

1989

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Recommended Citation

William H. Rodgers Jr., *The Lesson of the Red Squirrel: Consensus and Betrayal in the Environmental Statutes*, 5 J. Contemp. Health L. & Pol'y 161 (1989).

Available at: <https://scholarship.law.edu/jchlp/vol5/iss1/11>

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THE LESSON OF THE RED SQUIRREL: CONSENSUS AND BETRAYAL IN THE ENVIRONMENTAL STATUTES

*William H. Rodgers, Jr.**

I. CHARACTERIZING THE GAME AND THE PLAYERS

A. *Game Theory*

The subjects of legislation and legislative change are undergoing a revival of sorts in United States' law schools.¹ The academic community has offered a variety of theoretical visions on the nature of legislation—purposive and rational, irrational and political, the accidental outcome of competing interests, the imperfect product of high philosophy; the legislative process—formal and ritualistic, markets and auctions, plots and cabals, or public-regarding negotiations; and the individual legislators themselves—ritual players, auctioneers, maximizers of political gain, profiteers, and philosopher kings in shiny suits.

This author's personal approach to legal affairs of this sort is to draw on the laws of biology (loosely construed to include a range of sciences) to gain insights into the workings of complex social systems.² This is familiar ground for students of environmental law since the classical conservation writers (including George Perkins Marsh and Aldo Leopold) often applied the lessons of a dynamic physical environment to human cultural choices.³ The centerpiece of this type of analysis is game theory. This analytical approach is premised on the idea that "the choice of the 'best' is not formal and

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1. See, e.g., *Special Issue on Legislation: Statutory and Constitutional Interpretation*, 48 U. PITT. L. REV. 619 (1987); *Congress' Role and Responsibility in the Federal Balance of Power*, 21 GA. L. REV. 1 (1986); *Interpretation Symposium*, 58 S. CAL. L. REV. 1, at 277 (1985).

2. Rodgers, *The Evolution of Cooperation in Natural Resources Law: The Drifter/Habitué Distinction*, 38 U. FLA. L. REV. 195 (1986).

3. W.H. RODGERS, JR., 1 ENVIRONMENTAL LAW: AIR & WATER, preface at v (1986) [hereinafter 1 AIR & WATER].

definitive" but "is uniquely dependent upon what the other players do."⁴

A simple illustration⁵ will suffice: the red squirrel developed a chattering strategy to discourage predators like the great horned owl; it was a good strategy because owls don't waste their time pursuing prey that is alert and prepared. Unfortunately now, there is a new predator on the block—humans armed with rifles. Chattering is no longer a good strategy for red squirrels.

What do legislators have in common with chattering red squirrels? More perhaps than we would care to admit. It should be emphasized, however, that legislators (and we are interested specifically in the ones who are enacting the environmental statutes) do their best to get along in two distinctly different environments. In environment one, the statute is assembled in a small-numbers bargaining game between key legislators and representatives of interest groups;⁶ this game requires trades and exchanges. It is played over time, and yields a legislative product with "consensus" features (evidences of trading among players who prefer legislation to no legislation). This legislative gaming, however, has definite termination points (*e.g.*, when the bill is reported out of committee or enacted). This closing phase marks the onset of environment two. In the second environment, many of the bonds of cooperative solidarity developed in environment one are suddenly loosened. This legislative gaming yields a product with "betrayal" features (evidence of unilateral gain-seeking by players now free of the constraints of cooperation). These two environments come equipped with the lesson of the red squirrel: today's "best" for these players may not look so good in tomorrow's changed environment.

B. Simplicity of Assumptions

Taking a cue from the physical scientists, the attempt here is to keep the assumptions to a minimum. As any reader of law reviews can tell you, the explanatory power of any legal theory (or model) is inversely proportional to the number of pages needed to describe it.

