

STRANGE BEDFELLOWS MAKE NORMAL POLITICS: AN ESSAY

R. SHEP MELNICK^{*}

Are contemporary American environmental policies the product of (a) public spirited debate about the nature of the common good or (b) illicit deals struck by parochial, rent-seeking organized interests, covered with a thin veneer of public interest rhetoric? This was the question before the Third Annual Cummings Colloquium. Two groups of people seem to adopt the latter view: political economists and average citizens. A majority of Americans believe that the federal government is run by a small number of organized interests and consequently, that the government cannot be trusted to do what is right most of the time.¹ Political economists steeped in Mancur Olson's *Logic of Collective Action*² offer an elaborate justification for this vague public skepticism.³ This point of view is succinctly summarized as follows:

Modern theories of voluntary organization, derived from Mancur Olson, imply that national environmental groups will be difficult, if not impossible, to organize. Large numbers of citizens, each with only a small stake in clean air, will, if they are rational in the narrow economic sense, decline to invest their time or money in the cause of cleaning up the environment in the hope that they will be able to "free-ride" on the efforts of others It is a small step from Olson's theory of voluntary organizations to the political corollary that the interest of citizens in a clean environment will be systematically underrepresented in any lawmaking process in which interest group politics plays a significant role. Individual citizens who wish to breathe clean air are a classic example of a large, disorganized population seeking a collective good which will benefit each individual by only a small amount. The costs of environmental regulation, on the other hand, tend to fall heavily on a relatively small number of companies, which are already

^{*} Thomas P. O'Neill, Jr. Professor of American Politics, Boston College; B.A. and Ph.D., Harvard. The World-Wide Web version of this article can be found at <<http://www.law.duke.edu/journals/9DELPFMelnick>>.

1. See JAMES Q. WILSON & JOHN DI IULIO, JR., *AMERICAN GOVERNMENT: INSTITUTION & POLICIES* 99-100 (1998).

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

3. See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON., & ORG. 313 (1985).

reasonably well-organized and thus presumably less subject to free-rider problems.⁴

From this perspective, the only realistic explanation for the passage of environmental legislation is that it provides organized interests with indirect benefits such as barriers to entry and higher costs for competitors.

Serious students of government and politics understood the collective action problem and its implications for regulation long before Olson published his famous analysis. In his 1955 book, *Regulating Business by Independent Commission*, Marver Bernstein pointed out that most regulatory legislation is the product of brief moments of intense political agitation.⁵ Politicians believe they must respond to voters' concerns about the abuses of the railroads, the political and economic power of the trusts, the dangers of impure food and drugs, and the survival of our ecosystem. However, as public attention quickly wanes, so does the commitment of politicians and the "aggressive crusading spirit" of regulatory commissions. Gradually and inevitably:

[T]he spirit of controversy fades out of the regulatory setting, and the commission adjusts to conflict among the parties in interest. It relies more and more on settled procedures and adapts itself to the need to fight its own political battles unassisted by informed public opinion and effective national political leadership Perhaps the most marked development in a mature commission is the growth of a passivity that borders on apathy. There is a desire to avoid conflicts and to enjoy good relations with the regulated groups The close of the period of maturity is marked by the commission's surrender to the regulated.⁶

Such "capture" of the commission by the regulated is inevitable because dispersed, unorganized citizens cannot sustain the effort needed to counteract the power of organized interests. Dispersed publics may win momentary victories but cannot prevail in the long run.⁷

4. *Id.* at 322.

5. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 75 (1955).

6. *Id.* at 86-88, 90. For a description of how the surrender of the commission to the regulated might have applied to environmental protection, see Anthony Downs, *Up and Down with Ecology—the "Issue-Attention Cycle"*, 28 *PUB. INTEREST*, 38, 43-50 (1972).

7. The Interstate Commerce Commission and the Federal Communication Commission are two classic examples of this tendency.

Reformers of the 1960s and 1970s were familiar with the “capture theories” of Bernstein and others and were determined to find ways to save new “social” regulators at the Environmental Protection Agency (“EPA”), the Occupational Safety & Hazard Administration, and the Equal Employment Opportunity Commission from the fate of “economic” regulation at the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Communication Commission, the Federal Power Commission, and the Securities and Exchange Commission. Their efforts produced many of the distinctive features of environmental statutes: detailed rules, strict deadlines, citizen suits, aggressive judicial review, and extensive opportunity for public participation. In large part, they succeeded both in allowing environmental groups to survive and forcing business firms to spend enormous amounts of money on pollution control. The reformers’ success is attributable not just to their cleverness, but to larger changes in American politics, including the rise of subcommittee government in Congress, the institutionalization of judicial activism, the persistence of divided government, and the adversarial stance of the media after Vietnam and Watergate. These changes made it easier for political entrepreneurs to mobilize dispersed publics and to use the threat of mobilization to wield power in Washington. As is usually the case with simple, abstract theories, Olson and Bernstein’s models were not so much wrong as seriously incomplete.

