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FOREWORD: THE PUZZLE OF ENVIRONMENTAL POLITICS

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How did we get environmental law? The major theories of politics seem unable to explain this dramatic development in American law. Public choice theory predicts that special interest groups will systematically out-organize the general public and that general interest legislation will fail to overcome special interest opposition.¹ Yet the emergence of environmental law appears to contradict the public choice hypothesis: it appears to represent the victory of the broad general interest in clean air and water over the powerful special interests of regulated industry.²

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1. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). Professor Olson was to have been the keynote speaker at this Colloquium, but he suddenly and tragically died shortly before the event. We are all indebted to Professor Olson's foundational work and greatly saddened at his untimely passing. Dr. Paul Portney of Resources for the Future, who had already agreed to be a participant in the Colloquium, generously stepped in on short notice to deliver the keynote address.

2. See Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J. L. ECON. & ORG. 59, 60 (1992) ("The Olson paradigm appears to have a straightforward implication for

Perhaps public choice theory, initially developed in the mid-1960s, cannot account for the post-1968 change in American politics that gave birth to modern environmental law.³ If so, what alternative theory can explain this history? Or perhaps environmental law really *is* the product of special interests—of intra-industry gambits to impose burdens on rival industry members.⁴ If so, is actual environmental law doomed to neglect the public interest in a cleaner environment? And what can be done to improve the political system that produces environmental law?

The Third Cummings Colloquium on Environmental Law at Duke University was an effort to pull apart and piece back together the puzzle of environmental politics. As in past iterations of the Cummings Colloquia, our mission was simple but ambitious: to bring together diverse disciplines to confront the most difficult intellectual and practical challenges in environmental law and policy.⁵

environmental legislation: there should not be any. . . . [T]he two basic predictions [of Olson's model] are that environmental groups will not organize effectively and that environmental statutes will not be passed."); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 542, 561 (1997) ("[I]t is difficult to explain, in public choice terms, why there would be any environmental regulation at all.").

3. For example, Richard Posner's 1974 article on the politics of regulation expressly distinguished social regulation as a phenomenon unexplained by the 1960s theories of economic regulation. See Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 325, 355 (1974). See also E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313 (1985) (finding environmental regulation largely unexplained by standard theories).

4. See generally BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL / DIRTY AIR (1981) (scrubber requirements in 1977 Clean Air Act protected eastern coal at the expense of western coal); Ann P. Bartel & Lacy Glenn Thomas, *Predation through Regulation: The Wage and Profit Effects of the OSHA and the EPA*, 30 J. LAW & ECON. 239 (1987) (OSHA and EPA regulations protect large firms and rust-belt firms against smaller firms and sun-belt firms); Peter Pashigian, *Environmental Regulation: Whose Self-Interests are Being Protected?* 23 ECON. INQUIRY 551 (1985) ("prevention of significant deterioration" (PSD) provision in 1977 Clean Air Act was adopted by rustbelt states over dissenting votes of sunbelt states in order to suppress economic growth in, and industry relocation to, the sunbelt).

5. The Cummings Colloquia on Environmental Law at Duke University were launched in 1996 by a generous gift in honor of Jasper L. Cummings, Jr., and by the leadership of Dean Norman L. Christensen of Duke's Nicholas School of the Environment and Dean Pamela B. Gann of Duke Law School. The First Cummings Colloquium, held in April 1996, addressed the challenge posed to environmental law by the "new ecology": the rejection by ecologists of the static "balance of nature" equilibrium paradigm, and its replacement with a new non-equilibrium paradigm in which nature is seen as perpetually in flux. See Symposium, *Beyond the Balance of Nature: Environmental Law Faces the New Ecology*, 7 DUKE ENVTL. L. & POL'Y F. 1 (1996). The Second Cummings Colloquium, held in November 1996, addressed how diverse risks should be compared, how our methods of comparative risk analysis can be improved, and how a democratic system of government should engage in setting priorities when there is deep disagreement between experts and the voting public about the basic criteria on

One difficulty with much past analysis of the issue has been the conflation of the descriptive and normative issues raised by public choice theory. Devotees of the theory typically contend descriptively that special interests drive legislation and then slip too easily into the normative position that such legislation must be a bad thing, advancing special interests at the expense of the public good.⁶ Critics of the theory, conversely, begin by presuming that environmental legislation is patently a good thing and argue that it therefore could not have been the product of inappropriate special interest influence—and must instead have arisen from other sources, such as epochal “republican moments.”⁷ But these are not the only options. Another possibility is that environmental legislation *is* the product of special interests and that it may still be a good thing.⁸ Still another possibility is that environmental law may *not* be the product of special interests, and yet that it may be a bad thing.⁹

This Colloquium endeavored to keep the “is” and the “ought” distinct. First, we investigated the descriptive explanation of the emergence of environmental law, remaining agnostic about our normative judgment of the results. Second, we asked whether normatively desirable environmental law requires fundamental reform of the political system.

