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FOUR FAILURES OF THE POLITICAL ECONOMY

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I. INTRODUCTION

Environmental law in the 1990s has taken new directions. On the international front, global warming, acid rain, biodiversity, sustainability, and the 1992 Earth Summit are a few of the more pressing concerns. Domestically, between President Bush's "environmental administration" and Vice President Quayle's Council on Competitiveness, Environmental Protection

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Agency (EPA) Administrator William K. Reilly had his hands full. Indeed, two currents of environmental law cannot be denied: (1) environmental law is inextricably tied into international arenas,¹ and (2) environmental law is focusing more on the efficiency aspects of environmental regulation than ever before.²

The efficiency move may mean that environmental law and regulation are finally catching up to Chicago-style *laissez-faire* thinking, or it may be the last remnant of the Reagan Revolution. In either case, the contemporary, committed environmentalist must consider the consequences of environmental regulation on economic development. The move to international conventions, transboundary problems, and global solutions is simply a recognition of the reality of the transnational interdependencies between natural resources, energy, the environment, and the world economy. These changes in orientation from stewardship to cost-risk-benefit analysis and from the domestic to the international scene are deeply significant and cannot be ignored.

Still, there is yet another dramatic phenomenon in environmental law in the 1990s that may well signal the emergence of a unique way of thinking about environmental law and policy. Until recently, the only substantial environmental equity issue was generally viewed in the context of transgenerational justice.³

1. See generally ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* (1992); LESTER BROWN ET AL., *THE STATE OF THE WORLD* (1984-92) (describing the global environment with strategic recommendations); LYNTON KEITH CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY* (2d ed. 1990) (examining global environmental movement and international environmental cooperation); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEV., *THE STATE OF THE ENVIRONMENT* (1991) (recognizing worldwide economical and ecological interdependence and the need for global environmental improvement); UNITED NATIONS WORLD COMM'N ON ENV'T AND DEV., *OUR COMMON FUTURE* (1987) (attempting to formulate a global agenda for environmental change in order to achieve worldwide sustainable growth).

2. The literature on tradeable emission permits is perhaps the clearest example of market-based environmental laws. See ROGER W. FINDLEY & DANIEL A. FARBER, *ENVIRONMENTAL LAW: CASES AND MATERIALS* 345-77 (3d ed. 1991); Robert W. Hahn & Gordon L. Hester, *Marketable Permits: Lessons for Theory and Practice*, 16 *ECOLOGY L.Q.* 361, 368-96 (1989); Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation*, 18 *ECOLOGY L.Q.* 1 (1991). In addition, the political rhetoric of the Bush Administration emphasized the linkages between environmental protection, energy efficiency, and economic development. See U.S. DEP'T OF ENERGY, *NATIONAL ENERGY STRATEGY: POWERFUL IDEAS FOR AMERICA* 2-3 (1st ed. 1991-92).

3. EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* 1-3, 17-46 (1989).

Today, environmental equity also includes an analysis of the adverse effects of environmental regulation, or the lack thereof, on disempowered citizens.⁴ Although this paper will examine domestic issues, international organizations are also wary of human rights abuses in environmental regulation.⁵

If you asked someone at least a decade ago if any area of the law is free of bias, I would imagine that environmental law would have been a likely candidate. After all, efforts to remove pollution from land, air, and water could only inure to the benefit of the collective citizenry. Clean air and water, as any economist will tell you, are the quintessential public goods. Indeed, some environmental laws could even be seen as pro-poor. For example, low income individuals could benefit disproportionately from the strict enforcement of clean air laws, but this potential pro-poor disposition is largely theoretical.⁶

Upon further review, a contemporary policy analyst accustomed to the ways of the microeconomic model might admit that the effects of certain types of environmental regulation, (the placement of hazardous waste facilities, for example) might disproportionately impact the poor because it is economically prudent to locate facilities where land is the cheapest. The harsh reality of this strategy is that poor people are more likely to live in poorer sections of the country; thus, the likelihood of being closer to such a facility is higher than that of the general populace. Thus, under this hypothesis, environmental equity is class-based and dictated by economic considerations. Racial implications would, therefore, depend on a correlation between race and poverty.⁷

If this were a true picture of the world, there would be cause enough for concern. To remedy this situation, regulation could, for example, require that the cost of placing such facilities encompass the cost to the surrounding communities. Such regu-

4. See, e.g., Robert F. Kennedy, Jr. & Dennis Rivera, *Pollution's Chief Victims: The Poor*, N.Y. TIMES, Aug. 15, 1992, at A15.

5. See HUMAN RIGHTS WATCH & NATURAL RESOURCES DEFENSE COUNCIL, *DEFENDING THE EARTH: ABUSES OF HUMAN RIGHTS AND THE ENVIRONMENT* iii-vii (1992).