A variety of studies have shown that EPA has maintained an adversarial stance toward those it regulates, that environmental regulation has become more extensive and stringent over time, and that environmental groups wield significant influence in Congress, EPA, and the courts.⁸ Yet, other studies have shown that organized economic interests often join forces with environmental advocates. The most famous and best documented example is the scrubbing requirement of the 1977 Clean Air Act. As Bruce Ackerman and

8. *See generally* MARC K. LANDY ET AL., *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS, FROM NIXON TO CLINTON* (expanded ed. 1994); RONALD BRICKMAN ET AL., *CONTROLLING CHEMICALS: THE POLITICS OF REGULATION IN EUROPE AND THE UNITED STATES* (1985); DAVID VOGEL, *NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES* (1986); JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* (1988); RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE* (1989); R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983); DANIEL J. FIORINO, *MAKING ENVIRONMENTAL POLICY* (1995); STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

William Hassler demonstrate, environmentalists allied themselves with eastern dirty coal producers and miners to impose regulations that were both economically and environmentally inferior to obvious alternatives.⁹ Shorter studies of the 1977 Clean Air Act's Prevention of Significant Deterioration program (PSD) have shown that some of the support for PSD was protectionist: polluted urban districts wanted to make it more difficult for firms to move to cleaner areas.¹⁰ Ethanol and methanol producers joined environmentalists in fighting for a "clean fuels" provision in the 1990 Clean Air Act.¹¹ American producers of CFCs endorsed the Montreal Protocol on Substances that Deplete the Ozone Layer once they realized they could reap windfall profits from the agreement.¹²

These studies demonstrate (a) that some firms will receive a competitive boost from environmental regulation, (b) that in a few instances these firms actively promote such rent-producing policies, and (c) that in an even smaller number of cases they actually get what they want. But these studies do *not* demonstrate either that successful rent-seeking is common or that rent-seekers can prevail without assistance from environmental groups or other broad-based constituencies. Ackerman and Hassler argue that eastern coal interests could not have won in Congress or the EPA without the support of environmentalists, who sought both to curry favor with labor and to limit development in the west.¹³ B. Peter Pashigian notes that some westerners in Congress voted for strong PSD provisions even though it would curtail economic development in their districts.¹⁴ It is highly unlikely that Congress would ever have considered PSD if the Sierra Club had not won a remarkable court

9. See BRUCE ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* 117-18 (1981).

10. See B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?* 23 *ECON. INQUIRY* 551, 558 (1985); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431, 467 (1989). It bears noting that McNollGast's principal claim on PSD—that economic protectionism led the House to pass a stronger PSD provision than the Senate—is seriously flawed. See Craig Oren, *Clearing the Air: The McCubbins-Noll-Weingast Hypothesis and the Clean Air Act*, 9 *VA. ENVTL. L. J.* 45, 61-76 (1989).

11. See Jonathan H. Adler, *Clean Fuels, Dirty Air*, in *ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS* 19, 26 (Michael S. Greve & Fred L. Smith, Jr. eds. 1992) [hereinafter *ENVIRONMENTAL POLITICS*].

12. See Daniel F. McInnis, *Ozone Layers and Oligopoly Profits*, in *ENVIRONMENTAL POLITICS*, *supra* note 11, at 129, 142.

13. See ACKERMAN & HASSLER, *supra* note 9, at 31-38.

14. See Pashigian, *supra* note 10.

victory several years before.¹⁵ McInnis points out that American CFC producers were slow to jump on the Montreal Protocol bandwagon, and that Congress eventually taxed away their windfall profits.¹⁶ In short, attributing the bulk of environmental regulation to rent-seeking by organized economic interests requires us to make untenable assumptions about the political clout and cleverness of business leaders.

Most of the regulations mentioned above—scrubbing, PSD, clean fuels, ozone protection—were produced by what Bruce Yandle has aptly called an alliance of “Baptists and bootleggers.” Yandle argues that most coalitions supporting government regulation “include[] some that seek directly enhanced wealth and others that wish for an improved vision of society.”¹⁷ Baptists support Sunday closing laws to promote both moral behavior and church attendance. Bootleggers support these restrictions in order to shut down their competitors one day a week.¹⁸ If Baptists succeed in banning legal drinking completely, then the bootleggers will be able to put their legal competitors out of business entirely. Note, though, that the bootleggers are usually the junior partners in this coalition. They did not initiate the policy, nor can they sustain it for long after the political power of the Baptists fades. Showing that a group eventually benefited from regulation in no way demonstrates that it is responsible for enactment or maintenance of the regulatory regime.

