

RATIONAL CHOICE VERSUS REPUBLICAN MOMENT—EXPLANATIONS FOR ENVIRONMENTAL LAWS, 1969-73

CHRISTOPHER H. SCHROEDER*

I. INTRODUCTION

The years between 1969 and 1973 constitute a watershed in the evolution of federal environmental policy and legislation. During this time, Congress passed and the President signed the National Environmental Policy Act, the Clean Air Act Amendments of 1970, the Federal Water Pollution Control Act Amendments of 1972, and the Endangered Species Act of 1973. Each of these laws departed significantly from existing federal laws, and the air quality and water quality amendments in particular imposed significant compliance costs on American industry. Collectively, I'm going to refer to these major federal statutes as the *Beginning Environmental Statutes*, or the BEST.

What best explains how the BEST became law? I do not mean here to be inviting a recitation of the particular procedural path each took through the two chambers of the Congress. Rather I mean to inquire as to how our system of government first considered and then acted upon all the competing interests at stake and all the arguments made for and against their passage.

Within the legal literature, the conventional wisdom has concluded that we can rule out one explanation. The rational choice approach to interest group theory, which began with Mancur Olson's pathbreaking *The Logic of Collective Action*,¹ cannot explain these statutes, because, as recently summarized by Daniel Farber, its "two basic predictions are that environmental groups will not organize

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

effectively and that environmental statutes will not be passed.”² Even after allowing for sophisticated versions of rational choice, which can explain how some environmental groups might be able to form, Farber maintains that the “core prediction of interest group theory”—“the dominance of ‘special interests’”³—remains. Richard Revesz has recently echoed Farber’s conclusion, asserting that the logic of collective action makes it difficult to understand why we have any federal environmental laws.⁴

This conclusion, if sound, ought to have received much more notice in both political science and legal circles than it has. Rational choice has been the hottest stock in the political science portfolio for the past 30 years.⁵ During this same period, environmental legislation has been the hottest item in the changing priorities of federal social policy, as indicated by the fact that we frequently refer to the period that began around 1970 as the Environmental Era. Looking specifically at Olson’s book, the overlap between the surge in environmental statutes and the initial impact of his ideas about group behavior is quite striking as well. *The Logic of Collective Action* was first published in 1965, followed by a second edition in 1971, which included a new postscript in which Olson commented upon some of the significant reactions to the original volume. Those dates nearly bracket the crucial period of 1969 to 1973 in which the

2. Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J. L. ECON. & ORG. 59, 60 (1992).

3. *Id.* at 61.

4. See Richard Revesz, *The Race to the Bottom and Federal Environmental Regulation, A Response to Critics*, 82 MINN. L. REV. 535, 542 (1997) (“The logic of collective action would suggest that the large number of citizen-breathers, each with a relatively small stake in the outcome of a particular standard-setting proceeding, will be overwhelmed in the political process by concentrated industrial interests with a large stake in the outcome In fact, the logic of collective action makes it difficult to explain why there is any federal [environmental] regulation at all.”). See, e.g., JERRY L. MASHAW, *GREED, CHAOS AND GOVERNANCE* 33 (1997) (“According to interest group theory, groups representing such diffuse interests as those ‘concerned about the environment’ should never form, much less be effective.”); Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL’Y REV. 553, 566 (1997) (The fact that “public interest” groups, including environmental interest groups, “proliferated and prospered” in the 1960s and 1970s constitutes a “major predictive failure of the new public choice theorists,” who “predicted that such interests either would be unable to mobilize and sustain themselves as organizational entities or, once established, would be politically impotent.”). Schuck cites OLSON, *THE LOGIC OF COLLECTIVE ACTION*, *supra* note 1, as the “classic account” of this erroneous prediction. *Id.* at n. 55.

5. Legal scholars did not begin acquiring significant equity positions in rational choice theory until the late 1980s, but since then its impact has been tremendous, influencing scholarship in areas of constitutional law, statutory interpretation and theories of judicial review, among others.

Congress was enacting the BEST. Yet in the 1971 postscript Olson made no notice of the fact that his new approach to group behavior was just then being disproved in Washington, only a few miles down the road from where he was writing in College Park, Maryland.

If the rational choice approach cannot explain the BEST, what approach might do better? I have not made a systematic review of the vast number of works written within the pro-environment community in the past thirty years. Nevertheless, it seems undeniable that those who broadly support the BEST and subsequent environmental quality legislation overwhelmingly favor the view that the BEST must be understood as instances in which the country deliberated over what principles were necessary for the common good or were otherwise morally required. Farber, for example, argues that environmental laws are best understood as the product of a “republican moment,” defined as a period characterized by “(a) widespread public participation, taking the form of social movements and voluntary associations; and (b) utilizing a moral discourse appealing to concepts of the common good.”⁶

This republican moment explanation constitutes one variant of a group of theories of republicanism and deliberative democracy that have been extensively studied in recent years.⁷ As applied to the

6. Farber, *supra* note 2, at 66. (Professor Farber borrows this definition from James Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitution Order*, 139 U. PA. L. REV. 287, 311 (1990)).

Other distinguished environmental scholars share the view that environmental law predominantly reflects moral or other-regarding values, not selfish ones. Mark Sagoff, for instance, argues that:

One reason for [our environmental laws] is that Americans have moral convictions about the environment Private and public preferences . . . belong to different logical categories. Public ‘preferences’ do not involve desires or wants, but opinions or beliefs. They express what a person believes is best or right for the community or group as a whole.

Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1398, 1411 (1981). Although speaking about content, not causes, Don Hornstein has claimed:

For all its ungainliness, the substance of modern environmental law is a composite of moral decisions—about the levels of protection to be accorded such noncommodity values as human health, aesthetics, and responsibility toward nonhuman species and ecosystems—and instrumental decisions about the best way to achieve these morally based goals.

Donald Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 631 (1992).

7. Republican moment accounts are distinctive in that they interpret American history as punctuated by periods in which our politics has operated according to the republican tradition of deliberation and consensus, surrounded by times of everyday, ordinary politics when it does not. Because the results of republican moments arise out of these special and superior circumstances, they are entitled to special respect. The leading presentation of this vision of

BEST, the opposition between such explanations on the one hand and rational choice explanations on the other hand comprise but a specific instance of a larger debate over how the political process functions and, even more significantly, how it might function when it is working well. One view sees law as animated by public regarding values, the other by self-interested ones. One view sees law as the result of deliberative processes in which political actors persuade other actors of the correctness of certain policies, the other as the result of exchanges that occur because actors perceive them as in their own self-interest.

Standing as they do as one of the most noteworthy legislative accomplishments of this century, working through the causes for the BEST amounts to both a worthwhile undertaking in its own right, and a potentially significant contribution to the larger debate. This essay will not be able to articulate a full causal explanation for the BEST. Its more modest ambition, instead, is to show that the easy dismissal of rational choice explanations prevalent in the environmental literature is unjustified. Nothing in rational choice theory debars groups of environmentally inclined individuals from achieving their (self-interested) collective objectives. After arguing this point generally, the paper will identify several mechanisms—each consistent with the basic tenets of rational choice—that might account for the political success of environmental interests during the BEST time frame, and it will present some suggestive evidence that the costs and benefits of collective action confronting such individuals during this time frame were consistent with those mechanisms operating effectively. All in all, as a first cut at the problem, it is quite plausible to conclude that the rational choice approach to collective action can provide a sound explanation for the BEST, one in which these laws were driven primarily by citizen self-interest.⁸

dualist democracy is BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

8. As indicated, however, this paper will not finally resolve whether the rational choice or the republican moment explanation is superior. For one thing, although it explains why the environmental movement might be able to achieve legislative goals, it does not explain why the industrial interests arrayed against costly environmental legislation lacked the ability to thwart those efforts. No equilibrium model is specified, in other words. It is not my objective, however, to claim that the rational choice approach is right and the republican moment approach wrong. To the contrary, I want precisely to question the sharp dichotomy that is often drawn between the two. The last section of the paper makes a few brief remarks about the desirability of raising that question.

II. INTEREST GROUP THEORY AND ENVIRONMENTAL LAW

A. *Interest Group Theory*

Economics studies human exchanges and interactions with the help of some simplifying assumptions about human behavior and the concept of Pareto efficiency, defined as a state in which no individual position can be improved upon without making someone else worse off. If all the items that individuals value were available for exchange in perfectly functioning markets, these voluntary exchanges would achieve Pareto efficiency on their own. Few individual markets function perfectly, however, let alone the entire system of markets, and thus emerges a role for government and for public policy: to improve on the workings of existing markets so that the combined effects of markets and public policy more closely approximate a Pareto outcome.