6. See Joseph P. Tomain, *Distributional Consequences of Environmental Regulation: Economics, Politics, and Environmental Policymaking*, 1 KAN. J.L. & PUB. POL'Y 101, 106-08 (1991).

7. See generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992); CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* (1992) (arguing moral obligation to distribute goods and services more equally in America).

lation would be justified on efficiency grounds by requiring facility owners to account for externalities and incorporate social costs into the price of their services. Furthermore, such regulation would be equitable, as environmental harms and benefits could be distributed free of class bias.

Unfortunately, this picture of class inequity is only partial. Environmental inequity also entails racial discrimination. Recent studies reveal that, even when an analyst accounts for class bias, environmental programs have had a disproportionately adverse impact on racial minorities.⁸ This race bias cannot be discounted and the scholars who have revealed its existence have significantly changed the way we must think about environmental regulation in particular and social regulation in general.

This paper attempts to answer the following question: Why does environmental regulation show class and race bias? In answering that question, this paper argues that both structural and systemic problems pervade environmental decisionmaking and contribute to disadvantaging the disempowered.

II. THE STRUCTURE OF ENVIRONMENTAL REGULATION

The environmental equity problems of class bias and racial bias have a common structure and a common source. Perhaps it is not too much to hope that they may also share a common solution. The common structure results from the inability of diffuse and relatively powerless groups to participate in environmental decisionmaking and policymaking processes. The common source of these problems is the failure of the political economy to overcome the barriers to participation. The pro-

8. See ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 38-43 (1990); COMMISSION FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST, *TOXIC WASTES AND RACE IN THE UNITED STATES* 13-22 (1987); 1 U.S. ENVTL. PROTECTION AGENCY, *ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES* (June 1992) [hereinafter EPA]; U.S. GENERAL ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* 1-5 (June 1983); BENJAMIN A. GOLDMAN, *THE TRUTH ABOUT WHERE YOU LIVE: AN ATLAS FOR ACTION ON TOXINS AND MORTALITY* ch. 6 (1991); Regina Austin & Michael Schill, *Black, Brown, Poor, & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69, 69-71 (1991); Kelly M. Colquette & Elizabeth A. Henry Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL. L.J. 153, 158-62 (1991); R. George Wright, *Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury*, 23 ARIZ. ST. L.J. 777, 791-99 (1991); Roger D. Colton, *A Case Study in Environmental and Poverty Conflict: Auto Replacements as a Clean Air Strategy* (Apr. 25, 1992) (on file with author).

posed common solution is to restructure the political process to allow more meaningful participation—to allow more voice⁹ in the environmental regulatory process. This inclusion can occur at the agency level (through appointments)¹⁰ or through grass roots activism.¹¹ This paper suggests wider participation in rulemaking and decisionmaking processes.

There is a direct connection between the common structure and the common source of environmental equity problems, and they can be usefully discussed together. Moreover, former EPA General Counsel E. Donald Elliott succinctly made this point:

Standard economic and public choice theory would predict that groups that are less powerful politically and economically would be more likely to be exposed to disamenities of all types. In any event, in this instance, those who are least able to defend themselves through the political and economic system are more likely to bear the brunt of the harms of pollution.¹²

By elaborating on Professor Elliott's quotation, I intend to show that the disempowerment of certain groups and the resultant environmental inequities are the consequences of four failures of the political economy: (1) economic, (2) political, (3) constitutional, and (4) legal. The thesis is that before the voice of certain groups (i.e. racial minorities and the poor) can be heard by environmental policymakers, government regulation must be responsive to those failures.

I can state my thesis in one word: politics. Environmental equity is fundamentally an issue of regulatory politics. Simply stated, environmental equity is about distributive justice and, in particular, the distribution of environmental harms and benefits.

As a preface to the discussion of the "four failures," we must recognize both the polycentric structure¹³ of environmental

9. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* 120-26 (1970).

10. See 2 U.S. ENVTL. PROTECTION AGENCY, *ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES* 69-71 (June, 1992).

11. Luke W. Cole, *Correspondence: Remedies for Environmental Racism: a View from the Field*, 90 MICH. L. REV. 1991, 1996-97 (1992); Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 426-27 (1991).

12. E. Donald Elliott, Jr., *A Cabin on the Mountain: Reflections on the Distributional Consequences of Environmental Protection Programs*, 1 KAN. J.L. & PUB. POL'Y 5, 7 (1991).