Putting together coalitions broad enough to enact major environmental legislation in the United States requires a wide array of compatible interests, considerable political skill, and more than a modicum of luck. For coalition builders, failure is far more common than success. Amendments to the Clean Air Act were considered in nearly every Congress during the 1980s but did not complete the “obstacle course on Capitol Hill” until 1990. It is doubtful that any simple, abstract model can either predict or explain the politics behind such massive, complex, detailed legislative products. The best we can do is become familiar with the key players—both Baptists and bootleggers—and think about how their interests might at times converge.

15. See MELNICK, *supra* note 8, at 96.

16. See McInnis, *supra* note 12, at 150.

17. THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION: TRACKING THE UNICORN 23 (1989).

18. See *id.* at 24.

BAPTISTS

One reason the Baptist/bootlegger metaphor is so useful for describing environmental regulation is because environmentalism has become a formidable secular religion in contemporary America. Support for environmentalism is widespread with deep cultural roots. The diverse sentiments and beliefs we associate with environmentalism tap into the public's desire for health and security, for recreation and beauty, for a morally pure political cause, and for a simpler, more tranquil life. Support for environmentalism is reinforced by fears of change and dislocation, distrust of large corporations, and dread of cancer and invisible pathogens. As those with school-aged children know, teachers and television repeatedly deliver sermons on our sacred duty to protect the earth. Environmentalism has its own clergy, rival denominations, crusades, revivals, catechisms, heresies, and schisms.

Some scholars argue that the U.S. has experienced a "paradigm shift" from the material values of an industrial era to the "post-material values" of our "post-industrial age."¹⁹ Whether or not this is true, polling data clearly show strong and consistent public support for environmental programs. For years large majorities of those polled agree with the statement that "[p]rotecting the environment is *so* important that requirements and standards cannot be too high, and continuing environmental improvement must be made *regardless* of cost."²⁰ In fact by 1989, about 70% agreed and fewer than 20% disagreed.²¹ In 1990-91, about 60% of the public believed there was "too little" environmental regulation and only 15% thought there was "too much."²² Even in 1994, the year the Republicans gained control of Congress, almost half those polled thought that current laws "don't go far enough in protecting the environment," and less than one-fifth stated these laws "have gone too far."²³ In early 1996,

19. See generally RONALD INGLEHART, *THE SILENT REVOLUTION: CHANGING VALUES AND POLITICAL STYLES AMONG WESTERN PUBLICS* (1977); Samuel Hayes, *Three Decades of Environmental Politics: The Historical Context*, in *GOVERNMENT AND ENVIRONMENTAL POLITICS: ESSAYS ON HISTORICAL DEVELOPMENTS SINCE WORLD WAR II* 19 (Michael Lacey ed., 1989).

20. Robert Cameron Mitchell, *Public Opinion and the Green Lobby: Poised for the 1990s?*, in *ENVIRONMENTAL POLICY IN THE 1990S* 81, 85 (Norman Vig & Michael E. Kraft eds., 1990).

21. See *id.*

22. See Bob Benenson, *GOP Sets the 104th Congress on New Regulatory Course*, 53 CONG. Q. WKLY. REP., 1693, 1696-97 (1995).

23. *Opinion Pulse: Environmental Protection*, AM. ENTERPRISE, Mar.-Apr. 1995, at 100, 108.

Republican pollsters warned that congressional attacks on environmental programs were seriously wounding the GOP.²⁴

The key question is how this broad support for environmental programs is converted into political influence, congressional action, and aggressive enforcement? That, of course, is Mancur Olson's challenge to us.

Part of the answer lies in the remarkable success of contemporary environmental groups. In 1970, one might well have questioned whether politically active environmental groups would survive the ephemeral enthusiasm of the first Earth Day. To be sure, many environmental groups did disappear. But several of the organizations founded in the late 1960s and early 1970s have prospered.²⁵ Just as importantly, traditional conservation and recreation-oriented groups such as the Sierra Club, the National Audubon Society, the National Wildlife Federation, and the Izaak Walton League increased their political activity and provided environmentalism with a large, middle class membership base. National environmental groups have proven remarkably adept at using the media, winning court suits, building broad legislative coalitions, and supplying Democratic administrations with forceful political executives.

Students of voluntary organizations have long puzzled over the success of these Olson-defying organizations. To be sure, some build membership roles through "selective incentives": calendars, recreation guides, and group discounts. Advocacy groups such as the National Resource Defense Council ("NRDC") and the Environmental Defense Fund initially relied on grants from deep-pocketed patrons at the Carnegie, Field, Rockefeller Brothers, and Ford Foundations.²⁶ As these funds diminished some groups relied

24. See generally Ben Wildavsky, *Carrying On*, 28 NATIONAL JOURNAL 991 (1996).

25. See *infra* Appendix A at 93.

26. See Michael S. Greve & James Keller, *Funding the Left: The Sources of Financial Support for 'Public Interest' Law Firms*, in CRITICAL LEGAL ISSUES: WORKING PAPER SERIES 1, 10 (Washington Legal Foundation ed., 1987). Greve and Keller report that foundation giving accounts for about one third of the budget of these public interest law firms. See also JACK L. WALKER, JR., MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS 41-55 (1991) (explaining the importance of such patrons for overcoming the free-rider problem).

