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Gabriel L. Levine
Princeton University

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BEYOND “BIG GOVERNMENT”: TOWARD NEW LEGAL HISTORIES OF THE NEW DEAL ORDER’S END

*Gabriel L. Levine**

PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE
REMAKING OF AMERICAN LIBERALISM. By *Paul Sabin*. New York:
W.W. Norton. 2021. Pp. xviii, 254. \$26.95.

INTRODUCTION

New York State wants congestion pricing in Manhattan. In September 2021, Governor Kathy Hochul announced that she supported efforts to charge at least some drivers entering the busiest parts of the borough.¹ Congestion pricing already exists in London, Singapore, and elsewhere.² Los Angeles is looking into it too.³ Though New York’s congestion pricing politics have proven troublesome⁴—it turns out car commuters don’t want to pay to go to work each day or rearrange their daily routines to travel by train—the policy seems to be a sensible way to encourage the country’s largest metropolitan area to reduce its carbon footprint and to fund investment in public transit. If

* Ph.D. Candidate (Politics), Princeton University; J.D., May 2021, Yale Law School. Thanks to Greg Briker, Dirk Hartog, Meg Jacobs, Sam Moyn, Jan-Werner Müller, Jenne O’Brien, David Schleicher, and John Witt for their thoughtful comments on earlier drafts of this Review. Special thanks to Ben Lempert for his invaluable comments and advice throughout the writing process. Finally, thanks to the staff of the *Michigan Law Review*, especially Gabe Chess and Elena Meth, for their terrific editing. Any remaining errors or omissions are mine alone.

1. Erin Durkin, Anna Gronewold & Deanna Garcia, *Hochul Embraces Congestion Pricing*, POLITICO (Sept. 9, 2021, 7:18 AM), <https://www.politico.com/newsletters/new-york-playbook/2021/09/09/hochul-embraces-congestion-pricing-494259> [perma.cc/GE7G-UBN7].

2. Max Masuda-Farkas, *The Road to Clean Air is a Toll Road*, REGUL. REV. (Oct. 6, 2021), <https://www.theregreview.org/2021/10/06/masuda-farkas-road-clean-air-toll-road> [perma.cc/HDZ7-ZBFG].

3. Ryan Fonseca, *Where (and Why) LA Metro Is Exploring ‘Congestion Pricing’ (AKA Making You Pay to Use Certain Roads)*, LAIST (Feb. 10, 2021, 4:20 PM), <https://laist.com/news/here-are-the-places-la-metro-is-exploring-to-launch-congestion-pricing> [perma.cc/JMU2-CG84].

4. Ana Ley, *At M.T.A.’s First Congestion Pricing Hearing, Critics Abound*, N.Y. TIMES (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/nyregion/congestion-pricing-nyc-mta.html> [perma.cc/SEJ6-49J8]; see also Björn Hårsman & John M. Quigley, *Political and Public Acceptability of Congestion Pricing: Ideology and Self-Interest in Sweden*, ACCESS, Spring 2011, at 2–3, https://www.accessmagazine.org/wp-content/uploads/sites/7/2016/01/access38_congestion_pricing_sweden.pdf [perma.cc/AY7P-C4NX].

voters allow it, congestion pricing seems worth a shot. We are, after all, in the middle of a global climate crisis.

So there was something tragic, or maybe just absurd, when in August 2021, the Metropolitan Transportation Authority announced that environmental review of the New York City Congestion Pricing Project would take about sixteen months.⁵ This review is required under the National Environmental Policy Act (NEPA), one of the bedrock laws protecting human health and environmental quality in the United States.⁶ To be sure, congestion pricing is not a perfect policy; nothing is. But its climate and health benefits, at least, seem clear. Why, then, would environmental safeguards stymie this initiative? Why would they impose more than a year of waiting when climate danger is already upon us? Something has gone awry.

New York's experience with congestion pricing is, alas, not an isolated case. Professors J.B. Ruhl and James Salzman have recently argued that the "Old Green Laws," with NEPA and its state analogues foremost among them, threaten progress toward a "Green New Deal."⁷ This isn't just a matter of regulatory schemes such as congestion pricing: building green infrastructure large and small will require "major" governmental actions of all sorts, from spending to permitting. In some cases, environmental laws such as NEPA and its state analogues may alert the government to hidden costs. But these procedural requirements generally apply bluntly to both threats and opportunities, imposing presumptions of harm even on those projects necessary for averting disaster. New environmental laws, therefore, seem necessary for confronting new challenges.

Professor Paul Sabin's⁸ excellent book, *Public Citizens: The Attack on Big Government and the Remaking of American Liberalism*, illuminates the status quo from which some climate activists, as well as a broader cohort of "supply-side progressives," now wish to break.⁹ *Public Citizens* is not exactly a prehistory of our current environmental discontents. (More on that later.) Rather, it examines the "public-interest" legal movement, of which NEPA and laws like it are a product. Sabin's focus is the network of nonprofit organizations led

5. Winnie Hu & Dana Rubinstein, *As Cuomo Exits, Will Congestion Pricing Still Come to New York City?*, N.Y. TIMES, Sept. 29, 2021, at A15, <https://www.nytimes.com/2021/08/16/nyregion/new-york-congestion-pricing.html> [perma.cc/ECW3-A89Z].

6. FHWA *Greenlights Environmental Assessment for New York City's Proposed Congestion Pricing Plan*, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN. (Mar. 30, 2021), <https://highways.dot.gov/newsroom/fhwa-greenlights-environmental-assessment-new-york-citys-proposed-congestion-pricing-plan> [perma.cc/VV5J-CQPW].

7. See generally J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693 (2020).

8. Randolph W. Townsend, Jr. Professor of History and American Studies, Yale University.

9. See Ezra Klein, *The Economic Mistake the Left Is Finally Confronting*, N.Y. TIMES (Sept. 19, 2021), <https://www.nytimes.com/2021/09/19/opinion/supply-side-progressivism.html> [perma.cc/68TB-GDTZ]; see also Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019) (arguing that progressives ought to be more skeptical of constraints such as NEPA).

(some literally, others symbolically) by Ralph Nader in the 1960s and ’70s. These groups aimed to serve the previously unorganized public by providing a countervailing force against both business and government. Environmentalism was central to the public-interest legal movement, linking new consumer advocacy with older conservationist campaigning. Nader and his allies were remarkably successful both in litigating for environmental causes and in pressing for new legislation.¹⁰ But, Sabin argues, by criticizing the government, they unwittingly helped undermine public confidence in it. Ultimately, public-interest law helped unmake the New Deal order from within.

Though *Public Citizens* masterfully links legal advocacy to the broader history of American political economy, the book does not quite fulfill its own ambitions. Sabin shows that public-interest liberals were often harsh critics of the postwar state and the political coalitions that sustained it. In this respect, Nader and his allies had surprising affinities with the New Right. But unlike the conservatives who ultimately triumphed, public-interest liberals typically sought to expand the federal government,¹¹ not—in Grover Norquist’s charming phrase—to cut it to the size where they could drown it in a bathtub.¹² Nader was not the unwitting ally of Ronald Reagan, his antibureaucracy rhetoric notwithstanding.

Nonetheless, understanding public-interest liberalism remains an essential task for historians, one that I begin to take up here.¹³ Public-interest liberals transformed American governance in ways that still benefit us today, but which have also left the state vulnerable to conservative opposition. I examine this dynamic by sketching a new historical account of public-interest liberals’ vision, focusing on environmental law in the 1960s and ’70s. Environmental law was at the heart of both public-interest liberalism and of the late twentieth-century transformations of the American administrative state. In studying how lawyers worked to address the “insidious impacts of new technologies” (p. 23), we can see more clearly how they transformed American governance. Though environmental law is notoriously difficult to define in the abstract,¹⁴ its creation marked a specific historical development in American legal thought and practice. Environment law, therefore, provides a powerful lens through which to view the whole of public-interest law—and the New Deal order’s end more broadly.

10. See, e.g., pp. 30–31.

11. See *infra* Part II.

12. Jeremy W. Peters, *For Tax Pledge and Its Author, a Test of Time*, N.Y. TIMES, Nov. 20, 2012, at A1, <https://www.nytimes.com/2012/11/20/us/politics/grover-norquist-author-of-anti-tax-pledge-faces-big-test.html> [perma.cc/53PR-R9YL].

13. Sabin himself does not use the term “public-interest liberalism,” though Julian Zelizer does in his blurb for *Public Citizens*. *Public Citizens*, W.W. NORTON, <https://wwnorton.com/books/9780393634044/about-the-book/reviews> [perma.cc/J8SP-EG9J]. While I recognize the risks of subsuming multiple actors and ideas under an “ism,” I do not think “public-interest liberalism” distorts Sabin’s work.

14. See, e.g., A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENV’T L. 213 (2004).

The New Deal order, I argue, was not monolithic, but instead combined several distinct approaches to public policy. Chief among these were regulation and spending. Public-interest liberals embraced the former but not the latter, transmuting the New Deal's economic regulation into the "new social regulation." Public-interest liberals fused to regulation a moralized commitment to adversarial legalism. They hoped to escape from politics into law, and through law to develop ideals suitable for a new, environmental age. This synthesis of regulation and legalism was generative but short-lived. With their moral vision wedded so closely to law, public-interest liberals were unable to muster an effective, principled alternative when the courts turned hostile. In the 1970s and '80s, conservative judges dashed environmental legalism's grandest hopes. Regulation endured, but without the moral vision that had sustained it just a decade earlier. Today's challenges reflect not only the triumph of "small government" but also the limits of public-interest liberalism as an alternative.