I. CAN SELF-INTERESTED DECISIONS EXPLAIN ENVIRONMENTAL LEGISLATION?

The first set of articles in this symposium collection discusses whether the public choice theory of self-interested decision-making can explain the emergence of environmental legislation. While the articles agree that rational self-interest has played some role in this legislation, they disagree over the nature of that interest and the degree of its explanatory power.

which risks should be compared. See Symposium, *Risk in the Republic: Comparative Risk Analysis and Public Policy*, 8 DUKE ENVTL. L. & POL'Y F. 1 (1997).

6. See generally Roger E. Meiners & Bruce Yandle, *Common Law Environmentalism*, 94 PUBLIC CHOICE 49 (1998); Michael S. Greve, *Introduction: Environmental Politics Without Romance*, in ENVIRONMENTAL POLITICS: PUBLIC COTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith, Jr. eds., 1992).

7. See Farber, *supra* note 2.

8. See generally Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983); Donald Wittman, *Why Democracies Produce Efficient Results*, 97 J. OF POL. ECON. 1395 (1989).

9. See generally Frank B. Cross, *The Subtle Vices Behind Environmental Values*, 8 DUKE ENVTL. L. & POL'Y F. 151 (1997) (noting the regressive distributional effects of some environmental regulation).

Christopher Schroeder's article seeks to rescue rational choice theory from the critics' claims that environmental law disproves its predictions. He tries to explain how these laws could be the product of individual rational self interest on the part of voters and legislators, rather than some "republican moment" of public-interested good government. Yet his is not the gloomy public choice world of rule by narrow special interests. It is a much more optimistic vision of widespread unorganized but rational voting in favor of environmental protection. In his model, the difficulties of large group collaboration are overcome by myriad individual self-interested votes and by the opportunism of political entrepreneurs. Schroeder also points out the common underpinnings of the public choice and republican moment theories: the public choice theorists need a set of exogenous preferences to plug into their models of rational behavior, and civic republicanism supplies one possible story of such preference-formation; meanwhile, because civic republican moments still depend on voting and political institutions to make an impact, the republican moments must themselves be processed through the machinery of public choice. Schroeder's creative synthesis offers a fresh reconciliation of the heretofore juxtaposed and individually inadequate theories of the politics of environmental law.

Donald Hornstein's response to Schroeder does not entirely reject the rational choice explanation of environmental legislation but contends that it is incomplete. He suggests that the motivations behind environmental organizations are not so much the self-interest of individual members as what he considers their altruistic republican concern for the common good. Voting for environmental protection may similarly be explained, Hornstein contends, by altruistic rather than self-interested ends. Thus, Hornstein believes that environmental legislation is not centrally explicable through self-interest.

R. Shep Melnick offers an argument by which the views of Schroeder and Hornstein might be synthesized, though neither would probably embrace his synthesis. He explains how environmental groups can form and assume considerable political power through "purposive incentives." The classical public choice analysis views industry groups as the true special interests and seeks to explain why they would create environmental laws that are conventionally thought to be contrary to their interests (but in reality might serve their efforts to burden rivals). Melnick suggests that the "special interests" driving environmental law are really environmental groups, whose ability to organize and influence has been underestimated by most past analyses. Melnick's environmental groups are not moti-

vated by altruism, but rather by a desire to advance their policy objectives through power-seeking.

All three papers are interesting, but none is completely explanatory. Schroeder's theory of rational voting may offer a better explanation of the initial "modern" environmental laws than has yet been articulated. But it may not, as Hornstein observes, fully account for some subsequent environmental laws. Hornstein's theory of public-spirited altruism may explain these other laws, but his theory fails to explain how such altruism arises, why it often disappears, and how it is channeled to one law rather than another. Melnick's theory of powerful environmental groups has some plausibility today, but cannot explain the important first generation of environmental legislation, which predates many of these groups—and which is the main focus of Schroeder's article. Among other things, these papers demonstrate both the difficulty of creating a single descriptive theory for environmental legislation, and the fertile field offered by environmental law for testing hypotheses about political dynamics.

