

Book reviews

Research Handbook on Public Choice and Public Law

Edited by Daniel A. Farber and Anne Joseph O’Connell

Cheltenham, UK: Edward Elgar, 2010, 502 pp. (incl. index),
£145.00, ISBN 978-1847206749.

Research Handbook on Public Choice and Public Law is the first volume in a new series of handbooks in Law and Economics developed by Judge Richard Posner and Professor Francesco Parisi. Divided into four main sections—foundations, constitutional law, agency design and action, and specific statutory schemes—this volume offers valuable insights into theories of public choice and their application to public law. Written by leading experts in the field, the chapters stand as introductions to, rather than exhaustive accounts of, this branch of scholarship, and, as such, important questions are deliberately left for further exploration. What then is the relevance of a review of public-choice literature to a journal that focuses on legal issues relating to climate change? As the *Handbook* expertly shows, public choice and environmental law and policy overlap significantly.

According to Christopher Schroeder in the final chapter of the *Handbook*, public choice and environmental policy “grew up together” (p. 451). From the start of public-choice scholarship, Schroeder explains, environmental regulation was used as a backdrop against which public-choice theories were tested, confirmed, and furthered. Public choice first enters the story in the late 1960s and early 1970s when legislatures and agencies disregarded the suggestion by market theorists to apply market-based mechanisms to scarce resources (p. 452). Public-choice scholars used this regulatory hesitance as an opportunity to characterize government as driven by narrow self-interest, and, as such, unwilling to adopt an alternative mechanism that achieves the most optimal use of resources, and thus enhances welfare (pp. 451, 480-1). Schroeder’s own analysis of public officials digs deeper and brings to light a more recent public-choice literature that points to the flaws of earlier accounts of regulatory processes. Overall, this contribution offers a terrific depiction not only of regulatory rationales but also of environmental law more generally as seen through the lens of public-choice scholarship. While we note the conclusion that public choice and environmental policy “grew up together”, the separate question of whether environmental policy “grew up” with public choice is omitted from the analysis. This highlights the need for environmental lawyers to engage and challenge the positioning of the nature and rationale of environmental laws in public-choice settings.

Jonathan Wiener and Barak Richman provide another important chapter on mechanism choice as seen from the perspective of public choice. This chapter offers an excellent overview of the abundant possibilities and preferences in policy strategies, concluding that “no such thing as a perfect design” or “perfectly efficient solution” (p. 363, 365) exists. Regrettably, Wiener and Richman choose to characterize regulatory options as part of a “regulator’s toolbox” (p. 365), which suggests that the complexity in mechanism choice lies simply in *picking* a regulatory mechanism without consideration of its legal *context*. For instance, cap-and-trade is portrayed as a better choice, or, “optimally more adaptable” (p. 371) than tax when more stringent limits on pollution are desirable over time. The rationale underpinning cap-and-trade, Wiener and Richman claim, is that allowance-holders “will lobby in favor of keeping the allowances scarce—that is, in favor of enforcement of the cap—because lax enforcement means that their allowances lose value” (p. 371). Although this may hold true in certain cases, not all cap-and-trade systems will follow this rationale. For example, under the EU ETS, Member States are heavily lobbied by national industry to distribute emissions allowances generously, and enforcement, as I have argued elsewhere (S. Bogojević, ‘Litigating the NAP: Legal Challenges for the Emissions Trading Scheme of the European Union’, 3 *CCLR* 217, 2010), is heavily litigated before the European Courts. By failing to consider the legal setting in which mechanism choices, such as cap-and-trade, are implemented, law is mistakenly portrayed as a neutral design with mechanisms able to be integrated or imposed from one jurisdiction to the next in a similar fashion and based on the same rationale. Despite the overall richness of this chapter, this particular approach to the study of regulatory strategy is unjustly instrumental.