Part I of this Review reconstructs *Public Citizens'* main argument. Part II critically assesses Sabin's account. Part III outlines a new history of environmental law in the mid-to-late twentieth-century United States.

I. PUBLIC CITIZENS VERSUS THE NEW DEAL ORDER

Lawyers today might not always imagine the 1970s as a period of major liberal change, but forty or fifty years ago legal scholars believed the legal order of the New Deal had recently undergone sweeping reforms from the left. One major article described the replacement of the "expertise" model of the New Deal period" by a new "interest representation" model in administrative law.¹⁵ Another argued that federal environmental laws had gone "beyond the New Deal."¹⁶ A third described "the Public Interest era" as breaking from the New Deal even as it left most existing legislation untouched.¹⁷ The conservative politics of the last several decades, however, often overshadow these accomplishments. And when progressives seek models for today, they typically look further back to the New Deal.¹⁸ The Roosevelt and Reagan administrations both seem more important than what happened in between them.

Public Citizens can be understood as historicizing—and expanding upon—the consensus among law professors of the 1970s and '80s. This is less a story of liberals joining conservatives to unmake the New Deal order, than

15. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684, 1723 (1975).

16. See Bruce A. Ackerman & William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466 (1980).

17. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1315–16 (1986).

18. See, e.g., Nate Cohn, *Biden as a New F.D.R.? Try L.B.J.*, N.Y. TIMES, Jan. 21, 2022, at A12, <https://www.nytimes.com/2022/01/21/us/politics/biden-agenda-fdr-lbj.html> [perma.cc/W59M-5KUH].

of liberalism coming to reflect public-interest lawyers' ideas.¹⁹ As Sabin shows, the break from the New Deal was a fraught process of coalition formation and institution building; it was not foreordained that the "Public Interest era" would lie "beyond the New Deal." Public-interest lawyers, however, effectively transformed government institutions to reflect their skepticism of bureaucrats and their demands for robust public participation. We still live today, Sabin suggests, with the Naderization of the left.

Part I of *Public Citizens*, "A Great Power with No Challengers," describes the New Deal legal and political-economic order, as well as early challenges to it.

In Sabin's account, the post-World War II political economy is best understood as "a kind of managed capitalism," involving a "productive partnership between government, business, and labor" (p. 3). Sabin risks exaggerating this peaceable image, underplaying the racial and economic strife that plagued the New Deal order. Even in the United States' industrial core, for example, white property owners fought successfully against labor unions to resist racial integration.²⁰ Still, for many of the New Deal order's white, male beneficiaries, it really did seem harmonious, and the discord of the 1960s came as a shock.

For Sabin's protagonists, the New Deal state had two principal failings, both concerning administrative agencies. First, agencies sometimes regulated in ways that favored industry over consumers. "Regulatory capture" of this sort was the focus of the Nader-led investigative reports that form the core of Chapter Five. Second, even when not captured, agencies occasionally acted unthinkingly, pursuing bureaucratic needs at the expense of social goods. Critics such as Jane Jacobs and Rachel Carson, whom Sabin discusses in Chapter Two, leveled this charge at urban planners and agricultural administrators.

Sabin's focus on bureaucracies presents a fresh account of the New Deal order's fate. Sabin is not alone in contending that "New Deal big-government liberalism contained within it the seeds of its own decline" (p. xviii). But, in contrast to those who attribute this fall to American "individualism,"²¹ Sabin focuses on the public policy generated by the postwar "partnership" of government, business, and labor. Industrialization, suburbanization, and infrastructure development all started as real goods (at least for some). But soon,

19. Sabin frames his work as supplementing recent scholarship emphasizing conservative mobilization (p. xii), such as KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* (2009). Sabin's argument that the New Deal coalition collapsed from within, however, is not entirely new to historians of conservatism. See, e.g., Kim Phillips-Fein, *Conservatism: A State of the Field*, 98 J. AM. HIST. 723, 726 (2011). Prominent scholarship emphasizing liberal conflicts with the New Deal order includes, among others, GARY GERSTLE, *THE RISE AND FALL OF THE NEOLIBERAL ORDER* (2022), ELIZABETH POPP BERMAN, *THINKING LIKE AN ECONOMIST* (2022), REUEL SCHILLER, *FORGING RIVALS* (2015), and DANIEL T. RODGERS, *AGE OF FRACTURE* (2011).

20. See THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS* 63 (2005).

21. Jefferson Cowie & Nick Salvatore, *The Long Exception: Rethinking the Place of the New Deal in American History*, INT'L LAB. & WORKING-CLASS HIST., Fall 2008, at 3, 6.

they came to seem both ecologically destructive and psychologically alienating. In other words, the New Deal order had achieved prosperity but on unsustainable terms. This is what generated the public-interest backlash (p. 14). Though Sabin does not put the point in these terms, his narrative suggests a broader theoretical point: sustainability might be not only a political virtue²² but also a practical requirement for securing public trust in government.

Part II of *Public Citizens*, “Who Regulates the Regulator?,” turns to Sabin’s main actors: Nader and his allies, especially those in environmental law.

Starting in 1969, Nader’s organizations began publishing blistering attacks on federal agencies. *The Nader Report on the Federal Trade Commission* alleged “alcoholism, spectacular lassitude, and office absenteeism, incompetence by the most modest standards, and a lack of commitment to the regulatory mission” (p. 39). *Vanishing Air* described federal air-pollution regulators as a “disorganized band of government officials acting out a pollution control charade” (p. 78). And *Water Wasteland* called federal water-pollution control efforts “a ‘complex charade’ carried out by ‘long-faltering, if not pathetic, bureaucracies’ ” (p. 84). These were words meant to create scandals, ones to which the captive audiences of the broadcast era had little choice but to pay attention (p. 87). In each case, government officials felt compelled to respond; legislative reforms followed suit (pp. 84–86).

Nader’s organizations were joined by dedicated environmental groups (p. 90). In discussing these organizations, Sabin builds upon his pathbreaking article, “Environmental Law and the End of the New Deal Order.”²³ The practice of environmental law, Sabin explains, predated most environmental laws.²⁴ Years before NEPA or the Clean Air Act, there arose a small but vibrant ecosystem of environmental lawyers.²⁵ And these attorneys shared Nader’s skepticism about governmental bureaucracies. Inspired by recent victories for civil rights, they sought redress from liberals’ historical adversary: the courts. In other words, they “sue[d] the bastards.”²⁶

Suing the bastards, it turned out, was easier with sympathetic judges. This was the Warren Court’s heyday, and even relatively conservative jurists encouraged public-interest litigation. Sabin shows that decisions from this period such as *Office of Communication of the United Church of Christ v. Federal Communications Commission*²⁷ and *Scenic Hudson Preservation Conference v.*

22. On sustainability as a political virtue, see MELISSA LANE, *ECO-REPUBLIC: WHAT THE ANCIENTS CAN TEACH US ABOUT ETHICS, VIRTUE, AND SUSTAINABLE LIVING* 20 (2011).

23. Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 *LAW & HIST. REV.* 965 (2015).

24. *Id.* at 968.

25. For a history extending a similar narrative two decades back, see KARL BOYD BROOKS, *BEFORE EARTH DAY: THE ORIGINS OF AMERICAN ENVIRONMENTAL LAW, 1945-1970* (2009).

26. This phrase was a rhetorical signature for environmental lawyer Victor Yannacone Jr. Patrick Strickler, *Three ‘Ecology Freaks’—Mild to Wild*, *ST. LOUIS POST-DISPATCH*, Mar. 27, 1970, at 3D.

27. 359 F.2d 994 (D.C. Cir. 1966).

*Federal Power Commission*²⁸ provided—as one public-interest lawyer put it—a new “foundation-stone” for legal activism (p. 95). The Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club Legal Defense Fund all made use of these cases (p. 98). Other helpful decisions soon followed. Some, like *Abbott Laboratories v. Gardner*²⁹ and *Citizens to Preserve Overton Park, Inc. v. Volpe*,³⁰ became part of today’s administrative law canon;³¹ others, like the D.C. Circuit’s efforts to impose extrastatutory procedural requirements on federal agencies, were later rejected by the U.S. Supreme Court.³²

Good law, however, was not enough. Public-interest liberals needed strong institutions, and these institutions came to define public-interest liberalism. The New Deal order, as Sabin describes it, was a system of “countervailing powers.”³³ Government, business, and labor were preeminent. To this tripartite scheme, the public-interest movement sought to add its own non-profit organizations (p. 41). Their role would be to keep the other powers “insecure” (p. 59). “I really literally want to see 5,000 public interest lawyers in this town in six years,” said Nader in 1971 (pp. 70–71). He had little trouble convincing young elites in “revolt”³⁴ that they could escape “alienation” by joining his new organizations.³⁵ Funders such as the Ford Foundation, for their part, could be assured that Nader’s Raiders were “doing exactly what the establishment advised—working peacefully within the system to change the system” (pp. 46–47).

