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ENVIRONMENTAL LAW AND DEMOCRATIC LEGITIMACY

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INTRODUCTION

Environmental degradation starkly poses fundamental concerns about the proper role of government and the meaning of democratic governance. Two prominent and, in many respects, diametrically opposed ways of conceptualizing environmental discourse have surfaced within the legal community, each with its own claim to democratic legitimacy. These two contending views fit comfortably within larger modes of political discourse that I will call "liberal economic theory" and "civic republican theory."

The central commitment of liberal economic theory is an abstract conception of governmental neutrality, in which it is considered undemocratic and illegitimate for the State to align itself with any one of many competing conceptions of the good life.[1] Under this view, quality environmental resources may well be a desired objective, but it is just one of many economic goods and should not be singled out for special protection by the government. A well-known early expression of this view is William Baxter's assertion that, "[e]very man is entitled to his own preferred definition of Walden Pond, but there is no

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1. On state neutrality as the distinguishing feature of liberal conceptions of justice, see generally BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10–15 (1980); Ronald Dworkin, *Liberalism, in* PUBLIC AND PRIVATE MORALITY 113, 127 (Stuart Hampshire ed., 1978). Richard B. Stewart explores the links between liberal conceptions of neutrality, modern welfare economics, and the justifications for environmental regulation in *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983). For an insightful critique, premised on Deweyan philosophy, of this commitment to neutrality, see Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

definition that has any moral superiority over another, except by reference to the selfish needs of the human race."[2] More recently, this view has crystallized into a fiercely libertarian movement that describes itself as "free market environmentalism."[3] Although predating the free-marketers by several years, Charles Meyers provided a succinct summary of liberal economic theory:

> [T]he proper role of the government in resource allocation and environmental protection is to define property rights, so that market exchanges can occur; to enforce those bargains and protect property rights so defined; and to intervene in the economy when market failure produces external diseconomies such as water and air pollution.[4]

The "proper role" of government, then, is to let concerns about environmental quality be resolved through a myriad of bargained-for transactions among citizens, reserving the power of the government to make suitable corrections when these market mechanisms break down, generating negative environmental externalities or spillover costs. Moreover, when the government does act to correct for market failures, "public policy should aim to mimic the outcomes competitive markets . . . would achieve."[5] This model of political legitimacy assumes that the only appropriate reason for managing any environmental resources as common or public goods is purely a technical economic one,[6] owing to such factors as the benefits associated with economies of scale or the high costs of defining and enforcing property rights.[7] The reigning benchmark of legitimacy, on this view, is the extent to which our public environmental policies mirror the aggregate preferences of autonomous individual citizens.[8] This

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2. *See* WILLIAM F. BAXTER, PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION 8 (1974).

3. *See generally Symposium—Free Market Environmentalism: The Role of the Market in Environmental Protection*, 15 HARV. J.L. & PUB. POL'Y 297–539 (1992).

4. Charles J. Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426, 453 (1975).

5. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 191 (1993).

6. *See id.* at 193.

7. *See* Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 10, 21–23 (discussing high costs of creating property rights in some environmental resources and suggesting that the appropriate regulatory strategy is a function of the "pressure" exerted on particular resources). One of the many very large costs associated with creating and enforcing property rights in environmental resources is screening out would-be "free-riders," whose presence eliminates the incentives for private production of such resources. *See* RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY 107–109 (2d ed. 1978).

8. *See* Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 6 (1991) ("Modern economics . . . is dominated by a conception of welfare based on the satisfaction of existing preferences, as measured by willingness to pay; in politics and law, something called 'paternalism' is disfavored in both the public and private realms.") (citing generally DAVID GAUTHIER, MORALS BY AGREEMENT (1986) and RICHARD POSNER, THE ECONOMICS OF JUSTICE 83 (1983)); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1129 (1986) ("American law generally treats private preferences as the appropriate basis for social

conclusion flows from liberal economic theory's commitment to methodological individualism and that method's working assumption that "each individual knows what is best for himself (or at least knows better than anyone else)."[9]

Civic republican theory also insists that government action mirror the preferences of citizens, but unlike liberal economic theory, it assumes that before public respect is extended to individual preferences, they must be justified in public terms. The idea of "exogenous" preferences, a concept central to liberal economic theory, is a non-starter for civic republicanism, which recognizes the formative role played by social and political institutions in relation to individual preferences.[10] From this perspective, it is proper to demand that individuals offer reasons in justification for their preferences, making critical examination and deliberation possible. It is this deliberative testing or "laundering" of individual preferences[11] that legitimates the political process and the democratic demand for self-rule.[12] As Mark Sagoff argues: "The ability of the political process to cause people to change their values and to rise above their self-interest is crucial to its legitimacy. Political participation is supposed to educate and elevate public opinion; it is not, like economic analysis, supposed merely to gratify preexisting [sic] desires."[13] Accordingly, environmental policies should not mirror pre-existing and unexamined preferences; they should instead emerge as the product of rational political deliberation. But more than that, this process of deliberation and reasoned

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choice. . . . [s]haping of preferences, or the rejection of particular preferences as distorted, tends to be treated as at best misguided and more likely tyrannical.").

The assumption that democracy is best conceived as a political system that produces outcomes reflecting the preferences of individual citizens is also one of the foundations of social choice theory. For an accessible introduction to social choice theory, see FOUNDATIONS OF SOCIAL CHOICE THEORY (Jon Elster & Aanund Hylland eds., 1986).

9. Meyers, *supra* note 4, at 450. For a discussion of methodological individualism, see Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 59–60 (1992). For a guarded but persuasive critique, see Philippe Nonet, *The Legitimation of Purposive Decisions*, 68 CAL. L. REV. 263, 266–73 (1980) (arguing that institutions, not just individuals, can have purposes). Michael Walzer expresses a similar view. He argues that political protections are

> not rooted in or warranted by individual separateness . . . . We do not separate individuals; we separate institutions, practices, relationships of different sorts . . . . We aim, or we should aim, not at the freedom of the solitary individual but at what can best be called institutional integrity. Individuals should be free, indeed, in all sorts of ways, but we don't set them free by separating them from their fellows.

Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 325 (1984).

10. *See* Sunstein, *Preferences and Politics*, *supra* note 8, at 8–9; Sunstein, *Legal Interference with Private Preferences*, *supra* note 8, at 1145–66.

11. On preference "laundering," see ROBERT E. GOODIN, *Laundering Preferences*, *in* FOUNDATIONS OF SOCIAL CHOICE THEORY, *supra* note 8, at 75, 86–91.

12. For an overview of civic republican theory, see generally Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

13. MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW AND THE ENVIRONMENT 96 (1988).

justification of preferences promises to generate decisions that can claim universal acceptance. This commitment to universalism "amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue."[14]

The concern of this essay is with the claims these competing modes of discourse make to democratic legitimacy. I will argue that they fundamentally misconceive what democratic politics can, and should, attempt to accomplish in the context of environmental policy. By attempting to channel environmental discourse within the sorts of frameworks they propose, liberal economic and civic republican theorists blind themselves to more pragmatic approaches, and obstruct the pluralism at play in our liberal democracy. Both theories aspire to comprehensiveness, an aspiration that ensures both large degrees of paralysis on the part of regulators and the erosion of public commitment to the efficacy of our governmental institutions.[15]

The respective theories promise both too little and too much for them to be useful. Liberal economic theory promises too little, for it fails to recognize that many of our highest aspirations, particularly in the context of environmental law and policy, are decidedly moral commitments that cannot adequately be expressed in market rhetoric.[16] While these commitments are surely contestable and not uniformly shared by all citizens, they do represent claims that are entitled to public recognition and respect. Liberal economic theory simultaneously promises too much by casually assuming that the information it deems relevant to decision making can be assembled, interpreted, and applied in useful ways that lead to theoretically defensible outcomes.[17] Similarly, civic republicanism promises entirely too much, and seems to depend critically on a rather remarkable view of the power of deliberation and rational justification. While it would be foolish to claim that political deliberation itself is a bad idea, the

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14. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988) (footnote omitted).

15. For some acute examples of the paralysis induced by aspirations of comprehensiveness in the environmental context, see Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1213–30 (5th Cir. 1991) (remanding EPA ban, formulated by EPA after a decade-long rulemaking, on certain asbestos-containing products for failure to satisfy substantial evidence standard of Toxic Substances Control Act); AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992) (remanding OSHA's generic rulemaking for workplace air contaminants for lack of sufficient data and explanation). For a general criticism of aspirations to comprehensiveness in environmental regulation, see James E. Krier & Mark Brownstein, *On Integrated Pollution Control*, 22 ENVTL. L. 119 (1991); Charles Lindblom, *Incrementalism and Environmentalism*, *in* MANAGING THE ENVIRONMENT 83 (U.S. EPA ed., 1973).

16. For more discussion about the term "market rhetoric," see Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 57 (1993).

17. *See* Weyerhauser Co. v. Costle, 590 F.2d 1011, 1041 n.41 (D.C. Cir. 1978) ("[E]conomic theories are premised on a view that we have both adequate information about the effects of pollution to set an optimal test, and adequate political and administrative flexibility to keep polluters at that level once we allow any pollution to go untreated. . . . [I]t appears that Congress doubted these premises.").

universalistic suppositions that civic republicanism promises for deliberation defy even the most romantic of imaginations. Politics and law are, and should be, more often than not about winners and losers. In my view, it is best to recognize this social fact of life, lest we dismiss very real losses as simple misunderstandings. But just as civic republicanism promises too much, it also gives too little. It leaves virtually no room for experiments in pluralism, apparently wanting to "make a federal case" out of every issue of public concern.

An alternative approach to environmental law and policy that is more consistent with our liberal democratic traditions and is much less dogmatic in its rhetoric was described long ago by Charles Lindblom as the "science of muddling through," or "incrementalism."[18] This Deweyan approach has often been characterized as a fairly accurate description of our environmental policies, but it has rarely been defended for its normative appeal. This essay suggests a manner in which the normative significance of incrementalism can be appreciated and defended. As an approach to political discourse and deliberation, incrementalism emphasizes that our judgments about the goodness or legitimacy of environmental policies are contingent and revisable in light of their experienced consequences; we need not worry about the extent to which they satisfy abstract commitments to elusive and impoverished conceptions of legitimacy. To put this claim in stronger Deweyan terms, democratic governance does not, and should not, purport to conform its deliberations and policies to modes of justification laid down in advance. Instead, democracy in service of environmental quality is fundamentally about discovering and inventing modes of justification through the practice of democracy itself.[19] These modes of justification are written in our history and in our culture, embedded in and particularized by specific policies and the contexts from which they emerge. They are, in this sense, irreducibly "local" in form and practice.

Part I of this essay examines the liberal economic model of environmental policy. Part II discusses the civic republican model. In these sections, I argue that neither of these models has made out a persuasive case for its own conception of democratic legitimacy. Part III offers a unified critique of both models from a pragmatic perspective. Finally, I will argue that in liberating environ-

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18. Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959).

19. *See* JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 50 (1935):

> In collective problems, the habits that are involved are traditions and institutions. The standing danger is either that they will be acted upon implicitly, without reconstruction to meet new conditions, or else that there will be an impatient and blind rush forward, directed only by some dogma rigidly adhered to. The office of intelligence in every problem that either a person or a community meets is to effect a working connection between old habits, customs, institutions, beliefs, and new conditions.

mental discourse from the claims of democratic legitimacy, we can better get on with our experiments in environmental protection.

I. LIBERAL ECONOMIC THEORY: DEMOCRACY AS NEUTRALITY

A. Rationality and Efficiency

Economic theory addresses the problem of scarcity, and its mission is to analyze how limited resources might be deployed to maximize the satisfaction of individual desires. Its primary tools are the concepts of rationality and efficiency.[20]

The logic of the classical economic model—its rationality—rests on four principal assumptions. First, individuals are rational utility maximizers, consistently basing their decisions on how they perceive that the consequences of these decisions will advance their self-interest.[21] Second, preferences are best taken to be the product of autonomous individuals; they are exogenous to social and political processes. Third, the model assumes that preferences are largely incommensurable—i.e., there is no meaningful way to compare individual preferences due to their inherently subjective nature.[22] In the standard jargon of the social sciences, this assumption is often described as the problem of making "interpersonal comparisons of utility."[23] From this incommensurability assumption, it logically follows that one cannot speak profitably of an ordered set of social preferences, for there is no useful way to aggregate, compare, or scale values that are incommensurable.[24] Finally, the

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20. The discussion in the text draws heavily from STEWART & KRIER, *supra* note 7, at 99–117.