more on attorneys fees collected under environmental statutes.²⁷ They used fees collected in one case to subsidize work on the next.²⁸

In the long run, though, maintenance of these organizations rests on what James Q. Wilson calls “purposive incentives.”²⁹ Members are asked to make small contributions in order to save the earth, the rainforest, the ozone layer, the Alaskan wilderness, or to stop such enemies of ecological wellbeing as James Watt, Anne Gorsuch, or Newt Gingrich. As irrational as such contributions seem to some economists (who, no doubt, make such contributions themselves), they have kept many environmental groups solvent for years. Just as importantly, purposive incentives help these groups maintain a high level of commitment among their talented, barely-paid staff. Asked how environmentalists could compete with highly paid industry lobbyists, a Sierra Club staffer replied, “[t]he bottom line is they’re mercenaries and we’re true believers.”³⁰ Those familiar with the role that David Hawkins, Richard Ayres, David Doninger, and others have played in shaping the Clean Air Act can readily understand the importance of this level and length of commitment.

The fact that environmental groups do not rely on material incentives does not make them altruistic or guarantee that they will speak for the public as a whole. They may not be rent-seeking, but they certainly are power-seeking. Their ambition is not just to remake public policy, but to remake the American public itself. At times they are guilty of dangerous zealotry and demagoguery. Indeed, reliance on purposive incentives virtually guarantees that they will propagate an apocalyptic, moralistic message and demonize their opponents. Whatever their vices, leaders of environmental groups are seldom guilty of conventional greed. For better or worse, they generally place prophecy over profits.

In the long run, the success of environmental groups in Congress and the administrative process rested on their ability to mobilize—or threaten to mobilize—“inattentive publics,” i.e. the millions of voters who support environmental protection but pay little attention to activities of the Office of Air Quality Planning and Standards or the

27. See Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits became an Entitlement Program*, in ENVIRONMENTAL POLITICS, *supra* note 11, at 105, 107-10.

28. See *id.*

29. See JAMES Q. WILSON, POLITICAL ORGANIZATIONS 34-36 (1973).

30. See George Hager, *LOBBYISTS: For Industry and Opponents, A Showdown Is in the Air*, 48 CONG. Q. WKLY. REP. 145, 147 (1990).

House Commerce Committee.³¹ As Arnold explains, “legislators ignore inattentive publics at their peril. Latent or unfocused opinions can quickly be transformed into intense and very real opinions with enormous political repercussions.”³²

Transforming inattentive publics into angry voters requires an “instigator who can communicate with relevant publics”³³ Although candidates challenging incumbents can sometimes play this role, it helps to stand somewhat above the electoral fray. Arnold points to Ralph Nader as a particularly skilled instigator who became a model for contemporary reformers:

[b]efore Nader, legislators could ignore the consumers’ point of view, confident that no one would ever be able to rally the unorganized masses against them. Nader’s contribution was not to organize consumers—a nearly impossible task—but rather to label legislative votes as pro- or anticonsumer. The media then disseminated these messages, challengers helped citizens reach the proper political conclusions, and suddenly a formerly inattentive public was alive. Once Nader had demonstrated his ability to mobilize an otherwise inattentive public several times, he no longer had to do so regularly; simply labeling legislative votes as anticonsumer provided ammunition that others could use, and the mere existence of this ammunition was threatening enough to some legislators.³⁴

Environmental groups adopted Nader’s strategy. “Here one of the finest tactical maneuvers was to label legislators who had the worst environmental records as ‘The Dirty Dozen,’ in order to generate media attention and make it easier for inattentive citizens to identify the obstacles to clean water and fresh air.”³⁵ As one House staffer explained, “members are deathly afraid of being labeled anti-environment.”³⁶ Another noted that environmental groups “can dump 5,000 or 10,000 signatures on you in pretty short order.”³⁷

Mobilizing “inattentive publics” is easiest when instigators can credibly promise widely distributed benefits while claiming that

31. See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 68-71 (1990).

32. *Id.* at 68. Arnold’s discussion of “inattentive publics” is consistent with and in part based upon James Q. Wilson’s analysis of “entrepreneurial politics.” See generally WILSON, *supra* note 29, at chs. 15 - 16; WILSON & DI IULIO, *supra* note 1, at chs. 15, 22. The following paragraphs rely heavily on Wilson’s discussion of political entrepreneurship.

33. ARNOLD, *supra* note 31, at 68.

34. *Id.* at 69.