In Part III, “Government Is the Problem,” Sabin charts the shifting fortunes of the public-interest movement amid the New Right’s rise.

Public-interest liberalism became both better established and more ambitious throughout the 1970s. Having started out targeting specific bureaucracies, Nader and his allies began advocating for broader institutional reforms (p. 115). Sabin’s focus remains in Part III on the public-interest movement,

28. 354 F.2d 608 (2d Cir. 1965).

29. 387 U.S. 136 (1967).

30. 401 U.S. 402 (1971).

31. Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 *CARDOZO L. REV.* 2241, 2252 n.43 (describing *Abbott Laboratories* as “seminal”); *id.* at 2244 (describing *Overton Park* as “iconic”).

32. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 525 (1978).

33. Pp. 1, 7–9. The phrase is John Kenneth Galbraith’s. See JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM* (Routledge ed., 2017).

34. See LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* (2005).

35. Pp. 66, 74. In emphasizing the need for liberal legal organizations, Sabin supplements Steven Teles’s foundational scholarship on the conservative legal movement. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (Ira Katznelson, Martin Shefter & Theda Skocpol eds., 2008). On the one hand, public-interest liberals, no less than conservatives, needed institutions and not just ideas; on the other hand, public-interest liberals endured less trial and error than their conservative counterparts, perhaps because they were somewhat friendlier critics of the dominant regime.

but larger changes were afoot: from the 1969 McGovern-Fraser Commission to the 1974 Freedom of Information Act Amendments, new forms of public oversight were emerging to discipline government.³⁶

Despite these congenial developments, public-interest opposition to “the system” sometimes stalled or even backfired. During the Carter administration, public-interest liberals populated the White House and federal agencies (pp. 136–37). But when it came to making policy, the movement and the administration squabbled.³⁷ These challenges were exacerbated by the growing conservative movement, which appropriated the language of “the public interest” for its own purposes (pp. 131–32). The Carter administration, Sabin shows, “struggled for balance” between left and right without much success.³⁸ Drawing again on his earlier published work,³⁹ Sabin illustrates the dilemmas of Carter’s “disjunctive” presidency.⁴⁰ Its legacies, Sabin explains, included both regulation and deregulation, the preservation of liberal policies and the reform of those policies’ implementation (p. 171). This ambivalence satisfied few, including those in the public-interest movement. Though Nader declined to run for president in 1980, environmental crusader Barry Commoner echoed Nader’s rhetoric in a doomed third-party campaign (pp. 158–59). Ronald Reagan won resoundingly, promising to reject Carter’s liberalism while radicalizing his skepticism of regulation (p. 167).

Public-interest liberalism lived on, despite Reagan’s efforts to deconstruct much of the administrative state.⁴¹ But by 1980, the movement’s insistence that—as Reagan put it—“government is the problem” buttressed an agenda very different from its own (p. 168).

II. FROM NADERISM TO REAGANISM?

Public Citizens describes one shift in American politics, but the book arrives in the midst of another. Whereas public-interest lawyers once criticized the New Deal’s legacy, left activists now hope to revive it. Sabin mostly overlooks these recent developments: neither Donald Trump nor the Green New Deal appears in his book’s index. Yet Sabin suggests that public-interest lawyers’ challenges remain our own. The need “to balance support for public action with an increasingly sophisticated awareness of the limitations and flaws of government,” he claims, is a tension in American liberalism “that remains unresolved to this day” (p. xvii).

36. See *McGovern-Fraser Commission Report*, TEACHING AM. HIST., <https://teachingamericanhistory.org/document/mcgvorn-fraser-commission-report> [perma.cc/ZHA8-6SWR] (reproducing the report); 5 U.S.C. § 552a.

37. See, e.g., p. 140.

38. See Paul Sabin, “Everything Has a Price”: *Jimmy Carter and the Struggle for Balance in Federal Regulatory Policy*, 28 J. POL’Y HIST. 1 (2016).

39. See *id.*

40. See p. 170; STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 39–40 (2d ed. 1997).

41. See, e.g., p. 174.

Public Citizens offers an imperfect picture of the present, however, because it attempts to draw too much from its historical materials. Even as Nader and his allies “remade American liberalism,” they expanded the federal government’s reach. Conservatives and public-interest liberals offered a common diagnosis of government’s ills: regulatory capture. For this reason, the former may have taken some rhetorical cues from the latter. But, as Sabin recognizes, the two groups’ prescriptions differed starkly. Public-interest liberals usually endorsed not deregulation, but rather a combination of regulatory reform and regulatory expansion (p. xvii). To acknowledge that conservatives’ victories followed Nader’s rise is not, by itself, to show that public-interest liberalism actually abetted deregulation writ large. Instead, *Public Citizens* mostly shows public-interest liberals achieving success after success for “big government”—the very triumphs that Reagan targeted (p. 168).

Consider Nader’s first great legislative achievement: the simultaneous enactment in 1966 of the National Traffic and Motor Vehicle Safety Act and the Highway Safety Act. Sabin twice uses this accomplishment to juxtapose Nader with liberalism’s old guard. In the first pages of *Public Citizens*, Sabin describes a *New York Times* feature publishing Nader’s praise for the new laws alongside President Lyndon B. Johnson’s comments (pp. xi-xii). Later on, Sabin contrasts Nader’s work lobbying for new regulatory mandates with lawyer Lloyd Cutler’s efforts to curtail them. “The old Democratic Party establishment,” Sabin writes, “with its interwoven ties between government and business, was being forced to negotiate with its new liberal critics” (pp. 29–30). Nader won: the statutes ushered in important regulatory innovations and, thanks in large part to Nader’s efforts, were more stringent than those the Johnson administration had initially proposed.⁴²

What sort of challenge, exactly, had Nader posed to the “old Democratic Party establishment”? Nader questioned the “partnership” among business, labor, and government by insisting that the state do more than “structure the economic interactions of market participants” (p. 8). He did not, however, suggest that government as such was the problem. Nader wrote *Unsafe at Any Speed* while working in government for Assistant Secretary of Labor Daniel Patrick Moynihan. While Moynihan had earlier “attacked” the National Safety Council, a federally chartered nonprofit organization, for blaming drivers for car crashes (p. 28), Nader directed his own criticisms in *Unsafe at Any Speed* primarily at the automobile industry.⁴³ It was not Nader but Moynihan who later clashed with liberal Democrats from the right.⁴⁴ And it was Cutler, a corporate lawyer, who later served as White House counsel to triangulators

42. See, e.g., pp. 30–31.

43. RALPH NADER, *UNSAFE AT ANY SPEED* (1966). Nader did include government employees among the dreaded “traffic safety establishment” as well. See *id.* at 5.

44. See James Traub, *Daniel Patrick Moynihan, Liberal? Conservative? Or Just Pat?*, N.Y. TIMES MAG. (Sept. 16, 1990), <https://www.nytimes.com/1990/09/16/magazine/daniel-patrick-moynihan-liberal-conservative-or-just-pat.html> [perma.cc/J2M2-FGQW].

Jimmy Carter and Bill Clinton.⁴⁵ Nader's complaints about the status quo were not complaints about "big-government liberalism." Instead, as Sabin acknowledges, Nader came out of "a longer progressive tradition" (p. 32), one that had no basic quarrel with regulatory expansion.

This pattern recurs throughout *Public Citizens*. Nearly every time Nader and his allies challenged the post-New Deal "establishment," they expanded the state's reach. Nader and his allies accused the Federal Trade Commission of absenteeism and alcoholism but "thought that an expanded agency staff should engage in 'positive detective work'" to investigate corporations (pp. 39–40). They criticized the leadership of the United Mine Workers of America but "helped advance a series of laws to protect" coal workers (p. 60). And they offered "a scathing . . . critique of federal air-pollution control efforts" but won stricter regulations and greater enforcement (pp. 76–78). These were real clashes with liberalism's old guard, but all those participating presumed "big government's" necessity. Indeed, though Sabin quotes a 1971 syndicated column describing Nader as taking on "Big Business, Big Labor, and even more important, Big Government" (p. 59), that same column cheered that, "[w]ith [Nader's] prodding, though, the government seems to be doing much better."⁴⁶

Even where public-interest liberals did seek to limit regulators' authority, Sabin overstates their successes. Sabin notes that in *Sierra Club v. Morton*,⁴⁷ Justice William O. Douglas argued, "the courts had an obligation to defend the public interest against . . . captured agencies" (p. 98). But Douglas's opinion was a dissent.⁴⁸ Though not a total defeat for environmentalists, *Sierra Club* made public-interest challenges of regulatory decisions harder by tightening standing requirements.⁴⁹ And *Sierra Club* was only the first case in a decades-long retreat from the relaxed regime promised by *United Church of Christ*. Standing doctrine's proadministrative turn was not an outlier. In *Vermont Yankee v. Natural Resources Defense Council*, the U.S. Supreme Court curtailed lower-court experimentation in agency oversight;⁵⁰ in *Chevron v. Natural Resources Defense Council*, the Court enshrined deference toward agency interpretation of statutes.⁵¹ In short, insofar as public-interest liberals and the government clashed directly, the government often won.

