

TROUBLED WATERS: REINVIGORATING GREAT LAKES ENVIRONMENTAL GOVERNANCE THROUGH DELIBERATIVE DEMOCRACY

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*Water – despite its theoretical abundance – is probably the biggest looming problem in Canada.*²

I. INTRODUCTION: “A FAILURE OF GOVERNMENT”

While government officials deliberated internally over the purity of the drinking water in Flint, Michigan following the city’s switch from the Detroit water system to the Flint River as its water supply, one official dismissed concerned citizen groups as “anti-everything.”³ Three months before receiving – and dismissing – a report prepared by a local pediatrician disclosing that an increasing number of Flint children were presenting elevated levels of lead in their blood, the Environmental Protection Agency – itself hardly blameless – cautioned state and federal officials that “[r]ecent drinking water sample results indicate the presence of high lead results in the drinking water, which is to be expected in a public water system that is not providing corrosion control treatment.”⁴ More than a year after the switch from the Detroit water system pending the completion of a new pipeline from Lake Huron, city officials failed to lower lead risks by simply adding chemicals to prevent aging pipes from corroding and leaching metals such as lead.⁵ Meanwhile, the local government continued to ignore the concerns of local residents and publicly assure the purity of the water. “It’s a quality, safe product,” Flint Mayor Dayne Walling told *The*

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² Dr. David Schindler (quoted in Ivan Semeniuk, *Charting Canada’s Troubled Waters: Where the danger Lies for Watersheds Across the Country*, THE GLOBE AND MAIL (June 21, 2017), <https://www.theglobeandmail.com/news/national/canada-fresh-water-review/article35262579/> (last visited June 7, 2018)). This is no less true in the United States, as the discussion below demonstrates. See also Mark Bittman, *Making Sense of Water*, N.Y. TIMES (Apr. 14, 2015), https://www.nytimes.com/2015/04/14/opinion/making-sense-of-water.html?mcubz=1&_r=0 (last visited June 7, 2018).

³ Abby Goodnough, Monica Davey & Mitch Smith, *When the Water Turned Brown*, N.Y. TIMES (Jan. 23, 2016), <http://www.nytimes.com/2016/01/24/us/when-the-water-turned-brown.html> (last visited June 7, 2018).

⁴ *Id.*

⁵ *Id.*

Flint Journal in June 2014.⁶ A month later, the City of Flint sent a letter to residents saying that it was “pleased to report” that the “water is safe.”⁷ Ultimately, after the City publicly admitted to the water problem, an independent panel concluded that disregard for the concerns of poor and ethnic minorities contributed to the government’s slow response to local residents’ complaints.⁸ The report concluded that “[t]he facts of the Flint water crisis lead us to the inescapable conclusion that this is a case of environmental injustice.”⁹ A spokesperson for the state governor characterized the crisis as “a failure of government – at the local, state and federal levels.”¹⁰

“We are indeed all Flint,” argued Dr. Philip Landrigan, a professor of preventative medicine at the Icahn School of Medicine at Mount Sinai. “Lead poisoning continues to be a silent epidemic in the United States.”¹¹ This, however, does not diminish the tragedy of Flint, “which is particularly horrifying because it was delivered by the government through the municipal water system even as state officials scoffed at the local outcry.”¹² “Flint is a teachable moment for America.”¹³

⁶ *Id.*

⁷ *Id.*

⁸ Julie Bosman, *Flint Water Crisis Inquiry Finds State Ignored Warning Signs*, N.Y. TIMES (Mar. 23, 2016), <http://www.nytimes.com/2016/03/24/us/flint-water-crisis.html> (last visited June 7, 2018) [hereinafter *Inquiry Finds State Ignored Warning Signs*].

⁹ *Id.*

¹⁰ Goodnough, *supra* note 3. The governor, Rick Snyder, stated that he was repeatedly reassured by “career bureaucrats” and “so-called experts” in state government that the water was safe.

¹¹ Nicholas Kristof, *America is Flint*, N.Y. TIMES (Feb. 6, 2016), <http://www.nytimes.com/2016/02/07/opinion/sunday/america-is-flint.html> (last visited June 7, 2018). In the United States, 535,000 children ages one through five suffer from lead poisoning according to estimates from the Centers for Disease Control and Prevention.