Another significant intersection between public choice and environmental policy and law that the *Handbook* brings to light concerns the use of markets to achieve regulatory goals. Two particular markets are discussed in greater detail: competitive markets in the energy sector, by Jim Rossi (chapter 13), and markets in pharmaceuticals, by Daniel Carpenter (chapter 12). Rossi notes that the government’s push for privatization in the United States has “been celebrated by many as a triumph of competitive markets over regulation” (p. 419). The joy, as Rossi illustrates, is unfounded; energy markets are “heavily dependent on governmental processes” for their implementation and management, and, as such, energy markets merit the same level of critique that have been applied to more traditional energy regulation (pp. 419, 445). This observation is exceedingly pertinent: it shows that environmental markets of this kind do not shift regulatory power from the public to the private domain. They form part of, rather than falling outside, the scrutiny of public choice and legal scholarship more broadly. To an extent, Rossi’s chapter carries a similar message as Schroeder’s contribution: both criticize the one-dimensional view of market-based mechanisms in public-choice literature, in which these are understood to be *different* or *contrary* to government regulation and rationale. For environmental lawyers, Rossi’s and Schroeder’s chapters stand as important reminders of the necessity to think critically of environmental markets as legal concepts.

Daniel Carpenter’s chapter on markets in pharmaceuticals offers a fine, albeit at times technical, account of the kind of question that lawyers may pursue in examining the use and management of markets as regulatory measures. In examining the gate-keeping powers of the US Food and

Drug Administration, Carpenter points out that debates on this topic revolve around the degree to which the government limits, or ought to limit, markets, and in this sense, the freedom of patients in choosing drugs. Rather than engaging in outdated and dichotomous discussions that reject governmental intervention as their starting point, Carpenter questions the current regulatory structure and pursues an interesting inquiry into the impact that different levels of information have on structuring markets in pharmaceuticals. This kind of analysis is a break from classic public choice, paving the way for richer explorations of risk analyses and the role of government in regulating markets, which may be of use to both environmental and public law lawyers.

This review is inescapably an incomplete account of the scholarly riches that the *Handbook* provides. There is, however, a more important methodological point to be raised. Clearly, the *Handbook* shows that public choice and environmental legal matters overlap. The fact that overlaps exist may not be a novelty, but the way to approach these is a road less travelled—in particular when we take into consideration the immaturity of much environmental law methodology (see E. Fisher et al., ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’, 21 *J. Env’t’l L.* 213, 2009). In writing this review, I found it particularly challenging to offer a fair account of scholarship that is not written with the environmental lawyer in mind, and yet is of great relevance to environmental law. In this regard, one of the benefits that the *Handbook* offers environmental lawyers is the opportunity to engage in an intradisciplinary scholarly exchange: to challenge and confirm claims about environmental law and environmental regulatory processes as set out in public-choice theory. This type of exercise, in turn, is essential in establishing a firmer and more robust methodology in environmental law scholarship.

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The European Union as a Leader in International Climate Change Politics

Edited by Rüdiger K. W. Wurzel and James Connelly

London and New York: Routledge, 2010, 299 pp.,
hb £80, ISBN 978-0-415-58047-2.

The creation of a post-2012 international agreement on climate change is generally considered to be indispensable for generating the GHG emissions reductions needed to limit global warming to an “acceptable” level. In light of the global nature of climate change and the increasing globalization of the world’s economy, reaching an international agreement on the extent and distribution of emission-reduction efforts is absolutely essential. Setting incisive emission-reduction targets only at the national or regional level could lead to the exportation of CO₂-intensive industries abroad. International targets are thus needed, ultimately to put a global price on carbon and so to internalize the global climate-change externality.

As we know, however, states are particularly reluctant to commit to international obligations that would affect their national sovereignty. And so, while many states support their national low-carbon industry in order to boost their market competitiveness, their approach to the idea of binding national emissions constraints entailing international responsibility is much more cautious.

The European Union and its member states have adopted, and are in the process of implementing, internal climate-change mitigation policies that by international standards are relatively far-reaching. Acknowledging the global dimension of climate change, EU institutions are also actively pursuing an external (international) climate policy.

Wurzel and Connelly's volume on *The European Union as a Leader in International Climate Change Politics* focuses on this international dimension of the European climate-change mitigation policy. It examines the types of leadership (structural, entrepreneurial, cognitive) that the European Union has exercised on the international climate change stage. The analysis aims to understand Europe's influence by highlighting the role played by the various European institutions (including the Commission, the European Parliament, and the European Council), as well as by member states individually (in particular the United Kingdom, France, Germany, the Netherlands, Poland, and Spain) and European businesses and NGOs. Naturally, the book does not view the European Union as an isolated actor on the international stage but in relation to the roles played by the United States and China.