Welfare economists have for some time analyzed alternative public policies with respect to their ability to produce more efficient outcomes. Only in the past thirty years, however, have economists and political scientists analyzed the political arena in which those policies are produced with the same tools employed to analyze other interactions. The key conceptual breakthrough enabling economic theory to enter this arena was straightforward: simply apply the same assumptions used to analyze marketplace behavior to the behavior of political actors. Regardless of their specific roles—consumers, voters, legislators, presidents, bureaucrats—all individuals are treated under a common set of assumptions. They are goal-oriented (the motivational assumption), they are able to rank different combinations of those goals in a manner that satisfies the conditions of transitivity and completeness (the rationality assumption), and they make choices among alternative courses of action according to which choice promises the more highly ranked bundle of preferences (the behavioral assumption).

The Logic of Collective Action is one of the seminal contributions to the economic approach to politics, or to the rational choice approach, as it has come to be known. Olson analyzed the behavior of individuals in a sphere of activity essential to politics: group activity striving to achieve benefits that would be shared by non-contributors as well as contributors to the group effort. Arguing that most people would approach the decision to contribute or not by weighing the costs and benefits, Olson predicted that groups would be hard to organize when the group activity promised to produce

benefits that were spread out among beneficiaries in amounts that are small compared to the costs of securing them. Each individual would see that her contribution to the group effort was not going to affect her own personal fortunes—either others would contribute enough so that she could free-ride on their efforts or others would not contribute and the minimal amount she was willing to contribute would not put the effort over the top. In either case, no benefits to her would be produced by her contribution, and hence it would be irrational to join in the group effort.

Groups whose benefits were diffuse in this sense were labeled “latent” groups by Olson because the shared group benefit was likely to remain unrealized. In contrast, groups that contain members with more concentrated benefits would be more likely to organize, either because a single member has enough at stake in the benefit to underwrite individually the costs of securing the group benefit, or because a subgroup of members within the larger group is small enough so that they can effectively agree to pool sufficient resources to produce the benefit. Compared to latent groups, such groups as these have a comparative advantage with respect to their ability to organize to advance group interests. Olson termed these groups “privileged” and “intermediate,” respectively.

Within rational choice, a field of interest group theory has grown up on these Olsonian foundations. The interpretation of the theory that supports Farber’s conclusions takes Olson’s analysis to imply that groups such as environmental groups, whose benefits from environmental protection legislation are unconcentrated or diffuse, will not mobilize within the political arena to advance their group interests. It would be economically irrational, for example, “for individual farmers to join a group seeking higher farm prices when benefits from price increases would be enjoyed by all farmers, even those who contribute nothing to the group. Similarly, it would be irrational for an individual consumer to become part of organized attempts to lower consumer prices, when all consumers, members or not, would reap the benefits.”⁹

The prediction that large, diffuse groups are at a disadvantage in the political realm compared to smaller groups with more concentrated interests suggests that the “general thrust” of politics “is pretty grim.” Policy debates quite often pit the interests of latent

9. Burdett A. Loomis & Allan J. Cigler, *Introduction: The Changing Nature of Interest Group Politics*, in *INTEREST GROUP POLITICS* 1, 8 (Burdett A. Loomis & Allan J. Cigler, eds., 4th ed. 1995).

groups—broad, common interests—against those of more concentrated groups. In those situations, “the public goods that government ought to be providing . . . are seldom passed by the legislature, because the demand for them is usually not strong and legislators gain too little from sponsoring them Conversely, rent-seeking statutes—primarily, concentrated benefit, distributed [i.e., diffuse] cost measures—seem inevitable.”¹⁰

Interest group theory and its “pretty grim” thrust appear to have direct relevance to environmental policy, where legislative policy debates classically pit groups that stand to receive widely diffuse benefits, such as clean air or clean water—all citizens who would benefit from better environmental quality—against more concentrated groups—the industries who will bear the costs of clean-up. The opposite of rent-seeking statutes, these are concentrated cost, diffuse benefit measures. It seems to follow that environmental groups will remain latent.

So goes one standard account of Olson’s approach to interest group theory. As stated so far, however, this account is far from a complete retelling of Olson’s argument, or of interest group theory generally. A “*ceteris paribus*” clause is missing. Olson only concluded that concentrated benefit groups will have an easier time organizing to advance their interests than diffuse groups, other things being equal. Because things are seldom equal in the context-rich world of politics, it is entirely possible that a presumptively latent group can overcome its collective action problems to organize. Thus, an observation that some large, diffuse group has successfully organized is not by itself inconsistent with the theory.

A little historical context can reinforce this point. When *The Logic of Collective Action* first appeared in 1965, the whole idea that large group collective action was a *problem* requiring an explanation amounted to a frontal assault on the then-prevalent pluralist approach to the politics of groups. The then-prevalent theory of groups simply assumed, either tacitly or explicitly, that individuals who shared a common interest in political outcomes would combine

10. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 294 (1988). See also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?* 101 YALE L.J. 31, 39 (1991) (“Large diffusely interested groups will tend to be underrepresented.”).

forces to advocate and lobby for those outcomes.¹¹ Olson's logic challenged this view, arguing that collective action becomes problematic when viewed through the lens of rational choice's basic economic assumptions. "The achievement of any common goal or the satisfaction of any common interest means that . . . no one in the group is excluded from the benefit or satisfaction brought about by its achievement" whether or not the group member contributed to that achievement.¹² If an individual benefits whether or not she contributes, why contribute?

Olson, however, certainly did not believe that large groups could never organize, and his book is laced with examples of such large group activity.¹³ He only believed that, in light of the incentives, how such groups did successfully organize warranted further examination. Confronted with the choice of enjoying the fruits of the collective achievement without costly contributions from himself versus enjoying those fruits minus the costs of his contributions, a self-interested individual would choose to free ride on the efforts of others—*unless other incentives than the individual's anticipated share in the collective benefit were at play in the situation*. A good deal of his book was devoted to explicating those other incentives, which he termed "selective incentives."¹⁴

Other scholars have produced an extensive and growing body of literature exploring in detail how groups that might otherwise remain latent manage to overcome the collective action problem. The vast majority of this literature stands firmly within the research tradition that Olson's approach established, elaborating especially on the various kinds of selective incentives that groups provide their membership in order to organize large groups effectively.

11. See OLSON, *supra* note 1, at 16-22. See also Schuck, *supra* note 4, at 563. ("In [the pluralist] view . . . individuals who share common values and interests coalesce easily into groups; such group formation reflects individuals' natural social and political propensities.")

12. OLSON, *supra* note 1, at 15. See also *id.* at 16 ([T]he "efforts [of the individual member in the typical large organization] will not have a noticeable effect on the situation of his own organization, and he can enjoy any improvements brought about by others whether or not he has worked in support of his organization.")

13. Olson in fact devoted an entire chapter of his book to explaining how collective goals can be achieved as the by-product of organizations that provide selective incentives, and he also salted his discussion of group dynamics with references to selective incentives that could overcome the problem of latency. See *id.* at 132-167.

14. Olson also offered coercion as a second means whereby groups could organize, *id.* at 48, but all the actions discussed in this essay are voluntary, so this explanation is not relevant to the present discussion.

At this point, a long string citation to the interest group literature on selective benefits might be adequate to rebut the claim that interest group theory implies environmental groups will not organize. Farber's second prediction—if rational choice is correct, environmental statutes will not exist—requires further attention. While groups such as NRDC, EDF, NWF, Defenders of Wildlife, LCV and others certainly are instrumental to environmental policy successes as a matter of historical fact, explaining the organizational success of those groups is at best one step removed from explaining environmental policy success.¹⁵

It is commonly believed or assumed that interest groups influence policy by virtue of their ability to raise financial resources. Groups then invest those resources in campaign contributions, political advertising, or in other expenditures designed to affect elections. On this account, environmental groups may be able to organize, but they remain at a significant comparative disadvantage in raising money to be used in this way, compared to their opponents. If money explains policy results, environmental interests should still lose.

Any such conclusion, however, rests on an additional fallacy. The critical question with respect to political efficacy does not concern fund raising ability alone. The critical issue, rather, is whether a group has access to effective tools to advance group interests in the political arena. The structure of political life is fundamental here. In a representative democracy, interest groups do not make policy directly, legislatures do. Consequently, groups must provide incentives to legislators to act as their agents. For concentrated groups the main tools available are indeed financial. Legislators, who are presumed by the economic approach to politics to be motivated by re-election, are expected to be responsive to the prospect of groups assisting them.

