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Debate: Collaborative Environmental Law: Pro and Con

Eric W. Orts

University of Pennsylvania, ortse@wharton.upenn.edu

Cary Coglianese

University of Pennsylvania, cary_coglianese@law.upenn.edu

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DEBATE

COLLABORATIVE ENVIRONMENTAL LAW: PRO AND CON

In this thoughtful and intricate cross-disciplinary debate, Professors Eric W. Orts, of Penn's Wharton School, and Cary Coglianese, of Penn's Law School, discuss the benefits and disadvantages of collaborative public policy decision making in the environmental context. It is no exaggeration to say that each year the world grows ever more aware of the nature of the environmental problems we face, and yet critical policy solutions continue to remain beyond the grasp of even the most interested parties.

Professor Orts argues that it is time to embrace a different policy-making approach—that of collaborative environmental lawmaking. He argues that “the view that centralized governments acting alone will arrive at ‘correct’ solutions . . . begs the question of incommensurable values and the various people who hold them.” Professor Orts's skepticism of the independence of political and other governmental actors in a world in which “lobbyists and campaign financiers . . . play large and often decisive roles in th[e public policymaking] process” leads him to conclude that “in many situations, it makes better sense to trust less in the traditional centralized process of environmental lawmaking and to consider more frequently the alternative of engaging in collaborative environmental law.”

Professor Coglianese responds that collaborative environmental law is “not at all feasible for making real-world decisions about major environmental problems,” and that this policymaking approach “introduces new types of predictable and serious problems.” He cautions that “[t]he issue is not whether policymakers should reach out to affected interests and members of the public. Rather, the issue lies with the *purpose* of public engagement.” Professor Coglianese contends that, by making agreement the primary aim of policymaking, collaborative environmental law actually conveys a willingness to give in to interested parties in pursuit of the “holy grail” of consensus. Instead, Professor Coglianese urges that public “engagement should be used with another goal in mind . . . mak[ing] the best possible decision [to] . . . best advance[] the overall public interest.”

OPENING STATEMENT

*The Case for Collaborative Environmental Law*Eric W. Orts[†]

A recent suggestion put forward by a number of academics has been to consider one or another version of what I will call “collaborative environmental law” to address different kinds of environmental problems. Different labels have been used to describe this approach, including an emphasis on contracting, negotiating, and bargaining as methods of “doing” environmental law. I will use the term “collaborative environmental law” to refer to a general form of lawmaking that adopts a deliberative and participatory process designed to include not only government officials (and their designated scientific and economic experts), but also the representatives of a range of interests in civil society who will be affected by legal rules and decisions concerning a specific environmental problem, including businesses, citizens’ groups, and nongovernmental organizations. The principal aim of such a collaborative process is to arrive at a negotiated deal or agreement about how to treat a particular environmental problem in its specific context. My general claim is that this approach can work well for a large number of modern environmental problems. I do not claim that collaborative environmental law should replace traditional environmental law as the best approach to all problem contexts and situations. But I argue that this approach makes sense for at least some kinds of environmental problems in contrast to more traditional methods of lawmaking—namely, common law development, federal or state legislation, international treaties, and formal or informal administrative regulation.

Allow me first to argue against a few epistemological assumptions that some policymakers and academics make about the “best” way to do environmental law. These assumptions tend to reinforce traditional approaches. Many academics harbor a false confidence in the superiority of modern science and economics to provide concrete, generalized answers to most, if not all, environmental policy questions. I believe instead that in many circumstances, there are no “right answers” to be given by science or economics to many specific environmental problems. As a result, a centralized lawmaking ap-

[†] Guardsmark Professor, Legal Studies and Business Ethics Department, The Wharton School, University of Pennsylvania.

proach directed by allegedly “expert” government officials cannot be relied upon to yield objectively correct solutions. Decentralized approaches to environmental law would conform more closely to the descriptive and normative complexity of the problems.

Science and economics are helpful to diagnose some important dimensions of issues. For example, science can provide reliable evidence that exposure to particular chemicals in sufficient doses is likely to prove harmful to human health (as well as to other animals and plants). In other words, scientific methods estimate and quantify environmental risks. But science cannot provide answers to questions about how much risk is too much to impose on a particular population in specific situations. Environmental risks are instead routinely balanced against other considerations, such as convenience, voluntariness of the assumption of the risk, and economic values.

Similarly, economic analysis can provide useful information about how much a proposed environmental solution or prophylactic measure may cost, as well as an approximation of some of the benefits of reducing environmental pollution or other risks. But economic analysis cannot capture all of the values relevant to a particular environmental choice. When economics attempts to capture these non-economic values—such as natural beauty or an ethical appreciation of biodiversity—it fails. A notorious example is the use of “contingent valuation” to attempt to measure the value of a pristine natural feature in hypothetical dollars, such as in the survey question, “How much would you be willing to pay for a clear view of the Grand Canyon?” Simply to ask the question is to miss the point.

