled him to remain within the expert consensus. But judicial review was strongly supported by the business community and by their conservative congressional allies. Under those circumstances, Dole stifled his love of legislative craftsmanship in order to protect his right flank in the upcoming presidential primaries.⁵⁴

The failure of risk reform is a powerful reminder of the strong impact that the specific designs of electoral and legislative systems have on legislative outcomes. Both the primary system and the Senate's cloture requirement drove Dole's decision not to compromise, because Republicans who favored risk reform controlled the agenda in both instances. Dole's unwillingness to compromise on risk reform helped his primary chances by placating conservative primary voters who viewed him as a moderate compromiser.⁵⁵ While in the Senate, the risk reform bill failed due to anti-majoritarian cloture rules.⁵⁶

52. See Bob Benenson, *Foes Put Dole on the Alert*, 53 CONG. Q. 2050, 2050 (1995) [hereinafter Benenson, *Foes*] (The issue of "overhauling the federal regulatory process . . . had strong backing from both big and small businesses, important components of the GOP's voting and fundraising base").

53. See Benenson, *Overhaul*, *supra* note 15, at 2162.

54. See *id.* ("[A]s Dole gave ground [on the regulatory reform], he heard rumblings from GOP conservatives who favored a stringent bill. They expressed concern that Dole was giving away too much to get a bill passed By drawing the line and forcing a do-or-die cloture vote, Dole was able to placate anxious conservatives.").

55. See Richard L. Berke, *Poll Finds GOP Primary Voters are Hardly Monolithic*, N.Y. TIMES, Oct. 30, 1995, at A11.

56. Three cloture votes were taken in the Senate. On July 17, cloture failed 48 - 46. On

Even though Dole consistently obtained the support of a majority of senators, the cloture rules did not allow Dole to both pass S. 343 and project a conservative, pro-business image.

C. *Bill Clinton and Public Opinion*

President Clinton's stance on risk reform was entirely opportunistic. During the immediate aftermath of the 1994 Republican congressional takeover, he remained silent on the matter. However, he later opposed risk reform in the wake of events which weakened public support for reducing the size of government.⁵⁷ In these changed circumstances, Clinton anticipated, better than Dole, the public's negative reaction to the 104th Congress's aggressive attack on the current regulatory structure.

Many of these events had nothing to do with risk reform in particular or environmental regulation in general. Nonetheless, they served to put environmental regulation in a better light by diminishing the attractiveness of Congressional Republican attacks on the government. For example, the Oklahoma City bombing was perpetrated by individuals whose antigovernment rhetoric, while more extreme, resonated with the more radical pronouncements of Congressional Republicans. This identified Republican attacks on the public weal with extremism and did much to diminish popular enthusiasm for such sentiments.⁵⁸ Moreover, the Republican effort to cut Medicare, though quickly abandoned, likewise soured the public on anti-government crusades.⁵⁹ But perhaps the most important development was the inability of House Republicans and the president to reach a budget compromise that would have averted a federal government shutdown. Ordinary citizens found the shutdown of passport offices, national parks, and cleanups of hazardous waste dumps to be

July 18, cloture failed 53 - 47. The final cloture vote (58 - 40) occurred on July 20. See Benenson, *Overhaul*, *supra* note 15, at 2159.

57. See Kriz, *Risky Business*, *supra* note 19, at 419.

58. See John H. Cushman, Jr., *Inquiry Urged Into Possible Link Between Anti-Government Groups*, N.Y. TIMES, May 5, 1995, at A22 (reporting that Jeff DeBonis, executive director of an independent organization of government environmental employees, asked the Justice Department to investigate "possible links between paramilitary organizations and several grass-roots conservative groups seeking to reduce regulations on private landowners").