Large groups, however, have available to them something that small groups lack: the ballot box power of the members of the group. Their ability to marshal a significant number of votes can be a more

15. While the influence of environmental organizations in shaping federal statutory law is manifest later in the Environmental Era, Elliott, Ackerman and Millian have argued that environmental groups lacked significant influence in shaping the BEST. Because these groups were still nascent political actors in the 1969-73 time period, they lacked the stature that would have permitted them to validate more moderate environmental laws. Their absence from the political bargaining table helps explain why the BEST contained such stringent regulatory requirements. See E. Donald Elliott et. al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313 (1985).

effective tool for advancing interests in the political arena than the ability to marshal financial resources, which may or may not be convertible into the appropriate currency.

A model developed by Arthur Denzau and Michael Munger makes the point well. Their model contains three actors—legislators seeking to maximize votes and who can supply public policy, organized interest groups who have no votes but can supply campaign resources, and individuals who cannot supply campaign resources but who do have votes. They show in straightforward fashion that if voters are informed (about their preferences and the relation of policy proposals to those preferences), interest groups who have campaign resources but no votes cannot influence policy. “The result, then, is that interest group policy manipulation is constrained by the preferences of the geographic constituency.”¹⁶

Any complete statement of the interest group approach to understanding the passage of environmental legislation must thus recognize both (1) that even large, diffuse groups can enjoy some *organizational* success, if the conditions are right and (2) that any attempt to predict a group’s *policy* success must evaluate the ability of the group to marshal votes at the ballot box. When these refinements are applied to the question of the BEST, it becomes quite plausible to think that rational choice can provide an explanation for their enactment. Part II(C) sketches how that explanation would go.

B. *Self-Interest*

Before examining the rational choice approach to the BEST, I need to clarify an apparent inconsistency. I have claimed that the economic, or rational choice, approach to politics and the republican moment approach differ with respect to whether political actors were motivated by self-interest or by regard for the public as a whole.¹⁷ I have also claimed that rational choice makes three core assumptions about human action, but motivation based on self-interest was not among them.¹⁸ This section amplifies on the role that self-interest plays in the economic approach to politics and in the distinction between that approach and its republican competitors.

16. Arthur Denzau & Michael Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 AM. POL. SCI. REV. 89, 102 (1986).

17. See discussion *supra* pages 31-32.

18. See discussion *supra* page 33.

The assumptions stated earlier can be summarized by saying rational choice assumes that individuals pursue their preferences in a rational manner.¹⁹ Insofar as rational choice theory in its general form is concerned, no further assumptions are made about, and no limitations are placed upon, the *content* of the preferences that individuals are assumed to pursue. Debra Satz and John Ferejohn have employed the term “thin-rationality” to describe this characteristic of general rational choice theory.²⁰

Let me now define rational choice *models* as applications of the core assumptions of rational choice to particular choice situations. Such models typically *do* make further assumptions about the content of those preferences beyond the core assumptions of rational choice theory. In the terminology of Satz and Ferejohn, they exhibit “thick-rationality.” Niskanen, for instance, hypothesizes that bureaucrats seek to maximize budgets, because that maximizes their power, influence and prospects for future income,²¹ and Mayhew postulates that elected officials seek to maximize their chances of re-election.²²

One of the most prevalent thick-rationality assumptions is that individuals have preferences that are “selfish,” or that reflect their “self-interest.”²³ By itself, however, this statement remains unsatisfactorily vague, because “self-interest” can have a number of different meanings. Here it is useful to identify three different ways it which it is used. The thinnest conception of self-interest assumes

19. Although I think there is broad consensus that the three assumptions identified earlier, *see* discussion *supra* page 33, make up the core of rational choice, there are lively and on-going debates within the field as to the necessity of elements of each of them. Are models that drop the maximizing feature of the behavioral assumption, for example, and replace it with Simon’s concept of satisficing, entitled to be called “rational choice” models? Are models that drop the assumption that individuals evaluate future prospects according to their expected utility, and replace it with the heuristics of Kahneman and Tversky, or with the principle of minimax regret, properly called “rational choice” models? Are models that do not retain methodological individualism, but rather acknowledge that certain higher-order social facts, such as institutions, need not be explained by individual behavior alone, entitled to be called “rational choice” models? These debates are peripheral to the contest between public-regarding deliberative accounts of legislation, on the one hand, and rational choice accounts on the other.

20. Debra Satz & John Ferejohn, *Rational Choice and Social Theory*, 91 J. PHIL. 71, 84 (1994).

21. WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

22. *See generally* DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

23. This assumption is so prevalent, in fact, that some synthesizers have concluded that it belongs within the core of the rational choice approach. *See* Kristen Renwick Monroe, *The Theory of Rational Action: Its Origins and Usefulness for Political Science*, in *THE ECONOMIC APPROACH TO POLITICS* 1, 4 (Kristen Renwick Monroe ed., 1991).

only that individuals act to maximize their own well-being, however they experience it. Altruism, concern for the state of society, and additional other-regarding values can be a source of such individual well-being, often called psychic well-being. This conception rules out very little as a potential source of preferences for individuals, although the mechanism through which states of affairs generate preferences is restricted to influencing the individual's own well-being. This implies that people do not choose actions purely "for their own sake," or simply because that action expresses a value, or because it complies with some social norm, or because of considerations such as Sen's idea of commitment.²⁴ I will refer to this conception as *broad self-interest*.

The next two conceptions of "self-interest" are thicker. Both might be considered species of *egoism*. The thinner of the two assumes that individuals choose actions on the basis of anticipated effects on well-being that the individual experiences directly, not indirectly. Under this conception, which I will call *broad egoism*, various kinds of psychic well-being are still permitted, such as the feelings of rejuvenation produced by wilderness experiences, the calm produced by a hour spent gazing at the breakers along a shorefront, or the warm glow one may experience from participating in a winning political campaign. However, Sen's sympathy²⁵ and other psychological states produced by knowing that someone else's welfare has been improved are not included in broad egoism. Models adopting the assumption of broad egoism assume that individuals do not choose actions on the basis of such other-regarding effects.

A still thicker conception is *material egoism*. Material egoism limits the preferences assumed to form the basis of individual action to those that contribute to material well-being, either directly through income or wealth effects or indirectly by providing something that can be readily converted to income or wealth or that substitutes for something that would have to be purchased. Warm

24. Sen defines commitment as "a person choosing an act that he believes will yield a lower level of personal welfare to him than an alternative that is also available to him." Amartya Sen, *Rational Fools: A Critique of the Behavioral Assumptions of Economic Theory*, in *BEYOND SELF INTEREST* 25, 32 (Jane J. Mansbridge ed., 1990). Sen distinguishes this from sympathy. "When a person's sense of well-being is psychologically dependent on someone else's welfare, it is a case of sympathy." *See id.* Similar distinctions would need to be drawn for expressive values and social norms. To the extent that expressing values or complying with norms contributes to a person's well-being, and the action is not being undertaken despite its adverse effect on well-being, such choices are consistent with the broad self-interest.

25. *See id.*

glows and psychic enjoyment of the environment do not affect choices, nor do sympathies or the other-regarding values excluded by broad self-interest.

As noted a moment ago, modelers of political activity generally do not employ thin rationality in their models. Instead they adopt thick conceptions of self-interest to gain several possible advantages. Wielding Occam's Razor, they prefer the most parsimonious set of assumptions that can adequately explain the phenomena, so the fewer types of preferences the better. Modelers also often make thicker assumptions because they believe them to be true. For instance, they believe that, at least as a good, testable approximation, legislators are motivated primarily by the desire to be re-elected, so that a model employing that assumption will produce predictions that approximate the real world. Finally, thicker assumptions produce models that are more readily falsifiable than those based on thinner assumptions because they often rely upon preferences that have more easily observable indicators than those permitted by more thin-rational accounts.²⁶

Some rational choice modelers may value thickness to such an extent that they eschew thinning out their accounts of rationality in the face of apparent contradictions. There is an obvious tension here because descriptive accuracy is also a valuable asset in a theory of political outcomes, especially when explanation of the underlying causal mechanisms of those outcomes, rather than mere prediction of them, counts as a goal. "Sometimes the world is messy, and the most parsimonious explanation is false."²⁷ For those who believe that material egoist preferences are much too narrow to describe human behavior, and that models based on them will produce false results, the tension between generating testable hypotheses with thick assumptions and employing more realistic assumptions can be parodied. For instance, Justice Breyer (then Professor Breyer) did so when he observed that "insofar as interest group theory is interesting, it may be false, and insofar as it's true it doesn't seem very interesting."²⁸

26. For instance, Olson refused to incorporate moral incentives into his analysis because he believed that "it is not possible to get empirical proof of the motivation behind any person's actions; it is not possible definitely to say whether a given individual acted for moral reasons or for other reasons in some particular case. A reliance on moral explanations could thus make the theory untestable." See OLSON, *supra* note 1, at 61.