1. Numbers and Types of Games

In all likelihood, of course, the enactment of complex legislation involves scores of games with a host of players (*e.g.*, majority *v.* minority, staffers *v.* members, agency *v.* members, White House *v.* chair, and so on). These are assumed to be games in the familiar construct of the prisoners' dilemma—

4. Rodgers, *supra* note 2, at 197.

5. B. HEINRICH, *ONE MAN'S OWL* 73-74 (1987).

6. 1 *AIR & WATER*, *supra* note 3, at VI-VII.

an uncertain number of repetitions, nonzero sum (A's gains need not equal B's losses). Each player has some power to hurt the other. Individual games with many players, known as n-person games in the literature, focus on the necessity for the building of coalitions.⁷ The use of coalitions simplifies the analysis further by permitting a reduction of n-person games to two-person games.⁸ A two-person model may not fit faithfully the details of the legislative process but it is hoped that it expresses the important dynamics of bargaining.

2. *The Players*

The people playing the legislative game need not meet particular tests of motivation or status.⁹ They can be shadowy lobbyists, powerful environmentalists, or invisible staffers. They can be tools of the special interests, greedy maximizers driven by deep personal conviction, or prisoners of the flow of events.¹⁰ They can be prophets of God, agents of doom, or servants of the devil. They can have nicknames like rockhead, boozer, snakey, and traitor.

There are minimal rationality requirements that oblige a player to seek the highest payoffs during both the iterative and noniterative phases of the legislative game. Payoffs can appear in many guises and must appeal to individual preferences, but generally they are expected to appear as "favorable" consideration in the legislative product. As we shall see, strategies are expected to change as the phase changes. This rationality requirement does not rule out some nonrational behavior and the type of threats that have always had a special status in game theoretical analysis.¹¹

3. *Power Disparities, Fringe Players, and Late Entrants*

Life is filled with power disparities that affect bargained-for outcomes. (The Chicago Bears, to mention but one example, voted 45:1 to bar replac-

7. M.D. DAVIS, *GAME THEORY: A NONTECHNICAL INTRODUCTION* 173-74 (rev. ed. 1983) (The forming of coalitions permits a reduction of n-person to two-person games.).

8. *See id.* at 180-81.

9. *See generally* Harrison, *Strategy and Biology: The Continuing Interest in Self-Interest* (Book Review), 86 COLUM. L. REV. 213 (1986).

10. Compare Birnbaum, *Personal Reasons: Brush With Adversity is a Potent Motivator for Many Lawmakers*, Wall St. J., Oct. 2, 1987, at 1, col. 1 (on how the specialties of many lawmakers are influenced by personal considerations) with Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

11. *See* Rodgers, *Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENVTL. L. REV. 191, 212 n.146 (1980) (discussing the bargaining advantages of the fanatic).

ment players from the team, but this strong show of solidarity did not survive the single positive vote of Coach Mike Ditka). Obviously, some bargainers are more equal than others in the lawmaking game. The theory requires only that the players fall short of an all-powerful position that can do best by unilateral action. So long as the cooperation of others is needed, payoffs can be expected to bridge the differences between the parties. Sometimes a scrap is sufficient. The environmental statutes are filled with case-specific benefits for the constituents of individual members of Congress.¹² These may be the result of political compensation necessary to dissuade negative votes, or they may be courtesy payoffs to maintain the enthusiasm of fringe players.

Another version of the fringe player is presented by the problem of late entrants. It is intuitively plausible that the process of enacting legislation has crests or phase changes when the prospects of passing a piece of legislation jump from the remote to the probable (e.g., the Chair has said, "There will be a bill," or Presidential backing becomes more than lip service). At this point, for a variety of reasons, the process is likely to capture and hold players whose commitment to a "consensus" means only that they would rather be included than excluded from negotiations that are going to happen anyway. In other words, you can take the only train to New Haven, or you can walk.¹³

This phenomenon of being reluctant to defect from a game that can proceed without you is underscored by the Environmental Protection Agency's experience with negotiated rulemakings. The agency has resorted to the procedure four times: 1) to develop the rules for hazardous waste injection; 2) nonperformance penalties for truck engines; 3) pesticide rules for emergency exemptions; and 4) farmworker protection.¹⁴ The most salient consequence is that a "consensus" can be produced by these negotiations in what appear to be the most implausible of circumstances. It is difficult to imagine why the environmentalists abided by, much less consented to, definitions of

12. See, e.g., W.H. RODGERS, JR., 2 ENVIRONMENTAL LAW: AIR & WATER, § 4.2, at 27-29, § 4.23, at 344 (1986) [hereinafter 2 AIR & WATER].