21. For a discussion of this model of human behavior, described as "expected utility" theory, see Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 587–92 (1992). For a critical discussion, see Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

22. *See* Lawson, *supra* note 9, at 71 (concluding that " 'every important advance in economic theory during the last hundred years was a further step in the consistent application of subjectivism' ") (quoting FRIEDRICH A. HAYEK, THE COUNTER-REVOLUTION OF SCIENCE 51 (1952)).

23. For an insightful intellectual history describing the emergence of the perceived problem associated with interpersonal comparisons of utility, see Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1033–47 (1990) [hereinafter Hovenkamp, *The First Great Law & Economics Movement*]; *see also* Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305, 322–23 (1993). For a persuasive critique of the idea that interpersonal comparisons of utility are impossible, see DONALD DAVIDSON, *Judging Interpersonal Interests*, *in* FOUNDATIONS OF SOCIAL CHOICE THEORY, *supra* note 8, at 195, 196–211. For a vigorous defense, see Lawson, *supra* note 9, at 60–71.

24. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 3–6 (2d ed. 1963). For a different perspective on the "incommensurability" problem, see generally Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994); Radin, *supra* note 16.

model assumes that governmental policies should be evaluated in narrow, consequentialist terms.[25] Policies are deemed good if, and only if, they increase the satisfaction of aggregate individual preferences.[26]

Employing these assumptions, it follows that government should not endorse environmental policies that enhance the welfare of some individuals but diminish the welfare of others. A social choice of this sort would be objectionable under the neutrality assumption.[27] Such policies, in effect, give official sanction to the preferences of some citizens while devaluing the preferences of other citizens. Under this view, we can never fully justify a winners and losers approach to public policy because, under our operating incommensurability assumption, we are unable to say in any case that the gains reaped by the winners outweigh the losses incurred by the losers. Of course, it is appropriate and consistent with the neutrality assumption for government to fashion and enforce "Pareto-superior" policies—i.e., those that enhance the welfare of some individuals without diminishing the welfare of others.[28] But such Pareto-superior moves are widely recognized to be nothing more than conceptualizations, to be used only for heuristic purposes, and experienced rarely, if ever, in the "real" world.[29] Accordingly, restricting governmental policymaking within this narrow compass quickly becomes unworkable in a society inhabited by individuals with competing, mutually exclusive preferences regarding the uses of environmental resources.

To deal with these inevitable conflicts, liberal economic theory relaxes the assumption that individual preferences cannot be aggregated, measured, and compared. It does so by positing that, in the aggregate, revealed preferences—behavior of consumers reflected in the prices they are willing to pay—

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25. This idea is captured by Aanund Hylland's conclusion that "we implicitly assume that individuals are concerned only with 'the business end of politics.' " Aanund Hylland, *The Purpose and Significance of Social Choice Theory: Some General Remarks and an Application to the "Lady Chatterly Problem," in* FOUNDATIONS OF SOCIAL CHOICE THEORY, *supra* note 8, at 45, 53.

26. These assumptions are often linked, in ways too complex to explore here, to many forms of liberal political theory which embrace commitments to individual freedom and autonomy, a rigid conceptual division between public and private life, and constitutional government conceived in positivistic rule of law terms. *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

27. *Cf.* Dworkin, *supra* note 1, at 129–33 (describing neutrality as an interpretation of giving each citizen "equal concern and respect").

28. For a careful explanation of Paretian welfare economics, see JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 97–105 (1988). The Pareto superior criterion is sometimes linked with rational consent and thus considered a unanimity requirement. *See* Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1215 (1991) (describing the Pareto criteria as "a simple unanimity requirement"); Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 333 (1992) (describing "unanimous consent" as "the essence of the Pareto efficiency criterion"). *But see* COLEMAN, *supra* at 127–29.

29. *See* Calabresi, *supra* note 28, at 1216 ("[T]he set of Pareto superior changes which would make no one worse off and at least one person better off must ex ante be a void set.").

serve as a reasonable proxy for the social value of goods and services.[30] This reductionist move provides a common metric—dollars or "wealth"—that makes otherwise incommensurable preferences a subject of objective scientific inquiry.[31] Through this method, it becomes possible to compare aggregate social well-being (understood as the price-measured output of economic activity) under a variety of policy alternatives. Allocative efficiency occurs when the existing allocation of resources cannot be reconfigured in a manner that increases this measure of social well-being.[32]

There is nothing in this model that would commend markets over government-controlled allocations of a society's resources. Liberal economic theory is, however, quick to point out that the large, if not insurmountable, costs of collecting and analyzing the information needed to make such centralized decisions would quickly render government control of resources an expensive and potentially inefficient means of accomplishing appropriate outcomes.[33] Even assuming that such information could be collected at reasonable cost, the troubles associated with centralized control are potentially more problematic. The difficulty with government control of resources can be described as a principal-agent problem.[34] Citizens (as principals) lack effective mechanisms to monitor the activities of their political representatives (as agents). Because of the relative crudity of our existing monitoring mechanisms, political representatives can be expected to act in ways that promise concentrated benefits to highly organized, politically active groups and diffuse the costs

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30. *See* Lawson, *supra* note 9, at 88–96.

31. So claim some economists. On the "scientific" pretensions of modern welfare economics, see Hovenkamp, *The First Great Law & Economics Movement*, *supra* note 23, at 1036.

32. *See* COLEMAN, *supra* note 28, at 106–07. The use of this measure, typically in the form of the Gross National Product (GNP), is controversial among environmental economists, many of whom claim that GNP fails to account for environmental quality. *See generally* Robert W. Hahn, *Toward a New Environmental Paradigm*, 102 YALE L.J. 1719, 1732–37 (1993).

33. For discussion of this point, see ALLEN BUCHANAN, ETHICS, EFFICIENCY, AND THE MARKET 16–17 (1985).

34. Terry M. Moe, employing "positive political theory," describes what he calls the "twist" to applying agency theory to political actors: "[W]hile citizens are nominally the superiors in [the democratic] hierarchy, it is the legislators who actually hold public office and have the right to make law. Their role, as agents, is to exercise public authority, backed by the police powers of the state, in telling their principals what to do." Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, J.L. ECON. & ORG., Special Issue 1990, at 213, 232. Part of the problem with this arrangement, as described by Moe, is this:

> In general, it is well-known that principals usually cannot exercise perfect control over their agents, and, given the costs of control, do not find it rational even to try. Some slippage—some shirking by the agent—is to be expected. This applies with a vengeance to politics: constituents and groups, as principals, cannot perfectly control the public officials who are presumably their agents—and, indeed, because they are so often lacking in information, resources, and organization, there would appear to be room for lots of official shirking.

Id. at 231.

to the unorganized and politically impotent mass of citizens.[35] By conferring these economic rents on groups that can mobilize political support, representatives maximize their electoral fortunes.[36] In more common parlance, because the primary objective of political representatives is to maximize their own welfare (i.e., win re-election), the problem is the capture of formal government institutions by special interests.[37] This combination of the high costs of obtaining information and the lack of effective monitoring of official behavior drives liberal economic theory's endorsement of market mechanisms over authoritative, political allocations.[38] Unlike centralized decision making, markets rely on price mechanisms to supply consumers and producers with the freedom and objective information they need to engage in mutually beneficial bargains with other willing social actors.[39] In smoothly functioning (i.e., perfectly competitive) markets, bargaining will continue until resources are devoted to their highest valued use, thus achieving an allocatively efficient equilibrium.[40]

B. "Market Failures:" Externalities and Social Costs

Economists recognize, however, that markets do not always operate smoothly. Environmental problems are usually regarded by economists as

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35. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 165–67 (rev. ed. 1971).

36. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 23 (1993) (applying what the authors describe as the "economic theor[y] of legislation, . . . political activity should be dominated by small groups of individuals seeking to benefit themselves, usually at the public expense") (footnote omitted). For a slightly different explanation for environmental legislation, based on what the authors call a "Politicians' Dilemma," modeled on game theory's prisoners' dilemma, see E. Donald Elliott, et. al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 324–29 (1985).

37. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 283–95 (1967); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). For a sampling of applications of this logic to environmental policy, see generally RICHARD L. STROUP & JOHN BADEN, NATURAL RESOURCES: BUREAUCRATIC MYTHS AND ENVIRONMENTAL MANAGEMENT (1983); BUREAUCRACY VS. ENVIRONMENT: THE ENVIRONMENTAL COSTS OF BUREAUCRATIC GOVERNANCE (John Baden & Richard L. Stroup eds., 1981); Terry L. Anderson & Donald R. Leal, *Free Market Versus Political Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 297 (1991); Gordon Tullock, *Green Legislative Politics*, *in* ENVIRONMENTAL PROTECTION: PUBLIC OR PRIVATE CHOICE 39, 39–49 (Dirk Jan Kraan & Roeland J. in't Veld eds., 1991).

38. TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 9–23 (1991).

39. *See* Friedreich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524–28 (1945).

40. This is generally known as the First Welfare Theorem. *See* Hovenkamp, *supra* note 28, at 300 ("The First Welfare Theorem states that perfectly competitive markets yield Pareto optimal equilibria. Trading in such a market will continue until no two participants can benefit mutually from another bargain, and there is no excess of supply over demand.").

market failures in the nature of negative externalities or spillover costs.[41] The conditions that give rise to such externalities may vary significantly, but one primary condition is the absence of clear entitlements to, or property rights in, environmental resources.[42]

A simplified resource allocation problem illustrates this proposition. A firm discharges wastes into a stream situated between the firm's plant and an adjoining farmer. In the absence of well-defined entitlements, the firm is not required to bear the costs its wastes impose on the farmer and those costs are not reflected in the prices that the firm charges for its products. By externalizing these costs, the firm enjoys a subsidy that misinforms consumers about the true social costs of the firm's products, leading to an overproduction of environmental degradation.[43]

According to liberal economic theory, the problem of externalities could be solved by clarifying the rights of the respective parties to the use of the stream's resources. In my example, one might suppose that government should vest in the farmer the right to be free from the harm caused by the firm's polluting activities, with the correlative right to enforce that right in court.[44] The neutrality criterion might bar this solution because the characterization of the firm's activities as a harm suffered by the farmer assumes that the farmer's preferences about the best use of the stream are more deserving of protection than those of the firm. From the standpoint of neutrality, it is irrelevant to ask whether the farmer or the landowner is causing an externality; we should instead attempt to maximize social wealth by allocating the resource to its highest valued use.[45]

Suppose that legal rights to the use of the stream are indeterminate and that the firm would be willing to pay $200 to use the stream as a waste disposal site, but the farmer is only willing to pay $100 to keep the stream in a pollution-free state.[46] If we assume that bargaining is costless, any clarification

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41. *See* FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES 22–25 (1977).

42. *See* Garrett Hardin, *The Tragedy of the Commons*, 168 SCIENCE 1243 (1968).

43. *See* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387, 393–94 (1981).

44. The choice of remedy—damages, injunctive relief, or both—also becomes an important social choice. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972).

45. *See* Ronald J. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

46. It is wise to keep in mind that these willingness to pay figures are suppositions and would be even in a scenario of the type described in the text. How one would determine what the respective parties really would be willing to pay would be difficult, particularly if they knew in advance that they would not actually have to make good on their bids. The possibility of strategic behavior looms large. The government could, of course, conduct an auction, but this raises the question of how the proceeds should be distributed—to the losing bidder or, possibly, the general treasury? For a brief discussion of the attempt to devise methods to discern willingness to pay for environmental quality in the absence of markets, see *infra* note 54 and accompanying text.

of legal entitlements will ensure that the stream will end up as a waste disposal site.[47] If the right to enjoy the stream is vested in the farmer, the firm will find it profitable to purchase that right for any sum less than $200. Likewise, the farmer will be willing to forego the use of the stream in exchange for any payment in excess of $100. Thus, there is room for a bargain that will increase the welfare of both parties—i.e., a payment from the firm to the farmer of between $100 and $200, with the use of the stream as a dumpsite being the final result. Conversely, if the entitlement to use the stream is vested in the firm, the farmer will not find it profitable to purchase the firm's pollution rights, and again, the stream will be used as a disposal site.[48]

Bargaining in the real world, however, is not costless, and rarely does the problem of environmental degradation arise as a simple bipolar dispute over the use of a common resource. More commonly, conflicts over environmental quality involve many parties, making bargaining both difficult and costly. In the presence of this kind of potential market failure, the efficiency principle may make it critical for government to accurately identify the highest valued use of resources and assign entitlements in a manner that reflects that use.