II. CAN REFORM IMPROVE THE PROCESS OF ENVIRONMENTAL LEGISLATING?

A second set of articles addresses the opportunities for legislative reform, given the existence of special interest pressures. Robert Percival argues that reform can be produced by prominent "trigger events" that motivate the general public to rise up and demand action. Rena Steinzor's paper argues that the legislation created by such trigger events may prove unwise, due to unanticipated consequences. Studying the Superfund law, she notes that its broad liability provisions were counterproductive and the battle of special interests precluded the legislature from fixing this problem through amendment. Marc Landy and Kyle Dell's paper shows how public choice analysis can be oversold. Even when the "special interests" are lined up behind a reform proposal, Landy and Dell describe how its prospects can be doomed by the combination of public perception and coincidental electoral happenings.

If special interests do dominate the politics of environmental law, then perhaps "better" environmental law requires not technocratic reforms (such as requirements to employ precautionary principles or cost-benefit analysis) but fundamental reform of legislative politics. In short, better environmental law may require a better Congress.

This was the topic of an open discussion session at the end of the Colloquium. To set the stage, Professor Wiener played *Candide* to Professor Munger's Dr. Pangloss. *Candide* labored under the impression that hard work and a sturdy spirit could overcome all problems. So too, economists at least since Pigou have been warning that market actors will have incentives to create problems for third parties (externalities), and have been urging government to force market actors to internalize these market externalities. Meanwhile, Mancur Olson and others have been warning that the same incentives to externalize costs that are evident in market transactions are also rampant in government activities.

So what can be done? Professor Wiener offered a "naive" set of reforms that *Candide* might have proposed were he a modern political economist. They included campaign finance reform; improving the analytic capacity of the Congress to make regulatory decisions; delegating the inherently analytic tasks of risk regulation to the Executive Branch or even to an apolitical expert commission like the Federal Reserve; integrating Congressional committees into a single Risk Committee empowered to prevent perverse cross-media shifts of pollution; redrawing the political boundaries of environmental regulation along ecosystem lines; extending term lengths to capture more of the long-term impact of environmental issues and reduce the creation of intertemporal externalities; and reducing transaction costs of political voice so that more of the general public can participate—or (more radically) returning to direct democracy through referenda and interactive telecommunications technology.

The point of sketching these reform options was not to prove their merit. Many of them are obviously undesirable. The point was to ask: if we do face significant political market failures, can we devise any intelligent reforms?

While the difficulty of reform is typically lamented, Michael Munger's paper argues that this difficulty is actually a good thing. While reform is unlikely, in his view, due to organized interests, he argues that it will be bad when it does occur. Munger argues that the world we inhabit is, inescapably, the best of all possible worlds. Yet unlike Dr. Pangloss, his view is not particularly optimistic; he defends the dismal status quo only by reference to the comparative inferiority of the alternative.

III. CONCLUDING OBSERVATIONS

The contrasting presentations at this year's Colloquium certainly illustrate the difficulties of public choice analysis as applied to environmental regulation. While it would be presumptuous to expect a resolution of the issues, the papers shed considerable light on the debate. The colloquy between Schroeder and Hornstein, for example, illustrates the most insightful debate we have seen on the otherwise inexplicable success of the path-breaking environmental laws enacted between 1969 and 1973.

Yet this illumination may lead to complication and uncertainty rather than resolution. For example, the bulk of public choice scholarship presumes that industry groups or regions or some other entity seeking profit or economic protection are the special interests that distort the law. Yet Melnick contends that it is the environmental groups who are the powerful special interests. Other papers likewise testify to the influence of these groups. Creating and applying a theory of special interest influence is obviously difficult if we cannot even agree on who the special interests are, or what their objective functions are. What do environmental groups maximize?

All of the papers explicitly or implicitly concede that interest group theory has some explanatory power for environmental regulation but that it cannot entirely explain such action. Perhaps it is a fool's errand to seek a simple and yet thickly rational explanation of the emergence of environmental law.¹⁰ Rather, future study might be better directed toward how special interests interact and compromise with other influences on government. The interaction clearly differs over time and space. Both those who accept and those who reject public choice explanations of government have the same daunting task of explaining why and how environmental law has developed as it has, with its considerable general benefits and yet its unfortunate distortions, inefficiencies and adverse side effects.

10. For further discussion of the difficulties of these and other theories of the advent of environmental law, see Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L. J. (forthcoming Feb. 1999).