Given the space constraints here, I will simply assert rather than argue for the position that the imperial views of either science or economics (or both together) cannot yield final policy answers to many of the most difficult environmental problems. Instead, these problems often involve a clash of values—pitting environmentalists against business firms, citizens against consumers—with the government frequently in the middle. Adding to the complexity, governments operate at different levels: local, regional, national, and global. When competing values are implicated—what my Wharton colleague, Professor Nien-hê Hsieh, describes well as “incommensurable values”—they cannot be reduced to a common currency and traded off to find one correct, objectively rational solution. Instead, different risks and benefits have to be identified and negotiated, and tough choices must often be made. When there is no objectively right answer, then both individuals and society must “muddle through” (to use Professor Charles Lindblom’s famous phrase) and try to find the best practical

answer possible for difficult problems. The best approach discovered so far has been to apply deliberative, participatory democratic processes to yield negotiated compromises to address specific kinds of problems.

What does a collaborative approach to environmental law mean in practice? Allow me to describe a general method and provide a few illustrations.

First, one should start with a definition of the problem context and features of a particular environmental issue. Important dimensions include the size and scale of the problem, its nature in terms of a physical and scientific understanding, the economic interests at stake, the political considerations involved, and the different kinds of values implicated.

Centralized regulatory approaches often assume that the nation-state—embodied by the United States government or unitary national governments elsewhere—is the appropriate place to start. The context in which different kinds of environmental issues arise, however, may recommend a focus at lower or higher governmental levels. The principle of “subsidiarity,” originated in Europe, is helpful here. It recommends that any specific environmental problem should be addressed at the lowest governmental level possible. The reason is that the complexity of many environmental problems is more easily and more satisfactorily resolved at a smaller scale, if feasible. For some problems, such as global climate change or ozone-layer depletion, the relevant definition of the problem context is planetary. For others, such as the siting of a power plant or a waste processing facility, the appropriate level is often local or regional.

Second, once the problem context is defined and understood, the next step is to identify and convene the relevant interests to address the issue. Governmental actors will often need to play a leading role because those who are contributing to an environmental problem may not always be willing to convene voluntarily. Privately oriented businesses and individuals tend to deny the harmful public consequences of their actions. Collective action problems and the well-known “tragedy of the commons” describe most environmental problems, and often it is only the government—as the maker and enforcer of coercive law—which can effectively bring everyone to the negotiating table.

At this point, however, some scholars and policymakers quickly abdicate and prefer to delegate large powers to the government to “solve” a particular environmental problem through the application of alleged scientific and economic expertise. Thus the regulatory state is

born and expands, encouraging and encouraged by imperial claims of scientific and economic methodologies (sometimes devolving into ideologies) to supply policy answers. It is true that governmental agencies can frequently produce and collect relevant scientific and economic information efficiently and objectively. But the view that centralized governments acting alone will arrive at “correct” solutions—even if a notice-and-comment procedure solicits a range of opinions in the promulgation of administrative regulations—begs the question of incommensurable values and the various people who hold them. Democratic legislatures and executives may have the imprimatur of legitimacy through periodic elections, but everyone knows that lobbyists and campaign financiers (if not their seedier relatives who engage in old-fashioned bribery and corruption) play large and often decisive roles in this process such that the government’s position on many issues is often determined behind the scenes. The ideal of a truly objective Environmental Protection Agency or Office of Management and Budget is a myth.

Therefore, in many situations, it makes better sense to trust less in the traditional centralized process of environmental lawmaking and to consider more frequently the alternative of engaging in collaborative environmental law. Again, a collaborative process will not always work. Sometimes a big problem may require a big government solution. However, in a world in which many environmental problems have become increasingly complex (and often seemingly intractable), it makes sense to expand our thinking. Creative and effective solutions to specific problems may result from collaborative engagement in good faith among interested parties, even when their fundamental values may differ. In a world in which a religious-like belief in science or economics as infallible disciplines that give definitive answers to big policy questions has been exploded, there is really no other choice. To address many of the serious environmental problems that face the world today, there is no better course than for everyone involved to sit down, talk and listen to each other, and work out compromise solutions with legally enforceable consequences in the various contexts in which these problems arise.

Advantages for collaborative environmental law include a greater sensitivity to encouraging innovation and creativity, rather than relying on previous approaches or borrowing from old laws or precedents of dubious effectiveness, as well as a more active engagement of both the “regulated” and the “regulators” in committing to new regulatory schemes. Balancing different values through deliberation and negotiation may lead to new “win-win” solutions or other compromises that

hurt one side or another less than they might otherwise be hurt (e.g., a regulation that is either less costly or more respectful of the environment and therefore a “second best” if not a “first best” option). Collaborative environmental law may also help to elude the well-known “ossification” of traditional administrative regulation and hamstring, slow-moving legislatures.