13. This means that participants in the game include not only those who prefer legislation to no legislation but also those who, if faced with the prospect, prefer "influenced" legislation over "uninfluenced" legislation. Here are groups with clear incentives to work towards legislation that is "better" for them while being perfectly content with the prospect that the entire structure may come tumbling down. Legislation is indiscriminating in its allocation of rewards so the game remains open to fringe participants, latecomers, or poor sports.

14. W.H. RODGERS, 3 ENVIRONMENTAL LAW: AIR & WATER, § 5.16 at 215 ("the agency has hope for the procedures in limited contexts — those with a small number of interests affected, readily identifiable pressure groups, confined agendas, and raising issues of definition and mid-level policy consequences") [hereinafter 3 AIR & WATER]. Agency staffers, including senior personnel, keep a tight grip on the negotiations process.

an "emergency" that would allow the use of unregistered pesticides to avoid an abnormal fluctuation in profits by an agricultural enterprise.¹⁵ Of course, the choice is understandable if quitting the game means that you get nothing rather than a chance at something.¹⁶ In this context and with this interpretation the hard question is to explain why anybody would decline to participate in the game. The farmworker representatives did walk out of the rulemaking on pesticide field reentry standards,¹⁷ and this author wonders why.

The problem of those who come reluctantly to the negotiation table does damage to the concept of a "consensus" statute. Although enactment of a particular piece of legislation may not occur without the dominant players preferring legislation to no legislation, there is still some room in this situation for free riders or parasites. Not every feature of the statute needs to be explained as a consensus-builder; but it cannot be a consensus breaker. This strain on the "consensus" concept is made more acute by the noniterative aspects of the game discussed below.

II. THE PRODUCT OF ITERATIVE GAMES

A. *Consensus Laws*

A variety of academic works in recent times have explored unusual circumstances in which cooperation can be established among principals with strikingly different objectives.¹⁸ The crucial distinction that gives rise to cooperation is frequent interaction. Repeated opportunities for reward and punishment are important ingredients of reciprocity.¹⁹ The development of legislation, described as an iterative game played over time, is precisely the sort of occasion expected to give rise to a cooperative outcome containing "wins" for all the players. This expectation of a "consensus" law is compatible with other theoretical reasons for believing that the environmental stat-

15. These rules are proposed in 50 Fed. Reg. 13,944 (1985) (April 8, 1985) and adopted without substantial change in 51 Fed. Reg. 1896 (1986) (codified at 40 C.F.R. § 166 (1987)).

16. The pesticide emergency exemption rule has a smattering of "somethings" for environmentalists, including the possibility of resorting to unregistered pesticides to protect endangered species. Ordinarily, players on a team lacking three-point shooters would resist endorsing a three-point rule if the other players were expected to gain a greater advantage.

17. A prediction that your participation would earn you nothing might support a walkout to save one's dignity ("How dumb do they think we are?") not to mention the costs of continued participation. A walkout might be justified, even with predictions of a worsened position, because a complete rout could lead to judicial intervention that might be withheld in the mere case of severe injustice. Lawyers trapped in hopeless forums have been known to provoke error in the hopes of a subsequent collateral success.

18. R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984), which has been cited in scores of academic studies from a variety of different disciplines.

19. See Rodgers, *supra* note 2.

utes are the product of a "consensus" among key legislators and interest groups who prefer legislation to no legislation.²⁰ This prediction receives mild confirmation from the surprising number of enactments in the field that bear the "consensus" label,²¹ and much stronger verification from the widespread appearance in the environmental statutes of nonzero-sum features, where disadvantages to some players are offset by compensating gains within the same legislative package.²²

Accepting this "consensus" characterization for the moment, attention is drawn to the contents of a law product that can win the universal assent of the bargainers. Achieving this formidable goal calls for coalition-building in the extreme—some kind of miracle package that can create winners without losers. How can this be accomplished? Several prospects come to mind, and all are represented in the environmental statutes.