¹² *Id.*

¹³ Kristof, *supra* note 11 (quoting Dr. Richard J. Jackson, former director of the National Center for Environmental Health at the Centers for Disease Control and Prevention). In Canada, after seven people died and more than 2,300 became sick in May 2000 after E.coli bacteria polluted the drinking water in Walkerton, Ontario, Justice Dennis O’Connor headed a special commission of inquiry which released two reports: PART ONE REPORT OF THE WALKERTON INQUIRY: THE EVENTS OF MAY 2000, and RELATED ISSUES AND PART TWO REPORT OF THE WALKERTON INQUIRY: A STRATEGY FOR SAFE DRINKING WATER. Justice O’Connor observed that the involvement of a variety of groups in watershed management is critical, and that such public participation ought to be “meaningful and substantial.” THE HONOURABLE DENNIS O’CONNOR, PART ONE REPORT OF THE WALKERTON INQUIRY: THE EVENTS OF MAY 2000 (2002), https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/submissions/pdf/submissions_Dr.Charles_Smith/02-45-91-Cases_referenced_in_Dr.Smith_Submissions.pdf (last visited June 7, 2018); THE HONOURABLE DENNIS O’CONNOR, PART TWO REPORT OF THE WALKERTON INQUIRY: A

Flint is indeed a teachable moment, and not only in respect of lead poisoning. The “government failure” responsible for the crisis in Flint points indirectly to a broader failure in environmental governance, including Great Lakes governance.

During the University of Minnesota Sea Grant’s Upper Great Lakes Law and Policy Symposium on “Managing Water Across Boundaries” held in March 2016,¹⁴ for example, the Flint crisis weighed heavily – if awkwardly – in the background: heavily, because of its resonance with water governance and environmental justice in the Great Lakes region;¹⁵ awkwardly, because of Flint’s lack of direct and formal relevance to the issues under discussion. As the conference proceeded, however, the relevance of the Flint crisis to Great Lakes governance came into clearer relief. Central to both the Flint crisis and Great Lakes governance is the urgent need to better incorporate public participation into governance efforts aimed at water management and protection.

This need is particularly acute in the transboundary context of the Great Lakes.¹⁶ According to a recent analysis conducted by the Canadian Environmental Law Association, for example, the Great Lakes executive committee, which oversees the Great Lakes Water Quality Agreement,¹⁷ is failing to mitigate the threat of chemical pollution.¹⁸ While environmental groups have compiled a list

STRATEGY FOR SAFE DRINKING WATER (2002),

<http://www.ontla.on.ca/library/repository/mon/3000/10300881.pdf> (last visited June 7, 2018).

¹⁴ *Upper Great Lakes Law and Policy Symposium: Managing Water Across Boundaries* MINN. SEA GRANT, <http://www.seagrants.umn.edu/news/managingwater> (last visited June 7, 2018).

¹⁵ One of the conference’s scheduled speakers, professor Noah Hall, could not attend because he had just been appointed to the Michigan Attorney General’s probe into the Flint crisis. Brad Devereaux, *Environmental Attorney Noah Hall Joins AG Probe of Flint Water Crisis*, M LIVE, http://www.mlive.com/news/index.ssf/2016/03/emiromental_legal_expert_join.html (last visited June 7, 2018).

¹⁶ See e.g., Austen L. Parrish, *Mixed Blessings: The Great Lakes Compact and Agreement, the IJC, and International Dispute Resolution*, 2006 MICH. ST. L. REV. 1299 (2006); David J. Allee, *Subnational Governance and the International Joint Commission: Local Management of the United States and Canadian Boundary Waters*, 33 NAT. RESOURCES J. 133 (1993); Dan Tarlock, *Five Views of the Great Lakes and Why They Might Matter*, 15 MINN. J. INT’L L. 21 (2006).

¹⁷ Agreement on Great Lakes Water Quality, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383, as amended in 2012, <http://ijc.org/files/tinymce/uploaded/GLWQA%202012.pdf> (last visited June 7, 2018).

¹⁸ CAN. ENVTL. LAW ASS’N., *GREAT LAKES-ST. LAWRENCE RIVER BASIN ROADMAP ON TOXIC CHEMICALS: ADVANCING PREVENTION BY PROMOTING SAFER ALTERNATIVES* (2015), <http://www.cela.ca/sites/cela.ca/files/GLRoadmap.pdf> (last visited June 7, 2018). See also Colin

of more than 500 toxins for listing, the Canadian and American subcommittees administering the Great Lakes Water Quality Agreement have since its renewal in 2012 listed only four toxins, quite possibly due to the susceptibility of provincial and state governments around the Great Lakes to coordinated industry demands for weak controls on toxic chemical production.¹⁹ According to the Canadian Environmental Law Association, “the [subcommittees’] go-slow approach is completely out of sync with the scale and urgency of the problem. We cannot wait decades to stop these chemicals getting into the lakes and then having to launch massive cleanup efforts – if that is even possible.”²⁰