Sabin's evidence from the Carter administration similarly suggests the limits of *Public Citizen's* arguments. Carter rejected public-interest liberals' proposals in areas ranging from automobile safety to dam construction (ch. 8).

45. Adam Bernstein, *Consummate Lawyer Played Array of Roles*, WASH. POST (May 9, 2005), <https://www.washingtonpost.com/archive/politics/2005/05/09/consummate-lawyer-played-array-of-roles/14a754a7-7eec-43ff-bd42-4673408401f0> [perma.cc/CMZ8-BJJV].

46. Clayton Fritchey, *A Unique Phenomenon: Ralph Nader*, NEWSDAY, Jan. 6, 1971, at 2B.

47. 405 U.S. 727 (1972).

48. *Sierra Club v. Morton*, 405 U.S. 727, 741–55 (1972) (Douglas, J., dissenting).

49. *Id.* at 739–40 (majority opinion).

50. See 435 U.S. 519 (1978).

51. 467 U.S. 837 (1984).

Carter, it is true, did not simply betray public-interest liberalism. Rather, “[i]nformed by the public interest critique of government, [he] sought to reimagine the active administrative state as a flawed but still vital enterprise” (p. 150). Reforms such as the Paperwork Reduction Act reflected public-interest liberals’ influence even as they restricted the administrative state (p. 170). But were the aspirations of those who wanted to make regulation “government-proof” really vindicated by initiatives that aimed to give corporations more “flexibility” (p. 153)? Public-interest liberals did not think so. By 1980, Nader and his allies were wholly disillusioned with Carter’s administration (p. 160). To be sure, there were some important exceptions. For example, many liberals, including Nader, supported Carter’s deregulation of the airline industry.⁵² But as Sabin’s account suggests, such instances were overshadowed in Nader’s eyes by the administration’s regulatory timidity.

Sabin’s work does suggest another plausible argument in a domain he mentions but does not examine in depth: institutional design. In at least three crucial areas, public-interest liberals helped usher in reforms that may have empowered business interests and conservatives more than “public citizens.”

First, public-interest reforms by Congress after Watergate sometimes backfired. Limits on the power of committee chairpersons and the decline in congressional earmarks encouraged “a politics that was less transactional and more ideological” (p. 119). Restrictions on campaign donations “ironically pushed political funding into corporate political action committees and other extraparty vehicles that empowered lobbyists” (p. 119). These reforms dovetailed with earlier efforts to open political parties to popular participation, which redounded to similarly mixed effect.⁵³

Second, NEPA and its state analogues often shifted power “to narrow, self-organized groups” protecting private interests against progressive government initiatives (p. 193). Some of NEPA’s leading proponents had hoped to create an “environmental intelligence system” that would teach agencies to think ecologically.⁵⁴ But liberal lawyers quickly seized upon this statutory scheme by opening it to greater litigation, hoping for broad public scrutiny of agency decisions (pp. 103–04). Despite their often-praiseworthy aims and substantial accomplishments, liberal lawyers unintentionally empowered the well-resourced.⁵⁵

Third, federal transparency laws such as the Freedom of Information Act turned out to abet conservative activists and corporate interests, notwithstanding public-interest liberals’ intentions. Sabin claims these statutes “helped to force open the workings of the government” to public scrutiny

52. See p. 151; see also Reuel Schiller, *The Curious Origins of Airline Deregulation*, 93 *BUS. HIST. REV.* 729 (2019).

53. See SAM ROSENFELD, *THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA* 132–33 (2017).

54. See STAFF OF S. COMM. ON INSULAR & INTERIOR AFFS., 90TH CONG., *A NATIONAL POLICY FOR THE ENVIRONMENT* 8 (Comm. Print 1968).

55. See, e.g., pp. 107–08.

(p. 162). In this, he probably shares the common view. But as Margaret Kwoka has shown, for-profit companies frequently use FOIA to request commercially valuable information.⁵⁶ More generally, David Pozen has argued that transparency has undergone “ideological drift”: its “political valence has become less progressive and more libertarian” since public-interest liberalism’s heyday.⁵⁷

Together, these and other reforms might have inadvertently disabled the state, perhaps undermining public confidence that the state could do much at all.

Sabin does not much discuss these examples, perhaps because he focuses instead on political messaging. Presidents Carter, Clinton, and Obama, he writes, all embraced something of the public-interest liberals’ “complex view of government, yet struggled to ‘sell’ it politically to the nation” (p. xvii). These cases, however, show something different; “big government” sometimes undermined itself despite public-interest liberals’ public support. NEPA, FOIA, and congressional reform were not meant to check public power but to enhance “the efficacy and authority of the state itself.”⁵⁸ Public-interest liberals, then, did not usher in deregulation. But they did make choices about how to secure government against capture, which shaped liberalism’s character more broadly and, in some cases, left government vulnerable to attack.

Sabin, of course, acknowledges that Nader and his allies made mistakes. But he describes their errors as merely accidental, rather than as the predictable (if unintended) result of their ideology. Our answers, Sabin suggests, must be theirs, only better. But public-interest liberalism does not exhaust our options for confronting government’s flaws. History and theory offer other approaches to politics, even if one stays within the liberal tradition. As *Public Citizens* begins to show, the movement Sabin describes was only one possible response to the New Deal order’s limitations. Unless we recognize public-interest liberalism’s contingency, then and today, we cannot fully explain its successes and failures.

To sum up: Sabin shows that Naderites and Reaganites “sounded a surprising number of common themes” (p. 167), but he does not prove that public-interest liberals actually helped undermine “big government.” The Naderization of the left was not the end of the New Deal order. The partial convergence of “left” and “right” surely made it more likely that public policy would develop toward points of agreement. But if both “left” and “right” criticisms of government were prevalent, what is needed is some explanation of why the conservative version triumphed.

56. See generally Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016).

57. David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 102 (2018).

58. *Id.* at 122.

III. BEYOND “BIG GOVERNMENT”

This explanation should start where Sabin leaves off, building upon his foundational work toward new accounts of the New Deal order’s end. *Public Citizens* documents a remarkable transformation in liberal legal thought in the 1960s and ’70s. This development, in turn, begat profound changes in American governance, especially within the administrative state. These changes matter not because they abetted the New Right’s rise, but because they proved so vulnerable to it. The “Public Interest Era” did not last long before being replaced by “presidential administration.”⁵⁹

Below, I begin setting out my own account of the legal transformations underpinning the New Deal order’s end. Following Sabin, I focus on environmental law, given its intellectual and institutional importance. Environmentalism was at the heart of the public-interest movement. It is there that historians should now look to explain the 1970s’ seismic transformations in American governance.

Rather than asking *how much* government public-interest liberals wanted, I ask *what kind* of government they made. I argue that environmental law in this period uneasily fused two distinct but related commitments. On the one hand, environmental law was *regulatory*: it constrained private conduct rather than direct the provision of goods through the fisc or public ownership. On the other hand, it was also *legalistic*: it aimed to remove certain questions from ordinary politics, and to place them into a legal domain that environmentalists imagined as partly autonomous. This synthesis was highly generative, creating much of the life-saving law that still protects us today. But when courts turned against environmentalism, liberals could offer little in response, for they had reasoned so thoroughly within law’s terms. Their moral vision, then, proved fragile. Environmental law as we know it today, for all its enduring importance, is what remains of a short-lived intellectual synthesis.

A. Regulation’s Monopoly on Policy

Understanding early environmental law’s character begins with recognizing which governance techniques it embraced and which it slighted. This recognition, in turn, requires unbundling the New Deal order. Regulation and spending often went together in the years before Nader’s rise, but the two could and did come apart in environmental law.

For most lawyers today, the New Deal order is centrally defined by the federal government’s expanded regulatory authority. Regulation served a crucial role within the system of “countervailing powers.” “Large businesses would check each other’s excesses through competition, and powerful unions would represent the interests of workers. Government would play a crucial role, ensuring that the system did not tilt too far in one direction or the other”

59. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253–54 (2001).

(pp. 7–8). Regulation thus served to stabilize the political economy. Administrators had substantial leeway to stabilize as they saw fit: agencies could announce prospective policies through adjudication;⁶⁰ standing rules generally restricted litigation to those economically harmed by administrative decisions;⁶¹ and even before *Chevron*, courts accorded significant deference to administrative interpretations of statutes.⁶² These rules generated much legal work, as scholars examined the promise and limits of “judicial control of administrative action.”⁶³

Regulation, however, was not the only means by which government “intervened” in the economy. Fiscal policy was equally important, and infrastructure was among its central domains.⁶⁴ As Sabin writes, “Labor, capital, and government worked in tandem to fuel the postwar economic boom, remaking the American landscape with complex infrastructure to manage water, energy, transportation, and housing” (p. 9). Projects such as highways, dams, and power plants exemplified this trend. Infrastructure occupied a distinctive position within legal thought; though law pervasively structured American infrastructure, lawyers denied that first-order decisionmaking about infrastructure was their job.⁶⁵ And indeed, governance through infrastructure seemed to call for skills quite different from those of the traditional lawyer’s craft.⁶⁶ This perception, perhaps, made spending less immediately attractive to lawyers seeking policy change.