There are also potential disadvantages of collaboration, and they may sometimes outweigh the benefits. For example, collaborative administrative law in the form of negotiated rule making has been criticized as too time-consuming and expensive. The increased economic cost of any particular method of regulation is certainly relevant, and sometimes this consideration may be decisive. But it’s not the only value that should be measured.

Also, collaborative environmental law addressing similar issues in different places may yield inconsistent results. In the siting of power plants or waste facilities, for instance, some communities may choose to accept a greater degree of health risk than others. In this context, it may make sense for centrally determined regulations to specify minimal levels of safety for certain risks and then to allow collaborative negotiated solutions to proceed within these limits. Or, to take another example, some “habitat conservation plans” to preserve endangered species may turn out to be less effective than others, an inevitable result of applying different solutions in different situations. Lawyers may tend to overvalue consistency, however, and this hobgoblin should not prevent the use of collaborative approaches that make sense and, when taken collectively, promise to improve the ability of environmental law to address some of the most challenging problems effectively, efficiently, and democratically.

REBUTTAL

*The Case against Collaborative Environmental Law*Cary Coglianese[†]

Professor Eric Orts explains that the “principal aim” of collaborative environmental law is “to arrive at a negotiated deal or agreement about how to treat a particular environmental problem in its specific context.” This common understanding of collaborative environmental law provides the focal point for clarifying my concerns with this approach to environmental policymaking. I have no problem with policymakers encouraging public deliberation and seeking extensive input, nor do I quarrel with trying to increase participation or policymaking at local levels, but it would be a serious mistake to establish deal-making as the primary goal of domestic environmental policymaking.

Let me first clarify one conceptual distinction. Collaborative environmental law may hold certain affinities with localism, but policymaking can be collaborative (that is, it can place primacy on winning agreement) whether its scale is international, national, regional, state, or local. Professor Orts’s critiques of undue centralized national policymaking, and his invocation of the European subsidiarity principle, are thoughtful and perhaps even persuasive, but they do not help in deciding whether to favor collaboration. Collaboration requires its own separate defense.

Given this, why would criticisms of centralized, national policymaking find their way into a defense of collaboration? They appear to serve the same purpose as Professor Orts’s discussion of science’s inability to generate determinate policy answers. They make collaboration look good by making the alternative look bad. Indeed, much of Professor Orts’s case for collaborative environmental law is actually a case against the unattractive alternative of having centralized experts make major public decisions in ivory-tower isolation, taking nothing into account but cold scientific and economic facts.

There are choices other than decision making by quarantined central planners and decision making by collaboration. Without treating public deliberation as a negotiation, and without viewing their

[†] Edward B. Shils Professor of Law and Professor of Political Science, University of Pennsylvania Law School; Director, Penn Program on Regulation.

primary objective as the brokering of a deal, policymakers can, and regularly do, engage in extensive consultation and engagement. They hold public hearings and convene interactive roundtable dialogues to gather information that can improve their decisions. They pick up the telephone, ask questions of affected individuals and organizations, and listen to what they have to say. Policymakers not only meet individually with affected interests, they also consult with elected and appointed officials from other governmental bodies. All of these efforts to obtain input come in addition to the normal review of feedback accompanying the formal notice-and-comment procedure used by administrative agencies.

To question collaboration, then, is not to question public participation. The issue is not whether policymakers should reach out to affected interests and members of the public. Rather, the issue lies with the *purpose* of public engagement. Should public engagement be pursued in order to base environmental law on a deal struck by certain affected parties? Or should such engagement be used with another goal in mind, such as gathering information policymakers need to make the best possible decision consistent with relevant statutory objectives or with what best advances the overall public interest?

Professor Orts favors making agreement the principal aim of many significant environmental policies because, he says, “there is no better course than for everyone involved to sit down, talk and listen to each other, and work out compromise solutions.” As appealing as this Rawlsian aspiration may be, it is not at all feasible for making real-world decisions about major environmental problems. Environmental impacts are inherently diffuse, affecting large numbers of people; it is simply not possible for everyone affected by major environmental problems to sit down and talk things over. As a result, even when a collaborative environmental process is used to achieve agreement, the broader public is not necessarily well served by what the selective group of interested parties sitting around the negotiation table decides.

Professor Orts suggests that placing a primacy on agreement can better encourage participants to find creative “win-win” solutions, as well as provide a better opportunity for breaking governmental gridlock. Negotiated decisions may indeed be better in comparison to decisions made by government officials who lock themselves in their closets when developing new policies. But officials don’t do this, and I am aware of no credible evidence showing that the quixotic quest for consensus leads to better policy outcomes when compared to the real-

istic alternative of government decision making following robust public participation. On the contrary, what we know from past attempts at collaborative environmental law is that making agreement the goal often introduces one or more of at least five types of policy problems.