35. *Id.*

36. Hager, *supra* note 30, at 145.

37. *Id.*

outsiders or malefactors of great wealth will bear most of the costs. For example, environmental advocates argued that millions of Americans would benefit from elimination of smog and the auto industry (which had caused the problem in the first place) would foot the bill. Similarly, chemical companies and “midnight dumpers” would pay the cost of cleaning up toxic waste sites and reducing emission of “hazardous pollutants.” For years politicians in New York and New England pushed measures that would reduce acid rain in their states by imposing costly controls on Midwestern utilities. The strategy of “cost-externalization” is a key component of entrepreneurial politics.³⁸

Colloquium participants who have worked for environmental groups noted that environmentalists’ political clout is based in large part on their ability to generate publicity. As NRDC’s Greg Wetstone put it, “[w]hen the media pays attention, we win. When the issues are highly technical or are resolved in the backroom, we lose.”³⁹ While most Americans prefer “government in the sunshine” to “backroom politics,” generating the requisite publicity often involves oversimplifying complex issues, exaggerating environmental risks, hiding control costs, and playing on public fears.

The success of environmentalists and consumer advocates in playing the instigator role reflects not just the political skills of their leaders, but the new opportunities created by important changes in our political system since the mid-1960s.⁴⁰ For example, environmentalists found reliable allies among a new breed of investigative reporters looking for dramatic stories with “good visuals” and for evidence of misdeeds by industry and government. Environmentalism is clearly a cause with which most contemporary journalists can identify. Asked to identify sources to which they would turn to get reliable information on environmental issues, 69% of the journalists named environmental activists, 68% listed federal environmental agencies, and a mere 27% said business.⁴¹ As William Ruchelshaus has put it, “environmental reporters are often as close to

38. See Elliott et al., *supra* note 3, at 329-30.

39. Greg Wetstone, Remarks at the Third Annual Cummings Colloquium - The Rents of Nature: Special Interests and the Puzzle of Environmental Legislation (Mar. 27, 1998).

40. For an explanation of these broad changes, see *generally* THE NEW POLITICS OF PUBLIC POLICY (Marc K. Landy & Martin A. Levin eds., 1995); THE NEW AMERICAN POLITICAL SYSTEM (Anthony Kind ed., 2d. ver. 1990); REMAKING AMERICAN POLITICS (Richard A. Harris & Sidney M. Milkis eds., 1989).

41. See S. ROBERT LICHTER ET AL., THE MEDIA ELITE 57 (1986).

the environmental movement as the members of the movement itself.”⁴²

Environmental groups were particularly fortunate to appear on the scene just as “subcommittee government” was taking hold in Congress and the “new administrative law” was establishing itself in the federal courts.⁴³ Environmentalists found valuable allies in such places as the Senate Environment and Public Works Committee, the House Commerce Committee’s subcommittee on Health and the Environment, the D.C. Circuit (before Reagan appointees took over), and the Ninth Circuit. Senators Edmund Muskie, Robert Stafford, and John Chafee, Representatives Paul Rogers, James Florio, and Henry Waxman, Judges Skelly Wright, David Bazelon, and Abna Mikva, and many other strategically positioned officials worked assiduously to build more effective soapboxes for reaching “inattentive publics.” Although environmentalists contributed to both sets of institutional change, for the most part they rode a much larger historical wave.

From the dawn of “subcommittee government” in the early 1970s to the Republican takeover of Congress in 1994, self-selection in committee assignments produced committees, subcommittees, and staff dedicated to the cause of environmental protection. Members asked to sit on these panels because they considered environmental protection to be a particularly noble and popular cause. Veteran subcommittee leaders tended to view the Clean Air Act, Superfund, the Toxic Substances Control Act, and other enactments as *their* laws, and were not shy about explaining to administrators what they meant. Committees held regular oversight hearings, hired staff to monitor agency activity, and created elaborate reporting mechanisms in federal statutes. During the 1970s and 1980s, EPA officials appeared before congressional committees between 50 and 100 times per year.⁴⁴ EPA Administrator Russell Train recalled that Muskie’s

42. WILLIAM D. RUCKELSHAUS, U.S. ENVIRONMENTAL PROTECTION AGENCY, ORAL HISTORY INTERVIEW-1 35 (1993).

43. On Congress, *see generally* JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* (1981); CHRISTOPHER J. DEERING & STEVEN S. SMITH, *COMMITTEES IN CONGRESS* (3d. ed. 1997). On administrative law, *see generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* (1988).

44. *See* Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 L. & CONTEMP. PROBS., Autumn 1991, at 211-13.

staff “didn’t let many days go by without calling and telling you what you did wrong.”⁴⁵

Changes in the American party system also enhanced the political appeal of environmentalism. The rapid collapse of party organizations after 1960 turned nominations into free-for-alls among self-appointed candidates.⁴⁶ Many candidates sought to identify themselves with a popular cause and to align themselves with groups possessing extensive membership lists. Especially in Democratic primaries, it helps to be known as the “green” candidate. This is probably most true in low-visibility congressional primaries. But even in presidential primaries we have many examples of candidates who tout their environmental credentials: Edmund Muskie in 1972, Morris Udall in 1976, Gary Hart in 1984, Al Gore in 1988 and 2000. In an era of “candidate-centered elections,” what better way is there to demonstrate that one will fight for the public good, stand up to special interests, look to the future, and appeal to affluent, good-government suburban voters?