13. See, e.g., Milton R. Wessel, *SCIENCE AND CONSCIENCE* 4-10 (1980); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978). See generally ROBERT F. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* 187-219 (1982) (discussing the ethics of nuclear power).

disputes and the dynamic flow of environmental laws over the past two decades from stewardship to sustainability and from a problem-specific focus to global monitoring; from this we can readily see that environmental law is not a static concept.¹⁴ The structure and the dynamics of environmental law provide two lessons. First, environmental disputes are complex and costly due to such complexity. Groups with limited or no resources cannot compete effectively in the process. Second, one must realize that to discuss environmental regulation and distributive justice in one breath is to paint too grand a picture. Rather, environmental problems must be disaggregated and discussed with specificity to recognize that the distributional issues cut many ways.

We must not assume that all minority communities, whether referring to the urban poor or the Native Americans of this country or the indigenous peoples of developing countries, share the majority view of environmentalism. Conventional wisdom suggests that environmental protection is acceptable as long as it does not detract from economic productivity. A cruel variant of this theme is that it is easier (and cheaper) to provide for environmental protection if there is less invested in economic production (i.e. let developed areas or countries produce and let developing and undeveloped areas or countries protect). The direct *domestic* consequence of this conventional wisdom is that the poor sections of urban and rural economies suffer the effects of pollution in the name of economic production, while the wealthy sections provide environmental protection under the guise of green spaces. The dominant view is too crude. Benefits and harms are distributed unevenly among rich and poor, developed and developing countries, different generations, and according to particular environmental problems.

Both the polycentric structure of environmental problems and the dynamic status of environmental law contribute to the disadvantages suffered by disenfranchised groups; they also suggest a particular regulatory response. The problem may best be addressed by a political process solution (rather than through a substantive command and control standard) or a directive to decisionmakers to consider equity issues in their cost (risk)-benefit analyses.

14. See Mark Sagoff, *The Great Environmental Awakening*, 9 AMERICAN PROSPECT, 39, 42-44 (1992).

III. THE FOUR FAILURES

Relative to the benefits and burdens of environmental regulation, the political economy has disadvantaged these groups in four more or less specific, yet complementary, ways. At the bottom, the failures are those of four social institutions: the legislature, the market, the court, and the agency. Parenthetically, one could easily substitute the executive for the agency, thus covering all three constitutional branches.

Obviously, it is rather audacious to suggest in a short paper that, not only our market economy, but our entire governmental system is deficient in matters of distributive justice. I agree. Such a statement is audacious, but also true. Small, focused interest groups can outmaneuver larger, diffuse groups in both economic and political markets, and the law reinforces this disequilibrium.

A. Failure One—Political Failure

The current dominant view of the legislative process is that legislation is the outcome of a political bargaining process in which "deals" are struck by competing interest groups.¹⁵ Thus, if small, focused, well-financed groups can out-lobby large, diffuse groups, then legislative deals will, of course, favor the more organized special interest groups. The favored, special interest groups thus, "get a seat at the table" because they are largely responsible for setting that very table.¹⁶

Failure in the political marketplace derives directly from interest group theory. Because interest groups will form when the benefits to be gained by the members are greater than the transaction costs of organizing, smaller interest groups are more likely to coalesce. Larger groups are harder to organize and more susceptible to numerous "free rider" problems.¹⁷ In addition, broad groups tend to be concerned about nonmonetary harms, such as low-level toxic risk.¹⁸ For example, there are market disincentives for a large unorganized group (such as "the

15. See, e.g., WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 37-56 (1988).

16. See *id.* at 61-93 (for a critique of interest group theory).

17. See, e.g., MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53-57 (1965).

18. See John S. Applegate, *Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control*, 9 YALE J. ON REG. 277 (1992).

poor") to organize in opposition to the placement of a hazardous waste facility.¹⁹

In the political marketplace, small, well-financed interest groups out-lobby diffuse groups with notable regularity. Consider the politics of your own workplace. Small vocal groups, particularly if they register their interest with a focused intensity, will set policy over less intense or less vocal larger groups. The obvious defect in this design of majoritarian politics (a defect well known to Madison, by the way),²⁰ is that diffuse interest groups or factions will go underrepresented or unrepresented. The direct consequence of successful lobbying is the effectuation of wealth transfers from one group to another, as groups lobby to either capture benefits or to avoid burdens through the placement of legal entitlements.

A partial democratic response to this form of political failure in the legislature is the notion that government agencies "guard" the public interest. Administrative agencies, the delegated authorities of the democratic will of the legislature, are, in theory, formed to protect the public interest. This response is not wholly satisfactory for two reasons. First, the legislative deal may either be silent about or even negatively affect an already disadvantaged interest group. If so, then the agency is legislatively directed by the legislation to work against the interests of the disadvantaged group. Second, if a disempowered interest group has been "cut out of the deal," then agency officials cannot assess either a critique or a proposal made by parties with no seat at the table.