Moreover, according to a comprehensive review of Canada’s freshwater ecosystems recently conducted by World Wildlife Fund-Canada,²¹ the Great Lakes figure prominently in a number of the most pressing problems identified. These include overall stress levels – the Eastern Lake Huron and the Lake Ontario and Niagara Peninsula subwatershed, for instance, are the most disturbed in Canada due to high pollution levels, water use, and ecosystem fragmentation; flow alteration; invasive species; habitat loss; and, not least, climate change.²² However, the most significant threat of all is arguably a lack of baseline data, which hampers effective regulation. According to David Miller, World Wildlife Fund-Canada’s President: “We don’t know the facts. It’s a recipe for inaction.”²³ World Wildlife Fund-Canada’s report thus recommends – among other things – a community-based citizen-science approach to data gathering, while at the same time underscoring the urgency of national and international coordination.²⁴ This interconnection of the subnational, national, and international levels of Great Lakes environmental governance is critical, and is explored in this article in respect of the emerging understanding of both the potential and the limitations of deliberative democracy. While such an exploration may appear tangential to the particular context of Great Lakes environmental governance, the opposite is true. The key to enhancing Great Lakes environmental governance – particularly given

Perkel, *Urgent Action Needed to Tackle Pollution in Great Lakes: Report*, THE GLOBE AND MAIL (June 21, 2015), <http://www.theglobeandmail.com/news/national/urgent-action-needed-to-tackle-pollution-in-great-lakes-report/article25051465/> (last visited June 7, 2018).

¹⁹ See e.g., Robert J. Sugarman, *Controlling Toxics on the Great Lakes: United States-Canadian Toxic Problems Control Program*, 12 SYR. J. INT’L L. & COM. 299, 304 (1985).

²⁰ CAN. ENVTL. LAW ASS’N., GREAT LAKES-ST. LAWRENCE RIVER BASIN ROADMAP ON TOXIC CHEMICALS, *supra* note 17.

²¹ WORLD WILDLIFE FUND-CAN., A NATIONAL ASSESSMENT OF CANADA’S FRESHWATER (2017), <http://www.wwf.ca/conservation/freshwater/watershedreports> (last visited June 7, 2018).

²² *Id.*

²³ Semeniuk, *supra* note 2.

²⁴ WORLD WILDLIFE FUND-CAN., *supra* note 21.

the complexity of its interconnected, multi-level governance regime – is enhanced democratic deliberation. Such a call for greater public participation, however, is often the conclusion rather than the premise of scholarship on environmental governance, including Great Lakes governance.²⁵ This article seeks to make a novel and useful contribution to this area of scholarship and policymaking by focusing a sustained and critical lens on the present limitations on democratic deliberation in environmental governance with a view to overcoming them in the future of Great Lakes environmental governance.

To that end, this article unfolds as follows. The next section places Great Lakes environmental governance in the larger legal context of the purported “myth” of transboundary environmental harm prevention. Section III examines the role of public participation in environmental governance – including environmental impact assessment – under the now-traditional notice-and-comment model, and critically examines the limits of the public’s involvement and influence in environmental governance. Section IV describes an alternative, stakeholder-centered approach to facilitating meaningful public participation in environmental governance capable of potentially unmaking the myth of transboundary environmental harm prevention. In particular, this section describes an emergent community-based research and policymaking methodology – Photovoice – that is ideally suited to enhancing public participation in Great Lakes environmental governance. The article concludes with suggestions for further research into the critical question of how to enhance meaningful and influential public participation in Great Lakes environmental governance.

II. THE MYTH OF TRANSBOUNDARY ENVIRONMENTAL HARM PREVENTION

In 2005, the Great Lakes-St. Lawrence River Basin Water Resources Compact and Agreement²⁶ replaced the 1909 Boundary Waters Treaty, which was

²⁵ See e.g., Allee, *supra* note 16, at 148.