27. Jon Elster, *Selfishness and Altruism*, in BEYOND SELF INTEREST 44, 45 (Jane J. Mansbridge ed., 1990).

28. Stephen Breyer, *Roundtable Discussion*, in THE POLITICAL ECONOMY OF

The second half of Justice Breyer's quip gestures toward the manner in which the boundaries between rational choice accounts and some of the alternatives tend to blur as the concept of self-interest thins out. If "having a taste" for altruism, or for doing one's duty counts as a self-interested preference, what is the point of arguing whether people are motivated by self-interest or by altruism or duty?²⁹ In the present context, if we permit psychic satisfaction that individuals may experience from struggling for moral or other-regarding values to count as a component of an individual's well-being, it may well be impossible to distinguish people who are acting on selfish interests (as just defined) from those acting because they are persuaded by other-regarding reasons.

Of course, what is ultimately at stake here is more than a desire to keep rational choice interesting. At stake, rather, is our interest in engaging the issues that actually separate people when they debate the reasons why we have the environmental laws that we do, as well as how politics in general functions. At least as articulated by the republican or deliberative democracy literature, the crucial boundary line lies between egoism as the motivator of human decisions on the one hand, and either thinner conceptions such as broad self-interest or public-regarding motivations on the other.³⁰ Are the BEST to be explained as the product of individuals trying to satisfy pre-existing egoistic preferences or are they to be explained as individuals first suspending the pursuit of those preferences, subsequently reasoning

REGULATION: PRIVATE INTERESTS IN THE REGULATORY PROCESS 282 (Federal Trade Commission 1984).

29. One study of the behavior of persons who harbored Jews at great personal risk during the Second World War sought to examine whether they did so in spite of its impact on their own well being—the altruistic explanation—or because of that impact—the rational choice explanation. "The argument that altruism is a 'psychic good' is . . . an often cited explanation of altruism. Do altruists simply have a taste for helping others, a taste which produces an unusual utility function? We found this explanation both the most powerful and the most frustratingly tautological. It is extremely difficult to operationalize in a way that allows one to set a test by which it can be reliably accepted or rejected." Kristen Monroe et. al., *Altruism and the Theory of Rational Action: An Analysis of Rescuers of Jews in Nazi Europe*, in *THE ECONOMIC APPROACH TO POLITICS* 317, 326 (Kristen Renwick Monroe ed., 1991).

30. According to republican theory, a citizen exhibiting the necessary civic virtue will possess a "willingness . . . to subordinate their private interests to the general good." Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 18 (1986) (quoting G. STONE ET AL., *CONSTITUTIONAL LAW* (1986)). "Civic virtue can be understood as . . . the motivation to deal with public questions by sincere engagement in deliberative colloquy aimed at discernment of the general good . . ." *Id.* at 58. "Political actors are not supposed to come to the process with preselected interests The republican belief in deliberation counsels political actors to achieve a measure of critical distance from prevailing desires and practices, subjecting those desires and practices to scrutiny and review." Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-49 (1988).

together about what is best for the country as a whole, and finally reaching a consensus?³¹

With this groundwork laid, the thesis of the next section of this paper (and the main thesis of the paper as a whole) can be succinctly stated: a plausible case can be made that the BEST are the product of individuals rationally pursuing egoistic preferences.³² Such an explanation can certainly not be dismissed on the kind of logical or deductive grounds suggested by Farber and others, and it is consistent with a good deal of what we know about people's preferences during the BEST enacting period. In order to test republican moment theories against rational choice theories, however, we will need a much deeper inquiry into actual historical, social and cultural circumstances of the BEST period than this brief essay can supply.

C. *A Rational Choice Account of the BEST*

According to rational choice, whether individuals contribute to collective activities that promote environmental quality turns on the costs and benefits involved, and these depend upon the precise "contribution" being considered.

One such contributing action might be joining an environmental organization, as many individuals joined environmental organizations toward the end of the 1960s and early 1970s.³³ Rational choice

31. In the best accounts of deliberative democracy, reaching consensus is neither assumed nor required to occur every time a public issue becomes subject to deliberative debate. See, e.g., John Rawls, *The Idea of Public Reason*, in *DELIBERATIVE DEMOCRACY* 93, 115 (James Bohman & William Rehg eds., 1997) ("Close agreement is rarely achieved, and abandoning public reason [i.e., deliberation] whenever disagreement occurs in balancing values is in effect to abandon it altogether A vote can be held on a fundamental question as on any other; and if the question is debated by appeal to political values and citizens vote their sincere opinion, the ideal is sustained."). As the product of a republican moment, however, the BEST would seem to be one of those occasions for which republican environmental theorists would wish to claim consensus had been achieved.

32. The next section begins, in fact, by restricting preferences to those subsumed under material egoism only. It then expands the permissible preference set to egoist preferences generally. Among other things, this expansion provides room for Carole Jean Uhlaner's "relational goods." "Relational goods are goods that can only be 'possessed' by mutual agreement and after appropriate joint actions by a person and specific other people (or people from a specific set.) For example, friendship is a relational good; one (non-delusional) person cannot decide unilaterally to be a friend. Sociability, solidarity, and many instances of norm fulfillment also involve relational goods." Carole Jean Uhlaner, *What the Downsian Voter Weighs: A Reassessment of the Costs and Benefits of Action*, in *INFORMATION, PARTICIPATION AND CHOICE* 67, 75 (Bernard Grofman ed., 1993).

33. See text *infra* at note 54.

explanations have been offered for the considerable membership spurt during this period, but these are not our main focus here.³⁴ As stated earlier, the critical contribution that environmentally inclined individuals made during this period was “voting environmental,” not sending a check to the NWF in response to a membership drive, so it is the rational choice account of this action that will constitute our focus.³⁵

The decision to vote is one of the most studied issues in rational choice, and to this day there is no unanimity on the correct way to understand it. There is, however, a fairly broad consensus on how to analyze it or how to break the decision into its components.³⁶ An important article by Riker and Ordeshook³⁷ identified those components as: $R = pb - c + d$, where R equals the reward from voting; b equals the individual benefits should her candidate prevail; p equals the probability that the individual's vote will be decisive; c equals the costs of voting; and d equals the benefits that accrue as a result of voting per se.³⁸

Including the d term in the Riker and Ordeshook equation permits including non-material egoistic preferences in the rewards from voting. The most compelling rational choice accounts of the BEST include such preferences. It is useful to develop the case for

34. For a summary of the explanations that have been offered for the rise of environmental interest groups, rational choice and otherwise, see Helen M. Ingram et. al, *Interest Groups and Environmental Policy in ENVIRONMENTAL POLITICS AND POLICY* 115, 117-25 (James P. Lester ed., 2d ed., 1995).

35. Claiming that willingness to vote was the crucial action is not meant to belittle other aspects of the environmental movement's efforts to influence public policy, which included increasingly sophisticated lobbying operations in Washington. See, e.g., Robert Cameron Mitchell, *From Conservation To Environmental Movement: The Development of the Modern Environmental Lobbies*, in *GOVERNMENT AND ENVIRONMENTAL POLITICS* 104-06 (Michael J. Lacey ed., 1989). These other efforts would not themselves have been sufficient, however, without the ballot power of environmentalists behind them. On the rational choice hypothesis, such efforts were additional components of political entrepreneurship, as the leaders of the national organizations attempted to cash in on the resource potential available in environmentalism.

36. Once again, the unsettled waters of rational choice prevent any claim of complete unanimity. For a review of the various treatments of the voting decisions, see Uhlaner, *supra* note 32, and John Aldrich, *Rational Choice and Turnout*, 37 *AM. J. POL. SCI.* 246 (1993). Aldrich, a distinguished student of elections, doubts that the voting decision is a very good instance of rational choice at all because it is a low-cost, low-benefit decision to which the rational choice calculus of costs and benefits may not be well suited.