To guide governmental action in such circumstances, economists have advocated the use of "the potential Pareto, or Kaldor-Hicks criterion, according to which the project is efficient, and presumably therefore desirable, if the gains exceed the losses, so that gainers could compensate the losers and retain a residual gain."[49] This method is, of course, cost-benefit analysis. In my simple pollution example, the analysis would reveal that the social cost of requiring the firm to employ alternative means of waste disposal ($200) exceeds the social benefits of an unpolluted stream ($100). Accordingly, in the presence of transaction costs that potentially lead to market failures, the firm should be vested with the right to pollute.

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47. Coase, *supra* note 45, at 6–11.

48. Although the decision to vest an entitlement in either the firm or the landowner presumably will not affect efficiency or social wealth, each of the alternatives plainly does carry with it distributional consequences affecting the wealth of the relevant parties and thus their willingness to pay. For a discussion of the importance of distributive effects in economic analysis, see Calabresi, *supra* note 28, at 1211.

Another nagging problem with this hypothetical's conclusion, which is a variant of the problems explored by Coase in the *Problem of Social Cost*, *supra* note 45, is the absence of any clear explanation why or how the parties in this context would reach agreement. While there are clearly economic gains for both sides from such a bargain, it is not clear why bargaining might not break down when the parties attempt to decide how to distribute those gains among themselves. For a critical exploration of this aspect of the Coase Theorem, see Hovenkamp, *supra* note 28, at 302–09. There are additional reasons why bargaining might break down. For example, the parties may simply be at odds with each other and withhold consent purely out of spite. The existence of such "irrational" motives is simply assumed away by liberal economic theory.

49. JOHN V. KRUTILLA & ANTHONY C. FISHER, THE ECONOMICS OF NATURAL ENVIRONMENTS: STUDIES IN THE VALUATION OF COMMODITY AND AMENITY RESOURCES 28–29 (1975) (citations omitted).

The use of cost-benefit analysis to determine legal entitlements gives rise to several theoretical and practical problems.[50] For present purposes, I will mention only two, both of which are discussed below. The first problem is that cost-benefit analysis, understood in the Kaldor-Hicks sense, cannot plausibly be squared with liberal economic theory's commitment to neutrality, and it reduces to a positivistic conception of social relations that should be firmly resisted. The second problem concerns intergenerational inequity and how the long-term effects of present resource allocations are factored into (or ignored in) the cost-benefit calculus.

1. Efficiency, Wealth, and the Pitfalls of Positivism

To produce genuinely correct (i.e., efficient) results, cost-benefit analysts must be capable of accurately assessing the relevant costs and benefits. Yet deciding what is a cost and what is a benefit is a complicated endeavor that has proven to be extraordinarily elusive in practice.[51] For liberal economic theorists who advocate the use of cost-benefit analysis, this elusiveness poses problems at several levels, of which I consider only two. First, the data demands associated with cost-benefit analysis are very large and necessitate a lot of time and money. These costs are social costs, and if very large, they might make the enterprise a decidedly irrational affair.[52] Second, it is not clear how the employment of cost-benefit analysis solves the principal-agent problem that, for liberal economic theory, weighs against other forms of justification for political action. If the description of official behavior created by liberal economic theory is accurate, it seems likely that officials will manipulate cost-benefit analysis (for example, by understating some categories of environmental benefits) to achieve the outcome most conducive to their political fortunes. In fact, this is a widespread criticism of the use of cost-benefit analysis in the environmental context.[53]

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50. For general critical treatments of the Kaldor-Hicks efficiency criterion, see COLEMAN, *supra* note 28, at 97–129; Lawson, *supra* note 9, at 88–96. The use of cost-benefit analysis as a policy instrument in the environmental context has spawned an enormous literature, much of it critical. *See generally* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 525–70 (1992); COST-BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATION: POLITICS, ETHICS, AND METHODS (Daniel Schwartzman et al. eds., 1982).

51. For a judicial expression of differences on how cost-benefit analysis should properly be conducted, see Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1218–19 (5th Cir. 1991) (criticizing EPA's cost-benefit methodology with respect to asbestos hazards); International Union, UAW v. OSHA, 938 F.2d 1310, 1320 (D.C. Cir. 1991) (noting variance between the D.C. Circuit's understanding of cost-benefit analysis and that of the Fifth Circuit); Ohio v. United States Dep't of the Interior, 880 F.2d 432, 456 (D.C. Cir. 1989) (Understanding efficiency, in cost-benefit terms, "depends on how the various alternatives are valued.").

52. On the importance of administrative costs in the choice of management regimes for environmental quality, see Rose, *supra* note 7, at 12–14.

53. *See* SCIENCE ADVISORY BOARD, UNITED STATES ENVIRONMENTAL PROTECTION

For most environmental issues the costs and benefits cannot be calculated because of uncertainty about the effects of certain degrading activities, the lack of consensus on whether certain effects should be considered a cost or a benefit, and/or the lack of consensus on how effects considered a cost or benefit should be valued. Valuation problems have raised the most difficulty, particularly when the environmental resources under consideration are not actively traded in markets. Some economists have proposed methodologies for constructing "contingent" markets, based on individual willingness-to-pay, to yield "shadow prices" for environmental resources.[54] These methodologies, which rely on survey techniques, are highly controversial among economists for a variety of reasons.[55]

Assume, however, that we could discover through some method what individuals really would be willing to pay for various levels of environmental quality. The measured aggregate willingness to pay may not give us a fair indication of the social value of environmental quality. An attempt to "mimic the market" meets with a strong Deweyan objection:

> The real fallacy [of liberal economic theory] lies in the notion that individuals have such a native or original endowment of rights, powers and wants that all that is required on the side of institutions and laws is to eliminate the obstructions they offer to the "free" play of the natural equipment of individuals. . . . The notion that men are equally free to act if only the same legal arrangements apply equally to all—irrespective of differences in education, in command of capital, and that control of the social environment which is furnished by the

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AGENCY, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION 25 (Sept. 1990).

54. *See generally* ROBERT C. MITCHELL & RICHARD T. CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD (1989); RONALD G. CUMMINGS ET AL., VALUING ENVIRONMENTAL GOODS: AN ASSESSMENT OF THE CONTINGENT VALUATION METHOD (1986).

55. The use of the Contingent Valuation Method ("CVM") to determine natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a)(4)(C) (1988), and the Oil Pollution Act of 1990, 33 U.S.C. § 2702(b)(2)(A) (Supp. IV 1992), has sparked intense controversy. For criticisms of CVM, see generally CONTINGENT VALUATION: A CRITICAL ASSESSMENT (Jerry A. Hausman ed., 1993); Frank B. Cross, *Restoring Restoration for Natural Resource Damages*, 24 U. TOL. L. REV. 319, 327–33 (1993); Note, *"Ask A Silly Question . . .": Contingent Valuation of Natural Resource Damages*, 105 HARV. L. REV. 1981 (1992). A summary of the responses to the criticisms can be found in Jeffrey C. Dobbins, Note, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Losses*, 43 DUKE L.J. 879 (1994).

The D.C. Circuit tentatively approved the use of CVM for determining damages under CERCLA. Ohio v. United States Dep't of the Interior, 880 F.2d 432, 474–81 (D.C. Cir. 1989). Similarly, the National Oceanic and Atmospheric Administration has proposed to authorize the use of CVM in assessing damages under the OPA. NOAA, Natural Resource Damage Assessment Rule, 59 Fed. Reg. 1062, 1074 (to be codified as 15 C.F.R. § 990) (proposed Jan. 7, 1994) (proposing "that reliable estimates of lost passive use value due to discharges of oil can be estimated using [CVM] so long as the [CVM] study follows the guidance offered in this preamble and the proposed regulations").

> institution of property—is a pure absurdity . . . . Since actual, that is effective, rights and demands are products of interactions, and are not found in the original and isolated constitution of human nature, whether moral or psychological, mere elimination of obstructions is not enough. . . . The only possible conclusion, both intellectually and practically, is that the attainment of freedom conceived as power to act in accord with choice depends upon positive and constructive changes in social arrangements.[56]

This objection is given illustrative force by reconsidering the simple water pollution problem discussed earlier. Relying solely on the respective parties' willingness to pay, we could safely conclude that it is more efficient to use the stream as a waste site than to leave it in an unpolluted state. But we may later discover that the shifting fortunes of the firm and the farmer dramatically alter the amount they would be willing to pay for the right to their preferred uses of the stream. Suppose that shortly after we vest an entitlement in the firm, it faces unexpected budget constraints that limit its willingness to pay for the right to continued use of the stream to $50. Suppose further that the farmer's willingness to pay for the right to use the stream's resources remains at $100.

If a subsequent renegotiation between the firm and the farmer cannot be consummated because of prohibitive transaction costs, we again have what might be called a market failure, susceptible to correction through government action. Although this situation is functionally no different from the situation described earlier, unlike that situation, we now operate within a regime in which property rights are well-defined. If the government wishes to allocate the stream to its highest valued use, it would have to disregard existing entitlements. Indeed, if efficiency determined by individual willingness to pay is the governing criterion for distributing environmental resources among citizens, we might conclude that the proper action for government to take is to coerce the firm to transfer its entitlement to the farmer at an officially designated price. This, as a general matter, liberal economic theory is unwilling to condone. But why, we might wonder, should the mere contingencies of the circumstances present in the initial situation, at which time property rights were determined, provide such extraordinary protection for the preferences of the polluter over those of the farmer?

The problem described and implied by the question raised above can broadly be phrased in terms of a "baseline" problem. The baseline inquiry, for purposes relevant here, asks the question: "Under what social circumstances should willingness to pay be regarded as the appropriate measure of individual preferences?" To understand why this question is difficult for liberal economic theory to provide a convincing answer to, and why it casts critical doubt on the whole idea of government neutrality in decision making, it is useful to reconsider the initial situation a bit more closely.

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56. John Dewey, *Philosophies of Freedom*, *in* FREEDOM IN THE MODERN WORLD 236, 249–50 (Horace M. Kallen ed., 1928).

The farmer's and the firm's willingness to pay for the use of the stream was a function of at least three principal considerations: (1) their respective preferences; (2) the information at their disposal;[57] and (3) their respective wealth. The third consideration, wealth, is a function of many variables, not the least of which is the pre-existing legal rights held by the respective parties to the use and enjoyment of their property.[58] If we could conclude that these pre-existing entitlements were themselves the result of neutral governmental decisions, we could plausibly claim that relying on the parties' present willingness to pay is a neutral decision making criteria. But these initial rights may have been acquired by any number of means we might refuse to recognize as appropriate—e.g., through force or fraud. "Initial distribution is a matter of power, or it is a matter of equity and justice, but it is not a subject on which [liberal economic theory has] anything distinctive to say."[59] The problem, then, in considering the employment of willingness to pay as a neutral decision making device is this:

> If there are objections to the starting point, there will be objections to the finishing point, and nothing about [liberal economic theory] answers those objections. The point is not that an objectionable set of initial endowments calls in question the freedom or rationality of subsequent transactions (though that may also be true). It is simply a matter of legitimacy in, legitimacy out.[60]

Only if some entitlements are fixed—that is, only if there exists some baseline of property rights[61] against which individuals form, rank and value their preferences—can individuals express an intelligible answer to the question:

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57. This information, or rather the lack of such information, may make bargaining costly. *See* Michael C. Blumm, *The Fallacies of Free Market Environmentalism*, 15 HARV. J. L. & PUB. POL'Y 371, 379 (1992).

58. Sunstein, *Legal Interference with Private Preferences*, *supra* note 8, at 1137 ("[P]references may themselves be a function of legal rules: if this is the case, a change in legal rules will produce a change in preferences.").