Another key feature of contemporary American politics is the persistence of divided government. Since 1969 we have had but six years of united government.⁴⁷ With neither party able to command the support of a majority of voters, each is constantly looking for an issue that can cement the next realignment. Conversely, each wants to deprive the other of any potentially realigning issue. Each must bear some responsibility for the fate of important legislation; each covets the opportunity to blame the other party for defeating proposals with broad popular appeal. Democrats have seen environmentalism as an issue that can return to their party some of the lost elements of the New Deal coalition. Republicans have often realized that their ties with business and their skepticism about government intervention can become liabilities when the public focuses on environmental issues. Congressional Democrats learned stringent environmental laws can serve as convenient sticks for beating Republican Administrations - the more unrealistic the deadline, the surer the opportunity for inquisitorial oversight hearings. Party competition in an age of weak party organization and divided government thus created a dynamic that has kept

45. RUSSELL E. TRAIN, U.S. ENVIRONMENTAL PROTECTION AGENCY, ORAL HISTORY INTERVIEW-1 12 (1993).

46. See generally MARTIN P. WATTENBERG, THE RISE OF CANDIDATE-CENTERED POLITICS: PRESIDENTIAL ELECTIONS OF THE 1980s ch. 7 (1991).

47. Those years were from 1976 to 1980 and from 1992 to 1994.

environmental issues in the public arena and produced rigid, demanding environmental statutes.

The clearest instance of partisan bidding on environmental protection is the 1970 Clean Air Act. Edmund Muskie, the frontrunner for the Democratic presidential nomination, personified the congressional challenge to the Nixon White House. By virtue of his chairmanship of the Public Works Committee's subcommittee on air and water pollution, Muskie staked out his claim on the topic before it became politically fashionable. Hoping to preempt Muskie, President Nixon proposed legislation with legally binding national air quality standards. Stung by criticism from public interest groups and in danger of being upstaged by Nixon, Muskie and his staff wrote a particularly demanding law, including a mandate for 90% emission reduction from new cars and a 1975 deadline for meeting ambient air quality standards. Although President Nixon signed the Clean Air Act, his administration pressured EPA to go slow in implementing it.⁴⁸ This led to congressional hearings attacking the administration for failing to comply with the "intent" of Congress, as well as a blizzard of law suits, many of which were won by environmental groups.⁴⁹

A strikingly similar pattern appeared twenty years later. During the 1988 campaign, George Bush proclaimed that he wanted to be the "Environmental President" and pledged to support strong air pollution legislation. The Bush Administration subsequently proposed an innovative acid rain program. Democrats in Congress strengthened the Bush proposal and added a wide variety of other mandates. The White House threatened to veto the resulting 314-page omnibus bill, but eventually backed down.⁵⁰ House subcommittee chair Henry Waxman noted that:

[t]he specificity in the 1990 Amendments reflects the concern that, without detailed directives, industry intervention might frustrate efforts to put pollution control steps in place History shows that even where EPA seeks to take strong action, the White House will often intervene at industry's behest to block regulatory action.⁵¹

48. See MELNICK, *supra* note 8, at 31-35, 126-29, 373-79.

49. See *id.*

50. See generally Marc K. Landy, *The New Politics of Environmental Policy*, in *THE NEW POLITICS OF PUBLIC POLICY*, *supra* note 40, at 218, 218-21; GARY C. BRYNER, *BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990 AND ITS IMPLEMENTATION* 114-35 (1995).

51. Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1743-44 (1991).

Before long, Waxman's subcommittee was holding well publicized hearings claiming that the Bush Administration's Competitiveness Council had ordered EPA to ignore provisions of the new law.⁵²

No discussion of the success of environmentalism would be complete without mention of another set of actors who play a crucial role in legislative politics: public agencies dedicated to implementing environmental programs. These government bureaucracies not only enforce existing regulations, but identify new problems, propose incremental expansions, and build public support for their cause. EPA played a central role in creating Superfund, launching a war on cancer-causing pollutants, establishing a complex "nonattainment" policy under the 1970 Clean Air Act, and writing the much-criticized national permit section, i.e. Title V, of the 1990 Clean Air Act—to mention only a few examples. The federal EPA is joined by 50 state agencies, the Association of State and Territorial Air Pollution Program Administrators, and the Association of Local Air Pollution Control Officers, not to mention the federal Fish and Wildlife Service, the National Park Service, the Forest Service, and other federal agencies whose bureaucratic missions and professional norms lead them to promote environmental programs. To deny that these large organizations with impressive expertise play an important, independent role in policymaking—as economic theories of regulation almost always do—flies in the face of years of experience.