1. *Tractability over Importance*

When agreement is the goal, collaborative groups tend to give more attention to those issues that are most tractable—not necessarily those that are most important. I have written elsewhere about this problem in connection with two major consensus-based initiatives from the 1990s. The Enterprise for the Environment (E4E) initiative launched by former United States Environmental Protection Agency (EPA) Administrator William Ruckelshaus sought to forge agreement between business, government, and environmentalists on a diagnosis of problems with existing environmental law and on specific legislative remedies. When these objectives proved too controversial, E4E focused instead on the more attainable (but much less useful) goal of drafting a broad vision statement for an ideal environmental protection system. A similar fate befell the EPA's major, four-year undertaking called the Common Sense Initiative (CSI). CSI sought to develop consensus over ways to transform the current system of environmental regulation in six sectors; however, in the end, CSI only really produced narrow, tractable projects, such as the development of training manuals, case studies, and public education campaigns.

2. *Imprecision*

People can often more easily reach agreement over imprecise terms. Each side can interpret vague words or broad principles in a light favorable to its own interests, each thinking it has won more (or lost less) than its counterparts think. When agreement is the principal goal, we can expect to see resulting outcomes that have greater ambiguities. For example, in the E4E initiative, the final consensus report read like little more than a book of platitudes. Few could seriously disagree with E4E's general call for a better environmental protection system, but the devil (and the conflict) lay in the details that had been pushed aside in order to reach agreement.

3. *Lowest Common Denominator*

When securing agreement becomes the primary aim, each party effectively gains a veto over the outcome. If an agreement does result, it is likely to reflect little more than the lowest common denominator of the various parties. In this way, the turn to collaborative environmental law would transform domestic environmental decision making into something akin to multilateral decision making at the international level. Whether in negotiating treaties or reaching agreement in

the United Nations Security Council, it is not uncommon for multilateral action to reflect no more than what is acceptable to the actor with the greatest objections. As evidenced by the international community's response to global climate change, this is hardly a promising way to make progress solving major environmental problems.

4. *Increased Time and Resources*

As Professor Orts notes, collaborative environmental law has been criticized for taking longer to generate decisions. If each party effectively holds a veto, then much time will be needed for all negotiating parties to present their concerns and hear how others respond. To reach agreement, deliberation needs to continue until everyone agrees or decides they can live with an outcome. Empirical studies of federal negotiated rule making confirm that seeking consensus does not speed up the policymaking process. Complaints about the amount of time and energy demanded of participants in collaborative environmental processes are legion.

5. *Additional Conflict*

Although collaborative environmental law seeks to resolve conflict, it actually can add new and unproductive sources of controversy. For example, conflicts arise over who gets to participate in collaborative groups; in some cases, lawsuits have been threatened or even filed when organizations are not invited to sit at the negotiation table. Further, even when a deal is successfully brokered, conflicts arise over the precise meaning of what the parties agreed to and whether subsequent governmental action comports with that understanding. Neither of these additional sources of conflict arises outside the context of collaborative environmental law. Perhaps not surprisingly, empirical research shows that negotiated environmental regulations are challenged in court more frequently than comparable regulations formulated through alternative participatory procedures.

These five pathologies of collaboration arise not only with major federal initiatives but also with regional, state, and local attempts to make agreement the basis of public policy. When California's legislature unanimously passed a bill restructuring the state's electricity markets in the mid-1990s, for example, it enacted a compromise solution that had been forged in an unusual "multi-stakeholder" negotiation process convened by the relevant legislative committee. When rolling electricity blackouts occurred in 2001, wreaking havoc on the state's consumers and forcing utility companies into financial crisis, Californians discovered the deal's serious flaws.

Collaborative policymaking is clearly no panacea. On this point, Professor Orts would surely agree, as he quite sensibly recognizes that at least sometimes collaboration's disadvantages outweigh its asserted advantages. But in advocating deal making as the principal way of addressing many significant and vexing environmental challenges, Professor Orts fails to acknowledge the full extent of collaboration's disadvantages. This is not to say, of course, that alternatives to collaboration will always lead to effective and efficient outcomes either. Rather it is simply that making agreement the holy grail of policymaking introduces new types of predictable and serious problems *in addition to* the risks of failure that will inevitably accompany decision making over uncertain and complex problems.

The benefits to be gained from assuming these risks from collaboration are much smaller than Professor Orts suggests, if not entirely nonexistent. For one thing, practitioners of the art of negotiation have long advised against trying to negotiate over policy questions that involve a clash of fundamental values. Most advocates of collaboration have therefore favored negotiation only when policy problems have multiple, discrete facets that can be traded off against each other in hammering out a compromise. Attempts at collaboration seem least likely to result in agreement in those settings where Professor Orts advocates its use, namely over problems that evoke conflicts over values that "cannot be reduced to a common currency and traded off."

Whatever conceivable benefits collaboration might offer can be readily achieved by alternative means that do not introduce the distinctive pathologies that arise from a quest for consensus. As I noted at the outset, there are other ways of making environmental lawmaking participatory without structuring it as a negotiation exercise. In the end, if there is a case at all to be made for collaborative environmental law, that case favors instead ensuring that responsible governmental decision making is accompanied by serious efforts at public engagement—not that it is replaced with the much different aim of deal brokering.