²⁶ *Great Lakes-St. Lawrence River Basin Water Resources Compact*, GREAT LAKES COMPACT COUNCIL, <http://www.glscompactcouncil.org/Docs/Agreements/Great%20Lakes-St%20Lawrence%20River%20Basin%20Water%20Resources%20Compact.pdf> (last visited June 7, 2018); *Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement*, GREAT LAKES COMPACT COUNCIL, <http://www.glscompactcouncil.org/Docs/Agreements/Great%20Lakes-St%20Lawrence%20River%20Basin%20Sustainable%20Water%20Resources%20Agreement.pdf> (last visited June 7, 2018) [hereinafter and collectively, “Compact and Agreement”]. The Compact and Agreement were ratified by the state legislatures of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin, and the provincial legislatures of Ontario and

administered by the International Joint Commission (IJC).²⁷ Article IV of the Boundary Waters Treaty provides “that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”²⁸

Article IV’s prohibition of transboundary pollution in 1909 prefigures the development of international environmental law some six decades later. Transboundary harm prevention figures importantly in almost all international environmental treaties concluded in the last 40 years²⁹ and constitutes the cornerstone of international environmental law as expressed by Principle 21 of the 1972 Stockholm Declaration:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.³⁰

As John Knox observes, however, Article IV of the Boundary Waters Treaty and Principle 21 have more in common than their ostensibly absolute

Québec. Pursuant to the Compact and Agreement, the member states and provinces agreed to prohibit diversions out of the Basin, with limited exceptions for communities that straddle the Basin. They also agreed to minimum standards regarding major water withdrawals for use within the Basin as a conservation measure, with large consumptive uses triggering a regional review to be conducted by representatives of all 10 member governments. For further details about the Compact and Agreement, including an assessment of its strengths and weaknesses, see MARCIA VALIANTE, *Management of the North American Great Lakes in* MANAGEMENT OF TRANSBOUNDARY RIVERS AND LAKES 245 (O. Varis, C. Tortajada & A.K. Biswas, eds., Springer, 2008).

²⁷ Treaty Between the United States and Great Britain Relating to Boundary Waters between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, T.S. No. 548, [hereinafter Boundary Waters Treaty].

²⁸ *Id.*

²⁹ John H. Knox, *The Boundary Waters Treaty: Ahead of its Time, and Ours*, 54 WAYNE L. REV., 1591 (2009).

³⁰ Declaration of the United Nations Conference on the Human Environment, United Nations Conference on the Human Environment, June 5-16, 1972, U.N. Doc. A/CONF.48/14, Principle 21 (Jun. 16, 1972). See Philippe Sands, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 190 (Cambridge Univ. Press, 1995).

prohibitions of transboundary environmental harm.³¹ Neither provision is fully complied with by states. Pollution routinely crosses borders without states acting as if international law has been violated.³² “To say that a state has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day.”³³

Similarly, Canada and the United States have failed to meet the terms of Article IV.³⁴ Notwithstanding efforts by both governments to ensure water quality in the Great Lakes, including through the Great Lakes Water Quality Agreement,³⁵ transboundary pollution continues apace. In a recent comprehensive report on Great Lakes water quality, the IJC concluded that while “the Lakes today are less polluted than they were decades ago ... toxic, human, animal, and industrial wastes, as well as pharmaceuticals and airborne substances, continue to pollute our Lakes. Ongoing urban development, invasive species and climate change present additional challenges.”³⁶

While some observers lament the decline of the IJC and its former role in administering the Boundary Waters Treaty,³⁷ doubts about its ultimate effectiveness began with its very negotiation. As Knox recounts, the chief U.S. negotiator of the treaty described Article IV as “perhaps ... too strong.”³⁸ According to Toope and Brunnee, “the more the IJC attempted over the years to ... address transboundary environmental relations more comprehensively, the more was its freedom of action curtailed by increasingly reluctant governments,

³¹ For example, after being granted the power to investigate a particular dam project in the mid-1970's, the IJC suggested to the Canadian and U.S. governments that they negotiate more detailed norms for “prior notice and consultation” to bring the Boundary Waters Treaty in line with the 1972 Stockholm Declaration. In response, the IJC was rebuffed in no uncertain terms. The then Canadian Secretary of State for External Affairs wrote to the IJC suggesting that the governments would “call upon the IJC for assistance on appropriate occasions.” See David LeMarquand, *The International Joint Commission and Changing Canada-United States Boundary Relations*, 33 NAT'L RESOURCES 59, at 75, n. 106 (1933) (quoting letter from A. MacEachen, Sec. of State for External Affairs, to D. Chance, Sec. of the Canadian Section of the IJC (12 July 1976)).

³² Knox, *supra* note 29.

³³ Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. OF INT'L AFF. 457 at 463 (1991).