A central question of this analysis concerns the interrelation between internal action on climate change and the success of external (international) diplomatic efforts. Does the implementation of ambitious climate policies at the internal EU level enhance the credibility of the European Union and so increase its leadership at the international level? To answer this, the book offers a clear and thorough overview of the European Union's internal climate policy as well as the climate policies of selected member states. Adopting a historical perspective, the authors locate this overview in the context of the international climate change negotiations.

It would seem that there is no clear link between the implementation of internal measures in the European Union and its leadership or influence at the international level. For example, the important contribution that the European Union made towards the conclusion and ratification of the Kyoto Protocol was at a time when EU climate policy was still relatively undeveloped; and, conversely, the European Union's influence was marginal during the Copenhagen Summit even though it had just adopted an ambitious climate "package". These brief observations attest to the fact that other factors, such as the vacuum left by the United States after its refusal to sign the Kyoto Protocol, must be taken into account to understand the complex issue of leadership in international climate politics.

The focus on leadership is new to the climate change literature. The current difficulty states are having to agree to a post-2012 international climate regime highlights the relevance of Wurzel

and Connelly's collection. The clear and thorough analysis of the different facets of internal and external EU climate policy by leading scholars provides a much needed insight into the still unexplored domain of climate diplomacy. Yet, two methodological aspects limit the contribution of the volume to the current debate.

First, the volume does not clearly delimit its scope—namely, the concept of “international climate change politics”. It thus fails to take account of the leading role of the European Union in relation to the generation of GHG emission reductions outside of Europe. The concept of “international climate change politics” no doubt refers to intergovernmental negotiations on the creation of a post-2012 climate regime. However, the external EU climate policy is not limited to its participation in these negotiations. European institutions also play an active role in the creation at the international level of legal mechanisms to stimulate energy-efficiency improvements—and thus CO₂ reductions—in non-EU countries. This European “external energy efficiency” policy has been pursued during the negotiations of the Energy Charter Treaty, and more recently in the context of the G8. These policy initiatives not only aim to generate GHG emission reductions but also to stimulate the export of European energy-efficient (low-carbon) technology. European institutions pursue comparable policies as regards the development of renewable-energy sources. Wurzel and Connelly's volume extensively deals with the role that European institutions have played, and continue to play, as regards the conclusion of an international climate agreement. It also covers the concept of “ecological modernization”, defined as climate measures that would benefit the economy (e.g. the export of low-carbon technology). But the volume fails to include an analysis of the leadership that the EU has displayed in the field of international policy on energy efficiency and renewable energy.

Second, the collection provides a theoretical analysis of the different aspects of the EU climate leadership but does not examine the effectiveness of this leadership as regards the primary goal of climate policy, namely the reduction of GHG emissions. It is true that in the book we find accounts of Europe's influence on the process of negotiation of an international agreement, and it is also true that, as highlighted above, the conclusion of such an agreement is indispensable to combat climate change. Yet the essays in the book do not clearly explain this link. Moreover, not every international climate agreement will generate the necessary emission reductions. Leadership in the negotiation process will not *per se* aim to achieve ambitious climate-change mitigation objectives. Under pressure from domestic industry, states might even be tempted to take a leading role in the negotiations to *water down* climate proposals.

The essays examine the influence of energy-intensive business and of “laggard” member states on the design of European climate policy. They do not, however, clearly analyse how these forces have been reflected in Europe's external climate policy. Nothing in the collection questions the “prestige discourse” of the EU institutions, that Europe's climate policies stand as a worthwhile example on the international stage. Neither does the volume propose any method of assessing the European Union's success in convincing non-member states to adopt and implement their own climate policies. The reader is therefore left with an important question: What is the usefulness

of a study on European international leadership if the effectiveness of that leadership is not assessed?

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Developing CDM Projects in the Western Balkans: Legal and Technical Issues Compared

Edited by Massimiliano Montini

Dordrecht/Heidelberg/London/New York: Springer, 2009, xxiv + 202 pp.,
hb £90.00, ISBN 978-90-481-3391-8.