B. Failure Two—Economic Failure

As previously noted, in addition to distributing regulatory benefits and burdens, legislation has the direct consequence of placing legal entitlements on favored interest groups. The initial placement of legal entitlements legislatively empowers interest groups and dramatically affects "the players" in the "regulatory or judicial games" that remain to be played in the political process. To better understand how the initial placement of legal entitlements affects the winners and the losers in the legislative game, we must discuss economic failure.

Environmental economics derives more from the subdis-

19. Colquette & Robertson, *supra* note 8, at 162-70.

20. See THE FEDERALIST No. 10 (James Madison).

cipline of welfare economics than from the classical or neoclassical economic variants.²¹ Still, at least in the case of air emissions trading, we turn our attention to the microeconomic model for some environmental regulation. Thus, it is fair to say that both neoclassical and welfare economics drive environmental regulation.

Both models have their virtues. When the conditions of the neoclassical model are satisfied (i.e. when the market has a large number of buyers and sellers, product homogeneity, and "perfect" information), then the market obtains its considerable virtues.²² The well-functioning neoclassical market reaches an equilibrium at which the proper quantity of goods are produced at the proper prices, producer profit and consumer welfare are maximized, wealth is created, technological innovation is encouraged, and, as an added political attraction, individual liberty and equality are furthered (because each dollar counts as one vote, as choice is also maximized).²³ In other words, more is better because the pie is bigger.

Given these virtues, it would then seem that "the market," rather than government regulation, should produce the "proper" amount of pollution or non-pollution at the proper prices.

Welfare economics, in distinction, has a different focus. It assumes that initial starting points are unequal (as the playing field is not level for all buyers and sellers), that there are effects beyond the boundaries of the self-contained market, and that government affects markets. Indeed, a central tenet of welfare economics is that, in addition to establishing market prices, market transactions produce social costs.²⁴ Consequently, efforts to enhance efficiency may be furthered at the cost of distributional imbalances and some entity (i.e. the government) must make dis-

21. See, e.g., WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* 7-13 (2d ed. 1988); *HANDBOOK OF NATURAL RESOURCE AND ENERGY ECONOMICS* 3-59 (Allen V. Kneese & James L. Sweeney eds., 1985); JOHN V. KRUTILLA & ANTHONY C. FISHER, *THE ECONOMICS OF NATURAL ENVIRONMENTS* 3-16 (2d ed. 1985); JOHN PEET, *ENERGY AND THE ECOLOGICAL ECONOMICS OF SUSTAINABILITY* (1992).

22. JOSEPH P. TOMAIN & JAMES E. HICKEY, JR., *ENERGY LAW & POLICY* 24-26 (1989).

23. See, e.g., SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *REGULATORY LAW & POLICY*, ch. 5 (1993).

24. WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICIES* 536 (2d ed. 1982).

tributional decisions.²⁵ Accordingly, if the "free" market causes inequitable distributional consequences, then government intervention into that market is justified, and welfare economics provides an analytic model for evaluating the market and for suggesting regulatory responses.

The seminal discussion of the efficiency and distributional consequences of the placement of legal entitlements derives from the work of Nobel Laureate Ronald Coase. (Coase authored the essential article of the law and economics movement in 1960.)²⁶ A simple formulation of the Coase Theorem states: "If there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule."²⁷ Simply stated, the initial placement of a legal entitlement is irrelevant for efficiency purposes. In other words, law does not matter. Rather, bargainers will contract around problems in their best economic self-interest. This theorem can be easily demonstrated numerically.²⁸

If, for example, legislation permits the location of a hazardous waste facility upon the satisfaction of certain environmental conditions, then we can say that, upon the satisfaction of these conditions, the project sponsor has a legal entitlement to place that facility. Following the Coase Theorem, if the location of the facility is unacceptable (i.e. too costly) to the neighbors, then the neighbors will buy out the project sponsor and the facility will be relocated.

This application of the Coase Theorem is unrealistic in two respects. First, it neglects the existence of the political failure just discussed. Instead, the Coase Theorem starts with the assumption that the initial placement of the legal entitlement is neutral. It is this exact proposition that is disproved by interest group theory. Interest groups would neither form nor negotiate for legislative "deals" if there are no benefits to be had. Second, the distribution of resources is not and has never been even. Nor has there ever been an "original position"²⁹ from which an acceptable allocation of benefits and burdens has flowed.

Still, the Coase Theorem is powerful and useful. For me,

25. See, e.g., Allan M. Feldman, *Welfare Economics*, 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 889, 890-93 (J. Eatwell et al. eds., 1987).

26. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

27. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12 (1983).

28. TOMAIN & HICKEY, *supra* note 22, at 40-48.

29. JOHN RAWLS, A THEORY OF JUSTICE 17-22 (1971).

the beauty of the theorem lies in the corollaries and not in the theorem itself. There are two primary corollaries. First, given transaction costs, the initial placement of a legal entitlement may affect the efficiency of a transaction. If the transaction costs are high or unequal between the parties, then the wrong placement of the legal entitlement may preclude the attainment of efficient bargains. Also, efficient bargains may not be reached if one or both parties engage in opportunistic or strategic bargaining.