³⁴ *Id.*

³⁵ Agreement on Great Lakes Water Quality, *supra* note 17.

³⁶ INT'L JOINT COMM'N, THIRTEENTH BIENNIAL REPORT ON GREAT LAKES WATER QUALITY 1, (2006), <http://www.ijc.org/php/publications/pdf/ID1601.pdf> (last visited June 7, 2018).

³⁷ Parish, *supra* note 16.

³⁸ LeMarquand, *supra* note 31, at 67.

not allowing the IJC to fully utilize the powers it had nominally been granted.”³⁹ Article IV, it turns out, is more of a capstone than a cornerstone: “in order to be able to place it, countries must do much more to address the problems whose cessation it envisages.”⁴⁰

The creation of a new sub-national regulatory regime in the form of the Great Lakes Compact and Agreement, however, has not filled the void left by the hollowing out of the international Boundary Waters Treaty and the IJC, which now performs a far more circumscribed research and reporting role. In its 2015 report on the Great Lakes, for example, the IJC observed that the “Agreement and Compact may not be sufficient to deal with all potential future water issues and emerging trends in common and statutory law.”⁴¹ More fundamentally, decisions about whether to prevent transboundary environmental harm remain at the discretion of individual states.⁴² Accordingly, the displacement of transboundary Great Lakes environmental governance from the international level to the sub-national level simply displaces the underlying political problem from one level of government to another. This displacement is illustrated by the IJC’s recommendation regarding Great Lakes governance and climate change:

Considering the large uncertainties surrounding climate change and other human impacts on the hydrologic cycle, federal, provincial and state governments *should*, in addition to continuing to take an adaptive management approach in decision-making, incorporate climate resilience into policies and management practices regarding decision-making for diversions, consumptive use, and lake level management. Provincial and state governments *should* survey how widespread the development and adoption of adaptation strategies are across the Basin. Advancements in the state of science on climate change impacts in the Great Lakes *should* be encouraged by federal, state and provincial governments

³⁹ Stephen J. Toope & Jutta Brunnee, *Freshwater Regimes: The Mandate of the International Joint Commission*, 15 ARIZ. J. INT’L & COMP. LAW 273 at 275 (1998).

⁴⁰ Knox, *supra* note 29.

⁴¹ INT’L JOINT COMM’N, PROTECTION OF THE WATERS OF THE GREAT LAKES: 2015 REVIEW OF THE RECOMMENDATIONS FROM THE FEBRUARY 2000 REPORT 7, (2015), http://ijc.org/files/tiny/mce/uploaded/Publications/IJC_2015_Review_of_the_Recommendations_of_the_PWGL_January_2016.pdf (last visited June 7, 2018).

⁴² Knox, *supra* note 29. *See also* Toope & Brunnee, *supra* note 39, at 276 (arguing that the “IJC will only be as strong and as effective as the Canadian and U.S. governments allow it to be”).

through further funding and a synthesis of the state of the science.⁴³

Notably, the IJC further recommends:

*As part of a precautionary approach for limiting climate change impacts on Great Lakes water resources, state and provincial governments should urge the federal governments of Canada and the United States to aggressively pursue strategies for reducing greenhouse gas emissions.*⁴⁴

No matter the level of government, however, the critical analytic question is how to compel responsible governments to act responsibly and commit to transboundary environmental protection of the Great Lakes. This raises the issue of the role and ultimate influence of public participation in environmental governance, both through the regime of environmental impact assessment (EIA) and other governance mechanisms, as a potential counterbalance to the interests of industry and organized labour, and those interests' evident capture of various levels of government.⁴⁵

III. ENVIRONMENTAL IMPACT ASSESSMENT: PUBLIC INFORMATION, OR PUBLIC IGNORANCE?

*The IJC recommends broad-based collaboration among public and private sectors to enhance water stewardship by fixing leaking public water infrastructure, supporting innovation, and increasing funding to close the region's water infrastructure deficit, unlock water conservation potential and encourage a water stewardship focus region wide.*⁴⁶

International environmental law scholars generally agree that Principle 21 logically requires states to assess the potential transboundary impacts of activities

⁴³ INT'L JOINT COMM'N, *supra* note 41, at 13 [emphasis added].

⁴⁴ *Id.* [emphasis added].