Environmental law as constructed in the late 1960s and 1970s relied largely upon regulation rather than spending. NEPA reflected profound skepticism of the postwar federal infrastructure regime, relying upon environmental impact statements to redirect bureaucracies from within. “Because of our wealth,” President Richard Nixon explained upon signing the bill, “we can afford all the things that pollute the air, pollute the water and make this really a poisonous world”⁶⁷ As the *Washington Post* editorial board complained,

60. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

61. See, e.g., *Associated Indus. of N.Y. State v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

62. See, e.g., *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”).

63. E.g., LOUIS L. JAFFE, *JUDICIAL CONTROL OF AGENCY ACTION* (1965) (cleaned up).

64. In addition to Sabin’s work, see JASON SCOTT SMITH, *BUILDING NEW DEAL LIBERALISM: THE POLITICAL ECONOMY OF PUBLIC WORKS, 1933-1956* (2006).

65. See, e.g., A. Dan Tarlock, *Current Trends in the Development of an Environmental Curriculum*, in *LAW AND THE ENVIRONMENT* 297, 324–26 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970) (describing the status quo in legal education and proposing an interdisciplinary alternative).

66. See generally MYRES SMITH MCDUGAL & DAVID HABER, *PROPERTY, WEALTH, LAND* (1948); Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

67. Don Oberdorfer, *Pollution Fight Set by Nixon*, *WASH. POST*, Jan. 2, 1970, at A6.

“Mr. Nixon said nothing about money for recovering and preserving the environment.”⁶⁸ The laws that followed NEPA were costly but reflected a similar outlook. The Clean Air Act Amendments of 1970 created an elaborate regulatory architecture for achieving air quality standards.⁶⁹ The Clean Water Act accomplished something similar for abating discharges into federally governed waters.⁷⁰ Both these laws (and especially the latter) also appropriated funds for research and development of pollution controls.⁷¹ But the statutes’ fiscal initiatives were mostly excluded from environmental law’s ambitions as a field of study and practice.

That environmental lawyers emphasized regulation is not entirely surprising, but it *was* a choice. In some limited cases, fiscal policy was a significant mechanism for confronting ecological crisis. The Johnson administration had included the environment among the priorities of the Great Society. 1960s legislation provided for the federal acquisition of natural resources⁷² and for federal investments in urban mass transit.⁷³ Several years later, and just before his untimely death, United Auto Workers President Walter Reuther similarly called for the automobile industry “to join with the government and . . . with other industries in developing a modern mass transportation system all over America.”⁷⁴ Reuther’s Earth Day speech followed several years of environmental advocacy by the UAW, including calls for federal investments in cities and for union contracts requiring emissions reductions.⁷⁵ Even as late as 1972, Stewart Udall, the former secretary of the interior, argued, “Less investment in highways means more money for efficient public transportation, more open space, more investment in cheap, fast intercity trains.”⁷⁶

Environmental law’s regulatory orientation is partly explained by environmentalists’ drive for consensus. The early 1970s saw the first signs of the New Deal Democratic coalition’s fracture.⁷⁷ These political pressures, along

68. Editorial, *Getting Back to the Earth (and Air and Water)*, WASH. POST, Jan. 4, 1970, at D6.

69. Clean Air Act, 42 U.S.C. § 7401 et. seq.

70. Clean Water Act, 33 U.S.C. §§ 1251–1388 (2020).

71. For the Clean Air Act, see Aldo Beckman, *Nixon Signs Clean Air Measure*, CHI. TRIB., Jan. 1, 1971, at 2, and *Congress Passes Clean-Water Bill Over Nixon Veto*, WALL ST. J., Oct. 19, 1972, at 2.

72. See Martin V. Melosi, *Lyndon Johnson and Environmental Policy*, in 2 THE JOHNSON YEARS 113, 130 (Robert A. Divine, ed., 1987).

73. See Austin C. Wehrwein, *Advances Hailed in Rapid Transit*, N.Y. TIMES, Dec. 26, 1965, at 68.

74. Walter P. Reuther, *Two-ton Gadgets*, in EARTH DAY—THE BEGINNING: A GUIDE TO SURVIVAL 162, 162 (Nat’l Staff of Env’t Action eds., 1970) [hereinafter EARTH DAY].

75. See Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809, 848 (2018); see also CHAD MONTRIE, A PEOPLE’S HISTORY OF ENVIRONMENTALISM IN THE UNITED STATES ch. 5 (2011).

76. Stewart Udall, *The Last Traffic Jam*, ATL. MONTHLY, Oct. 1972, at 72, 76.

77. See generally JEFFERSON COWIE, *STAYIN’ ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* (2010).

with stagflation and oil crises later on, pushed those in power toward fiscal restraint.⁷⁸ But environmentalists sought unanimity even before they felt these constraints. Environmental law scholars Brigham Daniels, Andrew Follett, and Joshua Davis emphasize that politicians in 1970 viewed clean air as “an issue that’s better than motherhood.”⁷⁹ “Vietnam, civil rights, and Soviet tension may all have been out of reach,” Daniels and his coauthors explain, “but cleaning the air seemed to be attainable, and gains could be measured and seen.”⁸⁰ Even environmental radicals sought unanimity. “Ecologists,” one chronicler wrote, “tend to ignore political barriers; their enemy is man himself.”⁸¹ Not every means of reducing pollution, however, offered an “issue around which the hippies and the Hickels might unite.”⁸² For this reason, regulation held special appeal. Federal pollution standards benefitted the United States’ cities immensely—a fact not lost on their congressional champions.⁸³ But the regulations implemented did not substantially alter the country’s political geography or political economy.⁸⁴ Mass-transit spending might have helped reverse suburbanization; labor law reforms might have nudged unions toward Reuther’s environmentalism. For all their benefits, air-pollution standards did neither.

Regulation could also serve this consensual role because it had become easier and because its goals were limited. By 1970, the federal administrative state had begun a “rulemaking revolution”⁸⁵ that altered New Deal governance even as it perpetuated its regulatory structure. The number of notices of proposed rulemaking published each month in the *Federal Register*, for example, increased steadily throughout the 1960s, nearly tripling over the course of the decade.⁸⁶ This change corresponded to a widespread desire among legal elites for what Judge Henry J. Friendly called “better definition of standards” by federal administrative agencies.⁸⁷ And as Judge Friendly made clear, prospective

78. See generally MEG JACOBS, PANIC AT THE PUMP: THE ENERGY CRISIS AND THE TRANSFORMATION OF AMERICAN POLITICS IN THE 1970S (2016).

79. Brigham Daniels, Andrew P. Follett & Joshua Davis, *The Making of the Clean Air Act*, 71 HASTINGS L.J. 901, 903 (2020) (quoting Senator Eugene McCarthy).

80. *Id.* at 910.

81. Steven V. Roberts, *The Better Earth*, N.Y. TIMES MAG., Mar. 29, 1970, at 8, 53.

82. John H. Schaar & Sheldon S. Wolin, *Where We Are Now*, N.Y. REV. BOOKS, (May 7, 1970), <https://www.nybooks.com/articles/1970/05/07/where-we-are-now> [perma.cc/A6RC-4H3D].

83. See Purdy, *supra* note 75, at 826 n.55.

84. For an example of environmental regulations altering states’ economic geographies, see James E. Monogan III, David M. Konisky & Neal D. Woods, *Gone with the Wind: Federalism and the Strategic Location of Air Polluters*, 61 AM. J. POL. SCI. 257 (2017).

85. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1462 (1992).

86. Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1147 (2001).

87. HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962) (cleaned up).

standards were beneficial because they limited governmental discretion, thereby providing predictable background conditions for economic activity. Here, Judge Friendly quoted the former Vichy lawyer Georges Ripert.⁸⁸ Others might have put the point in Coasian terms.⁸⁹ In either case, regulation’s explicit premise was the primacy of private ordering.

Environmental regulation’s circumscribed ambitions reflected its affinities with earlier Progressive reforms. Here, Sabin’s passing remark that Nader came out of “a longer progressive tradition” (p. 32) is suggestive.⁹⁰ Though “Progressivism” is difficult to define in ideologically coherent terms,⁹¹ those who called themselves “Progressives” at the beginning of the twentieth century frequently embraced a professionalized politics of reform. Progressives, as an influential account from Nader’s heyday put it, were often members of a “new middle class.”⁹² This middle class, anxious about social upheaval, “sought continuity and predictability” through “rules with impersonal sanctions.”⁹³ Much the same was true for later environmental activists. Nader, for example, framed pollution regulations as a necessary response to “a breakdown in law and order.”⁹⁴ This breakdown, he claimed, was akin to the “anarchy” of “the streets,” so prominent in lawyers’ minds amid the tumult of the Sixties.⁹⁵ “Continuity and predictability” once required the Pure Food and Drug Act; now it demanded the Clean Air Act.