CLOSING STATEMENT

Eric W. Orts

Professor Coglianese does not like “deal making” as a method of creating law, but one wonders what kind of political and legal process he imagines taking place, even when the command-and-control legislation and rule making that he seems to favor are employed. Bismarck famously compared lawmaking to the production of sausage and is said to have proclaimed that if you want to retain respect for the law and enjoy sausage, then you shouldn’t look too closely at how either one is actually made. In a modern democracy, the process of lawmaking is often, if not always, a product of negotiations and deal making at some level. One principled argument in favor of collaborative law is that it can be structured explicitly to recognize that lawmaking is the result of conflicting interests and values—represented through various organized groups (businesses, industry groups, labor unions, public interest groups, religious organizations, etc.)—and that it may often make sense to make this process transparent. Professor Coglianese attacks collaborative law as an unappealing form of “deal brokering,” but one should then ask in return how he believes the status quo works? I would suggest that traditional environmental law in the form of national and state legislation—or the delegation to administrative regulation—is just as much a product of “deal-brokering” as collaborative alternatives. But the deals are often made in back rooms (though perhaps no longer smoky ones). Armadas of lobbyists and special interests participate in the making of traditional command-and-control regulation. In fact, back-room deals and danger of corruption arguably pose a greater risk in centralized lawmaking because the processes are more easily hidden. Collaborative law offers greater transparency because in a public forum the arguments that each side brings to the table must stand up to criticism. I therefore plead guilty to the charge of harboring Rawlsian tendencies to the extent that I believe that we should create political and legal processes that support and encourage arguments based on a Rawlsian “public reason” rather than assertions of self-interest and raw power. Collaborative lawmaking, when properly structured, can help to achieve this ideal better than traditional alternatives—at least in some circumstances.

Professor Coglianese is right to point out that command-and-control regulation—and other centralized alternatives—can be struc-

tured to include public participation. For example, the informal rule-making process of administrative law provides for “notice and comment,” and agencies may sometimes take these comments seriously and tweak the final rules in response. But notice that this process still assumes that the administrative agencies themselves “know best.” Hidden in Professor Coglianese’s defense of traditional lawmaking is a trust in the expertise of administrative agencies as public servants. But he doesn’t reveal the basis for this trust. To some extent—and again in many circumstances—I agree that agency expertise plays a very positive role in lawmaking. As stated in my initial argument, administrative agencies are well-positioned to gather and even sponsor relevant scientific and economic evidence. Their experience in drafting good regulations and their collective knowledge of the overall framework of law in a given field—especially in expansive legal areas such as environmental law—should be given credit, and, to some extent, deference (as recognized in the forgiving *Chevron* standard of judicial review of agency actions).

Notice, however, that Professor Coglianese does not say what higher authoritative standard the central policymakers consult when they make their final decision. He says that after soliciting information from the general public, the central policymakers will then “make the best possible decision consistent with relevant statutory objectives or with what best advances the overall public interest.” There is a big jurisprudential difference between following statutory objectives and doing what one sees as best in the public interest (legal positivism versus Dworkinian principles). But my main criticism of Professor Coglianese’s view is that he does not reveal the foundation for his implicit faith in the virtues of centralized policymaking. My skepticism is grounded in the reality that government “experts” are usually bureaucrats responding to heavy political influence (usually, in the federal context, the President’s views and those of his supporters). If a Republican is in power, then administrative agencies tend to be pro-business. Democratic administrations tend to be more favorable to environmentalists. High-level politics results in an unhealthy seesaw effect that may not translate into the “best policy” envisioned by Professor Coglianese. Collaborative environmental law may sometimes serve the public interest better by focusing on particular problems and trying to solve them directly—without the determinism of “great politics” controlling the legislative and administrative machinery. Of course, one has to elect leaders who will entertain using this kind of approach when warranted. But collaborative lawmaking methods can be adopted by both moderate Republicans and Democrats—and they

have worked for parties of different ideological stripes in Europe and elsewhere.

Professor Coglianese's primary response to my plea to consider collaborative law as an alternative method of doing environmental law is to declare that I am on a "quest" to replace other alternatives and that I see collaborative environmental law as a "holy grail." But this is a mischaracterization of my argument. I am not saying that a collaborative method (which is not, by the way, equivalent to "consensus") should replace all other methods or even that it should be elevated to be the principal method of lawmaking. My claim is more modest. I contend only that it makes sense to use collaborative methods in some circumstances, and other methods (e.g., traditional command-and-control, market-based variations, informational regulation, or even a "do nothing" approach) in other circumstances. By overstating my claim, Professor Coglianese seems for some reason to feel threatened by the mere suggestion that collaborative approaches may *sometimes* make sense.