BOOTLEGGERS

By emphasizing the ways in which environmental groups, politicians, and administrators can give political force to dispersed public support for environmental protection, I do not mean to imply that business firms, trade associations, and unions are not important elements of the coalitions supporting particular policies. Initially most firms and trade associations are wary of increased government regulation. But once a regulatory regime is in place, many businesses develop a stake in their continuation. A few discover they can improve their competitive position through expansion of regulatory controls. The literature on environmental policy includes a number of case studies documenting firms' efforts to use regulation to their advantage.⁵³

52. See Robert J. Duffy, *Divided Government and Institutional Combat: The Case of the Quayle Council on Competitiveness*, 28 POLITY 379, 390-94 (Spring 1996).

53. See BERNSTEIN, *supra* note 5; LANDY, *supra* note 8; see also Marc K. Landy & Mary Hague, *The Coalition for Waste: Private Interests and Superfund*, in ENVIRONMENTAL POLITICS,

In his insightful book, *Who Profits: Winners, Losers, and Government Regulation*, Robert Leone emphasizes that “every act of government, no matter what its broader merits or demerits for society at large, creates winners and losers within the competitive sector of the economy.”⁵⁴ As Leone explains:

[s]ince the price effects of regulation are essentially the same for all producers, but cost effects differ, public actions necessarily affect firms differently. All firms with cost increases less than the price increase actually see their profits *increase* with government intervention. Those firms with cost increases above the level of sustainable price increases experience losses.⁵⁵

Losers are likely to push for regulatory relief. Winners are likely to oppose these demands for relaxation, quietly acquiesce to further regulation, and even join forces with environmental advocates to extend regulatory requirements. Of course, the extent to which firms have adequate information on their compliance costs and the compliance costs of their competitors is open to question. Who wins and who loses usually is apparent only after the regulatory regime has been in place for some time.

What sort of political divisions are created by a regulatory regime? Leone’s work and the case studies cited above suggest that the following distinctions are politically important:

- Some firms invest in equipment and personnel to comply with government rules. Others drag their heels as long as possible and engage in protracted battles with enforcers. “Good apples” have an interest in stricter enforcement against “bad apples.”
- Similarly, firms that have already invested in compliance will not relish seeing new entrants freed from these rules. Unless they expect to expand significantly, they are likely to oppose suspension of existing rules and to favor more stringent rules for new sources than for existing sources.
- Large firms may be better at dealing with government paperwork than small firms, either because of their bureaucratic corporate culture or because there are economies of scale in dealing with red tape. Conversely,

supra note 11, at 67; David Vogel, *Trouble for Us and Trouble for Them: Social Regulation as Trade Barriers*, in *COMPARATIVE DISADVANTAGE? SOCIAL REGULATION AND THE GLOBAL ECONOMY* 98, 98-145 (Pietro S. Nivola ed., 1997).

54. ROBERT A. LEONE, *WHO PROFITS: WINNERS, LOSERS AND GOVERNMENT REGULATION* 3 (1986).

55. *Id.* at 44.

small business may be more successful at gaining delay, exemptions, and reprieves from Congress and other legislative bodies.

- Firms operating in many states may prefer uniform national rules to 50 sets of state laws. Smaller firms may prefer to take their chances with the states.
- Some forms of regulation apply to domestic producers but not their foreign competitors. Others are consciously designed to make compliance by domestic producers less costly or to fence out foreign producers.⁵⁶
- Regulations that ban consumer products or inputs or that make them more costly increase demand for alternatives. Producers of these alternatives will thus have an incentive to support government restrictions. Sometimes producers of the regulated good will also be producers of the alternative, as was apparently the case with CFCs and reformulated gasoline.

These winners and losers have a variety of political strategies from which to choose. Some of these strategies seek to minimize government regulation, others to expand it. Some promote quick and easy alliances with environmental advocates, other produce more troubled marriages. Among the strategies described in the environmental literature are the following:

- Promote the least objectionable alternative. Once the regulatory handwriting is on the wall, regulated firms will try to figure out which of the possible regulatory alternatives is least costly and intrusive. Their championing of a particular alternative does not mean that they will benefit from regulation, but only that they have resigned themselves to it. Thus in 1970 the auto makers preferred a two-car strategy to a 50-car strategy. In 1887 the railroads preferred a slow, court-like regulatory commission to a more energetic executive agency. In 1990 chemical companies apparently preferred a technology based “maximum achievable control technology” to more restrictive exposure limits.
- Regulate your competitor. Why should the other guy be subject to less regulation than I? If every regulation produces a competitive advantage for some firms or industries, then they will also create political demands for

56. See Vogel, *supra* note 53, at 108-10.

“leveling the playing field.” This was essentially the argument of eastern coal interests: environmental rules give an unfair boost to western coal. Similarly, stringent regulations in urban areas give an “unfair” advantage to rural areas. In general, regulations that require costly retrofitting of existing facilities generate demands for even stricter rules on new facilities. When the argument is framed in terms of imposing tighter controls on competitors rather than relaxing controls on those currently subject to regulation, environmental advocates will frequently join the effort—if they have not already given the bandwagon its initial push.