59. See Richard T. Cooper, *GOP Changes Held in Check by Earlier Revolutionaries*, L.A. TIMES, Dec. 31, 1995, at 1; Steve Wilson, *Political Pendulum Swinging Back, And GOP is in the Way*, ARIZ. REPUBLIC, Nov. 17, 1995, at A2; William Neikirk, *Clock Ticking for Budget Negotiators; Bargaining Drags On, Testing Voter Patience*, CHI. TRIB., Dec. 31, 1995, at 1.

a major inconvenience for which they blamed the Republicans.⁶⁰ Additionally, the public perception that the Republican agenda was too extreme was reinforced by House Republican—attempts to cut the EPA's enforcement budget—attempts that were made virtually concurrent with the Senate's consideration of risk reform legislation.⁶¹

While fortuitous events began to turn the public mood against Republican attacks on government, President Clinton recognized and tried to tap into the public's longstanding support for environmental regulation. For decades public opinion polls had consistently depicted overwhelming public approval for such regulation.⁶² Thus, as the public mood about government brightened, Clinton seized the opportunity to remind people how much they cared for the environment.⁶³ In addition, he depicted risk reform as a threat to the environmental improvements that government had accomplished. Several polls recognized that Clinton could increase his popularity by adopting this more aggressive position on environmental matters.⁶⁴

60. See Marjorie R. Hershey, *The Congressional Elections, in THE ELECTION OF 1996: REPORTS AND INTERPRETATIONS*, *supra* note 44, at 205, 212-13.

61. EPA Administrator Carol Browner reinforced such perceptions by stating on July 16, 1995, "It is clear that this is a concerted effort. If they [the Republicans] can't get it one place, they try it another place. This is about shutting us down, there can be no mistake." John H. Cushman, Jr., *G.O.P.'s Plan for Environment Is Facing a Big Test in Congress*, N.Y.TIMES, July 17, 1995, at A1.

62. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 5 (2d ed. 1996) ("Throughout the 1980s and the 1990s, an annual New York Times-CBS poll has found sizeable majorities of the public agreeing that 'protecting the environment is so important that requirements and standards cannot be made too high, and continuing environmental improvement must be made regardless of cost.'").

63. See Margaret Kriz, *The Green Card*, NAT'L J., 2262, 2267 (1995) [hereinafter Kriz, *Green Card*] ("Democrats are beginning to recognize the potential of playing the environmental card. President Clinton, who's often been accused of turning his back on the environment is now assuming the role of head environmental gunslinger.").

64. Dick Morris conducted a poll that was accorded prominent press attention that showed that Clinton could improve his popularity by adopting a more combative stance on environmental issues. See John H. Cushman Jr., *Environment Gets a Push From Clinton*, N.Y.TIMES, July 5, 1995, at A11 [hereinafter Cushman Jr., *Environment*]. This finding was verified by a joint NBC-*Wall Street Journal* poll, a *St. Louis Post Dispatch* poll, and several polls conducted by Republican Frank Luntz, all of which showed overwhelming public approval for strict federal environmental controls. See Kriz, *Green Card*, *supra* note 63, at 2262. After the Morris poll, Sally Katzen, the White House administrator of regulatory affairs, led a more aggressive defense of the regulatory status quo. Katzen maintained, however, that public opinion had no bearing on the White House's position on the risk reform bill. Katzen said, "There absolutely is a more assertive posture [on our part, but] it does not reflect a change of policy as much as the fact that our policy is now under tremendous assault." See Cushman Jr., *Environment*, *supra*, at A11.

Clinton signaled his new aggressive stance on the environment in his Earth Day Speech on April 21, 1995.⁶⁵ He claimed that Republican-sponsored risk reform legislation would “throw the gains we have made in health and safety away.”⁶⁶ He demanded to know whether Republicans could “prove that our air will be clean under the laws that have been proposed . . . [, that] our water will be free of deadly bacteria . . . [, or that] our meat will be untainted?”⁶⁷ Neglecting the exemptions for health emergencies contained in the 1995 legislation, Clinton claimed that the risk bill would “handcuff” government’s ability to deal with situations like the distribution of hamburger contaminated with *E. coli* bacteria that had caused four hundred people to become gravely ill.⁶⁸

Clinton’s committed defense of environmental protection cannot be overstated here. President Clinton rarely threatened, and never used, a veto the entire first two years of his term. But by employing such fevered rhetoric in defense of strict environmental regulation, Clinton signaled that he would veto any but the mildest type of risk reform legislation.

Thus, Clinton’s electoral concerns served to erase any middle ground between Dole and himself on this issue.⁶⁹ While Dole’s unwillingness to compromise helped him with party conservatives, Clinton’s rigid stance helped him with the broader electorate. Despite efforts by Senators J. Bennett Johnston, John Chafee, John Glenn and others to craft a bi-partisan compromise on regulatory reform,⁷⁰ each party’s presidential hopefuls charted a course away from the political middle.