Since 2005, the non-Annex I countries of the Western Balkans—Serbia, Montenegro, Albania, and Macedonia—which form a strategic area in Europe for the development of climate-change mitigation activities, have concluded inter-ministerial agreements with the Italian Ministry of the Environment, Land, and Sea (IMELS). The aim of these soft-law collaborations is to promote projects under the Clean Development Mechanism through the assistance of IMELS in setting up Designated National Authorities in those states and providing technical capacity for the estimation of their carbon-reduction potential, as well as for project scouting and project promotion.

The book sums up the results of that collaboration, by assembling chapters from lawyers and CDM experts directly involved in the project. Montini, the volume editor and head of the IMELS legal team, divides the book into two main parts. The first is dedicated to the legal issues involved in implementing CDM requirements in the Western Balkans, while the second canvasses the technical aspects of developing CDM projects in each of the four countries under examination.

The first section of Part I describes the basics of the climate change regime, the CDM, and the carbon market. The second section delves into the issues of establishing DNAs and CDM-assessment procedures in non-Annex I countries. At the head of this section is a detailed chapter by Mariachiara Alberton outlining the structural options for creating a DNA; they include inter-ministerial arrangements, an independent body made up of two units, and a foreign direct-investment body. The chapter compares current experience with DNAs in countries like Brazil, Israel, Mexico, and others. The rest of the section is made up of chapters reporting experience with DNAs in the four Western Balkan countries. These case studies are similarly structured and offer a detailed analysis of national climate law and policy in each country. They examine the process of setting up a DNA, describe the procedure to obtain a letter of approval, and discuss the sustainable-development requirements of each country for CDM projects.

Part II of the book discusses the technical issues related to CDM project implementation. The first section of this part comprises a short but wide-ranging chapter about the CDM project cycle

(by Vlastelica Sutic) and a description of the carbon-reduction potential in the Western Balkans from key sectors such as renewable energy, energy efficiency, and carbon sinks. The second section employs the same structure as its “twin” in Part I, describing technical experience with the identification of carbon-reduction potential and CDM projects in each of the four countries. It provides detailed information on key national sectors where concrete action is being taken or is, at least, feasible.

The concluding chapter, written by the editor, explores the reasons underpinning the chosen structures for DNAs, which have mainly to do with the territorial dimensions of the countries in question and the desire to avoid cumbersome procedures which might hinder CDM investments.

The book has some shortcomings. In the case-study chapters, the book seems limited to a mere reporting of the outcomes of the activity undertaken by the authors. The title of the book might lead the reader to expect a greater degree of reflection on the problems encountered in setting up DNAs and national carbon portfolios, or the lessons learnt from each national experience. The content of the first sixty pages do not add greatly to existing works on “general climate change law” or well-worn issues such as CDM reform. This might leave the reader with a feeling that insufficient space has been dedicated to the more innovative content of the book. Moreover, the concluding chapter on DNA experiences, while comparing and summarizing the earlier chapters, does not explain which of the different structures have proved to be the more efficient and coherent with the CDM’s goal of promoting sustainable development. Also, it does not offer a comparison with DNAs from other developing countries or a final synthesis.

Overall, *Developing CDM projects in the Western Balkans* is worth reading for its specificity. It certainly adds to the stock of knowledge and experience on the under-examined issue of institutional liaison between national administrative systems and international CDM rules. Also, the detailed descriptions of national laws, policies, and state-of-the-art CDM project-scouting in the Western Balkans provide a solid background for practitioners and potential investors.

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World Ethics and Climate Change: From International to Global Justice

By Paul G. Harris

Edinburgh: Edinburgh University Press, 2010, 214 pp. incl. index,
pb \$29.50, ISBN 987-0-7486-3910-6.

On the afternoon of 19 December 2009, the leaders of the United States, China, India, Brazil, and South Africa gathered in a small meeting room at the Bella Conference Centre in Copenhagen to

hash out the final language of a statement of political intent, christened the Copenhagen Accord. When presidents and prime ministers draft diplomatic accords themselves, not only does it upset normal conference protocol, it confirms the intense political importance of the particular subject matter. So where do ethical concerns figure in a narrative dominated by national interests, the geopolitics of energy, and economic competitiveness?