37. William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 *AM. POL. SCI. REV.* 25, 28 (1968).

38. See Aldrich, *supra* note 36 at 252; MELVIN J. HINICH & MICHAEL C. MUNGER, *ANALYTICAL POLITICS* 144-52 (1997).

the BEST, however, by first examining the nature of the purely material egoistic account. Therefore, this section proceeds by examining the nature of the p , b , and c terms first. Although ultimately less plausible than accounts that include d , scenarios under which material egoism alone accounted for the BEST are not impossible.

Without d , the decision to vote environmental reduces to a question of whether or not pb changed in the crucial enacting period such that it became greater than c . Such a change might occur through an increase in b , an increase in p , or both.

For many Americans, the value of b was increasing, perhaps substantially, during the 1960s. During that decade, the environmental movement broadened its organizational and conceptual foundations, adding to its traditional emphasis on conservation and natural resources a new and vital attention to the relationship between the environment and human well-being. People began paying especially close attention to adverse environmental impacts on human health. "While the public interest in natural environments rested on aesthetic objectives, the concern for pollution had its roots in new attitudes toward the biological environment and human health."³⁹ By the 1970s, these effects on human health of environmental pollution had come to dominate the policy debates over environmental policy, but the foundations for this emphasis were being laid in the 1960s.

Rachel Carson's *Silent Spring*, published in 1962, signaled this emphasis perhaps more clearly than any other single event. Carson "endeavored to make the problem of pesticide use as meaningful as possible to the ordinary person; hence her use of the silent spring metaphor and her emphasis on DDT's potential effects on human health."⁴⁰ Additional noteworthy developments in the 1960s included mounting evidence out of California associating automobile emissions with smog, and smog with adverse health effects. Also, water pollution effects were widely publicized including (1) large fish kills in the Passaic River in New Jersey from pollution that also threatened drinking water and (2) high levels of radioactive contamination in rivers in southwestern Colorado and northwestern New Mexico.⁴¹ In short, "the potential threat to health and life posed

39. Samuel P. Hays, *Three Decades of Environmental Politics: The Historical Context*, in *GOVERNMENT AND ENVIRONMENTAL POLITICS* 19, 24-25 (Michael J. Lacey ed. 1989).

40. Mitchell, *supra* note 35, at 86.

41. See JOSEPH M. PETULLA, *AMERICAN ENVIRONMENTAL HISTORY* 411-12 (2d ed.

by many of the pollution issues allow[ed] the [environmental] groups to motivate contributors by portraying the potential losses if these conditions are allowed to continue."⁴²

These health interests were complemented by rising interest in the movement's more traditional aesthetic values of wilderness and recreational areas, which were perceived as coming under increasing threat during this period as well. The Sierra Club had "gone national" in the 50s and early 60s on the basis of fights against Echo Park Dam which threatened Dinosaur National Monument in Colorado, and then against the damming of the Grand Canyon.⁴³ As individuals came to see their health, aesthetic and recreational values increasingly under attack from activities that polluted the environment or altered natural landscapes, the benefit they associated with actions to protect the environment also increased.

The growing benefits associated with improvements in environmental quality contributed to a growing demand for environmentally protective measures that was further assisted by the effects of rising incomes. Research indicates that environmental quality behaves like a normal good, so that demand for it increases as incomes increase.⁴⁴ The demand for environmental quality went up in the 1960s due to this income effect because the decade of 1960-

1988). A year before publishing *Silent Spring*, Carson had authored an article entitled, "How Safe Is Your Drinking Water?" in *Redbook* (Aug. 1961).

42. Mitchell, *supra* note 35, at 95. The motivational force of anticipated losses in health may be an even stronger than that of gains. See Daniel Kahneman & Amos Tversky, *Rational Choice and the Framing of Decisions*, in *THE LIMITS OF RATIONALITY* 67-70 (Karen Schweers Cook & Margaret Levy eds., 1990). See also John Hansen, *The Political Economy of Group Membership*, 79 AM. POL. SCI. REV. 79, 81 (1985) ("In sum, people are more easily mobilized in response to threats than in response to prospects.") Some would argue that incorporating such arguments as this into the analysis violates the expected utility condition that is part of rational choice, but the effect has considerable experimental verification. The role of such arguments in rational choice's "core" is contested territory. See *supra* note 19.

43. Hays argues that the first element of modern environmentalism to appear, "dominating the years from 1958 to 1965, was the drive to manage resources as natural environments for human enjoyment." Hays, *supra* note 39, at 28. Although it was the "new concerns for public health" that soon came to drive policy debate and calls for action. *Id.* at 34.

44. See, e.g., Matthew E. Kahn & John G. Matsusaka, *Demand for Environmental Goods: Evidence from Voting Patterns on California Initiatives*, 40 L. & ECON. 137 (1997). Mitchell notes that, with the exception of the National Wildlife Federation, "environmental contributors are disproportionately well educated and economically well off." He reports that in 1978, only 22 percent of the membership of national environmental organizations had household incomes below that national mean. Mitchell, *supra* note 35, at 98. Hays notes that rising incomes meant that "consumers had considerable discretionary income, which could be spent in many ways to make life more enjoyable. Environmental consumption was an integral part of this new direction of the economy." The public goods features of many environmental amenities meant, however, that collective action was necessary to provide them. Hays, *supra* note 39, at 26.

1970 saw the largest increase in per capita income the country has ever seen. During this period, median family income rose from \$27,384 to \$37,485 in constant dollars.⁴⁵

All of this suggests that by the time of the critical BEST enacting period of 1969-73, the value of the benefits, especially but not exclusively health benefits, that individuals stood to gain from legislative action that reduced environmental deterioration had increased substantially from previous levels, undoubtedly standing at an all-time historical high.

In terms of the logic of collective action, rising individual benefits from collective action may or may not produce collective action. Overcoming the collective action problem depends on the interaction of p , b and c . Olson's central point—that individual members of large diffuse groups would conclude that his or her individual contribution in fact could not make a difference—is equivalent to reasoning that p is very small, in which case $pb < c$, even for large values of b . So long as the individual believes her contribution is insignificant, even large values for b will not produce individual action to advance collective interests.

It is not a logical consequence of Olson's theory that an individual member of a large group must in fact conclude her effort is insignificant, however. Olson simply reasoned that this conclusion was likely, most of the time, in the case of large groups.⁴⁶ Even members of large groups can experience situations in which they believe that their contribution might be crucial, if enough other

45. See United States Census Bureau, Historical Income Tables – Families, Table F-7, (visited July 1, 1998) <http://www.census.gov/hhes/income/histinc/f07.html>. Figures are in 1996 dollars. This is by far the largest increase, in both absolute and percentage terms, during the postwar period. In 1950, median family income stood at \$23,365, and it was almost stagnant in the 70s and 80s, standing at \$40,079 in 1980 and \$42,400 in 1990. *Id.*

46. Olson does define *latent* groups to be those in which an individual's contribution to the collective effort is insignificant. In his words:

[A latent group] is distinguished by the fact that, if one member does or does not help provide the collective good, no other one member will be significantly affected and therefore none has any reason to react. Thus an individual in a "latent" group, by definition, cannot make a noticeable contribution to any group effort, and since no one in the group will react if he makes no contribution, he has no incentive to contribute.

OLSON, *supra* note 1, at 50. Had Olson equated latent groups and large groups, then the argument that some large groups can surmount the collective action problem without the aid of selective incentives would be contrary to Olson's reasoning. However, the best reading of Olson is that he did not view latent groups and large groups as synonymous, so that in fact both small latent groups and large non-latent groups are possible. For an excellent textual exegesis interpreting Olson's reasoning along these lines, see RUSSELL HARDIN, *COLLECTIVE ACTION* 38-49 (1982).

members of the group also contributed. To help identify situations in which individuals might well hold this belief, we can follow Russell Hardin in defining k for any group of size n , $k \leq n$, as the “minimum efficacious group,” or the smallest number of individuals who must contribute to the group effort in order for it to succeed.⁴⁷ Suppose that an individual believes that she and $k-1$ others are considering contributions to the group venture. In that circumstance, her contribution will make the difference between success and failure in the venture. If she contributes, and the others do, too, she receives $b-c$ from the group activity. If, on the other hand, she doesn’t contribute, she will receive 0. If she is sufficiently confident that the others will contribute, she gains more than she loses from contributing herself and therefore has an incentive to do so.