65. See Remarks on the 25th Observance of Earth Day in Havre de Grace, Maryland, 1 PUB.PAPERS 562, 564 (1995); see also Al Gore, *Earth Days Have Become Earth Years*, N.Y.TIMES, April 23, 1995, at A17 (commenting on the White House’s use of Earth Day).

66. Remarks on the 25th Observance of Earth Day in Havre de Grace, Maryland, 1 PUB.PAPERS 562, 564 (1995).

67. *Id.*

68. See *id.*

69. Senator J. Bennett Johnston, a Democratic supporter of Dole’s legislation, expressed his outrage at the White House’s veto threat during congressional negotiations over the legislation. “For the Administration to threaten a veto while we’re in the middle of negotiations is premature at best and bad faith at worst.” John H. Cushman, Jr., *Clinton Threatens Veto of Bill Curbing Regulatory Powers*, N.Y.TIMES, June 24, 1995, at A28.

70. See Benenson, *Overhaul*, *supra* note 15, at 2159.

D. *Conventional Political Science Wisdom Revisited*

This story of reasoned political and electoral maneuvering does not refute the conventional criteria explaining why a bill becomes a law,⁷¹ but it does encourage one to guard against viewing any of those criteria as dispositive. The political might of business groups regarding environmental legislation is limited, at least when a legislative debate has important electoral implications. The broad popularity of stringent environmental policy has the power to dwarf the lobbying power of business interests. Likewise, the tactical advantages of posing issues in procedural-technical terms should not be overstated. The opponents of risk reform countered by sensationalizing what they claimed to be its substantive implications. They harped on two of the most notorious current public health threats—bacterial contamination of food and water, and breast cancer—claiming that risk reform would slow government efforts to deal with them.⁷²

Similarly, expert consensus, though important, is not necessarily decisive in determining the outcome of a legislative struggle. In certain policy areas—taxes or trucking deregulation—experts did win the day. Their views ultimately came to dominate public opinion. However, this has never been the case regarding the environment. Since the 1960s, environmental economists have been preaching the virtues of cost-benefit analysis. They were later joined by risk scientists, who have tried to make the public understand the concept of relative risk. Despite their best efforts, though, the role of risk-benefit experts in the environmental policy-making process has been marginal at best. One sees their impact most vividly in Title V of the 1990 Clean Air Act Amendments, which establishes marketable permits for sulfur dioxide.⁷³ However, that same legislation includes mandates and timetables that contradict economists' recommendations and that have far greater economic impact than the acid rain provisions themselves. Trying to understand why issues involving the

71. See discussion *supra* Part I.B.

72. One editorial cartoon by Pat Oliphant even portrays Dole as "the leader of a cabal of witches mixing a cauldron of salmonella, *E. Coli* bacteria, fecal matter and other poisons into a 'Dole Stew'." Benenson, *Foes*, *supra* note 52, at 2050.

Regarding the other issue of breast cancer, Senator Barbara Boxer threatened a filibuster of Dole's bill. Boxer referred to the 46,000 women that die each year of breast cancer and said, "I will stand on my feet for 46,000 minutes or 46,000 hours or whatever it takes." See *id.*

73. See 42 U.S.C. §§ 7661-661 (f) (1994).

environment have proved so resistant to expert opinion leads directly to the question of preference formation.

PART III: BEYOND RATIONAL CHOICE: RIGHTS TALK VS. UTILITARIANISM

Having shown that the defeat of risk reform was driven by electoral politics, it remains to explain why Clinton found it politically advantageous to oppose a proposal supported by both the business and expert communities. Clinton is justifiably famous for his finely honed political sensibilities, and he would not oppose such legislation unless public opinion was against it. Why then did such popular opinion form in opposition to risk reform?