⁴⁵ Likewise, institutional reform (*e.g.*, of the IJC, which is often called for) is a secondary rather than primary issue. As Toope & Brunnee argue, "[a]ny reforms to the IJC should focus on improvements at a procedural level, to expedite the fact-finding function. In the longer term, *if a political commitment to ecosystem protection grows*, the IJC may evolve into a more autonomous institution with powers of norm-generation." Toope & Brunnee, *supra* note 41 at 287 [emphasis added].

⁴⁶ *Id.* at 15. *See also* Maude Barlow, LIQUID PIPELINE: EXTREME ENERGY'S THREAT TO THE GREAT LAKES AND THE ST. LAWRENCE RIVER (Ottawa: The Council of Canadians, 2014).

that may cause transboundary environmental harm (*i.e.*, transboundary EIA).⁴⁷ Phoebe Okowa explains the function of transboundary EIA in the following way:

The duty to carry out environmental impact assessments, as well as the duties of notification and exchange of information, only make sense if in the end an objection by a notified State is taken into account. In other words, the ultimate goal of such notification and supply of relevant information is to require the State of origin to accommodate the interests of the notified State, and if need be to adopt mitigative strategies for its benefit. The aim in each case is to ensure that the activity is carried out in a manner least harmful to the environment.⁴⁸

According to Knox, transboundary EIA is an outgrowth, not of Principle 21, but of national EIA regimes, the first of which was the U.S. National Environmental Policy Act of 1969 (NEPA).⁴⁹ EIA now forms part of the domestic environmental law of about a hundred nations.⁵⁰ The basic principles of domestic EIA continue to closely resemble those originally established in NEPA. Domestic EIA laws generally require government decision-makers to consider the environmental (*i.e.*, biophysical) impacts of proposed activities and projects prior to authorization.

Notably, domestic EIA laws typically give interested members of the public an opportunity to comment on the project proposals at some stage of the EIA, and further provide that the final EIA report be made public. It is well established that enhanced opportunities for public participation have improved the quality of environmental governance.⁵¹ As noted above, structures for public

⁴⁷ Knox, *supra* note 29. *See also* Andre Nollkaemper, THE LEGAL REGIME FOR TRANSBOUNDARY WATER POLLUTION: BETWEEN DISCRETION AND CONSTRAINT 180 (1993); Catherine A. Cooper, *The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, CAN. Y.B. INT'L L. 247, 303 (1986).

⁴⁸ Phoebe N. Okowa, *Procedural Obligations in International Environmental Agreements*, BRIT. Y.B. INT'L L. 275, 302 (1996) (footnote omitted).

⁴⁹ 42 U.S.C. §§4321-4370f.

⁵⁰ Barry Sadler, ENVIRONMENTAL ASSESSMENT IN A CHANGING WORLD: EVALUATING PRACTICE TO IMPROVE PERFORMANCE 25 (1996).

⁵¹ *See e.g.* MARK WINFIELD, METCALF FOUND. GREEN PROSPERITY PAPERS, A NEW ERA OF ENVIRONMENTAL GOVERNANCE IN CANADA: BETTER DECISIONS REGARDING INFRASTRUCTURE AND RESOURCE DEVELOPMENT PROJECTS (2016), <https://metcalffoundation.com/stories/publications/a-new-era-of-environmental-governance-in->

participation were originally significant features of EIA.⁵² More specifically, these structures have typically included public notices and invitations to comment on proposed projects, opportunities to make depositions and, in some cases, more formal presentations of evidence before EIA panels and hearings.⁵³ However, despite widespread legal provisions for some form of public participation in EIA processes, the degree of actual public participation – beyond the participation of special interests, academics, and NGOs – in EIA processes has remained rather low.⁵⁴ Moreover, domestic EIA is not generally – if ever – deployed by governments to actually prevent projects and activities that carry serious (even irreversible) biophysical impacts from being implemented. Rather, the aim of EIA is for such projects and activities to be authorized and undertaken in the full knowledge of their environmental impacts. After all, “EIA takes place in a political context: it is therefore inevitable that economic, social or political factors will outweigh environmental factors in many instances.”⁵⁵ Accordingly, significant as opportunities for public participation in EIA processes have proven in some instances under the domestic environmental laws of certain states, “*their ability to alter the trajectory of economic activities in the direction of sustainability has never been fully realized.*”⁵⁶

These limitations notwithstanding, public participation in environmental governance still has the potential to facilitate the meaningful inclusion of diverse perspectives, which are in turn capable – arguably *most* capable – of thoroughly and reliably reviewing project proposals.⁵⁷ According to a recent analysis of eight case studies of EIAs involving Indigenous groups in Canada, for instance, greater Indigenous community participation resulted in improved project design, the

[canada/](#) (last visited June 7, 2018); *But see generally*, JASON BRENNAN, *AGAINST DEMOCRACY* (Princeton Univ. Press, 2016).