59. Jeremy Waldron, *Criticizing the Economic Analysis of Law*, 99 YALE L.J. 1441, 1461 (1990).

60. *Id.* Waldron quotes David Gauthier, who makes the same point:

> The operation of the market is to convert an initial situation specified in terms of individual factor endowments into a final outcome specified in terms of a distribution of goods or products among the same individuals. Since the market outcome is both in equilibrium and optimal, its operation is shown to be rational, and since it proceeds through the free activity of individuals, we claim that its rationality leaves no place for moral assessment. Given the initial situation of the market, its outcome cannot but be fully justified. . . . But neither the operation of the market nor its outcome can show, or can even tend to show, that its initial situation is also either rationally or morally acceptable. . . . Market outcomes are fair if, but of course only if, they result from fair initial conditions.

DAVID GAUTHIER, MORALS BY AGREEMENT 94–95 (1986).

61. The term "property rights" is used guardedly here. These rights might take a variety of forms other than what we traditionally regard as "property." *See* Rose, *supra* note 7, at 23.

"What are you willing to pay for the right to use a particular resource?" The more general point is that preferences, and hence efficiency, are relative to the distribution of wealth-creating legal entitlements at particular moments. Unless the baseline can itself be justified on neutral grounds, the willingness to pay criteria rests on a thin veneer of neutrality that masks a host of factors at play in our society that may be decidedly non-neutral.[62] There are, of course, myriad theories of distributive justice that can be invoked to justify the choice of baselines.[63] However, as John Gray notes, reliance on willingness to pay as a criterion for distributing legal entitlements, "presuppose[s] a theory of just entitlements to property and liberty."[64] Attempts to justify reliance on cost-benefit analysis in ethical terms as the choice to which individuals would agree under initial conditions of equality have proven to be extremely unconvincing.[65]

While these somewhat abstract arguments are powerful in their own right, there is yet another, more concrete sense in which the baseline problem arises in the previous hypothetical. One of the key moves in the Coasean analysis applied in that hypothetical is the assertion that conclusions about whether particular actions harm others can only rationally be based on the arrangement of formal legal rights at particular historical moments.[66] This, however, is true only for the most thorough positivists (of which liberal economic theorists are the most prominent). It is possible that a well-settled baseline of entitlements

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62. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 41–42 (1990).

63. On distributive justice in the environmental context, see Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993). For a more systematic view, see PETER S. WENZ, ENVIRONMENTAL JUSTICE (1988).

64. JOHN GRAY, LIBERALISM 75 (1986). Compare the accounts of JOHN RAWLS, A THEORY OF JUSTICE (1971) and ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

65. Two prominent attempts to make this kind of argument are Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980), and Herman B. Leonard & Richard J. Zeckhauser, *Cost-Benefit Analysis Applied to Risks: Its Philosophy and Legitimacy*, *in* VALUES AT RISK 31, 31–48 (Douglas MacLean ed., 1986). For a devastating critique, see COLEMAN, *supra* note 28, at 115–30.

66. Coase's causal analysis of the type of situation described in the text is straightforward. He describes a situation involving "a factory the smoke from which has harmful effects on those occupying neighboring properties." Coase, *supra* note 45, at 1. In one of the key moves in his analysis, he argues:

> The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A [the factory] inflicts harm on B [the neighbors] and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.

Id. at 2.

to the use of the stream could be discerned, even absent its formal recognition in positive law. That baseline may be embedded in the practices of the surrounding community, and for that community such social norms may be every bit as binding as formal legal requirements, perhaps even more so.[67] It is not implausible to suggest that in my hypothetical, the understanding of the respective parties, both the firm and the farmer, was that the firm's pollution represented an unjustified harm inflicted on the farmer—a harm that the farmer and the community might reasonably have concluded gives rise to certain duties on the part of the firm. Robert Ellickson has demonstrated that conclusions of this sort can be observed in real, living communities.[68] In fact, Professor Ellickson concluded that his findings "suggest the unreality of . . . literal features of the Coasean Parable."[69] Community norms, rather than (and often in spite of) formal legal rules, may ultimately determine the manner in which entitlements are distributed and enforced.[70]

The point of this observation is that liberal economic theory provides no space for features of community life that may be essential to particular communities' understanding of appropriate rules of behavior and norms of social interaction. By focusing solely on willingness to pay and the contingent arrangement of formal legal rights, liberal economic theory sets in motion a process that reduces some of the most important features of our shared social life to mere inconveniences or misperceptions of what is "really" going on. These norms are considered irrationalities to be set aside should it be determined that they contribute to inefficiency as defined by liberal economic theory.[71] Some of these practices might be far more than mere inconveniences;

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67. On the role of community norms in defining property rights, see Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1344–62 (1993); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

68. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 671–87 (1986).

69. *Id.* at 686.

70. *Id.*

71. Consider, in this respect, David Gauthier's justification for rational choice contractarianism (which shares many of the assumptions of what I have described as liberal economic theory):

> It would be irrational for anyone to give up the benefits of the existing moral order simply because he comes to realize that it affords him more than he could expect from pure rational agreement with his fellows. And it would be irrational for anyone to accept a long-term utility loss by refusing to comply with the existing moral order, simply because she comes to realize that such compliance affords her less than she could expect from pure rational agreement. Nevertheless, these realizations do transform, or perhaps bring to the surface, the character of the relationships between persons that are maintained by the existing constraints, so that some of these relationships come to be recognized as coercive. These realizations constitute the elimination of false consciousness, and they result from a process of rational reflection that brings persons into what, in my theory, is the parallel of Jurgen Habermas's ideal speech situation. Without an argument to defend themselves in open dialogue with their fellows, those who are more than equally advantaged can hope to maintain their privileged position only if they can coerce their fellows into accepting it. . . . But coercion is not agreement, and it lacks any inherent stability.

they might in fact be the foundation of a community's sense of shared existence. To override that baseline of social norms in the name of efficiency may, in effect, be to transform an entire way of life[72]—a consequence the normative defensibility of which may be debatable, but the claim to neutrality of which is strained, at best. In the context of environmental law, we might believe that some environmental resources ought not be reduced to private property for reasons of just this sort: "their greatest value lies in civilizing and socializing all members of the public, and this value should not be 'held up' by private owners"[73] or by cost-benefit analysis.

2. Intergenerational Equity

The second objection to using cost-benefit analysis in determining the social value of environmental quality might be aptly summarized by asking: "Which 'society' is the one that counts in the decisional calculus of social costs and benefits?" The answer to this question, while seeming intuitively obvious—i.e., "Why, *our* society, of course!"—is really quite complex. This complexity is generated by a host of factors, including two increasingly important points in the discourse of environmental law. First, political boundaries (some of which are quite arbitrary) may give rise to large international "market failures" that raise a host of complicated equitable considerations, and second, we may be interested in the weight that should be given to our responsibility to provide a diverse, thriving stock of environmental resources to future generations. I will focus on the latter point here.

One obvious answer is to simply ignore future generations. Such a decision might be premised on either of two considerations: a value choice, or the absence of any practical methodology by which to take intergenerational considerations into account. The approach generally adopted by liberal economic theory is to assume that aggregate preferences will not change much over time—an imputation of values—and then apply an appropriate discount rate to arrive at a present value determination of all future costs and benefits. This latter approach, though widely employed by economists, raises intractable subsidiary problems, a few of which I will briefly explore.[74]

David Gauthier, *Why Contractarianism?*, *in* CONTRACTARIANISM AND RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER'S MORALS BY AGREEMENT 15, 28–29 (Peter Vallentyne ed., 1991) (footnote omitted). On Habermas's "ideal speech situation," see *infra* notes 95–98 and accompanying text.

72. *See* Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 961–66 (1991).

73. Rose, *supra* note 67, at 780.

74. The practice of discounting future costs and benefits is a bitterly contested one. For an overview, see Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations, and the Environment*, 46 VAND. L. REV. 267 (1993); PERCIVAL ET AL., *supra* note 50, at 361–62, 531–32, 567–68.

Liberal economic theory assumes that, at the margin, goods and services are freely substitutable.[75] A second, related assumption is that in the long run there are no resources for which adequate substitutes cannot be found. As Robert Solow explains, these assumptions could lead to the conclusion that the possibility of exhausting environmental resources "is in principle no 'problem.' The world can, in effect, get along without natural resources, so exhaustion is just an event, not a catastrophe."[76]

This conclusion and the underlying assumptions are problematic for two independent reasons. First, the idea that technological innovation can and will provide substitutes for the finite stocks of some natural resources is sheer speculation; it has no apparent justification in economic, ecological, or technological reality. Second, assuming that technological innovation can provide substitutes for exhaustible resources, there is no reason to believe that we should regard them as perfect substitutes for future generations who may value them differently than we do.

The long-term implications of current resource decisions are not simply a problem of choosing the most "efficient" use of resources as revealed by an "objective" cost-benefit analysis. As Baumol and Oates argue, "in dealing with the allocation of resources over time, the issue of intergenerational equity arises unavoidably."[77] The liberal economic model provides no theory of how political action can legitimately mediate such issues of equity.[78]

II. CIVIC REPUBLICAN THEORY: DEMOCRACY AS DELIBERATION AND COMMUNAL CONSENSUS

Civic republican theory purports to provide a process that legitimates political decisions that the liberal economic model cannot. It claims to provide a structure that allows government to select particular conceptions of the good without unduly infringing on the liberty and autonomy of individuals.

A. Community, Deliberation, and the Common Good

For civic republican theory, only a politics that promotes civic virtue and the transformation of self-regarding preferences into public-regarding values can claim the status of democratic legitimacy.[79] Under this view, "[p]olitical

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75. For a classic statement of this assumption, see William D. Nordhaus & James Tobin, *Growth and Natural Resources, in* ECONOMICS OF THE ENVIRONMENT: SELECTED READINGS 400, 401 (Robert Dorfman & Nancy S. Dorfman eds., 1977).

76. Robert M. Solow, *The Economics of Resources or the Resources of Economics*, AM. ECON. REV., May 1974, at 1, 11.

77. WILLIAM J. BAUMOL & WALLACE E. OATES, THE THEORY OF ENVIRONMENTAL POLICY 138 (2d ed. 1974).

78. For a general theory on intergenerational equity, see EDITH B. WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 17–46 (1988).

79. The idea that political processes are a means by which the community can "test" and

participation is supposed to educate and elevate public opinion; it is not . . . supposed merely to gratify preexisting [sic] desires."[80]

The key intellectual move for most civic republican legal theorists is to invigorate the concept of political community. Rejecting the Hobbesian view (sometimes regarded as the basis for liberal political theory) that individuals enter political society as autonomous bundles of "prepolitical" preferences who agree to cooperate socially only because it is in their self-interest to do so,[81] civic republican theory views the extended political community as integral to, and constitutive of, individual autonomy and identity.[82] Citizens participate in a community of discourse about "common perception[s] of ourselves and the values we stand for as a moral community."[83] Civic republican discourse, however, is not a means by which self-interested individuals or groups seek to exert political pressure in order to impress their vision of the good on the political community. Nor is it merely a conversation designed to produce an overlapping consensus—a *modus vivendi*—that peacefully mediates and coexists with an extant plurality of comprehensive general theories of the good.[84] In civic republican theory, both of these views of politics are much too thin to meet the demand for genuine democratic governance.

Civic republican theory links democratic governance to individual freedom by positing a dialogic process through which citizens can transcend various barriers to self-realization, such as weakness of will (*akrasia*) and distorted

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revise "individual" preferences into public values is a central theme in the "liberal republican" theory of Cass Sunstein. *See* Sunstein, *Preferences and Politics*, *supra* note 8, at 3–6; Sunstein, *supra* note 14, at 1547–58. For similar expressions, see Hanna Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 347–349 (1981). Professor Sunstein applies this theme to environmental issues in Cass R. Sunstein, *Endogenous Preferences, Environmental Law*, 22 J. LEG. STUD. 217, 245–47 (1993).

80. SAGOFF, *supra* note 13, at 96.

81. On Hobbesian political theory, see generally DAVID P. GAUTHIER, THE LOGIC OF LEVIATHAN (1976); David Gauthier, *Thomas Hobbes: Moral Theorist*, *in* MORAL DEALING: CONTRACT, ETHICS, AND REASON 11, 11–23 (1990); Jean Hampton, *Two Faces of Contractarian Thought*, *in* CONTRACTARIANISM AND RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER'S MORALS BY AGREEMENT 31, 33–50 (Peter Vallentyne ed., 1991).

82. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 218 (2d ed. 1984) ("I am not only accountable, I am one who can always ask others for an account, who can put others to the question. I am part of their story, as they are part of mine. The narrative of any one life is part of an interlocking set of narratives."); Michael J. Sandel, *The Political Theory of the Procedural Republic*, *in* CONSTITUTIONALISM AND RIGHTS 141, 146–47 (Gary C. Bryner & Noel B. Reynolds eds., 1987); Charles Taylor, *Overcoming Epistemology*, *in* AFTER PHILOSOPHY 464, 478 (Kenneth Baynes et al. eds., 1987) (claiming the "priority of society as the locus of the individual's identity"). For a useful overview of the clash between these "communitarian" approaches and more "liberal" ones, see STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS (1992); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 733–36 (1992).

83. SAGOFF, *supra* note 13, at 122.

84. *See* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1 (1987).

preferences, caused by cognitive dissonance and imperfect information.[85] At the center of this view of democratic governance is the argument:

> [A] political process can validate a societal norm as self-given law only if (i) participation in the process results in some shifts or adjustment in relative understandings on the parts of some participants, and (ii) there exists a set of prescriptive social and procedural conditions such that one's undergoing, under those conditions, such a dialogic modulation of one's understandings is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom.[86]

Rational, undistorted deliberation about the common good among political equals will yield "unanimous and rational consensus, not an optimal compromise between irreducibly opposed interests."[87] Under this view, it is possible, through politics and law, to fashion an environmental policy that each and every citizen would warmly embrace as fitting and appropriate, or more simply, good. Such policies would truly mirror the politically informed preferences of citizens.

B. Politics, Pluralism, and Environmental Law

The difficulties associated with civic republican theory as a descriptive claim about how ground level politics really works need not be substantiated by scores of empirical studies. We are constantly being reminded of the power of "special interests" and their ability to influence political outcomes. The history of environmental law and politics does not fit comfortably within the framework of a civic republican model. It is better explained as the product of both interest group pressure and political bargaining—just what a pluralist political model might predict.[88]

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85. For an argument along these lines, see Sunstein, *supra* note 14, at 1557–58. For a typology of the sorts of barriers that stand in the way of self-realization, see Sunstein, *Legal Interference with Private Preferences*, *supra* note 8, at 1138–69. These barriers to what may be considered rational beliefs, motivations, and actions are a recurrent theme in the work of Jon Elster. *See, e.g.*, JON ELSTER, THE MULTIPLE SELF (1986); JON ELSTER, SOUR GRAPES (1983); JON ELSTER, ULYSSES AND THE SIRENS 37 (1984); Jon Elster, *Weakness of Will and the Free-Rider Problem*, 1 ECON. & PHIL. 231 (1985). For a somewhat different perspective, coming from cognitive psychology, on what appears to be individual irrationality, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982). For the implications of the latter perspective in environmental decision making, see Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747 (1990).

86. Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1526–27 (1988).

87. ELSTER, SOUR GRAPES, *supra* note 85, at 35.

88. *See, e.g.*, BRUCE ACKERMAN & WILLIAM HASSLER, CLEAN COAL/DIRTY AIR 26–41, 56–57 (1981); Elliott et al., *supra* note 36; Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. at 311, 316–17 (Autumn 1991); Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 196–97 (1988); Alfred Marcus, *The Environmental Protection Agency*, *in* THE POLITICS

But then civic republican theory is largely not intended to provide a description of how politics is currently conducted or how environmental law has been formulated in the past. Indeed, most civic republican theorists acknowledge (and deplore) the hegemony of the pluralist tradition in American public law. Accordingly, a critique of civic republican theory's descriptive power fails to connect with its essential rhetorical message. It is on civic republican theory's normative terms that its claims to legitimacy must be evaluated. While there is much to favor in civic republican theory, particularly its insistence on the transformative potential of political deliberation, its distinctive criteria of legitimacy are deeply problematic. In the next two subsections, I argue that civic republican theory's twin commitments to the deliberative laundering of preferences, as a means to achieve its universalistic ambitions, and to the primacy of citizenship combine to form a deeply problematic vision of social and political life.

1. Deliberative Politics and the Universalist Impulse

The heart of the problem with the civic republican claim to legitimacy is its utterly romantic assumption that deliberation can actually yield uncoerced, universal commitments on environmental policy.[89] Consider this claim against

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OF REGULATION 267 (James Q. Wilson ed., 1980). William Rodgers, Jr. has applied game-theoretic models to explain the presence of "fakery" and "deception" in environmental laws. *See* William H. Rodgers, Jr., *The Lesson of the Owl and the Crows: The Role of Deception in the Evolution of the Environmental Statutes*, 4 J. LAND USE & ENVTL. L. 377 (1989); William H. Rodgers, Jr., *The Lesson of the Red Squirrel: Consensus and Betrayal in the Environmental Statutes*, 5 J. CONTEMP. HEALTH L. & POL'Y 161 (1989).

While there are notorious counter-examples, I do not, like some (but certainly not all) of the scholars listed above, conclude that this interest group pressure and bargaining undermines the legitimacy of much of our current environmental practices. Many of the conclusions voiced to the contrary are premised in the logic of public choice theory, which seems to portray the world in black-and-white terms: there are public-promoting policies and special interest policies. By contrast, I believe this distinction is much more elusive, and depends vitally on what one posits to be a suitably public interest. For explorations of this indeterminacy, and an articulation of views I generally share, see Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and 'Empirical' Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

89. This claim can also be quite confusing. Perhaps the two most prominent proponents of civic republicanism, Cass Sunstein and Frank Michelman, express the aspiration to universalism in a way that purports to provide room for diversity (a.k.a. pluralism). Accordingly, it is not with their presumed intentions that I am primarily concerned; rather it is with the rhetoric they employ to convey those intentions. Professor Michelman, for example, speaks of an "inclusory, plurality-protecting ideal that arguably characterizes the [civic republican] tradition at its best." Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1505–06 (1988). At the same time, he concludes that those who take pluralism seriously cannot also be republicans; under his view, "[f]or true pluralists, good politics can only be a market-like medium through which variously interested and motivated individuals and groups seek to maximize their own particular preferences." *Id.* at 1508. He also claims that "the pluralist picture of politics cannot do without higher law." *Id.* I think both of these claims are badly mistaken. In my view, Professor Michelman cannot see that while

the water pollution problem discussed in connection with liberal economic theory. One could imagine that the parties may justify their preferences with the following kinds of reasons. The firm may take the initial position that its discharges into the stream do not adversely affect the farmer's use of the stream at all. It might even offer a credible scientific report that supports this assertion. By contrast, the farmer might insist that pollution is bad in and of itself; it destroys the natural ecological conditions of the stream which are intrinsically valuable and which should command our respect.[90] And the farmer, too, may offer a credible scientific report in support of his position. The firm could respond that the farmer has interpreted the concept of "harm" much too broadly. The farmer would make the opposite argument: the firm has unduly restricted the concept of harm.

The firm might even take the position that, assuming that some "harm" has occurred, it should be allowed to continue to use the stream because of the importance of its operations and products to the community. It could claim that the "public interest" lies in the continued utilization of the stream as a disposal site. The farmer may respond that the firm has interpreted the "public interest" in much too narrow a fashion; the stream should remain unpolluted for the benefit of existing and future generations, and therefore should not be sacrificed to meet short-term economic goals.

This short exercise in imagination illustrates that there may not be a common metric by which to assess the merits of competing claims to the use of environmental resources. At each step in this argumentative structure, the

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universalism may be an imminent aim of truly virtuous politics, it is an aim that is held in plurality, shifts with context, and is never realized.

Professor Sunstein is quite candid about the difficulties associated with the aspirations of universalism. He acknowledges that "[t]he task of incorporating into republican theories the need for intermediate organizations to be insulated from the state is a large and critical one." Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1574 (1988). What seems to bother Professor Sunstein about pluralism is that its advocates, whom he describes as "antirepublicans," "can give no account of the normative foundations of [their] own rhetoric." *Id.* at 1575 (quoting JURGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY 294, 336–37 (1987)). This is a problem only if we believe that there is a (unitary) foundation that supports and legitimates rhetorical practices. If we drop that idea, the problem goes away. Moreover, it is not precisely clear what the "foundational" justification for civic republicanism is. For example, Professor Sunstein's version seems to presuppose that the boundaries that make up the formal jurisdiction of the modern State, particularly the United States, are suitable ones for determining the extent of the community within which justifications can be legitimately demanded of all persons, institutions, or groups. What is the "normative foundation" of that rhetoric—nationalism? In short, why should the lines be drawn in this fashion rather than some other way? For the beginnings of what might justify plurality in place of universality, consider Seyla Benhabib's distinction between relations to others based on "formal reciprocity" and those based on "complementary reciprocity." SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY 340–41 (1986).

90. *See* Holmes Rolston, III, *Duties to Ecosystems*, *in* COMPANION TO A SAND COUNTY ALMANAC 246, 247 (J. Baird Callicott ed., 1987).

parties invoke norms of diverse, multiple and particular institutions and communities (e.g., norms of science, community and equity) in justification of their respective positions. Remarkably, in the structure imagined, the parties seem to agree at points about what norms to consult; they just disagree about what those norms dictate. Still, there is no reason to suspect that even this basic level of agreement—i.e., what the "problem is about"—will occur in the generality of environmental disputes. Indeed, liberal economic theory wants to start rational argumentation from the premise that environmental degradation is an "economic" problem—a premise that civic republicans are likely to reject.

It is possible that the firm and the farmer in the initial example each might be moved by the force of the other's justifications. One should not dismiss the possibility of some sort of agreement that both are prepared to accept as good. But what is it about deliberation that ensures such a result? Civic republicanism fails to describe why or how authority in the service of the common good may legitimately be exercised in the face of genuine disagreement generated by rational argumentation from different premises. It simply posits that rational deliberation ensures that an agreement will be reached.[91] Consider how implausible such a conclusion is when we move the water pollution dispute from the local level in the hypothetical to a debate in the legislature, then to the particularities of rulemaking by administrative agencies, then to the decisions of the courts, and finally throughout the political community. That movement illustrates, if only in a general way, that the context in which conflict or disagreement occurs may (indeed, is likely to) require the parties to establish structures of justification—modes of rational argumentation—that will vary depending on that context.[92] More troubling, within each of its institutional moments—as a political, legislative problem; as an administrative problem; as

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91. For a defense of deliberative democracy shorn of universalistic rhetoric, see Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 357–64 (1987). He concludes

> The free individual is not one who already knows absolutely what he wants, but one who has incomplete preferences and is trying by means of interior deliberation and dialogue with others to determine precisely what he does want. When individuals approach political decision making, they only partially know what they want. We are justified in taking as a basis for legitimacy not their predetermined will but the process by which they determine their will. . . . Without renouncing a concern for legitimacy, which in the modern world can only be based on the individual, deliberation makes it possible to avoid the exorbitant requirements of universality and unanimity.

Id. at 364.

92. *See, e.g.*, Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC'Y, 3, 4 (1980) (noting "the existence of legal consciousness as an entity with a measure of autonomy . . . a set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest"). For a particular application, see Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

a legal problem; as a problem of "obligation"—there may be wide-ranging disputes about the appropriate premises from which justifications for action can emerge. This problem can shift to yet another dimension: the various institutions involved may have radically different understandings of their respective functions and purposes. These institutions may, in short, fail to observe the lines that determine the appropriate sphere of their activities. Accordingly, as we move from institution to institution, the very nature of the problem changes; it is redefined and categorized in a manner that is conducive to the self-understanding of the institution involved. Any agreement reached at a particular moment within a particular institution is likely to become fragile as it radiates through the plurality of institutions in our society.[93] However, civic republican theorists do not suggest that the absence of agreement on environmental issues among this plurality of institutions means that no decisions are necessary; that the status quo should be regarded as the legitimate baseline. So the question becomes: "Which among various competing institutional conceptions of the public good is the legitimate one?"