The answer is complicated. Climate change is not just a problem for economists, scientists, technologists, and policy-makers, it also represents a new challenge for those concerned with ethics and morals. In his book *World Ethics and Climate Change: From International to Global Justice*, Paul Harris introduces the reader to the problem with assurance, outlining the key scientific findings, and then sketching the main accounts of justice as they apply to climate change. He underlines the fact that the adverse effects of climate change on the poor and vulnerable “are mostly a result of what other, mostly affluent people, have done in places far from where the pain is felt” (p. 38). Climate change is an injustice visited upon the poor everywhere by affluent people, regardless of whether the rich are inhabitants of industrialized or developing countries. Moreover, those set to suffer most—the poor living in low-lying developing nations and small islands—are also the least responsible.

To the extent that justice has been part of the climate change regime at all—finding expression in the principle of common but differentiated responsibilities—it has been based on the rights and duties of states. As is well known, the dominant divide is between developing and developed countries, with the latter responsible for around three-quarters of cumulative, historic, emissions of greenhouse gases. But “by focusing all attention on the rights and obligations of states, international environmental justice may be acting as an obstacle to a truly effective agreement on climate change” (p. 73). The failings of the current climate regime, rooted in the prevailing interstate doctrine, call for an “alternative ethic”, grounded in cosmopolitan ethics and global justice. Harris thus seeks to unmoor the climate change (in)justice discourse from its state-centric pier.

Harris traces the different conceptions of cosmopolitanism, which recognizes “the rights, obligations and duties of individuals regardless of their nationality” (p. 100). This philosophical tradition stands in opposition to communitarianism, which holds that duties and obligations are owed based on relationships of kinship, group, and citizenship, and are thus closely aligned with the state system. As Harris admits, many attempts to apply cosmopolitanism internationally start off promisingly, before collapsing into a state-centric mode when it comes to recommending actions. It is all well and good to recognize the equal worth and dignity of persons situated anywhere; it is somewhat more difficult to make a persuasive case about how the resultant duties could be acted upon.

If, as Harris contends, the affluent are the root cause of the problem, then the duty to act must also fall on them irrespective of nationality. To this end, Harris marshals data on the rising affluent classes in developing countries—what he calls the “new consumers”. One could quibble with the data presented. Does a per-capita income of US\$7,000 or 10,000 really vault a person in a developing country into quite the same category as middle-class consumers in the United States

or Europe? Consider that the median per-capita income in the United States in 2009 stood at US\$39,000.

The conclusion that the obligation to act on climate change attaches to all affluent individuals, no matter where they live, gives rise, for Harris, to a corollary (or supplement) to prevailing applications of international justice to climate change. Harris maintains that this cosmopolitan corollary offers all actors, including states, a politically more viable approach to solving the climate change problem. Of course, having diagnosed the problem from a cosmopolitan perspective, it is not acceptable to pin the added responsibility back onto the state as dominant actor. How then, in practical terms, should these ethical responsibilities be fulfilled? Harris suggests that states, rather than being the exclusive bearers of these cosmopolitan duties, should instead be viewed more explicitly as facilitators of individual rights and duties. This is an important albeit—as Harris admits—subtle point. Taking this point further, one could argue that states should expand citizens' options for reducing climate impacts, for instance through increasing access to information, and more broadly encourage lifestyles that favour learning, community, and other values over consumption.

Although not long, the book devotes appropriate space to the topics necessary to support a well-framed, focused argument. Harris is confident in his treatment of the literature, clearly drawing on his previous work in this area. One omission noted by this reviewer is the absence of a reference to the work on the Greenhouse Development Rights framework of Athanasiou, Baer, and Kartha, which seeks to apportion responsibility based on income levels (see generally <http://gdrights.org/publications/>). Harris argues forcefully that the cosmopolitan corollary is politically viable, in part because it would help unlock the stalemate between developed and developing countries over who takes action first. Here, however, students of public policy might be tempted to intervene and ask why elites and key interest groups, in developed and developing countries alike, would impose on themselves potentially costly measures.

This accessible book is highly recommended reading for all interested in international climate change, especially those seeking perspectives beyond the usual policy fare.

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