One situation in which an individual might have reason to believe that her contribution was crucial in this way occurs when $k = n$. In other words, the minimum efficacious group equals the size of the group as a whole. Each individual’s contribution is now crucial. In such a situation, each person knows that in order to achieve the group goal, she (and everyone else) will have to contribute. Free riding has been replaced by Ben Franklin’s advice to his fellow signers of the Declaration of Independence that “we must all hang together or we will assuredly all hang separately.”⁴⁸ Everyone, furthermore, is similarly situated, so everyone knows this. In such a situation, Shepsle and Bonchek argue that each person will make the following calculation:

If I don’t contribute, then I get a payoff of 0. If I contribute, and so does everyone else, then I get a payoff of $b - c > 0$. If I contribute, but someone else does not, then I get $-c$. Everyone else makes the same calculation. Everyone will realize that everyone in the group appreciates his or her own essential status, on the one hand, and that there is nothing to be gained by not contributing (aside from avoiding putting oneself at risk) on the other hand.⁴⁹

As k becomes less than n , it becomes less and less likely that any member will think her contribution to be essential, and less and less likely that any member will impute failure to achieve the group goal to any other specific person in the group. Shepsle and Bonchek

47. In that case, k satisfies the condition that $c(k-1) < C$, $ck \geq C$, where $C =$ the cost of obtaining the group benefit.

48. Benjamin Franklin, *Remarks at the Signing of the Declaration of Independence* (July 4, 1776), in JOHN BARTLETT, *FRANKLIN QUOTATIONS* 384 (Emily Morrison Beck ed., 1968).

49. KENNETH SHEPSLE & MARK BONCHEK, *ANALYZING POLITICS* 228-29 (1997).

reason, however, that the “Ben Franklin” effect can remain in play for at least some k 's less than n : “The general conclusion of this analysis is that the combination of strategic and psychological pressures that encourage contribution rise as k gets large relative to n .”⁵⁰ Expressed in terms of the Riker and Ordeshook equation, p can be greater than zero even for large groups, if the conditions are right.

In order for conditions in large groups to generate the Ben Franklin effect, an individual must believe both that her individual effort will succeed only if combined with a substantial majority of the other group members *and* that those other individuals also believe this. Without the second belief, she will have no reason to suppose that other members are aware of the possibility of large joint benefits if only they all pitch in. Large groups, however, frequently suffer from a low level of shared knowledge. Members of large groups can be unaware of who other group members are, they may be unable to gauge their combined strength, or they can be divided or ambivalent about the course of action that would best achieve their objectives. Any of these deficiencies can perpetuate group latency.

On the other hand, under conditions of increasing values of b , as existed during the 1960s for those who valued the health benefits and the aesthetic and recreational values associated with environmental amenities, a dynamic comes into play that improves the possibilities that latency can be overcome. As b is increasing for each such individual, so is the sum of these benefits, B , to all the individuals in the group. At some point, B becomes substantially larger than the total costs, C , of obtaining the collective benefit, even if b remains small in comparison to C . There is thus an opportunity for some individual to invest resources in solving the group's collective action problem. If a solution can be found for some amount, O , such that $C+O$ is still less than B , then it is possible that this problem solver and the group can arrange a mutually beneficial exchange, in which the problem solver expends O in order to overcome the collective action problem. Individuals in the group ought to be willing to pay, and the problem solver ought to be willing to accept, any amount between $B-C$ and O as payment for providing these services.

In one of the first reviews of *The Logic of Collective Action*, Richard Wagner suggested that political interest groups were often organized and maintained through the efforts of just such problem

50. *Id.* at 232.

solvers, whom Wagner called political entrepreneurs.⁵¹ In the appendix to the 1971 edition of his book, Olson gratefully acknowledged the contribution that the notion of political entrepreneurship made to the theory of collective action, seeing that the idea of an entrepreneur who would work to solve the collective action problem “does not contradict [the] logic [of the argument made in *The Logic of Collective Action*] or invalidate its conclusions, but rather enriches the argument, and makes it a better tool for the study of organization leadership and change.”⁵²

One special category of such political entrepreneurs are those who run for elected office. Under the conditions that existed in the 1960s, the potential electoral consequences were enormous for the entrepreneur who could convince members of a large group that electing him will promote the group’s environmental interests because the magnitude of the *b* term may then swamp whatever offsetting benefits individuals associate with the entrepreneur’s opponent. The group issue becomes politically salient.

In order to cash in on these potential electoral benefits, environmental group entrepreneurs needed to create a base of shared knowledge for members of the group, make believable projections of group success only if substantial numbers of group members acted together, and propose specific legislative actions to achieve that success. Under those conditions, an environmentally inclined individual could conclude that $pb > c$, both with respect to the decision to vote environmental and with respect to other possible contributions to the group cause.⁵³

51. Richard Wagner, “Pressure Groups and Political Entrepreneurs,” *Papers in Non-Market Decision Making* 1161 (1966).

52. OLSON, *supra* note 1, at 178. Thus, any implication in Farber, *supra* note 2, that political entrepreneurship is an addition to interest group theory that was either unaccounted for by Olson’s own analysis or somehow an alteration of the basic logic of collective action that underlies interest group theory is mistaken.

53. Professor Farber’s republican moment account of the BEST also relies heavily on political entrepreneurs but with the implication that they were tapping into republican motivations, not self-interested ones. Farber, *supra* note 2, at 65-67. Without empirical investigation, however, it is impossible to tell which motivations they were tapping. Jerry Mashaw states the relationship between political entrepreneurs and voters with more appropriate neutrality: “Rather than waiting for some demand to emerge from organized interests, entrepreneurial politicians pursued issues of interest to a broader electorate and used the voters’ positive responses to political advantage in seeking national office.” MASHAW, *supra* note 4, at 33. By referring to the electorate, Mashaw may be assuming that entrepreneurs typically tap interests of people who are already planning to vote, rather than organizing and getting to the polls groups of individuals not otherwise inclined to vote. The analysis in the text has not made that assumption. The Riker and Ordeshook equation seeks to

Evidence from the 60s and early 70s is highly compatible with the possibility that political entrepreneurs were recognizing the great electoral potential of the environmental movement. President Nixon and Senator Muskie, who in the BEST time frame was aspiring to be the Democratic nominee for president, repeatedly challenged each other for the mantle of chief environmental legislative advocate, and for good reason. In 1960, the then-existing seven national conservation groups had total membership of 124,000 (membership defined as dues paying). By 1969, total membership of these seven groups had grown to 819,000. By 1972, membership in eleven groups (adding EDF, NRDC, FOE and EA to the list, but with these contributing insignificantly to the total) equaled 1,127,000.⁵⁴ If we follow John Aldrich's reasoning that the act of voting is a low-cost activity,⁵⁵ we might well conclude that the number of individuals willing to join environmental organizations significantly understates the number willing to vote environmental. Were that number to be four times larger than the membership figures, for example, this suggests a potential voting bloc in the neighborhood of 4 to 5 million individuals. A little more than 73 million people cast votes for president in 1968.⁵⁶ The opportunity to grab the major chunk of a 5 - 7 % voting bloc would attract any elected official's interest. If the number of people willing to vote environmental more closely approximated the estimated 20 million individuals who participated in Earth Day on April 25, 1970, candidates would most definitely grasp the significance of the environmental issue in electoral terms.

Direct evidence as to how much priority voters gave to environmental benefits is scanty, but what information exists suggests a level of political saliency sufficient to make environmental issues a significant electoral force. One study reported by Dunlap, for example, shows 15% of the public indicated that they would probably not vote for a candidate if they disagreed with his or her environmental views.⁵⁷

Up to this point, the analysis has been examining why environmentally inclined individuals might find the estimated benefits of going to the polls to vote for environmentally preferable

analyze the choice between voting and not voting. If we instead assume that environmentally inclined individuals are already planning to vote, then the argument that environmental interests can explain the BEST becomes even more powerful. See text *infra* notes 58-60.