Professor Coglianese is also right to point out instances in which a collaborative approach to lawmaking has failed to achieve positive outcomes. I don't know the details of the case of California's deregulation of electricity (and I'm not sure how it fits into a discussion of environmental law), but let's grant that fundamental mistakes were made. Collaborative law is, I agree, no panacea. But anecdotal evidence that a particular use of collaborative lawmaking didn't work isn't dispositive—just as pointing to a bad command-and-control statute isn't a convincing argument against the use of statutes.

Similarly, it is true that the Common Sense Initiative that attempted to engage industry groups in a European-style collaborative approach to regulation did not lead to great success. Yet a post-mortem might instead focus on what went wrong—perhaps with an eye to whether the government wielded a credible or meaningful threat of less desirable regulation if no agreement was otherwise reached—rather than simplistically declaring it an example of an inevitably failed approach. Similar approaches seem to have worked in Europe, and it might be worth inquiring about the differences.

If one looks, one can find successful examples of collaborative environmental law in the United States. Traditional approaches have had an especially difficult time addressing certain kinds of environmental problems that involve many sources of pollution with many individual contributors. Non-point source water pollution and nonattainment of basic air quality standards in major cities are two exam-

ples. Given the long-standing *intractability* of these problems (responding indirectly to one of Professor Coglianesi's criticisms), it makes sense to consider alternative approaches. A collaborative example appears in the CALFED San Francisco Bay program examined by Professors Jody Freeman and Daniel A. Farber in *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005). As its name implies, this program combined twenty-three state and federal agencies with jurisdiction over various environmental problems in the San Francisco Bay (and Sacramento-San Joaquin River Delta) into a cooperative effort with other nongovernmental interests (including businesses and environmental groups) which resulted in measurable success, though it depended also on political will to maintain it. The example highlights a feature of collaborative law that Professor Coglianesi overlooks in his quick dismissal of the European idea of subsidiarity. For many environmental issues, it is important to focus attention on the right level or "place" of the problem. Ecological and geographical dimensions are often more important than artificial political boundaries. As the CALFED case illustrates, different governmental authorities are often implicated, and a "compact" or other collaborative approach can help to achieve the coordination needed in the specific context.

In any event, Professor Coglianesi should respond to my moderate argument that collaborative environmental law should *sometimes* be considered, rather than setting up a straw man who claims that *all* environmental law should be collaborative. Again, I agree that collaborative environmental law has disadvantages as well as advantages—costs and benefits in the largest sense of the words—but then so do traditional methods. The five "pathologies" that Professor Coglianesi finds in collaborative methods can infect traditional lawmaking as well. (What language can be more vague and symbolic, for example, than the broad statutory goals expressed by the Clean Air Act and the Clean Water Act? And the courts are filled with conflicts over the meaning of terms in traditional statutes too, such as whether greenhouse gases count as "air pollution.") Perhaps Professor Coglianesi would agree with what I am actually arguing: that collaborative environmental law is another possible approach that should be considered as an alternative method of regulation in a complex world with a host of different kinds of environmental problems demanding effective and efficient solutions that are responsive to conflicting interests and values. The scholarly debate could then move on to a more useful examination of when collaborative approaches have worked and when they have not, which would then help to inform effective legal responses to future environmental problems. For example, Project XL

was a collaborative approach to innovative rule making that was intended to encourage creative alternatives to standard regulatory requirements. My reading of the academic assessments of this experiment is that sometimes it worked, and sometimes it did not. The same may be true for negotiated rule making, despite the increased costs documented by Professor Coglianese and others. Some negotiated rules may be *substantively* better than traditional ones in addressing the particular problem involved. Proving only that negotiated rules are more costly—or litigated more frequently—does not show that they are substantively worse than traditional regulations in addressing particular problems.

I conclude with one final example of an environmental problem that may prove more susceptible to environmental contracts or agreements rather than centralized lawmaking: global climate change. It is curious that Professor Coglianese employs this example as one illustrating a collaborative approach (unless one is to read him as saying that all international law is inherently and defectively collaborative!). Instead, following a traditional lawmaking path, the Kyoto Protocol attempts to enlist all of the countries of the world (eventually) into a mandatory scheme to reduce the emissions of greenhouse gases (mostly carbon dioxide and methane) that have been scientifically determined to be causing a general warming of the Earth's atmosphere. In other words, the not-so-secret dream of Kyoto is a traditional command-and-control solution with market-based variations of cap-and-trade or green taxes included for efficiency. In my view, however, the complexities of the problem—considering especially the fervent economic competitiveness among nation-states and the harrowing divide between rich and poor regions of the world—suggest that a command-and-control solution with market-based add-ons is doomed. Instead, other regulatory methods may prove more effective, including collaborative agreements among companies to disclose and reduce their emissions (e.g., the Carbon Disclosure Project), as well as smaller agreements among countries, companies, and nonprofit environmental groups—perhaps under an umbrella of a larger post-Kyoto and post-Bali treaty encouraging technology transfers and subsidies for the development of new energy technologies, conservation practices, and adaptive behaviors. At the very least, global climate change provides an example of why scholars and policymakers should not bind themselves too closely to traditional lawmaking models when considering new challenges. Collaborative environmental law in the form of smaller environmental contracts,

deals, and ad hoc arrangements may do more good in this context than quixotic ambitions for a grand regulatory scheme to save the planet.