Environmental law built upon both Progressivism and the “rulemaking revolution” by expanding regulation’s scope. In 1985, the law professor Richard Stewart explained that under the “economic regulation” of earlier decades, “a regulatory agency controls most aspects of a particular industry’s business.”⁹⁶ By contrast, under the “social regulation” that had emerged in the 1970s—of which environmental regulation was the most important example—

88. *Id.* at 20 n.80 (“De la permanence des règles dépend l’utilité de l’action, car aucune prévision ne peut être faite que sur la considération de ce qui existe.”) (quoting GEORGES RIPERT, *LES FORCES CRÉATRICES DU DROIT* 1 (2d ed. 1955)); FRÉDÉRIC AUDREN, *GREAT CHRISTIAN JURISTS IN FRENCH HISTORY* 372–86 (Olivier Descamps & Rafael Domingo eds., 2019).

89. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 17 (1960) (“Instead of instituting a legal system of rights which can be modified by transactions on the market, the government may impose regulations which state what people must or must not do and which have to be obeyed.”).

90. Sabin sometimes presents public-interest liberalism as opposed to Progressivism, e.g., pp. 5, 12, and sometimes as continuous with it, e.g., p. 66. Without equating the two, I think the continuity framing is more powerful. Where public-interest liberalism seemed to reject Progressivism, its opposition was often more directly to later, New Deal-style administration disconnected from civic organization.

91. See Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIST. 113 (1982).

92. ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920* 112 (1967).

93. *Id.* at xiv.

94. Ralph Nader, *Violence — A Matter of Definition*, WASH. STATE BAR NEWS, June 1970, at 5, 6.

95. *Id.*

96. Richard B. Stewart, *The Discontents of Legalism: Interest-Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 670 (1985).

“an agency regulates only a limited aspect of the business activities of many industries.”⁹⁷ For Stewart, as for those who had analyzed the “new ‘social regulation’ ” several years earlier,⁹⁸ environmental law involved disquieting interference with the market. But in some ways, the new social regulation was more congenial to capitalism: limited regulation everywhere could substitute for public provision, preserving the basic political-economic structure while managing externalities.

Regulatory thought lent itself to a distinctive conception of “the environment.” The political scientist Lynton K. Caldwell, whose work influenced NEPA, wrote in 1963 that in theory “it matters little how environment is defined, provided it is defined comprehensively.”⁹⁹ But in practice, this “comprehensive” definition was circumscribed by the presumptions of regulation—presumptions that Caldwell himself shared. An “ecological” viewpoint, Caldwell wrote, was one “congenial to the scientist-administrator who prefers decisions based on verifiable facts, for example, to those based on political fiat.”¹⁰⁰ Caldwell argued that the “ecological” perspective must be integrated with the political and economic “market.” But he made clear that the environment required a distinctive form of “administration.”¹⁰¹ A decade later, the legal scholars Bruce Ackerman and James Sawyer offered one vision of Caldwell’s view at the level of institutional design. Their work assumed “the perspective of a hypothetical social engineer charged with . . . designing a set of institutions that promises to handle ‘best’ the complex problems of environmental regulation posed by a major interstate river.”¹⁰²

B. *Legalism as Morality*

Environmental law was not defined only by its reliance upon regulation but also by its legalistic moral orientation. Public-interest lawyers were often not just activists who used the courts, but intellectuals who developed their political visions through law. These visions were powerful when first conceived, but they depended upon the legal system’s reliable moral prestige—prestige that proved fleeting for environmentalists.

97. *Id.*

98. See William Lilley III & James C. Miller III, *The New ‘Social Regulation,’* PUB. INT., Spring 1977, at 49.

99. Lynton K. Caldwell, *Environment: A New Focus for Public Policy?*, 23 PUB. ADMIN. REV. 132, 133 (1963); Oliver A. Houck, *Is That All? A Review of The National Environmental Policy Act, An Agenda for the Future*, by Lynton Keith Caldwell, 11 DUKE ENV’T L. POL’Y F. 173, 174–75 (2000).

100. Caldwell, *supra* note 99, at 135.

101. *Id.* at 137.

102. Bruce Ackerman & James Sawyer, *The Uncertain Search for Environmental Policy: Scientific Factfinding and Rational Decisionmaking Along the Delaware River*, 120 U. PA. L. REV. 419, 422 (1972).

I use “legalism” to invoke two related ideas. First, the political scientist Robert Kagan describes “adversarial legalism” as an institutional structure. Legalism in his definition means “party-and-lawyer-dominated legal contestation.”¹⁰³ Second, the political theorist Judith Shklar characterizes legalism as an “ethical attitude,” one that “holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”¹⁰⁴ Shklar’s analysis is illuminating but should be expanded. Legalism as an “ethical attitude” may hold moral conduct to be defined not just through “rules,” but also through the full set of social practices that constitute law. With Shklar in mind, we might see that Kagan’s “adversarial legalism” is often a moralized project, not simply a strategic choice among means for pursuing predetermined ends. Indeed, legalism may valorize any process that assumes away the disagreements endemic to political life in the name of law’s rule.¹⁰⁵

Shklar’s analysis indicates that while politics is inevitably legalistic to some degree, one can speak of degrees (and, one might add, varieties) of legalism.¹⁰⁶ Politics, of course, cannot do without law over the long term: Congress—to take the simplest case—is a legally constituted body, and to propose a political program is usually to propose legal change. Describing politics as “legalistic” (or not) will therefore always be fraught. Nonetheless, the law’s role varies in its prominence and character. Indeed, as I discuss further in Section III.C., environmental law’s initial legalism was historically anomalous. Professor Adrian Vermeule, for example, argues that administrative law has now “abnegated its authority, relegating itself to the margins of governmental arrangements.”¹⁰⁷ Law is still “constitutive of the administrative state” today, he insists, but “only in a thin sense.”¹⁰⁸ Similarly, Professors William Eskridge and John Ferejohn posit that, unlike several decades ago, the constitutive principles of environmental law currently include deference to agency experts.¹⁰⁹

Early environmental law, however, was conceived in quite-different terms. Leading 1960s legal scholar Charles Reich, for example, responded to the New Deal order’s defects by calling for a new “law of the planned society.” By this, he meant a set of processes adequate for choosing public values, given that “agencies [were] to be our new legislatures.”¹¹⁰ Reich’s proposals found resonance in the public-interest lawyers’ aspiration, so well documented by Sabin, to make regulation “government proof” (ch. 5). Only law, and not or-

103. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2d ed. 2019).

104. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 1 (1964).

105. Cf. Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319 (2010).

106. SHKLAR, *supra* note 104, at 3.

107. ADRIAN VERMEULE, *LAW’S ABNEGATION* 1 (2016).

108. *Id.*

109. WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES* ch. 6 (2013).

110. Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1259 (1966).

dinary politics, could guarantee “bodily rights” against car crashes and air pollution (p. 23). This is not to suggest that Reich or others drew sharp conceptual boundaries between law and politics. Indeed, Reich insisted that they were intertwined.¹¹¹ Yet these theorists nonetheless thought that in some measure “the environment” could and should elude politics’ grasp.

Environmental thinkers of many intellectual stripes shared legalistic ideas. Some, including Reich, understood environmental law as protecting private interests rather than “the public interest.” “The ‘public interest,’ ” Reich wrote, “no matter how democratically arrived at, no matter how broadly conceived, is not an adequate concept of society.”¹¹² Instead “the Bill of Rights,” as interpreted in *Griswold v. Connecticut*, must furnish the “starting point” for further safeguarding individuality.¹¹³ The law professor E.F. Roberts extended Reich’s analysis, calling for the courts to find in *Griswold* “a personal right to a decent environment.”¹¹⁴ That Reich and Roberts both invoked the contraception case was no accident. As lawyer David Sive explained, drawing upon Roberts’s essay, *Griswold* seemed to herald a new, liberal role for substantive due process. *Lochner* had been forgotten, replaced by “the right to look at the [unquarried] mountain.”¹¹⁵

Others, such as lawyer Victor Yannacone, embraced “the public interest” yet still remained legalistic. Yannacone joined Roberts and Sive in advocating for environmental constitutional rights but insisted those rights should be “public” rather than “personal.”¹¹⁶ Yannacone’s vision, as he explained in a brief, was one of “judicial suprem[a]cy.”¹¹⁷ This meant not just that courts should have ultimate interpretive authority but also that they should exercise broad supervisory power over government. Yannacone acknowledged that litigation was “inefficient and cumbersome.”¹¹⁸ Nonetheless, he retained his faith that “[t]he courtroom [was] the last arena where the individual citizen can meet mighty government or big business and hope to survive.”¹¹⁹ This was a

111. *Id.* at 1257–58.

112. *Id.* at 1267.

113. *Id.* at 1267–68.

114. E.F. Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, in LAW AND THE ENVIRONMENT, *supra* note 65, at 134, 161 [hereinafter, Roberts, *The Right to a Decent Environment*]; see also E.F. Roberts, *The Right to a Decent Environment; E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674, 690–91 (1970).

115. David Sive, *The Environment: Is It Protected by the Bill of Rights?*, CIVIL LIBERTIES, Apr. 1970, at 3, 6.

116. VICTOR J. YANNAZONE, JR., BERNARD S. COHEN & STEVEN G. DAVISON, ENVIRONMENTAL RIGHTS AND REMEDIES 9–10 (1972).

117. Brief of Plaintiff on Equitable Remedies at 37, *Yannacone v. Dennison*, 55 Misc.2d 468 (N.Y. Sup. Ct. 1967), <https://yannalaw.com/about/major-litigation/ddt/suffolk-ddt/suffolk-county-ddt-litigation-equity-brief> [perma.cc/73CC-V37D].