54. Mitchell, *supra* note 35, at 96 Table 2.2.

55. Aldrich, *supra* note 36.

56. LYN RAGSDALE, VITAL STATISTICS ON THE PRESIDENCY 100 Table 3.1 (1996).

57. Farber, *supra* note 2, at 67 n.12.

candidates sufficient to outweigh the costs of voting, as well as why candidates would attempt to create the necessary conditions so that such individuals would realize that voting was worth the effort. One might think that this is more than a theory seeking to explain the BEST needs to accomplish. If we instead took it as given that roughly 70 million individuals already intended to vote in 1968 and 1972, and that environmentally inclined individuals were sufficiently represented in those numbers, then an analysis of the hefty influence that environmental issues had in the Congress during this period does not have to explain why individuals came to believe that the benefits of voting outweighed the costs. It simply needs to explain why environmentally inclined individuals would choose the environmentally superior candidate once at the polls. For that job, it is not necessary to show how environmental interests were organized, but only to show why a voter would prefer an environmental candidate to her opponent.⁵⁸

A political entrepreneur who figures out that environmental issues are salient to enough voters can take advantage of citizen preferences for environmental quality even if environmental interests remain unorganized.⁵⁹ She does this by proposing a program that advances those interests, and bundles this program with positions on other politically relevant issues so as to swing environmental votes her way. So long as individuals who have already decided to vote desire environmental goods strongly enough, a political entrepreneur can swing votes her way without relying on the Ben Franklin effect at all, because the choice one faces at the polls—which candidate to vote for—depends upon the comparative attractions of the opposing candidate's platforms and policy positions, not upon some assessment

58. Denzau and Munger's model of voters, interest groups and representatives takes this approach. Under their model, voters remain unorganized. Whether representatives satisfy special interest group demands or the demands of their unorganized constituents depends upon whether the constituents are adequately informed about the consequences of legislative action for their own preferences. If they are, constituent preferences prevail over special interests. Denzau & Munger, *supra* note 16, at 102.

59. Trubeck and Gillen's analysis of the passage of the National Environmental Policy Act concludes that environmental interests prevailed despite being relatively unorganized at the time. "NEPA [and other BEST successes] were not the result of normal group politics. Rather, these laws emerged from a period in which mass attention had been drawn to environmental concerns through the media and the activity of politicians and policy entrepreneurs who worked from relatively narrow organizational bases." David M. Trubeck & William J. Gillen, *Environmental Defense II: Examining the Limits of Interest Group Advocacy*, in *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 195, 216 (B. Weisbrod et al., eds., 1978).

of *p*. Indeed, if the environmental interests are sufficiently strong, both candidates in a race may seek to appeal to these interests. Don Elliott, Bruce Ackerman and John Millian have suggested that these entrepreneurial dynamics were at play when Senator Edmund Muskie and President Richard Nixon each sought to gain the environmental high ground in 1969-71, even though environmental organizations were still relatively unorganized.⁶⁰

Finally, an even stronger rational choice case for the BEST can be made by expanding the permissible range of egoistic preferences beyond material ones alone, to include certain kinds of non-material egoistic returns to individual well being. In the Riker and Ordeshook equation, these are captured by the *d* term; in Olson's terminology, these are a subset of selective incentives or benefits that accrue only to participants in the collective activity.⁶¹ Selective benefits accrue to individuals by virtue of their participation in some group activity. It seems quite likely that they played a considerable role in the political potency of environmental interests being able to enact the BEST.

Individuals quite regularly experience positive feelings when acting in concert with others whose values they respect and share and whose opinions they value.⁶² Sharing bonds of friendship or solidarity with others creates incentives to respond to calls for support or assistance when others in the group ask for it.⁶³ These incentives can

60. Elliott et al., *supra* note 15, at 324-29.

61. OLSON, *supra* note 1, at 51 ("[O]nly a *separate and 'selective' incentive* will stimulate a rational individual in a latent group to act in a group-oriented way."). Olson conceived of political entrepreneurs for large groups as engaged entirely in the enterprise of producing selective incentives. *Id.* at 177. Different interpretations can be given to the content of the *d* term. In my opinion, accounts of the *d* term that incorporate a role for groups and entrepreneurs are superior to the more standard interpretation of *d* as simply "citizen duty." See, e.g., Riker and Ordeshook, *supra* note 37. When *d* is interpreted as citizen duty, the result is to explain voting behavior without any reference to candidate-specific information, such as the candidate's policy positions and the efforts of a campaign to mobilize voters, thus removing the politics from analysis of the most fundamental political action a citizen takes. Interpreting *d* in terms of allegiance to groups and the efforts of leaders to advance group interests by increasing support for candidates who take preferred policy positions puts political activity back into the equation. See, e.g., Aldrich, *supra* note 36; Ulhaner, *supra* note 32.

62. Olson recognized the possibility that group allegiance could supply selective incentives. *Id.* at 60-61. They are fully consistent with his overall analysis. As he put it, "[t]he existence of these social incentives to group-oriented action does not, however, contradict or weaken the analysis of this study. If anything, it strengthens it, for *social status and social acceptance are individual, noncollective goods*. Social sanctions and social rewards are 'selective incentives' . . ." *Id.* at 60-61.

63. See, e.g., Carole J. Uhlaner, *Rational Turnout: The Neglected Role of Groups*, 33 AM. J. POL. SCI. 390, 396-97 (1989) (noting studies using altruism toward group members as one measure of social groups employed in the "social identification model" employed by

be increased by such contextual factors as whether the group is perceiving a threat as opposed to anticipating a benefit, whether there is a sense of urgency about the threat, and whether the individual has adequate knowledge about the threat.⁶⁴ Willingness to act can also be affected by whether or not the proper course of action seems well-defined or ambiguous.

The incorporation of these benefits from participation adds significantly to the earlier analysis because it now becomes plausible to believe that collective action need not depend so heavily on the rather razor-edge belief that the minimum size of an efficacious group is close to the full group size.⁶⁵ To the contrary, group participatory benefits would now depend more upon a "tipping point" phenomenon, as suggested by Thomas Schelling:⁶⁶ in order for individuals to have adequate incentives to participate, the number of others participating only needs to achieve a certain critical size, such that each individual has real assurance that what he or she is doing will be positively valued by herself and by others.⁶⁷ For political action, this critical size may be as large as k because groups that attempt to influence policy and succeed seem likely to generate more participating benefits than those that fail. Once that size had been achieved, however, the presence of these participatory benefits might well mean that participation is an equilibrium, even in situations where k is significantly less than n . The gains from participating would now equal $b + d - c$, whereas the gains from not participating equal b . So long as $d > c$, environmentally inclined individuals have more to gain from participating than from abstaining. Because voting seems to be a low cost activity,⁶⁸ it seems quite plausible that the participatory benefits, d , could exceed the voting costs, c , for many such individuals.

Political entrepreneurs help create the conditions for participation to seem superior to non-participation (1) by defining the proper course of action and then communicating that widely, (2)

sociologists).

64. See Ingram et. al., *supra* note 34, at 121 (noting threats to "one's environment or the general environment" as a major reason why individuals join environmental groups).

65. See text *supra* notes 47-50.

66. THOMAS SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 102-10 (1978). See also the elaboration of this idea in the specific context of political action in DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT 112-40 (1991). I am grateful to Don Hornstein for this reference.

67. "[P]articipation will go up to the extent [leaders] can foster the desire of citizens to be like others and citizen beliefs that others will act." Uhlener, *supra* note 32, at 76.

68. See Aldrich, *supra* note 36.

by stressing the significance of the threat at hand, and (3) by regularly proclaiming the need for immediate action.⁶⁹ The tasks such entrepreneurs must undertake in order to stimulate such group or social incentives are to a large degree just those noted in the earlier discussion of entrepreneurial activity.⁷⁰ The environmental movement developed a tremendously positive image in the 1960s. This made it highly attractive to many members of society and hence facilitated individual identification with group objectives. Contrary to popular perception, the movement was not primarily nostalgic for simpler days, but progressive and forward looking. Samuel Hays explores at length the various strands of progressivism and optimism that were interwoven in the environmental movement during this period (and which continue to be part of it).⁷¹ Especially when it was first breaking onto the national scene in the late 1950s and 1960s, environmentalism presented its core ideas of ecological interdependence as providing a breakthrough paradigm for properly understanding the human-environment relationship.⁷²

The environmental movement of the 1960s and 70s may also have benefited in comparison with other national issues and themes. America was displaying a significant dark side on other fronts, including a divisive war, urban unrest, campus violence, riots and strife over civil rights. Environmentalism's ability to attract allegiance may have been enhanced by the favorable contrast of its positive image to these darker places in American society.⁷³ In sum,

69. See generally N. Schofield, *Anarchy, Altruism and Cooperation, A Review*, 2 SOC. CHOICE & WELFARE 207 (1985), pointing out that:

[T]he fundamental theoretical problem underlying the question of cooperation is the manner by which individuals attain knowledge of each others preferences and likely behavior. Moreover, the problem is one of common knowledge, since each individual, *i*, is required not only to have information about others preferences, but also to know that the others have knowledge about *i*'s own preferences and strategies.

Id. at 218. Entrepreneurs help like minded individuals to overcome this common knowledge problem.

70. See text *supra* notes 51-53, 59-60. Carole Uhlaner's incorporation of groups into voter turnout analysis emphasizes the intermediary role of group leaders. She argues that those leaders can negotiate a shift in a candidate's policy position "as part of a trade with leaders for turnout." Then, "[t]he leaders function as entrepreneurs who provide the structure—and selective incentives—for organizations in exchange for capturing a portion of the surplus. . . ." Uhlaner, *supra* note 32, at 74.