Second, the initial placement of entitlements affects the distribution of wealth. Simply stated, law matters—especially with regard to distributive justice. Regarding the location of a hazardous waste facility, it matters whether the project sponsor has a legal entitlement to locate the facility or whether the neighbors have a legal entitlement to force a relocation. Transfer payments will go to the party with the legal entitlement, thus effectuating a redistribution of wealth.

These economic ideas are central to a discussion of distributive justice precisely because of the now familiar reasons that the marketplace does not internalize all of its social costs, marketplace transactions spill over into society and cause harm, and the distributions of costs and benefits are uneven.

Thus far, we have seen that poorly organized or unorganized groups are placed at a double disadvantage. First, they are likely to lose the legislative game, thus suffering a political failure. Second, they suffer economic failure because access to wealth empowers groups to play in the legislative arena and secure legal entitlements.

Unfortunately, these political and economic failures are further compounded by law, as the have-nots are disadvantaged by constitutional and legal failures.

C. *Failure Three—Constitutional Failure*

Exacerbating the political and economic imbalance is an asymmetrical distribution of constitutional rights. In the regulatory arena, the key actors are the regulator and the regulatee. As the affected party, the regulatee usually has statutory standing before the agency. Moreover, should the regulator impinge on either the liberty or property interests of the regulatee, then, in addition to statutory claims, the regulatee can assert Fifth Amendment takings and due process arguments, as well as

Fourteenth Amendment due process and equal protection claims.³⁰ In the area of environmental law, one scholar has written that some environmental statutory rights take on constitutional weight.³¹

Affected third parties do not have such extensive constitutional protections. First, third parties are not assured of statutory standing. Third party standing, based on a constitutional procedural due process claim, is weak or non-existent. Second, once legislation is passed, regulation is proposed or implemented, and benefits or burdens are distributed, affected disenfranchised third parties may make a general claim that equal protection has been violated or that the regulation is unreasonable. To claim an equal protection violation, however, requires that the claimants demonstrate not only discrimination in fact, but discriminatory intent must also actually be shown before relief is available.³² To compound that problem, the range of judicial scrutiny of environmental equal protection claims has been restrictive.³³

On the substantive due process side, so long as regulation satisfies a "basic rationality" test, then the persons adversely affected by the regulation have little chance for relief.³⁴ Once again, the organizing problems for diffuse interests in the legislative arena are legitimized by a narrow scope of equal protection review and an expansive scope of substantive due process deference. Furthermore, access to agencies expands and contracts with the law of standing and the current Supreme Court seems to be undergoing a contraction.³⁵

30. See SHAPIRO & TOMAIN, *supra* note 23 (at ch. 3).

31. AMAN, *supra* note 1, at 29.

32. See McCleskey v. Kemp, 481 U.S. 279, 291 (1987); Village of Arlington Heights v. Metropolitan Hous. Dev., 429 U.S. 252, 264-68 (1977); Washington v. Davis, 426 U.S. 229, 239-45 (1976).

33. See R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1149-50 (E.D. Va. 1991); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 884-87 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); Bean v. Southwestern Waste Mgmt. Corp., 482 F. Supp. 673, 677-81 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038 (5th Cir. 1986).

34. See R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1149-50 (E.D. Va. 1991); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 884-87 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); Bean v. Southwestern Waste Mgmt. Corp., 482 F. Supp. 673, 677-81 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038 (5th Cir. 1986). See also FERC v. Mississippi, 456 U.S. 742, 753-58 (1982) (rational basis test under the Commerce Clause); United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 (1938) (rational basis test).

35. Compare Jonathan R. Macey, *Separated Powers and Positive Political Theory*:

D. Failure Four—Legal Failure

1. Common Law Failure

A refinement of the Coase Theorem arrived in a groundbreaking article by Calabresi and Melamed,³⁶ in which the authors suggest that further analysis shows the importance of whether a liability rule or a property rule is used and where a legal entitlement is placed since the available remedies will affect the distributional and efficiency consequences of that placement. The use of a property rule can stop a project with an injunction, and the use of a liability rule can afford compensation. Thus, depending on which party is assigned the legal entitlement, both liability and property rules affect the distribution of wealth and can also affect efficiency. If the surrounding populace can stop the location of a waste facility through an injunction or demand compensation through a damages award, then, if the facility owner wants to operate the plant, there will be a payment of some amount to such individuals. The amount of the payment (or the gains from trade) will depend on whether property or liability rules are applied.