If one looks at what was said in opposition to regulatory reform legislation, it is easier to understand Clinton's position, as well as the dominant public view of environmental regulation. The issue does not boil down to a reasonable versus an unreasonable approach to environmental issues, but rather to a struggle between two realms of discourse: one utilitarian, and the other rights-oriented. The former approach determines the appropriate amount of environmental protection using cost-benefit analysis. The latter posits a right to a healthy and safe environment, and seeks to secure that right regardless of cost. This latter approach is not obviously "irrational" or even "religious." There is no more cause to call this view a "secular religion" than there is to apply that label to utilitarianism. In fact, this rights-oriented approach has roots in the Declaration of Independence and the whole tradition of Anglo-American Liberalism represented by Locke, Hobbes and others.⁷⁴

As Sidney Milkis has shown, this rights tradition was significantly transformed as a result of the New Deal which, building upon what the Progressive Movement had pioneered, expanded the notion of right to include economic and social aims requiring positive government involvement. He refers to these as "programmatically rights."⁷⁵ In the 1960's and 1970's, these came to encompass rights for consum-

74. Of particular interest are Locke's chapters II ("Of the State of Nature"), V ("Of Property") and IX ("Of the Ends of Political Society and Government"). See JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988). For a treatment of the Declaration of Independence, see, e.g., CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (1958).

75. SIDNEY M. MILKIS & RICHARD A. HARRIS, THE POLITICS OF REGULATORY CHANGE 341, 374 (1996). A similar theme has also been pursued by Mary Ann Glendon in her seminal book *Rights Talk*. See MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

ers, the handicapped, aliens, and the environment.⁷⁶ Shep Melnick claims that this “rights revolution” has led to a significant shift in political discourse.

The “rights revolution” refers to the tendency to define nearly every public issue in terms of legally protected rights of individuals[, such as] . . . the handicapped, . . . workers, . . . students, . . . racial, linguistic, and religious minorities, . . . women, . . . [and] consumers, the right to a hearing, [and] the right to know—these have become the stock and trade of American political discourse.⁷⁷

If politicians’ concern for the 1996 election was the proximate cause of risk reform’s defeat, the public’s preoccupation with rights talk⁷⁸ represents the more fundamental cause. This public susceptibility to rights-based arguments in the environmental context framed Clinton’s understanding of how the risk reform issue would affect his electoral prospects. Clinton’s embrace of rights talk in his Earth Day speech resonated powerfully with voters. Thus, playing “the environmental card” led to the public’s rejection of risk reform’s utilitarian characteristics in favor of the moral absolutes implied in rights-based theories of environmental protection.

Viewing the environment in rights-based terms is widespread among supporters of both parties. In a review of environmental polling data, *The National Journal* found that “polls show Democrats, Republicans and independents all consider environmental protection to be an inalienable right that they rank alongside liberty and the pursuit of happiness.”⁷⁹ Environmentalists oppose regulatory reform because they want to maintain the moral high ground which rights talk provides them. They have triumphed so far because utilitarians have failed to frame their arguments in an equally compelling way. Environmentalists also enjoy a comfortable advantage over the busi-

76. See MILKIS & HARRIS, *supra* note 75, at 374 (1996).

77. R. Shep Melnick, *The Courts, Congress, and Programmatic Rights*, in REMAKING AMERICAN POLITICS 188, 188 (Richard A. Harris & Sidney M. Milkis, eds., 1989).

78. See MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE at x-xi (1991) (Rights talk, or the rhetoric of rights, in the U.S. is “set apart from rights discourse in other liberal democracies by its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities.” This “intemperate rhetoric of personal liberty . . . encourages our all-to-human tendency to place the self at the center of our moral universe.” Furthermore, this American preoccupation with rights talk leads to “a tendency to frame nearly every social controversy in terms of a clash of rights” which “impedes compromise, mutual understanding, and the discovery of common ground.”).

79. Kriz, *Green Card*, *supra* note 63, at 2264.

ness community and property owners, because the judicial system has thus far been sensitive to appeals based on the environmental variant of rights talk. The 1995 regulatory reform legislation would have granted similarly broad judicial review for some of the staunchest opponents of the current environmental regulatory community. When presented with this possibility, environmentalists and opponents of regulatory overhaul used an impassioned, rights talk defense of environmental regulations to defeat the reform efforts.