71. See Hays, *supra* note 39, at 19-81.

72. See *id.* at 23.

73. Environmentalism resonated with so many people that Riley Dunlap concludes that it had become a consensual public policy issue by the early 70s. Riley E. Dunlap & Angela G. Mertig, *The Evolution of The U.S. Environmental Movement from 1970 to 1990: An Overview*, in AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT, 1970-1990 1

leading up to the BEST period, environmentalism seems to have possessed great ability to produce good feelings that could be actuated in individuals when they took concrete steps to put their new, positive understandings into action through voting, through contributions to environmental organizations, and in other ways.

Invoking the participatory benefits that individuals receive from acting along with others to achieve group objectives employs a thinner conception of self-interest than material egoism, but one that can still be egoistic. The operating hypothesis is that individuals identify with environmentalism because it provides them an intellectual framework as well as a social framework enabling them to understand the interaction between human action, nature and their own material welfare—safe drinking water, clean air, a world uncontaminated by toxic chemicals or man-made radiation, and so on. Hence extending the conception of self-interest to include participatory benefits does not collapse the rational choice scenario for the BEST into the republican moment account. It does not commit us to the idea that individuals put self-interest aside to advance a program based on moral principles or on a conception of what was best for the country as a whole, regardless of the effects of that program on their own well-being. Identification with environmental group values can itself be rooted in material preferences because environmentalism offers a way to understand threats to environmental quality that individuals were concerned about for material self-interested reasons. The ability of the movement to sell its ideas may well have been predicated on the consistency of those ideas with the material interests of its adherents.

II. WHAT'S WRONG WITH SELF-INTERESTED ENVIRONMENTALISM ANYWAY?

The economic approach to politics and the approach of deliberative democrats and republicans diverge in important respects. Of central relevance to this essay, they have different approaches to the role of self-interest in political life. Economic, or rational choice, theories of politics hypothesize that many political outcomes are explicable by assuming that political actors seek to advance their self-interest. Deliberative democrats argue that self-interest should not motivate political behavior and should not constitute a reason for political action. In their view, we should aspire in our public lives to

decision making via procedures of fair and rational deliberation among equals in which selfish preferences play no role.

These approaches do not necessarily contradict one another, because one is positive, modeling political decisions as they are, while the other is normative, describing political decisions as they ought to be. Still, the strictures that deliberative democrats would place on the political process are sufficiently heroic that arguments for their feasibility are greatly assisted by historical examples. Such examples can be pointed to as proof of the realistic possibility of the theory, and hence can buttress a conviction that striving to achieve the conditions of deliberative democracy would not be fruitless. The Constitution itself is perhaps most frequently invoked as the product of a republican moment.⁷⁴ According to accounts such as Farber's, which reflects opinions that are widely shared by many defenders of federal environmental regulation, the BEST constitute the product of a similar period.

The republican moment explanation for the BEST, however, rests on an attempted proof by elimination. By claiming that the economic approach to politics fails even to be *logically* capable of explaining the BEST, the republican moment approach eliminates a formidable competing theory, without any inquiry into the particulars and circumstances ordinarily required in an exercise of historical causal explanation. This essay has argued that the charge of logical incompatibility is mistaken. The rational choice approach to interest groups does in fact have the resources to offer plausible scenarios based on self-interested mechanisms that might well explain the wave of environmental legislation passed between 1969-73. In addition, the essay has presented suggestive, but admittedly incomplete, empirical evidence that a rational choice explanation is plausible in the particular circumstances existing during this period.

This essay, however, need not be considered a soldier in the battle between two competing visions of politics. It could be taken as an effort to expose a gap between two visions of politics that needs to be bridged. As someone who believes that our environmental laws *are* attempts to advance defensible principles and not just self-interest,⁷⁵ notwithstanding the argument I have just made, I will

74. See ACKERMAN, *supra* note 7.

75. See, e.g., Christopher Schroeder, *Foreword: A Decade of Change in Regulating the Chemical Industry*, 46 L. & C.P. 1 (Summer 1983); Christopher Schroeder, *In the Regulation of Manmade Carcinogens, If Feasibility Analysis Is the Answer, What is the Question?* 88 MICH. L. REV. 1483 (1990) (Review of Frank Cross, *Environmentally Induced Cancer and the Law*).

conclude with a few notes on what that bridge building project might look like.

In some crucial respects, proponents of deliberative democracy need self-interest to motivate citizens to action in the first place. It is doubtful that any significant social movement in the United States has ever succeeded without a core constituency that was responding to a personal sense of grievance.⁷⁶ Even the drafting of the Constitution was instigated in circumstances in which substantial factions within the country had self-interested reasons for changing the Articles of Confederation.

Grievance alone cannot justify government intervention for deliberative democrats. However, the concession that self-interest is a significant motivator of human action is not equivalent to saying that it alone ends up explaining all political outcomes. More work needs to be done in trying to understand situations in which self-interest and principle may be working together to achieve results that neither could accomplish alone. There is a saying in politics that it is a wonderful thing when convenience and principle come together, yet we do not have very good ways to model mixed motive cases in politics.

One fashion in which self-interest and principle may work together in reaching political outcomes is through the interplay of groups and their entrepreneurs. As noted earlier, entrepreneurs play a crucial role in focusing the group's attention on a specific solution to their collective dilemma, out of the vast array of solutions that may be possible. Since debate and dialogue are often important parts of the formulation process, it may be that deliberation plays its most significant role in the entrepreneur's efforts to formulate measures that promise to have ultimate legislative success.

In any event, deliberative democrats need to sharpen their understanding of the role of the legislature in their theory. Too many discussions of deliberation proceed without clarifying how the activity identified could possibly occur within a population of 250 million people. No account is taken of the very small amount of time people spend informing themselves on matters of public affairs, a decision perfectly explicable in rational choice terms because most public actions have marginal or ambiguous effects on personal

76. See, e.g. Schuck, *supra* note 4, at 569, noting that critics of special interests fail to "recognize that single-issue groups had produced some of the most important advances in social justice in American history, such as female suffrage and abolition of slavery." To which I would add the civil rights advances of the 1960s.

welfare. Conversely—and returning to a point just made—public issues that are most likely to gain people’s attention for any period of time are those that do have an effect on their personal interests. Indeed, why should anyone, in a society that promotes concern for self and family as paramount virtues and which suggests in various ways that no one else will provide anything more than emergency assistance, expect that individuals would not be preoccupied with satisfying self-interest?

Plausible theories of deliberative democracy need to account for the unlikelihood of true, countrywide deliberation by according more significance to the deliberation that can and should take place in representative bodies. Deliberation in representative assemblies might constitute the mechanism through which self-interested grievances are “laundered,” to see if they can appropriately be incorporated into a larger understanding of social norms.⁷⁷ This, after all, is approximately the role that the Founding Fathers thought Congress would fulfill in our representative democracy.⁷⁸

In short, the pursuit of self-interest seems an inevitable aspect of political life, and it is hard to believe that we will achieve a firmer understanding of how legislation is enacted without incorporating it into our analysis. At the same time, an approach that finds a place for both self-interest and principle may turn out to be superior to one that seeks to eliminate one or the other.⁷⁹

77. See Robert Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY (J. Elster & A. Hylland ed., 1986) for a discussion of the value of forcing self interested preferences to be placed in a larger principled framework.

78. See, e.g., Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-48 (1985) (describing Madison’s arguments that civic virtue would reside especially in our elected representatives). For a defense of the proposition that deliberation does in fact occur in national government, especially the Congress, see JOSEPH M BESSETTE, *THE MILD VOICE OF REASON* (1994).

79. This concluding section is only intended to be illustrative of ways deliberative approaches to democratic decisionmaking and interest group approaches might be merged. For another dimension of this problem, consider the “Bootleggers and Baptists” coalitions discussed by Bruce Yandle and others. In such coalitions, those who support policies for principled reasons combine with those who support them for self-interested reasons. See, e.g., BRUCE YANDLE, *THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION: TRACKING THE UNICORN* 25 (1989); Marc Landy & Mary Hague, *The Coalition for Waste: Private Interests and Superfund*, in ENVIRONMENTAL POLITICS 67 (Michael S. Greve & Fred L. Smith, Jr., eds., 1992) (noting that support by environmentalists and the waste disposal industry make Superfund reform extremely difficult).