In the most basic sense, civic republican theory embraces the possibility of transforming the politics of compromise and bargaining into a politics of rational discourse or genuine deliberation. It seeks to transform political processes[94] in such a way as to satisfy what Jurgen Habermas calls the "formal conditions of a rational life."[95] Under such conditions, "truth claims . . . can only be redeemed by the unforced force of the better argument."[96] By assuming that political participants must speak in the voice of reason, with reference to the common good, civic republican theory posits that all participants expose themselves to the force of reason, and are thereby influenced to give up their prejudices and self-interest in favor of a rational decision about the collective good.[97]

The problem is, first, that we do not have political processes that satisfy the formal conditions for such rational discourse—what Jurgen Habermas describes as the "ideal speech situation."[98] Second, we have no descriptively apt concep-

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93. This does not imply any necessity to this plurality as a theoretical point; it is only meant to point out that the extant plurality in our political community is a sufficient cause for a plurality of meanings, and conflict among them, to be generated.

94. The discussion of institutional pluralism in the text immediately following this statement gives rise to a critical ambiguity in civic republican theory—i.e., the appropriate scope of the concept of the "political," a point explored briefly *infra* notes 106–107 and accompanying text. On the conceptual difficulties of confining the concept of the political, see Agnes Heller, *The Concept of the Political Revisited*, *in* POLITICAL THEORY TODAY 330–43 (David Held ed., 1991).

95. JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 74 (Thomas McCarthy trans., 1984).

96. Gardbaum, *supra* note 82, at 714.

97. *See* ELSTER, SOUR GRAPES, *supra* note 85, at 36.

98. The "ideal speech situation" is described in JURGEN HABERMAS, LEGITIMATION CRISIS 107–108 (Thomas McCarthy trans., 1975). A useful description is also provided by Seyla Benhabib:

tion of what those conditions might look like in our society of plural norms or how to go about getting from "here" to "there."[99] "There is no God's eye point of view that we can know or usefully imagine; there are only various points of view of actual persons reflecting various interests and purposes that their descriptions and theories subserve."[100] The consequence of this, as Jon Elster argues, is a kind of "double bind:"[101]

> [O]ne cannot assume that one will get closer to a good society by acting as if one had already arrived. If, as suggested by Habermas, free and rational discussion will only be possible in a society where political and economic domination have been abolished, it is by no means obvious that abolition can be brought about by rational argumentation. [Moreover,] even in the good society the process of rational discussion could be fragile, and vulnerable to individual or collective self-deception. To make it stable there would be a need

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> Habermas names discourse through which truth and normative claims are thematized "theoretical" and "practical" ones, respectively. The aim of discourses is to generate a "rationally motivated consensus" on controversial claims. . . . The "ideal speech situation" specifies the formal properties that discursive argumentations would have to possess if the consensus thus attained were to be distinguished from a mere compromise or an agreement of convenience. . . . It serves to delineate those aspects of an argumentation process which would lead to a "rationally motivated" as opposed to a false or apparent consensus. . . . The four conditions of the ideal speech situation are: first, each participant must have an equal chance to initiate and to continue communication; second, each must have an equal chance to make assertions, recommendations, and explanations, and to challenge justifications. Together we can call all these the "symmetry condition." Third, all must have equal chances as actors to express their wishes, feelings, and intentions; and fourth, the speakers must act *as if* in contexts of action there is an equal distribution of chances "to order and resist orders, to pormise [sic] and to refuse, to be accountable for one's conduct and to demand accountability from others."

Benhabib, *supra* note 89, at 284–85 (1986) (emphasis in original) (footnotes omitted).

99. Jon Elster lists seven theoretical objections to the idea that rational consensus can be reached through deliberation: (1) the issue of "paternalism"—it might be considered an "unwarranted interference to impose on the citizens the obligation to participate in political discussion;" (2) "unanimous and rational agreement would not necessarily ensue" in a regime exclusively devoted to pursuing other-regarding policies; (3) even if unanimity were possible, "[s]ince there are in fact always time constraints on discussions—often the stronger the more important the issues—unanimity will rarely be achieved;" (4) some movement toward an ideal speech situation is not necessarily desirable—"[i]n some cases a little discussion is a dangerous thing, worse in fact than no discussion at all;" (5) the problem of "group-think"—a challenge to "the implicit assumption that the body politic as a whole is better or wiser than the sum of its parts;" (6) "unanimity, were it to be realized, might easily be due to conformity rather than to rational agreement;" and (7) "a denial of the view that the need to couch one's arguments in terms of the common good will purge the desires of all selfish elements." ELSTER, SOUR GRAPES, *supra* note 85, at 37–41. For a survey of the critical literature on Habermas' "ideal speech situation," see BENHABIB, *supra* note 89, at 282–343.

100. HILARY PUTNAM, REASON, TRUTH AND HISTORY 50 (1981).

101. For more discussion about the term "double bind," see Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699–1704 (1990).

> for structures—political institutions—that could easily reintroduce an element of domination.[102]

The double bind, in short, is that because we currently do not have an ideal speech situation, we will not get free and rational deliberation,[103] and we could only get it by engaging in dominating and authoritative speech to offset the dominating elements that now make the ideal speech situation impossible. Suppose the latter suggestion is plausible. Notice that it begs the question: Who is this "we?"

2. *Citizenship, Politics and Law*

My second objection to civic republican theory responds to this question (Who is this "we?") by exploring civic republican theory's underlying premise that "only as [a] citizen, as [a] political animal involved in a *vivere civile* with his fellows [can an individual] fulfill his nature, achieve virtue, and find his world rational."[104] I understand this underlying premise to mean two things. First, that there is some privileged position that politics occupies by virtue of its connection to some innate or "essential" aspect of human nature, and second, that the primary purpose of politics is to transform self-interested individuals into other-regarding citizens—to instill civic virtue.

With this understanding, the civic republican theory of citizenship makes two critical errors. The first error lies in positing as an end of politics the promotion of civic virtue. This assumption "turn[s] into the main purpose of politics something that can only be a by-product."[105] To be sure, political discourse can change one's understanding of what a good environmental policy might look like and how we should go about attaining it. This process may also promote civic virtue by enlarging or even replacing our vocabulary about what should or should not be considered in deciding what such a "good" is. But the double bind must be considered here as well. Persons are not environmentally rational or virtuous because they engage in civic-minded political discourse. Rather, persons engage in civic-minded political discourse because they are rational or virtuous. Having ruled out coercion as a legitimate means of instilling public values, civic republican theory can only work by presupposing that the political community already possesses the virtue that its theorists posit as the end of political discourse.

The second error in the civic republican concept of citizenship is the claim that the only way in which individuals can truly make sense of their lives is

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102. ELSTER, SOUR GRAPES, *supra* note 85, at 42.

103. *See* Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379, 389–90 (1981) ("In the political arena, the philosopher's truths are likely to be turned into one more set of opinions, tried out, argued about, adopted in part, repudiated in part, or ignored.").

104. Gerald E. Frug, *Why Neutrality?*, 92 YALE L.J. 1591, 1601 (1983) (quoting J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 114 (1975)) (brackets by Frug).

105. ELSTER, SOUR GRAPES, *supra* note 85, at 91.

through political discourse. The critical ambiguity here is the nature of what civic republican theory treats as the political.[106] Individuals participate in a web of relationships in and among institutions and communities.[107] To the extent that these webs of relationships are regarded as "political," they are mostly of a decidedly local character. These relationships generate vocabulary and meaning not only about the content of particular social goods but also about the extent and scope of authority that each overlapping institution and community may appropriately seek to exert upon the others.[108]

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106. Professors Michelman and Sunstein both recognize this critical ambiguity, but tend to resolve it by fiat. I agree with Professor Michelman's claim that "much of the country's normatively consequential dialogue occurs outside the major, formal channels of electoral and legislative politics, and that in modern society those formal channels cannot possibly provide for most citizens much direct experience of self-revisionary, dialogic engagement." Michelman, *supra* note 89, at 1531. This leads him to endorse the "non-state centered notion of republican citizenship." *Id.* Remarkably, however, the guardian of this conception of citizenship is the Supreme Court—perhaps the most particularist, insular, and non-participatory institution in our formal structure of "state-centered" institutions! He concludes that

> [t]he Court helps protect the republican state—that is, the politically engaged citizens—from lapsing into a politics of denial. It challenges 'the people's' self-enclosing tendency to assume their own moral completion as they are now and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends.

Id. at 1532. For a different view, see Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983), discussed *infra* notes 112–117 and accompanying text.

Professor Sunstein also concludes that "[c]itizenship, understood in republican fashion, does not occur solely through official organs." Sunstein, *supra* note 89, at 1573. He recognizes that "[m]any organizations—including labor unions, religious associations, women's groups of various sorts, civil rights organizations, volunteer and charitable groups, and others, sometimes marking themselves outside of and in opposition to conventional society—serve as outlets for some of the principal functions of republican systems." *Id.* He then goes on to describe the interests of these organizations as "prepolitical," claiming that pluralists commit the same sort of misstep attributable to those who rely on "possessive individualism:"

> In both approaches, interests are seen as largely exogenous and prepolitical; in both politics in governmental processes is a matter of self-interests, and largely of deals; in both, politics it is normal and legitimate for political actors to seek goods or opportunities solely on the ground that it is in their interest to do so; in both, there is reason for considerable suspicion about the state, and in particular about measures that purport to reflect a unitary public good; in both, spheres of individual and group autonomy are highly valued; in both, the notion of mediation among conflicting conceptions of the good seems fanciful.

Id. Thus, it is clear that Sunstein's republicanism is formal and statist; common understandings and purposes worked out among individuals and groups outside the formal institutions of the State are "prepolitical," and thus not entitled to any presumptive legitimacy.

107. *See generally* Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714 (1988).

108. *See generally* Walzer, *supra* note 9, at 319.

Indeed, pluralism might be thought to exist primarily because we have come to appreciate the idea that the formal political community has no claim to exclusivity as a forum for social deliberation. Such a claim need not collapse into Hobbesian atomism, as some civic republican theorists tend to suggest.[109] The distinction between a pluralist view of community and a civic republican view of citizenship might therefore depend on what we regard as the arena of politics. If citizenship is meant by civic republicanism to relate mostly to formal political activity, it differs from pluralism on "the distinction between respecting and *fostering the particular and diverse values of different individual communities* (whatever those values happen to be) on the one hand, and fostering *the* (single) value of substantive [i.e., political] community, on the other."[110] It is well to remember, in this respect, that "[w]ithout many different and autonomous forms of expression, association, and action, oppression is virtually guaranteed and opportunities for creativity, openness, and reconstruction are closed off."[111]

A justification for pluralism of just this sort is implicit in the work of Robert Cover. He argued that a normative world of meaning—a *nomos*—for the individual is generated by the narratives of local communal involvement. While "the formal institutions of the law and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention."[112] The greater part of our normative universe is created through associational ties, and practices embedded in more local institutions and communities that stand between the individual and the formal institutions of the law.

The striking feature of Cover's work is the persuasive manner in which he describes the possible "jurispathic" consequences of "the formal institutions of law." His basic point in this respect has been well summarized by Martha Minow: "For Robert Cover, the state's norms are not necessarily superior. Certainly, they are not superior simply because they are the state's. The backing of force and the power to suppress simply mean that the government's norms are capable of killing off the norms of other communities."[113] This conception of state law does not always mean such bleakness: "Law is a force, like gravity, through which our worlds exercise an influence upon one another, a force that affects the courses of these worlds through normative space."[114] That force can sometimes be an "enrichment of social life, a potential restraint

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109. *See supra* notes 106–107 (discussing the problematic notion of the "political").

110. Gardbaum, *supra* note 82, at 699 (emphasis added).

111. Philip Selznick, *Dworkin's Unfinished Task*, 77 CALIF. L. REV. 505, 511 (1989).

112. Cover, *supra* note 106.

113. Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 1, 9 (Martha Minow et al. eds., 1992).