The essential problem with liability and property rules is that they derive from a common-law, private property baseline³⁷ and do not easily or adequately account for social costs or future effects. Property and liability rules are more easily applied to discrete, past disputes involving relatively few parties.³⁸ Nuisance suits, for example, involve difficult evidentiary and burden of proof issues, require technical expertise, and fre-

The Tug of War Over Administrative Agencies, 80 GEO. L.J. 671, 677-78 (1992) ("Courts tend to grant standing to those groups that were excluded from the original deal . . .") with *Department of Energy v. Ohio*, 112 S. Ct. 1627, 1632-35 (1992); *Hallstrom v. Tillamook City*, 493 U.S. 20, 25-33 (1989); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). (The Supreme Court's restrictive interpretations of citizen suit provisions in environmental statutes).

36. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089-93 (1972).

37. See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* vii-x (1985); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 13-18, 210-20 (1990).

38. Class actions, institutional or structural lawsuits, and impact litigation are, of course, counter examples. See, e.g., PAUL MACAVOY, *INDUSTRY REGULATION AND THE PERFORMANCE OF THE AMERICAN ECONOMY* 5 (1992) ("While not perfect, the legal framework works so much better in the 1990s than when regulation was initiated in the 1890s or 1930s that it has become a much more attractive alternative to regulatory controls and practices."). Still, common law principles, as distinct from government regulation, are better applied retrospectively than prospectively.

quently yield limited outcomes. In other words, in an area as complex as the environment, regulatory controls offer a more comprehensive regulatory regime than judicial supervision. Moreover, even with the availability of class actions and the promise of large contingency fees, the disempowered lack the resources to initiate legal action and few attorneys accept such cases.³⁹

2. Agency Failure

To the extent that the legislative process imperfectly represents the interests of some groups over others, those imperfections reappear in administrative agencies. Without adequate public participation, agencies are poor guardians of the public interest for two reasons. First, since agencies are delegates of congressional action, they simply reproduce the deals cut through the legislative process. Second, agencies are subject to capture by the regulatee.⁴⁰ The interest groups that can plausibly capture the EPA, such as Waste Management, Browning-Ferris, the Sierra Club, or the Nature Conservancy, are not inherently responsive to the environmental needs of minorities or the poor.

Thus, given these four reasons—economic failure, political failure, constitutional failure, and legal failure—we must ask: Is government regulation justified? If so, what sort of regulation is responsive?⁴¹

IV. A REGULATORY RESPONSE

Regulatory analysis posits that the market is preferable to government regulation. However, if the market is either inefficient or unfair, then government regulation may cure the defect. Moreover, the identification of the specific market defect also suggests the proper regulatory response.⁴² The political and economic failures of environmental regulation demonstrate that not

39. See Cole, *supra* note 11, at 1992 & n.3.

40. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 54-60 (1992); Richard A. Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON. & MGMT. SCI.* 335 (1974). See generally George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971) (explaining influence of regulatees in creating regulations).

41. See generally Melissa Thorne, *Local to Global: Citizen's Legal Rights and Remedies Relating to Toxic Waste Dumps*, 5 *TUL. ENVTL. L.J.* 101 (1991) (analyzing remedies for toxic waste dump problems from the local to the international level).

42. SHAPIRO & TOMAIN, *supra* note 23 (manuscript at ch. 1).

only are disempowered groups disadvantaged in the legislative process, but also that that disadvantage is reproduced in the regulatory process and is compounded by law. Moreover, each of these reciprocal failures have the consequence of diminishing or silencing the participatory voice of those least able to help themselves. In other words, these four failures of the political economy all dictate a political process solution.

In February 1992, the EPA Environmental Equity Workgroup published a draft list of findings and recommendations, most of which focus on the collection, analysis, and dissemination of better information and data about the distributional consequences of environmental regulation.⁴³ Calls for more study and information are properly cautious and may both confirm and reveal other instances of environmental racism. Furthermore, the accumulation of more scientific information and knowledge can help institutionalize a regulatory response to problems of environmental equity. Indeed, basing a response on scientific knowledge establishes a common language for reform.⁴⁴

Still, I am skeptical that a "techno-rational" response to matters of distributive justice is sufficient.⁴⁵ If the data reasonably leads to the conclusion that environmental laws generally or that the location of hazardous waste facilities in particular disproportionately affect minorities, then more data collection is not responsive. The problem is, essentially, political, not technical; thus, a political solution is necessary.

If the call for more data collection and analysis is helpful, though not responsive, to the four failures, then what is? The short answer is wider public participation.⁴⁶ Somehow, a seat at

43. EPA, *supra* note 8, at 6. The recommendations are that the EPA should do the following: (1) increase the priority of environmental equity, (2) collect data and information to assess risk by income and race, (3) incorporate environmental equity into risk assessment, (4) identify and target opportunities to reduce high concentrations of risk to different population groups, (5) assess and consider the distribution of projected risk reduction in major rulemakings, (6) review permitting, granting, monitoring, and enforcement processes for their impact on environmental equity, (7) improve communication with racial minorities and the poor, and (8) incorporate environmental equity into long-term planning. *Id.*

44. See AMAN, *supra* note 1, at 138-42.

45. See also Robert D. Bullard, Comments on the Draft EPA Environmental Equity Report (on file with author) (discussing EPA's failure to address "institutionalized racial discrimination").