B. Strategies of Consensus

1. Dissembling and Manipulation

Students of political decisionmaking are quick to remind us that in contests between several alternatives and more than two voters "the outcome depends as much on the procedure of amalgamation as on the tastes of participants."²³ The skillful political decisionmaker is able to juggle parameters, by controlling agenda, adding dimensions, and the like, to influence the outcome in a voting setting. One of the classical cases of this art form is former Senator Warren Magnuson's success in defeating proposals to ship nerve gas to his home state of Washington by recharacterizing the issue as one of Senate prerogative rather than local objection.²⁴

These stark necessities of the political mind prompt us to entertain the prospect of legislative provisions that would allow both dissembling and manipulation by the principals. In this context, dissembling means hoping to achieve A by voting for B and manipulation means a packing of the agenda to make dissembling possible. Put simply, one might expect these "consensus" laws to have safe refuges for hiding "no" votes under a "yes" veneer.

20. Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313 (1985).

21. See 1 AIR & WATER, *supra* note 3, at vi-vii n.5.

22. See *id.* at vii. Traditional logrolling arises where favors in the context of legislative measure A are paid back in the context of legislative measure B. A breakdown in legislative discipline (a condition said to accompany Congressional "reforms") may reinforce a tendency to include favor and payback within the same measure.

23. See W.H. RIKER, *THE ART OF POLITICAL MANIPULATION* 152 (1986) (discussing, among other works, that of A.K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970)).

24. *Id.* at 207 (drawing upon the popular book of E. REDMAN, *THE DANCE OF LEGISLATION* (1973)).

Doctrinal prospects for this service include provisions on federalism, procedural entitlement, and the allocation of authority among different agencies.²⁵

2. *Issue Expansion*

Another tip on legislative content can be drawn from the theory and practice of negotiations. Bargaining is said to thrive in settings where there are mismatches in the intensity of preferences, and mismatches can be created by expanding the agenda of issues.²⁶ This means that the elusive "consensus" can be obtained not only by faction-spanning devices that command the support of several principals but also by faction-spanners accommodating varying degrees of intensities of preference. For present purposes, it might be possible to filter legislation through this lens and identify the legislative provisions that are indispensable to certain players and those that are a matter of indifference to them. Valuable statutory acquisitions that are viewed with indifference by some of the players are a useful currency in any exercise of consensus-building.²⁷

C. *Evidence of Consensus*

Alerted by the theory to anticipate "consensus", it is visible everywhere in the fabric and structure of the federal environmental statutes.

First, are the process *entitlements, hedges, and bets*. These are the ultimate non-zero-sum lubricants of the environmental laws. Congress creates process in wholesale bursts, and it is used freely to assuage those made victim in other particulars. A promise to A of substantive relief from pollution can be offset by a promise to B of respectful procedural preconditions. Process also is a currency that is useful for smoothing off nonsymmetrical preferences and spanning issues that are finely decomposed. Moreover, process is a payoff medium of particular attraction to lawyer/lobbyists. Procedural opportunity often is a bet on one's future competence (or a challenge to it), and it is easy to feel smug about the high value of a future hearing featuring oneself. (Environmentalists are notorious suckers for promises of access to future decisionmaking that will be helpful to them but more than helpful to the

25. One would expect this tendency to be confirmed by a study of all dissenting legislative views during enactment of the federal environmental laws in the last twenty years. That is, opposition is likely to be directed at the means, not the ends, and to recite structural and process objections to the goals included in the legislation that was enacted.

26. See Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 85 DUKE L.J. 261, 331-33 (1985) (and authorities cited therein).

27. The "consensus" proposals in the 1986 negotiated agreement to amend the Federal Insecticide, Fungicide, and Rodenticide Act included provisions to strengthen patent protection for registered pesticides. These provisions are valuable treasures for the registrants and are only mildly objectionable to environmentalists.

other folks who can swamp the process).²⁸

Second, are the options of *vagueness*, *ambiguity*, and *delegation*. These techniques are recognized in the literature as serviceable tools of choice-avoidance.²⁹ They expand the textual landscape and thus allow refuge for a wide variety of legislative points of view.

Third, are a variety of other opportunities for *dissembling* and *manipulation*, as mentioned above. Most of the votes in Congress opposing the environmental statutes are planted firmly in these refuges (of which federalism is perhaps the most important).