⁵² A. John Sinclair & Alan P. Diduck, *Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directions* in ENVIRONMENTAL IMPACT ASSESSMENT PROCESS AND PRACTICES IN CANADA 65 (K.S. Hanna, ed., 3rd ed. 2015).

⁵³ *Id.* at 11. In the U.S. context, “legitimizing public participation, and demanding openness in planning and decision-making, has been indispensable to a permanent and powerful increase in environmental protection”: Joseph Sax, *Introduction* in 19 U. MICH. J. LAW REFORM 797, at 804 and n. 28.

⁵⁴ *See e.g.* Judith Petts, *Public Participation and Environmental Impact Assessment*, in 1 HANDBOOK OF ENVIRONMENTAL IMPACT ASSESSMENT: ENVIRONMENTAL IMPACT ASSESSMENT IN PRACTICE: IMPACT AND LIMITATIONS (Judith Petts, ed., 1999).

⁵⁵ CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW 2-3 (1995).

⁵⁶ *Id.* at 7 (emphasis added).

⁵⁷ Robert B. Gibson et al., *Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment*, 29 J. OF ENVTL. L. & PRAC. 252 (2016).

integration of new knowledge about potential impacts, the discovery of new ways to mitigate environmental damage and community impacts, and the opportunity for even greater collaboration.⁵⁸

Such enhanced collaboration, however, will only be achieved by encouraging and enabling the equal and ongoing participation of a plurality of voices. While the traditional “notice and comment” approach is capable of furnishing decision-makers with more information, a better understanding of the competing interests at stake, and the likely consequences of different courses of action, this approach neither accounts for nor alters the inequality of resources, power, and influence among different social and political groups. Indeed, reliance on notice-and-comment-style public participation may actually *further entrench* this inequality. Decision-makers are rarely if ever legally obligated to respond to issues raised in public comments, and in practice, the most influential comments tend to be those that provide decision-makers with the kinds of data and sophisticated analyses that can readily be used to justify decisions.⁵⁹ Representative government “has given way to a world in which the prime minister’s courtiers talk to a handful of senior Cabinet ministers, a few carefully selected deputy ministers, lobbyists, former public servants turned consultants, heads of friendly associations, and some CEOs of larger private firms. This permeates all aspects of government – even regulation.”⁶⁰

But this is not all. A typical move in an analysis of the kind pursued thus far in this article is to proceed to describe and advocate for new potential forms of

⁵⁸ BRAM NOBLE, MACDONALD-LAURIER INST., LEARNING TO LISTEN: SNAPSHOTS OF ABORIGINAL PARTICIPATION IN ENVIRONMENTAL ASSESSMENT, (2016), https://www.macdonaldlaurier.ca/files/pdf/Noble_StewardshipCaseStudies_F_web.pdf (last visited June 7, 2018). Conversely, the lack of tribal consultation and public participation in respect of the Dakota Access Pipeline permit approval process may well have been a major driver of public protests against that project. I am grateful to an anonymous reviewer for this point.

⁵⁹ See generally, Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411(2005). In the context of U.S. banking reform, one commentator observed that in responding to public comments, financial “regulators crave data that can be used to justify decisions” while “historically, industry groups have dominated these information wars, plying regulators with exhaustive studies and detailed analyses of the options at hand. Trade groups have more money and more people, and they often produce and control the relevant information about business and customers.” See Binyamin Appelbaum, *On Finance Bill, Lobbying Shifts to Regulations*, (N.Y. TIMES, June 27, 2010), at A1.

⁶⁰ DONALD J. SAVOIE, WHAT IS GOVERNMENT GOOD AT? A CANADIAN ANSWER 266 (McGill-Queen’s Univ. Press, 2015). This pattern is equally evident in the United States. See e.g. LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME CORPORATE (Oxford Univ. Press, 2015).