46. See Bradford C. Mank, *The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?* 19 B.C. ENVTL. AFF. L. REV. 239, 272-82 (1991).

the regulatory table must be given to those currently absent.

There are two basic governmental responses to this situation. First, the government can establish an agency to serve as a surrogate advocate for the disempowered.⁴⁷ Such an agency can provide technical, scientific, and legal resources so that the poor and racial minorities can exercise their voice in environmental decisionmaking and policymaking processes through proxies or through selected attorneys. Second, these processes can be opened up to the disadvantaged for their active, direct participation (beyond ordinary notice and comment participation). One way to accomplish this is through an agency's use of alternative dispute resolution (ADR) techniques, although ADR is not without problems and failures of its own.

The increased use of ADR by the EPA is a particularly appropriate solution to the insufficient political participation problem for three timely reasons. First, third party standing before administrative agencies is fundamentally statutory (not constitutional) and passing legislation is both costly and risky. Second, as previously mentioned, the Court's recent glosses on statutory standing have been restrictive. Third, and most importantly, recent legislation authorizes administrative agencies to effectively expand participation in ADR programs on their own without the need for statutory permission.

ADR, in general, refers to methods of dispute resolution and conflict management other than litigation. In November, 1990, the Administrative Procedure Act was amended by the Administrative Dispute Resolution Act⁴⁸ and the Negotiated Rulemaking Act of 1990.⁴⁹ Although ADR techniques have been widely used inside and outside administrative agencies, these new federal laws eliminate ambiguity concerning the authority of agencies to utilize such methods.

A. Administrative Dispute Resolution Act

The ADR Act is the more generic of the two statutes, directing agencies to adopt a policy concerning the use of ADR in adjudications, rulemakings, enforcement actions, licensing

47. See, e.g., Department of Public Advocate Act of 1974, Stat. Ann. §§ 52:27E-1 to 52:27E-47 (West 1986 & West Supp. 1992).

48. Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended at 5 U.S.C. §§ 581-93) (Supp. III 1991).

49. Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 581-90) (Supp. III 1991).

procedures, and other agency actions. Agencies are further directed to appoint and train ADR specialists in the theory and practice of negotiation, mediation, arbitration, and related techniques. In addition to these techniques, agencies are authorized to use conciliation, facilitation, fact-finding, mini-trials, or any combination of ADR methods. The purpose behind ADR is to avoid costly, polarizing, and time-consuming litigation in favor of more efficient, participatory, and creative dispute resolution procedures. Through ADR, the parties to a dispute play a more active role in facilitating its resolution in lieu of the winner-take-all aspect of the adversary system.

B. Negotiated Rulemaking Act

Much agency activity is accomplished through legislation-like rulemaking proceedings. Formal and informal rulemaking has adversarial characteristics which can lead to expensive and time-consuming litigation and appeals. Because rulemaking is forward-looking and polycentric (that is, rulemaking often involves several parties with various interests), structured negotiation is a method that can reduce the time and expense of a rulemaking proceeding. Through negotiated rulemaking (or "reg-neg"),⁵⁰ the affected parties can participate in the development of the rule, share information and technical knowledge, and increase the acceptability of the outcome.

The central feature of reg-neg is "to bring together representatives of the agency and the various interest groups to negotiate the text of a proposed rule."⁵¹ The initial attraction of reg-neg is that the parties most likely to be affected by an agency's rule help draft the rule. As the parties will have an earlier and better idea of how they will be affected by the rule, increased compliance should result.

The agency, however, must be careful to bring the right "interested parties" to the table. While industry representatives may have the wherewithal to participate in reg-neg, individual consumers, small groups, and grass roots public interest groups may not have sufficient resources to participate effectively. In

50. See, e.g., Philip J. Harter, *Negotiating Regulations: A Cure of Malaise*, 71 GEO. L.J. 1, 28-31 (1982); Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1630-46 (1986).

51. ADMINISTRATIVE CONFERENCE OF THE U.S., *NEGOTIATED RULEMAKING SOURCE BOOK 1* (1990).

such a case, an agency must provide resources to make participation meaningful.