Fourth, are the *postponements*. These suit the nonzero-sum strictures of the process quite well, and of course take a wide variety of forms (e.g., delegations and deferrals). Study provisions are rampant in the environmental laws and they are sustained by a host of tactical aims such as decision-avoidance, information acquisition, experimentation, and even elaborate plots for future action.³⁰

Fifth, are the conundrums of *self-nullification* where command and countermand are stuffed into the same sorry package. This is the game without losers written small, and it has produced some extravagant legislative contraptions featuring confounding procedures, implausible grandfathering, and loops and mazes filled with variances and exclusions.³¹ Entire chapters of environmental texts are devoted to exemptions, variances, and escape-routes.³²

Sixth, are the *teases* (aspirational commands), which include an assortment of expressions that are without hope or any viable means of implementation.³³ This is another instance of the nullification appearing in close

28. See, e.g., Rodgers, *Siting Power Plants in Washington State*, 47 WASH. L. REV. 9 (1971).

29. See Note, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 HARV. J. ON LEGIS. 565 (1973). See also Hoy, *Interpreting the Law: Hermeneutical and Post Structuralist Perspectives*, 58 S. CAL. L. REV. 135, 143 (1985) ("the range of possibilities for textual meaning is greater than for speaker's meaning."); Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

30. See 1 AIR & WATER, *supra* note 3, at 174-76; 2 AIR & WATER, *supra* note 12, at 7-9. Former Senator Commerce Committee Chief Counsel Michael Pertschuk is credited with the device of the Consumer Product Safety Commission as a necessary precursor of consumer product safety legislation. The Indian Policy Review Commission was created with a similar scenario in the minds of its sponsors but no legislation resulted.

31. For one among many illustrations, see 1 AIR & WATER, *supra* note 3, § 3.23, at 377 (visibility protection).

32. See, e.g., 1 AIR & WATER, *supra* note 3, § 3.13, at 289, § 3.14, at 297, § 3.17, at 321, § 3.35-.37, at 507-36.

33. Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978).

proximity to the entitlement, that gives rights (or rather hopes) that are amputated and constrained. These half-laws are found commonly in statutory statements of purpose. *Teases* can be viewed as evidence either of the consensus traits of environmental statutes (the parties can agree because not much has been said), or their betrayal traits (because someone has big plans for an ostensibly harmless statement of purpose).

III. PRODUCT OF NONITERATIVE GAMES

A. *Betrayal Laws*

The vision of harmony outlined above is not the only vision competing for recognition. Major amendments to the environmental statutes occur periodically (perhaps every eight to ten years), and with a substantial turnover in the negotiating players (lobbyists, staffers, and members of Congress). At the point of enactment, the iterative game, dominated by strategies of cooperation, suddenly becomes noniterative and characterized by isolated interaction. Here, the temptation to defect is great, and the exploitative gain is within reach.³⁴

B. *Evidence of Betrayal*

In response to the noniterative features of the legislative game, the search is directed to the antithesis of consensus, and we find:

First, the *defections* which are characterized by last-minute changes in substance or purpose of the legislation that substantially reallocate the legislative benefits and burdens. Players who promote these changes exploit end-of-the-game advantages when the normal rules of cooperative bargaining are suspended. The techniques include: last-minute amendments; secret tacks on to appropriations bills; contrived floor debate; language in the Conference Report contradicting the bill; and sundry other sneaky and eleventh-hour revisions. These things happen, of course,³⁵ and the people who accomplish them are called masters of the legislative art.

Second, are the *sleepers*. These are provisions in a bill of enormous practical consequence that slip through as a result of neglect or other circumstances inherent in the lawmaking process. Although *sleepers* are a product

34. See generally Rodgers, *supra* note 2; Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655.

35. An interesting near-miss in the fall of 1986 was the attempt by lameduck Senator Paul Laxalt to amend an appropriations bill to accomplish Senate ratification of the California-Nevada Interstate Compact. The result would have been to allow massive diversions of water from the Truckee River to the detriment of Pyramid Lake, including the Pyramid Lake Indian Tribe.

of disparate bargaining abilities and limited vision of the players, they are aided by the end-of-the-game phenomenon (the stresses of time that can defeat close analysis). A few examples: Section 7 of the Endangered Species Act of 1973³⁶ (that worked an absolutist protection of the habitat for all listed species) was the handiwork of a single staffer on the House Interior Committee.³⁷ The National Environmental Policy Act of 1969³⁸ itself was a vast sleeper, with consequences that outran the wildest imagination of its sponsors and most enthusiastic supporters. (The bestowal of a social good greatly in excess of design puts credit-claimers in a quandary).