CLOSING STATEMENT

Cary Coglianese

Professor Orts and I would have had nothing to debate if he defended a notion of collaborative environmental law that simply counseled policymakers to act with humility. I would also have had little to say if he were encouraging policymakers to try harder to seek out the information and opinions held by those who will be affected by their decisions or to do more by way of creating broad, interactive deliberations about policy options. I am not even sure I would have been motivated to participate in this exchange if he had defended a still stronger principle: namely, policymakers may in some cases permissibly negotiate deals with affected interests, but only when doing so will best achieve (or at least not diminish the achievement of) appropriate policymaking objectives, such as implementing a statute or advancing the overall public interest. Of course, Professor Orts probably would not disagree with any of these other positions, but as best as I can tell he advocates something much less modest.

I say “as best as I can tell” because Professor Orts objects that I have misstated part of his initial argument. Whereas in his Opening he claimed that collaborative environmental law “can work well for a large number of modern environmental problems” and suggested there was no better way to address “many of the serious environmental problems that face the world today,” he now says in his Closing that he only meant that collaboration “should *sometimes* be considered.” He appears to be making a substantial retreat from his earlier claims, but I am happy to let the reader judge. I will also leave it to the reader to decide whether, in characterizing Professor Orts as advocating deal-making for “many significant and vexing environmental challenges,” I was setting up the straw position (as he claims I have) “that *all* environmental law should be collaborative.”

These accusations of mischaracterizations are just red herrings. Fundamentally, my objections to the case for collaborative environmental law are unaffected by how frequently Professor Orts thinks collaboration should be used. My objections are instead animated by the claim that policymakers should even occasionally assume deal-brokering as their “principal aim”—precisely how Professor Orts and others have defined terms like collaboration and consensus-building. As I explained in my Rebuttal, my concern centers on what a policymaker’s *goal* should be, and this concern does not disappear simply by

saying policymakers should only “sometimes consider” an approach that substitutes an improper purpose for a proper one.

In opposing collaborative environmental law in any context, I am not naïve about how policymaking actually gets made. As a political scientist, I am fully aware of the role bargaining plays, as a practical and an empirical matter, in how things now work. But I am also aware of the difference between *is* and *ought*. One can accept a positive political economy account of policymaking that emphasizes interest accommodation and bargaining, and yet at the same time deplore converting that descriptive account into policymakers’ primary normative objective.

Professor Orts suggests that at least collaborative environmental law moves deal making out of the back room. Yet if that is the underlying motivation behind collaboration, I would have thought it better to advocate more direct solutions, such as strengthening transparency or reason-giving requirements. Of course, even with these kinds of direct requirements in place, individuals who want to deal improperly may well find ways to work around them. I see no reason to think collaborative environmental law could do any better to prevent motivated individuals from engaging in subterfuge.

Professor Orts accuses me of overly trusting public servants. Yet anyone who worries about abuses of power still has much to worry about with collaborative environmental law. Policymakers still control who participates in multi-stakeholder negotiations, and they influence how problems get defined and agendas are set—deep sources of power subject to much less oversight or review than substantive, on-the-record decision making. One charge I have heard made, particularly by groups excluded from collaborative processes, is that in these processes policymakers tend to bring together like-minded actors and seek to use the mantle of collaboration as a political cover for outcomes they already prefer.

When it comes to bias, manipulation, and corruption, collaborative environmental law might even make things worse in at least two important respects. First, if policymakers are to be judged by whether they meet the primary goal of striking a deal, they presumably will try even harder to make sure a deal gets made—even if that means more *ex parte* communications or illegal side payments. One thing participants in formal multi-stakeholder negotiations have reported is that they can make more progress toward a deal by working in the shadows, during breaks and between meetings, than in the light of open negotiation sessions.

Second, if collaborative environmental law also means less centralized decision making (something Professor Orts appears to believe), it will become harder to monitor policymaking and ferret out improper conduct—simply because there will be more potential sites of corruption to oversee. One reason we observe so many instances of corruption and back-room deals in our capital cities is because the media, watchdog groups, and government prosecutors concentrate their attention there. Oversight would no doubt become more difficult with policymaking authority distributed broadly across a series of ad hoc negotiating groups.

Professor Orts also says that by arguing against collaborative environmental law, I must be a fan of “command-and-control” regulation. Perhaps some readers will agree with him. I have no doubt, though, that current and former students of mine who read this exchange will find much humor in his accusation. That is because, at some early juncture in most of my regulatory courses, a student will use the phrase “command-and-control regulation”—prompting me to launch into a sermon against those words. I begin by explaining that I am probably the only one who will ever counsel them against using “command-and-control regulation,” as this phrase has become part of the lingua franca of regulatory wonks and is used even by many excellent scholars whose work I respect (including Professor Orts). But I admonish my students against the phrase for two reasons.