114. Cover, *supra* note 106, at 9–10.

on arbitrary power and violence."[115] But, as Cover reminds us, the agency of state law is predicated on acts of coercion and is called into service when communities (or individuals within them) collide.[116] It is sometimes ruthlessly violent: "By exercising its superior brute force, . . . the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities."[117]

What is true of "the agency of state law" in the sometimes violent legal world of Robert Cover seems likely to be true with respect to the "agency of political community" in the otherwise romantic world of civic republicanism.[118] The more we emphasize statist conceptions of community and a universal conception of the good environmental policy, the more we may need to rely on the formal institutions of law to make such visions work. Some of the effects of relying heavily on the force of centralized law are now becoming more apparent in matters of the environment, as the choices and options of state and local communities about suitable levels of environmental quality are becoming more tightly constricted as a matter of constitutional principle.[119]

The kind of violence expressed in Cover's work is also at play in the work of John Rawls, who has for similar reasons attempted to free his political theory of justice from metaphysical presuppositions.[120] That is, we don't need to link our talk of justice and legitimacy to some sort of "philosophical foundations."[121] Civic republican theory refuses to break the connection. Moreover, it fails to articulate in sufficiently tangible terms just what citizenship and a commitment to "dialogic self-modulation" might entail in our pluralistic society. As Michael Walzer has argued, "Any historical community whose members shape their own institutions and laws will necessarily produce a particular and

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115. *Id.* at 68.

116. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1628 (1986) ("So let us be explicit. If it seems a nasty thought that death and pain are at the center of legal interpretation, so be it."); *Id.* at 1629 ("Between the idea and the reality of common meaning falls the shadow of the violence of law, itself.").

117. Cover, *supra* note 106, at 44.

118. *See generally* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 858–79 (1993).

119. These restrictions have taken a variety of forms, from "dormant" commerce clause limitations, to limitations on the police power enforced through the "takings" clause. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (takings clause); Chemical Waste Management v. Hunt, 112 S. Ct. 2009 (1992) (dormant commerce clause); Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992) (dormant commerce clause).

The "federalization" of environmental law is a much debated topic. *See, e.g.*, Stewart, *Regulation in a Liberal State*, *supra* note 1, at 1546 (arguing that "[i]nterstate mobility of products, capital, and pollution undermine local or state environmental initiatives, and invite nationwide solutions."); Frug, *supra* note 104, at 1600 (arguing that "local communities must be empowered to make environmental decisions").

120. Rawls, *supra* note 84, at 4.

121. *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 57 (1989).

not a universal way of life."[122] If within our polity there are many such "particular" ways of life or "historical communities," the particularity that each displays "can be overcome only from the outside and only by repressing internal political processes."[123] Given the fact of pluralism, the better argument may be that we should strive to maintain a discourse that views the maintenance of a private sphere as an object of political conversation.[124] As Richard Rorty notes:

> We can urge the construction of a world order whose model is a bazaar surrounded by lots and lots of exclusive private clubs. . . . Such a bazaar is, obviously, not a community, in the strong approbative sense of "community" used by critics of liberalism like Alasdair McIntyre and Robert Bellah. You cannot have an old-timey *Gemeinschaft* unless everybody pretty much agrees on who counts as a decent human being and who does not. But you *can* have a civil society of the bourgeois democratic sort.[125]

Moreover, that might not be so bad. A "civil society of the bourgeois democratic sort" rests on an "unjustifiable hope, and an ungrounded but vital sense of human solidarity."[126] This sense involves a profound rejection of the "inferential connection between the disappearance of the transcendental subject—of 'man' as something having a nature which society can repress or understand—and the disappearance of human solidarity."[127]

III. UN-FREEZING THE DIALECTIC: ENVIRONMENTAL LAW UNCHAINED FROM THE CONSTRAINTS OF LEGITIMACY

To this point I have argued that two very different conceptions of the democratic process do not, and cannot, satisfy their own criterion for legitimacy in the context of environmental policy-making. How, in such a *telos*-less political community, should we determine what to do as we confront ever more serious forms of environmental degradation? To resolve this question, I want to sketch some reasons for believing that we should quickly abandon any notion that our choices should be tightly constrained within a particular conception of democratic legitimacy. The major task in this essay is to dispel one notion that

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122. Walzer, *supra* note 103, at 395. For a similar view, see CHARLES TAYLOR, HEGEL 414–16 (1975).

123. Walzer, *supra* note 103, at 395.

124. For an argument along these lines, see Rawls, *supra* note 84, at 1–8. This is not to imply a radical distinction between the public and private—or perhaps "personal"—spheres of social and political life. Any attempt to draw such lines is inevitably a political matter. *See* Frank I. Michelman, *Private Personal But Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783, 1794 (1990) (concluding that "what ought to be secured" as "personal" "is the most deeply and constantly political of questions").

125. Richard Rorty, *On Ethnocentrism: A Reply to Clifford Geertz*, 25 MICH. L. REV. 525, 533 (1986) (emphasis in the original).

126. RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 208 (1982).

127. *Id.*

is common, implicitly or explicitly, both to civic republican and liberal economic theory. That notion is that there is some privileged form of political discourse, the criteria of which can rightfully claim democratic legitimacy. The idea at work in these theories is that there is some discrete stopping point in our experiment in democracy—a moment that freezes a truth or a way of talking about it—that we are all prepared or can rightfully be forced to accept as such.

These theories' conceptions of truth, their principles, are purely procedural. They do not describe in any meaningful way what our environmental policy would achieve should their approaches be fully implemented, nor do they describe how different communities or social relations might be affected by a rigid adherence to their respective legitimating criteria. One can well imagine circumstances in which the property rights approach advocated by liberal economic theory might yield pockets of environmental degradation so severe as to disrupt or destroy the entire fabric of a community. Similarly, it takes no great insight to understand that civic republican theory's requirement of universalism might translate into a lowest common denominator strategy that yields intolerably large amounts of environmental degradation.[128]

The frozen truth offered by these legitimating theories will thaw in context as we continue our experiment in democratic governance. When faced with choices, we fall back on the available heuristics, with all their ungrounded presuppositions and biases, in an effort to make sense of a new social situation, and then we act in a way that conforms to that sense of context. But in this operationalizing process of discourse and action, new, sometimes competing, truths are created, and conflicting interpretations eventually may (or may not) generate radically different ideas about the legitimate scope and method of governmental regulation. This constant working out of meaning in which we are all engaged may deprive us of legitimating comfort, but it need not bury us in desperation either. Breaking the chains of closure—or theories that promise it—liberates us from the mistakes of history and enables us to remove the link of necessity to existing social practices that are plainly undesirable.

In contrast, there is the formal institution of law to consider. We do count on it to resolve competing claims, to fix entitlements and assign responsibilities in the face of conflict. Law must surely rely on some criterion for decision, some privileged form of discourse. But that "necessity" is simply the recognition that "some particular social practice [must] block the road of inquiry, halt the regress of interpretations, in order to get something done."[129] The criteria of environmental law that apply to environmental decision making are in a constant state of flux, defying facile descriptions. When we seek something less plastic, more grounded, we must necessarily refuse to make the

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128. *Cf.* Peter H. Sands, *International Cooperation: The Environmental Experience*, *in* PRESERVING THE GLOBAL ENVIRONMENT 236, 240 (Jessica T. Mathews ed., 1991) (describing how international conventions, which rely on universality or unanimity, "tend to reflect the lowest common denominator").

129. Rorty, *supra* note 126, at xli.

pragmatic judgments needed to "halt the regress of interpretations." Indeed, there are signs that we are becoming less willing to make such pragmatic judgments. There is a drive toward comprehensiveness, a demand to take into account "all the relevant factors," that is pushing environmental law more and more in the direction of the legitimating criteria of liberal economic theory. It was not so long ago that Judge McGowan could proclaim a "new approach reflect[ing] developing views on practicality and rights:"[130]

> [T]he new approach implemented changing views as to the relative rights of the public and of industrial polluters. . . . Henceforth, the right of the public to a clean environment would be pre-eminent, unless pollution treatment was impractical or unachievable. . . . This new view of relative rights was based in part on the hard-nosed assessment of our scientific ignorance. . . . the widely shared conviction that the nation's quality of life depended on its natural bounty, and that it was worth incurring heavy cost to preserve that bounty for future generations.[131]

Similarly, Judge Skelly Wright concluded that when "evidence [is] difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge . . . we will not [as courts] demand rigorous step-by-step proof" to support environmentally protective policies.[132] Implicit in these approaches is the recognition that there is simply no "fact of the matter" to be discovered, and we will have to create these facts by relying on our considered contextual judgments about the appropriateness of particular regulatory decisions. Now, however, courts are increasingly demanding that those unknowable facts be discovered and detailed in a "rigorous step-by-step" manner to support regulatory decisions. Consider in this respect, the D.C. Circuit's embrace of cost-benefit analysis under the Occupational Safety and Health Act[133] as a "systematic weighing of pros and cons."[134] Or consider also the Fifth Circuit's refusal to allow EPA to justify its asbestos ban on the basis of "unquantified

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130. Weyerhauser Co. v. Costle, 590 F.2d 1011, 1042 (D.C. Cir. 1978).

131. *Id.* at 1043.

132. Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

133. 29 U.S.C. § 651–78 (1988).

134. International Union, UAW v. OSHA, 938 F.2d 1310, 1321 (D.C. Cir. 1991). As part of this "systematic" inquiry, Judge Williams suggested that a defensible cost-benefit analysis would require the agency to consider the adverse effect on workers' health of the proposed safety regulation itself. *Id.* at 1326 (Williams, J., concurring). The logic of this conclusion goes like this: "More regulation means some combination of reduced value of firms, higher product prices, fewer jobs in the regulated industry, and lower cash wages. All the latter three stretch workers' budgets tighter . . . . And larger incomes enable people to lead safer lives." *Id.* This logic was warmly received by the Office of Management and Budget, which insisted that OSHA consider these effects in a rulemaking. *See* Frank Swoboda, *OMB's Logic: Less Protection Saves Lives*, WASH. POST, Mar. 17, 1992, at A15. The Seventh Circuit recently refused to require OSHA to undertake such an inquiry. American Dental Ass'n v. Martin, 984 F.2d 823 (7th Cir.), *cert. denied*, 114 S. Ct. 172 (1993). For a detailed account of this attempt to achieve greater comprehensiveness, see PERCIVAL ET AL., *supra* note 50, at 153–55 (Supp. 1993).

benefits," because it could easily "make[] a mockery of the requirement[] . . . that EPA weigh the costs of its action before it chooses the least burdensome alternative."[135]

Perhaps this push for a comprehensive accounting of the costs and benefits of proposed regulatory measures will ultimately make for better regulation. If that is the result, however, it will not be because the agency got the facts associated with its cost-benefit analysis absolutely right. Following John Dewey, I "would reply that the whole notion of an 'absolute' fact is nonsensical."[136] Rather, it will be because the public, our democratic community, either has come to view environmental quality as a commodity whose value can be assessed through the reductionist logic of liberal economic theory, or it has simply lost the will to undertake the effort needed to communicate its values to those entrusted with decision making. If the former occurs, we might simultaneously have satisfied the universalist legitimating criteria of civic republican theory, though I doubt seriously anyone would consider cost-benefit analysis the kind of dialogic engagement needed to test and justify pre-existing preferences. I suspect, however, that the latter is what is driving the push toward comprehensiveness, and its implications for our experiment in democracy are demoralizing. Should that day come, in my view, the question would "remain[] open whether in the case of the agent who claims to be applying the science of human behavior we are genuinely observing the application of a real technology or rather instead the deceptive and self-deceptive histrionic mimicry of such a technology."[137] Justice Marshall made a similar point, dissenting from the plurality's decision in *Industrial Union Department*[138] to require a quantified showing of "significant risk" before allowing OSHA to regulate workplace toxins. In his view, "[t]o require a quantitative showing of a 'significant risk' . . . would either paralyze [OSHA] into inaction or force [it] to deceive the public by acting on the basis of assumptions that must be considered too speculative to support any realistic assessment of the relevant risk."[139]

The point of this discussion for environmental policy is simple but also quite abstract and general. It is implausible to suggest that environmental policy can be framed consistently through political judgments that meet the

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135. Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1219 (5th Cir. 1991). While in both the cases discussed in the text, the judges were obviously well-intentioned, there is another, less charitable interpretation. The move toward comprehensiveness, with its attendant high decision costs and procedural complexities reminds one of Calabresi's and Bobbitt's observation that one way to limit the extent of our commitment to particular values is to "[i]mpos[e] a complicated procedure [which] functions as a system for allocation." GUIDO CALABRESI & PHILLIP BOBBITT, TRAGIC CHOICES 96 (1978).