Third, are the *skewers* which are defined as a shifting of liabilities to non-participants in the legislative game. *Skewers* are examples of political cost-externalization. This relief from the stress of an in-house allocation would be fully anticipated by students of energy systems,³⁹ and is aided by the well known difficulties in the forming of organizations.⁴⁰ A common *skewer* of the environmental laws is a shifting of the liabilities to the taxpayer (e.g., indemnification for the owners of banned pesticides, and for beekeepers whose charges are felled by errant pesticides; a small price to pay if you're a citizens group holding out, say, for a citizens suit clause). Nominating absentees to assume the costs of enactment is evidence of cooperation not defection among the players, although it looks like defection to the victims.

IV. EVALUATION OF THE HYBRID STATUTES

This survey of the environmental statutes has uncovered evidences of the hybrid nature of the environmental legislation that combines both "consensus" and "betrayal" features. The most conspicuous feature of this account is that it contradicts most if not all of the prevailing assumptions customarily extended to statutes. This author takes as a counterpoint an authoritative

36. 16 U.S.C. § 1536 (1982 & Supp. IV 1986).

37. See generally Erdheim, *The Wake of the Snail Darter: Insuring the Effectiveness of Section 7 of the Endangered Species Act*, 9 *ECOLOGY L.Q.* 629 (1981); Houck, *The "Institutionalization of Caution" Under Section 7 of the Endangered Species Act: What Do you Do When You Don't Know*, 12 *ENVTL. L. REP.* 15001 (1982); Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 *U. MICH. J. L. REF.* 805 (1986).

38. 42 U.S.C. §§ 4321-47 (1982 & Supp. I 1983).

39. See L.A. WHITE, *THE EVOLUTION OF CULTURE: THE DEVELOPMENT OF CIVILIZATION TO THE FALL OF ROME* (1959). See also Elliott, Ackerman & Millian, *supra* note 20, at 329-30 (discussing political cost-externalization).

40. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). See also Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 43 (1983) (virtually all legislation is designed to produce "private goods at public expense"), criticized in Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J. L. ECON. & ORG.* 81 (1985).

description offered by Reed Dickerson:⁴¹

* “[I]n a statute it is generally assumed that the draftsman used his words in their normal senses and that he meant what he said.”⁴² But what of the dissembling, teases, and self-nullifications?

* “It is further assumed that the draftsman did not intend to contradict himself.”⁴³ But what of the case where self-contradiction is essential to achieve a precarious consensus?

* “Third, it is assumed that the statute is intended to produce a constitutional result.”⁴⁴ But is it significant that constitutionality of result rarely figures in the calculations of the individual lawmakers?

* “Fourth, it is assumed that ‘the legislature was made up of reasonable persons pursuing reasonable purposes reasonably’.”⁴⁵ But what of the opportunistic and irrational forays of which there is no, or little evidence?

* “Finally, it is assumed that the draftsman did not include language unless it contributed to the ideas expressed.”⁴⁶ But what of the teases, dissembling, vagueness, and contradictions that are an important ingredient of the legislative process?

Some of the apparent differences between these accounts of statutory law may disappear upon further analysis. Also, there may be convincing normative reasons why courts and other interpreters might adhere to a view of legislation that departs from that which is practiced. For the moment, however, this author is content to offer an account of the lawmaking product that departs from historical visions of comprehensive rationality.

V. CONCLUSION

Environmental lawyers often are drawn into observations of natural populations, systems and actors. This article has succumbed to the temptation to extend these habits of scrutiny to another field of complex and elegant creation—the federal environmental statutes. The red squirrel gives us a hint of what to look for in the environmental laws. One suspects that there is not a great deal of stability in a law product that represents an uneasy coalition of “consensus” and “betrayal”. But we will leave to another day to assess the

41. Dickerson, *Obscene Telephone Calls: An Introduction to the Reading of Statutes*, 22 HARV. J. ON LEGIS. 173, 181 (1985) (footnotes omitted).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

longer-term prospects of statutes that are stitched together in this anxious tactical game.