118. YANNAZONE, JR. ET AL., *supra* note 116, at 8.

119. NORMAN J. LANDAU & PAUL D. RHEINGOLD, THE ENVIRONMENTAL LAW HANDBOOK 8 (1971) (quoting Yannacone).

reason to turn to the courts while “[w]aiting for Washington.”¹²⁰ But—as the omission of the judiciary from “Washington” suggests—Yannacone’s premises could also underwrite the frank embrace of judicial review as “essentially an anti-democratic process.”¹²¹

Some sought to harmonize judicial supremacy with public prerogatives by casting litigation as democratic. Roberts argued that “the Court is only able to lead in constitutional development when the people will recognize a constitutional restatement as essentially their own.” And with concern for the environment proliferating, the “intellectual environment” seemed to him “propitious” for such innovations.¹²² The law professor Joseph Sax offered a different but related argument. In his view, court-issued injunctions against agency actions could function “essentially [as] . . . judicial remand[s] to the legislature.” So understood, environmental litigation involved “citizens . . . com[ing] to the least democratic of the branches of government to make democracy work.”¹²³ Despite their substantial differences, both Roberts and Sax thought “the environment” needed to be removed from ordinary politics to realize democracy’s promise. Both, it seemed, held on to the heroic image of the courts even after Earl Warren’s day had passed.

Environmental law in practice reflected these legalistic visions from the outset. In two well-known cases, for example, environmentalist plaintiffs invoked the nondelegation doctrine to challenge federal statutes.¹²⁴ And in one of those suits, the American Civil Liberties Union of Southern California sought judicial recognition of the “fundamental right to retain and enjoy the esthetic beauty of natural resources reasonably free of obstruction and pollution.”¹²⁵ Even lawyers who emphasized collective interests over private rights placed similar faith in the judiciary.¹²⁶ The *New York Times* welcomed such

120. John C. Esposito, *Air and Water Pollution: What to Do While Waiting for Washington*, 5 HARV. C.R.-C.L. L. REV. 32 (1970).

121. John Y. Pearson, Jr., Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458, 481 (1970).

122. Roberts, *The Right to a Decent Environment*, *supra* note 114, at 165.

123. Joseph L. Sax, *Emerging Legal Strategies: Judicial Intervention*, 389 ANNALS AM. ACAD. POL. & SOC. SCI. 71, 76 (1970).

124. See Malcolm F. Baldwin, *The Santa Barbara Oil Spill*, in LAW AND THE ENVIRONMENT, *supra* note 65, at 5, 40; *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 106 (2d Cir. 1970). The latter was a federal constitutional claim, notwithstanding that the relevant authority delegated was from New York’s legislature. David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 622 n.42 (1970).

125. *Cnty. of Santa Barbara v. Hickel*, 426 F.2d 164, 166–67, 166 n.2 (9th Cir. 1970); *Cnty. of Santa Barbara v. Malley*, 426 F.2d 171 (9th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971); *Petition for Writ of Certiorari, Malley*, 400 U.S. 999 (No. 695) (listing two ACLU lawyers as the attorneys for the nongovernment petitioners); see also Sive, *supra* note 115, at 3.

126. See, e.g., *Env’t Def. Fund, Inc. v. Hoerner-Waldorf Corp.*, 3 E.L.R. 20794 (D. Mont. 1970) (considering a claim for environmental constitutional rights); see also YANNAZONE, JR. ET AL., *supra* note 116, at 370 (describing *Hoerner-Waldorf* as “raising the claim that the defendant corporation owed a duty to the people of the Missoula valley in Western Montana to provide the cleanest ambient air” technologically possible).

suits promising to expand constitutional protections “beyond property.”¹²⁷ But, as the *Washington Post* recognized, these legal challenges relied upon “personal property rights” even if they extended those rights to “the environment.”¹²⁸ “It seems highly improbable,” the *Post*’s editorial board observed, “that this complex problem will be solved by courts relying upon an enlarged concept of the principle of due process of law.”¹²⁹

Even after these early litigation experiments faded, legalism’s legacies remained. In 1975, Richard Stewart described the rise of a new “interest representation” model in administrative law.¹³⁰ Expanded standing to sue, greater rights to participate in agency proceedings, and “hard look” judicial review of administrative decisions—all reflected the aspiration to saturate bureaucratic decisionmaking with law. Yet this aspiration’s appeal rested upon the rejection of political “right answers”¹³¹—which is precisely what had made consensus through regulation seem feasible. “Interest representation,” Stewart explained, rejected any “objective basis for social choice.” “‘Public interest’ lawyers actually represent important but unorganized private interests rather than some transcendent collective interest in the national welfare.”¹³²

Environmental legalists also bequeathed to their field their own conception of “the environment.” Judicial articulation of the personal right to a decent environment, Roberts wrote, “would require every agency of government, whether a local zoning board or a federal home-mortgage lending agency, to review their plans to make certain that their activities did not actually exacerbate the deteriorating environment.”¹³³ So understood, issues were “environmental” when they involved the expanded property rights heralded by the *New York Times*.¹³⁴ Roberts’s proposed right, of course, was never federally recognized. But NEPA and its state analogues came to serve much the same function.¹³⁵ Presumptions drawn from constitutional jurisprudence thus came to describe the proper subject matter for a “national environmental policy.”

127. Editorial, *Beyond Property*, N.Y. TIMES, July 15, 1969, at 38.

128. Editorial, *Conservation and Property Rights*, WASH. POST, July 20, 1969, at B6.

129. *Id.*

130. See generally Stewart, *The Reformation of American Administrative Law*, *supra* note 15.

131. See, e.g., *Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 621 (2d Cir. 1965) (“For (the administrative) process to be successful in a particular field, it is imperative that controversies be decided as ‘rightly’ as possible, independently of the formal record the parties themselves produce.” (quoting JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 39 (1938))).

132. Stewart, *The Reformation of American Administrative Law*, *supra* note 15, at 1683, 1683 n.67.

133. Roberts, *The Right to a Decent Environment*, *supra* note 114, at 163.

134. *Beyond Property*, *supra* note 127.

135. Cf. *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 (1980) (per curiam) (treating effects of siting low-income housing as “environmental” for the purposes of NEPA’s assessment requirement).

C. *Environmental Law as Short-Lived Synthesis*

Environmental law as constructed in the 1960s and '70s did not last long. Commitments to regulation in policy and to legalism in morality initially combined in productive tension. But the two visions soon came apart: regulation endured while legalism faltered. For liberals who had depended upon law—and especially upon the judiciary—for their ideas, the judiciary's conservative turn proved devastating. Environmentalists “h[e]ld the line” against Reaganism (p. 179) and later threats. But with their original moral vision defeated, environmentalists were indeed unable “to create a coherent alternative to market-oriented conservatism” (p. xiv).

Environmental regulation persisted in part because it was never fundamentally challenged. Sabin celebrates environmentalists' successes in preserving their gains against the New Right. Within the “sharply polarized climate” of the early Reagan years, “the nonprofit sector surged as an external force” (p. 178). That the Natural Resources Defense Council, the Sierra Club, and other groups could mobilize in resistance vindicated Nader's vision of “countervailing power.” By 1981, “public lobbyists” had fortunately gained some power.¹³⁶ But threatening as the Reagan administration was, its policies remained within the existing paradigm. For administration officials James Watt and Anne Gorsuch, the central choice really was between more regulation and less.¹³⁷ Reagan's appointees left no doubt where they stood.¹³⁸ Yet, in continuing to frame the debate in terms of the degree of regulation, they did not entirely abandon the vision of earlier environmental advocates. In this respect, what Professor Richard Lazarus calls “[t]he Reagan Revolution that wasn't”¹³⁹ was not quite so revolutionary even in its conception. Within these ideological limits, “the scope of environmental protection” could even “dramatically expand[]” through the 1980s.¹⁴⁰

Environmental legalism, by contrast, faced fatal threats. Here the greatest danger was not the New Right, but the Burger Court. In environmental law's early years, the federal judiciary had been largely amenable to legalism. In 1971, Judge J. Skelly Wright proclaimed the judicial duty “to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”¹⁴¹ Twelve years later, then-Judge Antonin Scalia quoted Wright's opinion to show how far

136. See RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE* 236 (2d ed. 1996).

137. See, e.g., Susan Trausch, *Deregulation Works Its Way into Your Life*, BOS. GLOBE, Dec. 12, 1982, at 1; ‘*Fox in Chicken Coop, Some Say: Agencies Will Be Led by Former Foes*, BALTIMORE SUN, Mar. 10, 1981, at A1.

138. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 100–01 (2004).

139. *Id.* at 99.

140. *Id.* at 106.

141. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

astray the judiciary had gone in its “long love affair with environmental litigation.”¹⁴² In fact, the affair was already over. In cases such as *Warth v. Seldin*¹⁴³ and *Vermont Yankee*,¹⁴⁴ the Supreme Court had curtailed judicial oversight of environmental policymaking. *Chevron* was soon to follow.¹⁴⁵ Today, environmentalists have made their peace with these decisions. Indeed, deference to administrative agencies may serve their ends more often than not.¹⁴⁶ But the Court had nonetheless stripped the legal process of its liberal clout. “As the fates would have it,” E.F. Roberts lamented in 1975, “the times ceased to be propitious” for environmental legalism.¹⁴⁷

By the early 1980s, “party-and-lawyer dominated legal contestation” survived, but without the “ethical attitude” that once animated it. Environmental law thus became the technocrat’s “search for environmental quality.”¹⁴⁸ In 1971, an article in Volume 1 of the *Ecology Law Quarterly* had called for expanding citizen standing to sue as a democratic prerogative.¹⁴⁹ Representative Morris Udall’s Introduction to Volume 10 of the same journal struck a different note. In the short term, Udall wrote that court cases would be “vital battles in the war to preserve and institutionalize environmental ethics.”¹⁵⁰ But in the longer term, he hoped that “cooperation, or at least mutual respect” would replace “confrontation” between industry and environmentalists.¹⁵¹ Richard Stewart criticized regulation through litigation and offered a cooperative vision. He advocated for “abandon[ing], wherever feasible, centralized command and control regulation in favor of economic-based incentive systems.”¹⁵² This market-based vision soon caught on. Udall and Stewart, then, disagreed about whether to mourn or to celebrate legalism’s defeat, but both saw that environmental law’s future lay beyond the courts.

Environmental justice advocates offered a different path forward. Many early environmental lawyers saw “the environment” as posing problems of bureaucratic and industrial thoughtlessness. Others, however, saw it as presenting questions of power. “Our rich white brothers,” said one speaker in an Earth Day skit presented by activist and organizer Freddie Mae Brown and the St.

142. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983).

143. See 422 U.S. 490 (1975).

144. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

145. See *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

146. See, e.g., Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 524–25 (2022).

147. E.F. Roberts, *The Right to a Decent Environment: A Premature Construct*, 1 ENV’T POL’Y & L. 185, 188 (1976).

148. BRUCE A. ACKERMAN, SUSAN R. ACKERMAN, JAMES W. SAWYER, JR. & DALE W. HENDERSON, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974).

149. See Robert E. Lutz II & Stephen E. McCaffrey, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L.Q. 561 (1971).

150. Morris K. Udall, *Introduction to Volume 10*, 10 ECOLOGY L.Q. 1, 2 (1982).

151. *Id.* at 2–3.

152. Stewart, *The Discontents of Legalism*, *supra* note 96, at 683.

Louis Metropolitan Black Survival Committee, “never cared at all” about the problems of pollution “until they started calling them environmental problems and saw that the mess in the food, water, and air wasn’t just killing poor folk but was killing them too.”¹⁵³ This critique persisted and expanded through the 1970s and ’80s as social-scientific research further revealed the scope of injustice.¹⁵⁴ In a landmark 1987 report, the United Church of Christ emphasized that, though Black and other “racial and ethnic communities” were deeply concerned with environmental issues, “the environmental movement . . . has historically been white middle- and upper-class in its orientation.”¹⁵⁵ Because of this narrow focus, communities of color suffered unequally from environmental harms. This political problem demanded a political solution: the United Church of Christ called not only for new regulatory directives but also for voter registration campaigns to empower those affected.¹⁵⁶

These challenges have now gained new salience as environmental regulation’s limits have become more apparent. Environmental law in the United States has been no small achievement. The regulatory regimes first built in the 1970s helped avert looming crisis, endured the Reagan administration’s assaults, and hold still-untapped resources for confronting today’s threats. But in the face of looming climate catastrophe, environmental law as it exists today is not enough. President Biden and congressional Democrats have begun to recognize this: even as they have proposed new regulations, they have focused much of their proposed environmental agenda on wielding the fiscal power of the federal government.¹⁵⁷ Indeed, it seems many liberals, along with those further left, have begun abandoning “environmentalism,” preferring instead to speak in terms of “climate.”¹⁵⁸ Democrats, it is true, have mostly rejected

153. Freddie Mae Brown, St. Louis Metro. Black Survival Comm., *Black Survival: A Collage of Skits*, in EARTH DAY, *supra* note 74, at 95, 103–04.

154. See, e.g., Robert D. Bullard & Beverly Hendrix Wright, *Blacks and the Environment*, 14 HUMBOLDT J. SOC. RELS. 165 (1987).

155. COMM’N FOR RACIAL JUST., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES, xi–xii (1987).

156. *Id.* at xv–xvi.

157. See, e.g., *Fact Sheet: The Bipartisan Infrastructure Deal*, WHITE HOUSE (Nov. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal> [perma.cc/Y6MD-W5HM] (characterizing the \$89.9 billion allocated by the Infrastructure Investment and Jobs Act as “the largest [f]ederal investment in public transit in history”); Maegan Vazquez & Donald Judd, *Biden Signs Inflation Reduction Act into Law*, CNN (Aug. 16, 2022, 10:29 PM), <https://www.cnn.com/2022/08/16/politics/biden-inflation-reduction-act-signing/index.html> [perma.cc/B2PY-SAX3] (characterizing the Inflation Reduction Act as “the largest climate investment in American history”).

158. See Jeffrey M. Jones, *Four in 10 Americans Say They Are Environmentalists*, GALLUP (Apr. 21, 2021), <https://news.gallup.com/poll/348227/one-four-americans-say-environmentalists.aspx> [perma.cc/AB9L-QM3N].

aspirations for mass mobilization around a “Green New Deal.”¹⁵⁹ But mainstream proposals for a “Civilian Climate Corps” suggest new concern for empowering ordinary citizens in the fight for a livable planet.¹⁶⁰

CONCLUSION

Public Citizens argues that public-interest liberals helped unmake the New Deal order from within. But as I have shown, their greatest victories were in fact on “big government’s” behalf. To understand the influence of public-interest liberalism, we should focus less on how its proponents undermined the state, and more on how they transformed it. Public-interest liberals, I have suggested, were centrally committed to regulation in public policy and to legalism in political morality. In the environmental field, the synthesis of regulation and legalism proved short-lived, as liberals were unable to muster a convincing vision after the courts turned against them.

With this history in view, we can now better understand New York’s congestion pricing debacle along with the broader challenges it represents. Congestion pricing, it turns out, is not an entirely new idea. Just after Congress passed the Clean Air Amendments of 1970, lead sponsor Senator Edmund Muskie declared that the bill would “require that urban areas do something about their transportation systems . . . [and] the development of public transit systems.”¹⁶¹ The report of Muskie’s committee was even more explicit: “[c]onstruction of urban highways and freeways may be required to take second place to rapid and mass transit and other public transportation systems. Central city use of motor vehicles may have to be restricted.”¹⁶² Muskie almost certainly envisioned something closer to “command and control” than to “economic-based incentive systems.” But either way, the Clean Air Act did not quite do what he said: any statutory restrictions upon vehicular traffic would be indirect at most, imposed through the churn of state and federal administration.

The problem, of course, was not only that the Clean Air Act failed to restrict “central city use of motor vehicles.”¹⁶³ One year earlier, Muskie had decisively influenced another environmental statute: NEPA.¹⁶⁴ He could not

159. See Lisa Friedman, *Senate Blocks Green New Deal But Expends Plenty of Carbon Talking About It*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/us/politics/senate-green-new-deal.html> [perma.cc/Q44C-S4X8].

160. See Martha Ross, *America’s Young People Face a Grim Future. A Civilian Climate Corps Can Help*, BROOKINGS: THE AVENUE (Jan. 27, 2022), <https://www.brookings.edu/blog/the-avenue/2022/01/27/americas-young-people-face-a-grim-future-a-civilian-climate-corps-can-help> [perma.cc/5QTT-5QK4].

161. Arlen J. Large, *New Car Deadline Highlights Pollution Bill, but Other Parts Could Have Broad Impact*, WALL ST. J., Dec. 21, 1970, at 2.

162. *Id.*

163. See *id.*

164. See generally Brigham Daniels, Andrew P. Follett & James Salzman, *Reconsidering NEPA*, 96 IND. L.J. 865 (2021).

have foreseen that his two legislative achievements might conflict decades later.

History presented one more irony. Soon after Muskie’s statement, President Nixon signed the Clean Air Act into law. That same day, Nixon approved five other bills, including the latest highway bill. Just as Congress demanded sweeping environmental regulations, it appropriated over \$14 billion in new funding for the country’s open roads, helping to ensure the automobile’s continued dominance.¹⁶⁵

Here in 1970 were the seeds of New York’s—and the country’s—present dilemmas: regulation, legalism, and federal spending, all combined for good and for ill, with consequences unpredicted by their champions. Perhaps the real tragedy, then, was not that liberals unwittingly undermined “big government,” but that they failed to see all that liberalism offered for building a more-sustainable world.

165. Don Oberdorfer, *Muskie Not Invited to Air Law Signing*, WASH. POST, TIMES HERALD, Jan. 1, 1971, at A2; see CHRISTOPHER W. WELLS, *CAR COUNTRY: AN ENVIRONMENTAL HISTORY* 275 (2012).