136. Hilary Putnam, *A Reconsideration of Deweyan Democracy*, *in* PRAGMATISM IN LAW & SOCIETY 217, 227 (Michael Brint & William Weaver eds., 1991).

137. MacIntyre, *supra* note 82, at 85.

138. *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980).

139. *Id.* at 716 (Marshall, J., dissenting).

criteria of liberal economic theory or civic republican theory when we have no uncontroversial method for implementing either or, more fundamentally, choosing one approach over the other. The contingencies of circumstance and time and the environment itself create a means-ends dialectic that make both interpretation and judgment necessary and inevitable. There may be discrete periods of what Kuhn describes as "normal science,"[140] or what Rorty calls "normal discourse"[141] in our practices, when existing descriptions of a good environmental policy *can be* reflexively and routinely applied as law in a manner that does not seem at all controversial. Ultimately, the legitimacy of democracy does not depend at all on its ability to lead us into this kind of discourse of uncontroversial truth claims. "Our democracy is an emblem of what could be. What could be is a society that develops the capacities of all its men and women to think for themselves, to participate in the design and testing of social policies, and to judge the results."[142]

IV. CONCLUSION: "MUDDLING THROUGH"

If we are unsure whether it makes sense, or is possible, to speak of some non-arbitrary common good, or to demand a governmental structure that meets some criteria of legitimacy, what can we demand of politics in general or environmental law in particular? Some time ago, Charles Lindblom wrote:

> The value problem is . . . always a problem of adjustments at a margin. But there is no practicable way to state marginal objectives or values except in terms of particular policies. That one value is preferred to another in one decision situation does not mean that it will be preferred in another decision situation in which it can be had only at great sacrifice of another value. Attempts to rank or order values in general and abstract terms so that they do not shift from decision to decision end up ignoring the relevant marginal preferences. The significance of this . . . point . . . goes very far. Even if [we] had at hand an agreed set of values, objectives, and constraints, and an agreed ranking of these values, objectives, and constraints, their marginal values in actual choice situations would be impossible to formulate.[143]

Lindblom offers a useful way of thinking about democratic politics and law in the service of environmental quality. Consider four important points in Lindblom's notion of value "adjustments at the margins." First, Lindblom's model recognizes that the tension between and among many competing values makes any rank ordering of public values highly contingent on the circumstances in which a decision must be rendered. Second, it makes clear that any attempt to treat ends as distinct from means is a barren, meaningless enterprise, ultimately begging the question of: "Which policy should we choose?" Third,

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140. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (2d ed. 1970).
141. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 320 (1982).
142. PUTNAM, *supra* note 136, at 217, 239–40.
143. Charles Lindblom, *supra* note 18, at 82.

it refuses to accept as a test of "goodness" the extent to which a given policy decision achieves pre-determined public values. Once we rid ourselves of the idea that to be good a policy must exhibit some holistic, "comprehensive rationality," we will rather insist that "[t]o show that a policy is mistaken . . . one must . . . argue that another policy is more to be preferred."[144] Finally, Lindblom offers a powerful argument in favor of respecting the limits of appeals to rationality. Instead of seeking "agreement on what elements in the decision constitute objectives and on which of these objectives [agreement] should be sought," the pragmatic approach described by Lindblom "falls back on agreement wherever it can be found."[145]

There are several standing objections to this pragmatic process of "muddling through" as a normative model of environmental decision making.[146] The most important, in my view, is the charge that pragmatism simply takes an existing social situation as given, making small corrections at the edges but never examining the core.[147] The idea here is that pragmatism implicitly legitimates the status quo; "it leaves the world as it is."[148] This pragmatic focus, it is argued, channels environmental discourse into an existing rhetorical structure, precluding serious examination of or critical inquiry into its assumptions, and thus, affirming its privileged status. We are forced into "normal discourse:" a conversation conducted within a "set of conventions about what counts as a relevant contribution, what counts as answering a question, [and] what counts as having a good argument."[149] "Abnormal discourse"—"what happens when someone joins in the discourse who is ignorant of these conventions or who sets them aside"[150]—is powerfully suppressed as irrational or irrelevant.

This claim appeals to the discomfort some experience with the notion that as a political community we might never be able either to question or legitimate *our* core values, or substitute justice and certainty for extant injustice and confusion. In short, the fear is that we cannot, as a society, ever claim that some things are simply right and others are clearly wrong.

The short response to these standing objections is that we can make such judgments in the muddling, pragmatic way Lindblom suggests. A partial answer lies in the following points. First, this criticism of pragmatism suggests that it is a method that is freely chosen, that it is replaceable by some other method. It is questionable whether pragmatism, at least in its more current forms,

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144. *Id.* at 83.

145. *Id.* at 84.

146. For a general discussion of the perceived weakness of "incrementalism," see Colin Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 399 (1981).

147. *Id.* at 400.

148. Jurgen Habermas, *Philosophy as Stand-In and Interpreter*, *in* AFTER PHILOSOPHY 296, 306 (Kenneth Baynes et al. eds., 1987).

149. Rorty, *supra* note 141, at 320.

150. *Id.*

endorses the idea that there is a unitary method to be used or that it could make any sense to choose one. Indeed, one of pragmatism's aims is to ask us to imagine what a world without meta-theories might look and feel like, to free ourselves from "theory-guilt." Democracy, in its Deweyan moments, is the political expression of that freedom. Pragmatism invites us to live with "the sense that there is nothing deep down inside us except what we have put there ourselves, no criterion that we have not created in the course of creating a practice, no standard of rationality that is not an appeal to such a criterion, no rigorous argumentation that is not obedient to our own conventions."[151] In short, with a Deweyan idea, we might "insist that we neither have nor require a 'theory of everything,' and stress that what we need instead is insight into how human beings resolve problematical situations."[152]

Second, pragmatic legal responses to the fact of pluralism need not be inherently conservative. They might instead affirm that "abnormal discourse" is a continuing fact of political and social life, a source of new and possibly better vocabularies. In this respect, we should take some stock of the character of much of our political discourse to discern the manner in which environmental concerns have penetrated into areas that twenty years ago would hardly have been imaginable. The recent debate about whether and how to integrate environmental considerations into the North American Free Trade Agreement is a prominent example.[153] Those who criticize pragmatism suggest that the ongoing conflict of values, the fact of pluralism, accepted (and celebrated) by pragmatism, can be resolved, clearing the way for a kind of "supra-normal" discourse, freed from the hegemonic chains of interest and ideology, and based on some ultimate, privileged, and correct vocabulary that truly mirrors the essence of politics in human society.

In my view, this attack ironically folds into itself. Those who view pragmatism as intolerant or oppressive may be the largest enemies of abnormal discourse. By assuming that there is, or can be, a form of environmental discourse against which we can assess the legitimacy of varying claims to legal entitlements, they must additionally contend that arguments that are not cast in the privileged form should summarily be dismissed as "wrong." Pragmatism, by contrast, simply acknowledges that such criteria are presently unavailable, and that the form and meaning of environmental discourse are historically contingent. "The terms used by the founders of a new form of cultural life will consist largely in borrowings from the vocabulary of the culture they are hoping to replace."[154]

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151. Rorty, *supra* note 126, at xlii.

152. Putnam, *supra* note 136, at 228.

153. *See* Frederick M. Abbott, *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI.-KENT L. REV. 173, 192–200 (1992). For a general discussion of how environmental issues have penetrated trade issues, see generally OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND THE ENVIRONMENT: CONFLICTS AND OPPORTUNITIES (1992).

154. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 56 (1989).

Indeed, where else would they come from? We create new meanings only by showing how old meanings fail to perform the work for which they were adopted. A new paradigm, a redescription, can work only if it resonates deeply within the community in which it is proposed. It must be situated historically and must explain the deficiencies of history in practical terms. John Dewey provides assistance in understanding the formative and transformative nature of our experiment in democracy:

> The old and the new have forever to be integrated with each other, so that the values of old experience may become the servants and instruments of new desires and aims. . . . Human life gets set in patterns, institutional and moral. But change is also with us and demands the constant remaking of old habits and old ways of thinking, desiring and acting . . . . In its large sense, this remaking of the old through union with the new is precisely what intelligence is.[155]

Another related critique of pragmatism might seem particularly apt to environmental policy. "The case for comprehensive rationality seems especially compelling with regard to environmental policy because the synoptic approach is so confluent with the holistic ecological principles that serve as articles of faith among committed environmentalists."[156] Muddling through, under this view, is simply too risky because failure can wreak tragic environmental consequences, perhaps on a global scale. Indeed, William Ophuls has argued that one of the chief vices of muddling through is its "remedial orientation in which policies are designed to cure obvious immediate ills rather than to bring about some desired future state."[157] For Ophuls, the failure of American society to pursue a more "synoptic" or "public interest" form of political discourse has inevitable environmental consequences: government becomes "an 'adhocracy' virtually oblivious to the implications of [its] acts and politically adrift in the dangerous waters of ecological scarcity."[158] In short, the impending ecological crisis—vividly described by Ophuls—leaves us with "no choice but to search for some ultimate values by which to construct a post-modern civilization."[159]

In response to this claim, Lindblom's description of how synoptic policy-making "breaks down in *its* handling of values or objectives" seems to me a complete answer:

> The idea that values should be clarified, and in advance of the examination of alternative policies, is appealing. But what happens when we attempt it for complex social problems? The first difficulty is that on many critical values or

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155. DEWEY, *supra* note 19, at 49–50.

156. Krier & Brownstein, *supra* note 15, at 123–24.

157. WILLIAM OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY: PROLOGUE TO A POLITICAL THEORY OF THE STEADY STATE 191 (1977).

158. *Id.* at 193.

159. *Id.* at 237.

> objectives, citizens disagree, congressmen disagree, and public administrators disagree.[160]

Consider also the demands that discussions of "ultimate values" place on citizens, representatives and other decision makers:

> Although the [synoptic] approach can be described, it cannot be practiced except for relatively simple problems and even then only in a somewhat modified form. It assumes intellectual capacities and sources of information that men simply do not possess, and it is even more absurd as an approach to policy when the time and money that can be allocated to a policy problem is limited, as is always the case.[161]

The loss of the legitimating comfort associated with the critique of the liberal economic and civic republican models does not mean that we should resign ourselves to the contingency of history by employing a strategy of retreat. It only means that we should "forswear the search for knockdown arguments that will convince absolutely everyone that [particular] values are important" to an effective environmental policy.[162] We should recognize that political action, necessitated by conflict over ways of living, means that you cannot always get what you want. To deny that the quest for certainty, for "legitimacy," is a meaningful project is nothing more or less than a frank acknowledgement of "the fact that many of our contemporaries, even our most thoughtful contemporaries, hold deeply different, probably irreconcilable, visions of the ideal world." More importantly, the loss of legitimating criteria invites us to accept a potentially much greater gain; to "celebrate a wide-open and diverse culture"—"the prerequisite to all the central Deweyan virtues: intelligence, freedom, autonomy, [and] growth."[163] If we can accept this gain, with all "its inconclusiveness and open-endedness, its demand that we struggle

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160. Lindblom, *supra* note 18, at 81.

161. *Id.* at 80. The same point is made in ROBERT NOZICK, THE NATURE OF RATIONALITY 125 (1993): "[R]ationality does not require the most extensive sifting of evidence, computational exertion, and so on. That process itself has its costs, and some (rough) decision would be made about the amount of time and energy to be put into any particular decision or formation of belief." Lindblom has made this particular point forcefully with respect to environmental policy:

> [T]he environment is all interconnected. . . . Believing, then, that everything is interconnected, we fall into the fallacy of believing the only way to improve those interconnections is to deal with them all at once. . . . But because everything *is* connected, it is beyond our capacity to manipulate variables comprehensively. Because everything is interconnected, the whole of the environmental problem is beyond our capacity to control in one unified policy.

Lindblom, *supra* note 15, at 84 (emphasis in original).

162. Anthony Weston, *Beyond Intrinsic Value: Pragmatism in Environmental Ethics*, 7 ENVTL. ETHICS 321, 338 (1985).

163. *Id.* at 339.

for own values without being closed to the values and hopes of others,"[164] we may begin to ask the right question: "What alternative policies will better accomplish the plurality of purpose in our environmental practices?"

164. *Id.*