In reviewing the defeat of risk reform, it appears environmental economists and risk scientists have been unable to overcome two powerful conceptual hurdles. The first involves the human desire for safety and security. The practical question which people want answered is whether a substance or an activity is safe or not. This leads to a strong tendency to think in terms of thresholds. If a substance is found in certain concentrations it is 'safe'; if it occurs in greater concentrations it is 'unsafe.' Risk science, however, denies such comforting certitudes. It emphasizes the relative nature of risk, adopting the motto, "the dose makes the poison."⁸⁰ More is more dangerous; less is less dangerous. The very nature of environmental problems as understood by risk science forces one to choose between different levels of insecurity. Safety is a meaningless abstraction.⁸¹ Yet, as Clinton's Earth Day speech illustrates, this relativism has not penetrated popular public discourse. If it had, Clinton would have refrained from demanding that any environmental statute guarantee that meat would be *untainted*, air would be *clean*, and water would be *free* of bacteria.⁸²

Aversion to risk relativity dovetails with a second profoundly anti-utilitarian principle—criminality. A utilitarian understanding of environmental risk is based upon an amoral view of pollution. In this view, pollution is not a crime, but rather the residual of productive, beneficial activity. Thus, the appropriate amount of pollution reduction is based on a calculation of the costs of that reduction versus the benefits the reduction will confer. But the public has been trained to view polluting as a criminal activity, and therefore not subject to utilitarian calculation. Polluting is akin to murder or rape—acts that are

80. It was Paracelsus who said, "All substances are poisons; there is none which is not a poison. The right dose differentiates a poison from a remedy." See Michael A. Gallo, *History and Scope of Toxicology*, in CASARETT AND DOULL'S TOXICOLOGY: THE BASIC SCIENCE OF POISONS 1, 4 (Curtis D. Klaassen, 5th ed. 1996).

81. For a more detailed analysis of this concept, see LANDY ET AL., *supra* note 27, at 334.

82. See discussion *supra* Part II.C.

prima facie wrong and should not be permitted. In principle, the level of such activity should be reduced to zero. Thus, when environmental economists speak of “acceptable levels” of a particular pollutant, they are ignoring the public’s moral outrage. While economists and risk scientists remain free from having to consider these public attitudes, politicians (especially those running for President) certainly cannot.

This conception of pollution as a criminal activity is not unfounded. Indeed, environmental crimes, such as poaching bald eagles or midnight dumping of toxic waste, do exist. The public, however, has received little instruction about how to distinguish between these relatively rare environmental crimes and the great bulk of polluting activity that results from reputable productive endeavor.

These conceptual moral hurdles, the human desire for safety and the conception of pollution as criminal activity, were very much in place as the 104th Congress began its deliberation on risk reform. But favorable political circumstances emboldened risk reform supporters to proceed despite persisting evidence of the popularity of the existing environmental regulatory regime. The Republicans controlled the Congress. The President was politically damaged. The business community was solidly in support. Therefore, the risks of arousing public ire by pushing for regulatory reform seemed sufficiently low. However, the positive omens concerning risk reform’s passage were due not to a shift in public environmental sentiment toward utilitarianism, but rather to the temporary political submergence of rights-based sentiment. Thus, once events shifted the political tides sufficiently to enable the pre-existing rights-based public sentiment to resurface, Dole’s risk reform legislation was doomed to fail.⁸³

Therefore, an explanation that suggests only that the defeat of risk reform was driven by electoral politics describes merely one operational phenomenon at work in a more complex scenario. A more precise picture emerges when our examination of the failure of the 1995 risk reform legislation is broadened to include the fundamental moral conflict upon which the preferences of the political actors are based. Absent such a sensitivity to this underlying moral tension, ra-

83. While the 1995 risk reform legislation ultimately failed, efforts to revive regulatory relief continue. The latest effort is S. 981, sponsored by Senate Governmental Affairs Committee Chairman Fred Thompson and Carl Levin. See Regulatory Improvement Act of 1998, S. 981, 105th Cong. § 623-27 (1998). Unfortunately, its broader, bipartisan approach to reform appears to have attracted support from neither conservatives nor environmental activists.

tional choice theory remains mired in the rather banal observations that self-serving politicians operated to satisfy their own electoral preferences. To pursue an understanding of how such preferences are formed and informed by competing orders of moral discourse is to challenge and hopefully improve upon the neo-classical economic roots of a strictly rational choice study.