First, “command and control,” as an adjectival modifier of “regulation,” is redundant. “Regulation,” like law more generally, refers to rules backed up with consequences. By definition it consists of “commands”—not hints or advice. And every kind of regulation seeks to “control” in the sense of shaping incentives and thereby inducing changes in certain kinds of behavior or outcomes. Using “command and control” to modify “regulation” therefore adds nothing.

Second, I ask my students to consider how the words “command and control” are used. These words are almost always used to distinguish the writer’s (or speaker’s) own preferred approach from disparaged alternatives that are conveniently placed under the “command and control” banner. Too often this phrase simply undercuts opposing views by applying a pejorative label to them, sometimes without any accompanying substantive argument or analysis.

What I want my students to learn is how to analyze and assess the impact of the crucial differences in the types of commands, the objects of control, and the nature of the consequences applied across different types of regulatory schemes. Reliance on obfuscating or

meaningless phrases like “command and control” impedes the development of better policy analysis and empirical knowledge about regulation and regulatory processes.

This matters because ultimately major choices about regulation hinge on answers to empirical questions, where analytical precision is crucial. For example, even though my disagreement with Professor Orts centers on a normative question (i.e., whether policymakers should adopt collaborative environmental law), our answers are no doubt affected by empirical judgments about the consequences of adopting collaboration in environmental policymaking. In my Rebuttal, I said that I have never seen anyone provide any credible evidence that collaboration works better than alternatives, such as robust participation. Given that various governments have now tried to use collaboration numerous times over the course of several decades, it is hard not to view the lack of evidence as probative of the merits of the case. At the very least, it is clear that no case has *yet* been made for collaborative environmental law.

The evidence that has accumulated tends to show, with remarkable consistency, distinct problems that arise when policymaking is oriented around a search for agreement. Time and again, when advocates trumpet “successful” examples of collaboration, it takes only a little scratching beneath the surface to raise questions and concerns. For example, Professor Orts claims that the CALFED program has led to “measurable success,” citing work by Jody Freeman and Daniel A. Farber. Although Freeman and Farber did characterize the CALFED program quite favorably, they also acknowledged that CALFED’s main success had come in the form of new procedures and programs rather than improved environmental outcomes.

A study posted on SSRN earlier this year by two Stanford researchers, Michael W. Wara and W. David Ball, “*There It Is. Take It*”: *Endangered Species and Water Management in the San Francisco Bay Delta*, 26 STAN. ENVTL. L.J., available at <http://ssrn.com/abstract=987544>, also casts the CALFED program in a much less favorable light. Although Wara and Ball are predisposed to the view that “multi-jurisdictional/multi-agency cooperation, and a focus on consensus . . . have many potential benefits,” *id.* at 1, they conclude that in the CALFED program “consensus and cooperation have not produced results.” *Id.* at 35. The way Wara and Ball describe it, CALFED has run afoul of the same pathology of tractability over importance that I have found to afflict other collaborative initiatives. As Wara and Ball summarize:

[CALFED] fails to internalize the costs of environmental protection to agricultural and urban water users. Focus on cooperation has allowed agencies to get things done, but the focus has perhaps been on projects that *can* happen rather than projects that *need* to happen. As a result, four years after CALFED began, the fish are little if any better off.

Id. at 1. This is obviously not the place for me, or Professor Orts, to offer a full assessment of the CALFED initiative. Suffice it to say, however, if CALFED is one of the best examples supporting collaborative environmental law, the case for collaboration is much shakier than its advocates admit.

Professor Orts also brings up CALFED to raise a question about how to deal with environmental problems that cut across existing governmental boundaries and jurisdictions. In cases where inter-governmental coordination is needed to direct rules and management resources in a way that best advances statutory goals or the overall public interest, then seeking agreement between the relevant governmental bodies is also presumably necessary. The same is true at the international level where, by definition, agreement between states is essential for creating a legal response to global environmental problems. If one has no choice, then one has no choice.

But this does not mean cross-governmental agreements are the best, or even a desirable, way of managing resources when choice does exist. Nor does it mean that any agreement is better than no agreement. Even in domestic and international trans-boundary cases, there is absolutely no reason to advocate that government officials make getting an agreement their principal objective. After all, it would make little sense to take an ecosystem that wholly exists within a single jurisdiction and parcel it up across other jurisdictions just to be able to create opportunities for crafting agreements. But this is essentially what collaborative environmental law would imply. As I said in my Rebuttal, taking collaborative environmental law seriously burdens domestic environmental law with the same quixotic collective action problems that necessarily confront international policymaking.

For these reasons, the appropriate holy grail for environmental policymakers should remain the attainment of the best outcome for society. Will that outcome always be self-evident? Of course not. But that is only reason to try harder, not to abandon the search.

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