- Define and manipulate emerging markets. Environmental regulations increase demands for cleaner inputs and consumer goods. Producers will have an intense interest in seeing their products permitted and encouraged.⁵⁷
- Raise barriers to entry. Higher capital costs, stringent rules on new sources, elaborate and time-consuming paperwork requirements—all these (and much more) make it more difficult for new firms to enter a market. But raising barriers to entry without increasing the costs of existing firms is not always easy - nor is it an attractive strategy for firms that expect to expand in the near future.

Of course, a regulatory restriction that improves one’s competitive position might also substantially reduce the autonomy of managers. Given the uncertainty over the former, the latter may loom particularly large.

Although competition among firms creates incentives for the strategic use of regulation, it also makes political cooperation among firms difficult. Trade associations and peak associations⁵⁸ often fail to reach internal agreement on controversial issues. They frequently face severe collective action problems. As James Madison predicted, multiplying the number of interests affected by regulation tends to reduce the political power of those interests.⁵⁹ “Business” may be

57. The best example is the dispute over clean fuels, described in Adler, *supra* note 11, at 24-38. It should be noted that both ethanol and methanol producers had difficulty prevailing in Congress and the administrative process. Their interests were too transparent, and the public benefit of the rules too dubious to generate a stable governing coalition.

58. A peak association is one that claims to represent business or labor generally such as the AFL-CIO.

59. See THE FEDERALIST No. 10, at 60-61 (James Madison) (Bicentennial ed., 1976).

organized, but it is seldom united. Far from omnipotent, “the business community” is close to an oxymoron.

Ironically, those scholars most intent on claiming that policy is the result of lobbying by organized groups spend very little time actually observing the political behavior of organized groups. To understand the role of organized economic interests in the formation of environmental policy we need less abstract model-building and more painstaking empirical research on the political strategies of business. Students of environmental politics need to do what Raymond Bauer, Ithiel de Sola Pool and Lewis Dexter did in the late 1950s and early 1960s⁶⁰ and David Vogel has done in recent years:⁶¹ interview lobbyists; pour over documents and newspapers; follow the long, winding road of legislation and administrative rules; be alert to the uncertainties of economic and political life as well as the potential for unlikely alliances. Such research often requires what Richard Fenno has described as “soaking and poking—or just hanging around.”⁶² It cannot be done in one’s office, nor will it produce elegant, parsimonious models. But to paraphrase a famous economist and remarkable public servant, it is better to be “approximately right” than “precisely wrong.”⁶³

60. *See generally* RAYMOND A. BAUER ET AL., AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE (2d. ed. 1972).

61. *See generally* DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA (1989).

62. HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 249 (1978).

63. Alfred Kahn, *quoted in* THOMAS K. MCGRAW, PROPHETS OF REGULATION 247 (1984).

APPENDIX A⁶⁴

<i>National Audubon Society (founded 1905)</i>	
Members:	516,220 (1980: 412,000)
Budget:	\$32.9 million
Staff:	337

<i>Defenders of Wildlife (founded 1947)</i>	
Members:	80,000 (1980: 44,000)
Budget:	\$4.5 million
Staff:	30

<i>Environmental Action (founded 1970)</i>	
Members:	20,000
Budget:	\$1.2 million
Staff:	24

<i>Environmental Defense Fund (founded 1967)</i>	
Members:	125,000 (1980: 45,000)
Budget:	\$12.9 million
Staff:	100

<i>Friends of the Earth (founded 1969)</i>	
Members:	50,000
Budget:	\$2.5 million
Staff:	35

<i>Greenpeace (founded 1971)</i>	
Members:	1.4 million
Budget:	\$33.9 million
Staff:	1,200

64. See Hager, *supra* note 30, at 146.

<i>Izaak Walton League of America (founded 1922)</i>	
Members:	50,000
Budget:	\$1.8 million
Staff:	26
<i>League of Conservation Voters (founded 1970)</i>	
Members:	15,000
Budget:	\$500,000
Staff:	40
<i>National Parks and Conservation Association (founded 1919)</i>	
Members:	100,000
Budget:	\$3.8 million
Staff:	30
<i>National Wildlife Federation (founded 1936)</i>	
Members:	5.6 million members and supporters
Budget:	\$85 million
Staff:	700
<i>National Resource Defense Council (founded 1970)</i>	
Members:	125,000 (1980: 42,000)
Budget:	\$13 million
Staff:	125 (40 lawyers)
<i>Sierra Club (founded 1892)</i>	
Members:	553,246 (1980: 180,000)
Budget:	\$28 million
Staff:	185
<i>The Wilderness Society (founded 1935)</i>	
Members:	330,000 (1980: 45,000)
Budget:	\$20 million
Staff:	130