Thus, while ADR generally and reg-neg particularly, offer promises of more creative solutions and more democratic participation, they also warrant caution on two fronts. First, ADR may magnify the disparity in resources among various interest groups unless provisions are made for information (especially technical information) to be available to the participants. Second, reg-neg may well expand the policymaking role of administrative agencies, raising the specter of the nondelegation doctrine, as the affected parties help write the rules to govern themselves.⁵²

C. *Evaluating ADR*

The ADR⁵³ movement has much to commend it. ADR methods are flexible and applicable to a range of matters. In the regulatory arena, ADR is being used on many fronts (especially environmental regulation). ADR can be responsive to the four failures, especially if outreach is active and technical support is made available. Although ADR cannot remake the legislative "deal," it can enable the agency to more adequately fulfill its charge to regulate in the public interest. With outreach and resources, participation can be meaningful, can overcome economic and regulatory failure, and can overcome legal failure at the agency level.

Extrajudicial forms of dispute resolution promise to be cheaper, quicker, more participatory, and more creative than litigation. Moreover, if the outcomes are, indeed, crafted by the disputants, then a high compliance rate for ADR settlements may follow. Determining whether these promises are fulfilled requires an ADR evaluation.

Efficiency, effectiveness, and efficacy are the standards used to define quality in ADR. Efficiency is equated with cost savings, while effectiveness denotes user satisfaction and compliance. Although there is little consensus regarding the efficiency of mediation, there is general agreement regarding its effectiveness, where "effective" is defined as achieving settlement in a

52. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-41 (1935), the Supreme Court was critical of the National Industrial Recovery Act for delegating too much authority to the President and, in turn, to the industry.

53. See Joseph P. Tomain & Jo Anne Lutz, *A Model of Court-Annexed Mediation*, 5 OHIO ST. J. ON DISP. RESOL. 1, 1-18 (1989).

high percentage of cases without compromising the quality of justice. Additionally, researchers report high levels of user satisfaction and compliance, with agreements ranging from sixty to ninety percent. Efficacy, as a measure of justice, is a more elusive concept, although ADR advocates conclude that such mechanisms promote justice because they are more creative, participatory, and lead to democratic solutions.

Critics of alternative processes counter that ADR adds another procedural layer (and associated costs) to dispute resolution, arguing that mediation merely creates an illusion of participation, voluntariness, and consensus. The central criticism surrounds the privatism of mediation and the consequent reduction in publicity of that process. In other words, private parties, under a promise of confidentiality, control the mediation process and often the results to the exclusion of public involvement or review. Thus, government sanctioned ADR to these critics is simply another way of legitimizing private wealth transfers.⁵⁴

The ADR movement, however, particularly as evidenced by reg-neg, offers a promising dispute resolution technology for broadening participation in agency decisionmaking and policymaking. With such a promise, though, comes the associated risk that ADR can reduce the public oversight in those processes.

V. CONCLUSION

Is greater public participation the proper regulatory response to the "four failures" of the political economy? It may well be argued that I have overstated my case about wider public participation in agency activity as an antidote to distributive injustice. A critic might assert that I am wrong as a matter of theory, practice, and reality. Instead of complaining about the imperfections of the democratic process, it may be propounded that we accept them for what they are—imperfections in an imperfect world. In addition, the critique continues, I should resign myself to the reality that some small groups simply suffer "relative disadvantage[s]" as a result of "accommodation[s] to the political process."⁵⁵ Such pragmatism has an apparent attraction; the system works relatively well and is relatively

54. See Charles Ellison, *Dispute Resolution and Democratic Theory*, SYSTEMATIC ANALYSIS IN DISPUTE RESOLUTION (Stuart S. Nagel & Miriam K. Mills eds., 1991).

55. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 890 (1990).

accessible. The reality, however, is difficult. Recent scholarship and government reports indicate that practice correlates with theory and that the disempowered do, in fact, suffer disproportionate environmental harm.⁵⁶

If a disenfranchised group cannot adequately participate in basic political and economic markets, and if constitutional and legal rules are tilted against it, then public participation seems justified for at least four complimentary reasons. First, wider participation performs an educative function, as agency decisionmakers hear both different and additional views of the subject matter of the regulation.⁵⁷ Second, for purposes of political accountability, government should listen to viewpoints other than those of the regulatee to avoid problems of capture, corruption, and the inefficient outcomes attendant with prisoner's dilemma games.⁵⁸ Third, wider, more inclusive participation serves a legitimating function, especially if, as is the normal case, the regulatory activity is a form of private wealth transfer. Finally, public participation helps satisfy the democratic ideal of self-government, especially in light of the four noted failures. While data collection and analysis will provide needed and necessary information, this response should be seen as suppletive to a systemic change in an agency's political process. A seat at the table must be set and new voices must be heard during the regulatory dinner conversation.

56. See sources cited *supra* note 8.

57. See GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE & PUBLIC LAW* 129-31 (1991).

58. See AYRES & BRAITHWAITE, *supra* note 40, at 54-98.