enhanced opportunities for meaningful public participation in environmental governance, such as the IJC's recommendation that anchors this section.⁶¹ However, there is still another limitation to the public's ability to influence the course of environmental decision-making, a limitation that is also a serious challenge to the underlying normative commitment to greater public participation in public interest governance, or what is often called "deliberative democracy" or "republicanism."⁶² Namely, public ignorance. According to legal scholar Ilya Somin, "[t]he evidence shows that political ignorance is extensive and poses a very serious challenge to democratic theory."⁶³ For Somin, political ignorance is rational for most citizens. Voters *qua* voters have little incentive to become informed because there is only an infinitesimal chance that any one vote will influence the outcome of an election. This, argues Somin, explains why so many members of the public remain ignorant about basic political issues, despite the fact that basic political information is readily available. Indeed, political knowledge – as revealed principally through representative surveys and polling practices – has not increased along with corresponding increases in the overall level of education in western democratic countries.⁶⁴ Political ignorance is not inadvertent. The issue is one of demand, not supply (let alone cognitive capacity): "The main constraint on political learning is not the availability of information, but the willingness of voters to take the time and effort needed to learn and understand it."⁶⁵

Moreover, experimental studies show that individuals tend to use newly acquired information to reinforce their preexisting views on political and other ideological issues while discounting evidence that runs counter to them. Such "rational irrationality," where the object of gathering and processing new political information is not political knowledge itself, but to reinforce preexisting

⁶¹ See also CAN. INST. FOR ENVTL. LAW & POL'Y, PUBLIC PARTICIPATION IN WATER MANAGEMENT IN THE GREAT LAKES: PROVINCIAL AND JOINT INITIATIVES, 4 (2004), (arguing that "a number of organizations involved in the management of the Great Lakes require improved public participation").

⁶² See e.g. James S. Fishkin, *Deliberative Democracy and Constitutions*, 28 SOC. PHIL. & POL'Y, 242-260; CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (Harv. Univ. Press, 1993); AMY GUTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (Belknap Press, 1996).

⁶³ ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 3* (Stan. Univ. Press).

⁶⁴ *Id.* at 76.

⁶⁵ *Id.* at 3. For an analysis of this phenomenon as it plays out in respect of the highly technical language of agribusiness and environmental protection of the Great Lakes ("agriculturalese"), see T.S. Harvey, *Muddying the Waters: Protection, Public Participation, and Ambiguity in the Language of Pollution in the Great Lakes*, 37 J. OF CULTURE & AGRIC. 107 (2015).

viewpoints and group attachments,⁶⁶ may be even more of a threat to deliberative democracy than pure voter ignorance.

The problem, however, runs deeper still. Somin argues that “the prospects for a major increase in political knowledge in the foreseeable future seem relatively bleak.”⁶⁷ As noted above, previous increases in education levels have not led to greater political knowledge. Somin proceeds to review Ackerman and Fishkin’s much-discussed proposal, whereby, prior to each election day, the government would declare a national holiday called “Deliberation Day” during which all voters would have the opportunity to gather in groups of 500 and hear presentations on key issues by representatives of major political parties. Following the presentations, voters would be able to ask questions and discuss the issues among themselves.⁶⁸ Fishkin’s extensive research on the use of “deliberative polling,” which shows that many deliberative poll participants changed their minds about various political issues after hearing opposing arguments,⁶⁹ lends support to the “Deliberation Day” proposal.

While a “Deliberation Day” would almost certainly increase voter knowledge to some degree, Somin is nonetheless right in observing that such deliberations would not be capable of covering even a fraction of the almost infinite variety of issues regulated by the modern state. To cover a greater fraction of the government’s agenda, multiple “Deliberation Days” would be required throughout the election cycle, greatly increasing their cost and the unlikelihood of continued public engagement.

Somin is equally right to observe that any given “Deliberation Day” would be shaped by incumbent political leaders, who would determine the issues to be discussed and select the party representatives who would participate. “This process would create numerous opportunities for manipulation.”⁷⁰ This incumbency issue is significant. As Kaiser notes, “to pass such [democratic] reforms would upend the culture that has evolved in modern times, the culture that has served today’s incumbent politicians well.... The avid supporters of real

⁶⁶ SOMIN, *supra* note 63, at 79; *See also* BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007); *see also* works of Dan M. Kahan, *available at* <http://www.culturalcognition.net/kahan/> (last visited June 7, 2018).

⁶⁷ SOMIN, *supra* note 63, at 190.

⁶⁸ BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* (2004).

⁶⁹ *See e.g.*, JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009).

⁷⁰ SOMIN, *supra* note 63, at 179.

reform on Capitol Hill are few, the cynics many.”⁷¹ Somin neatly describes this catch-22 dilemma:

As with proposals to increase political knowledge by improving civic education, a well-informed electorate could potentially force elected officials to enact a relatively unbiased Deliberation Day, one that would at least genuinely increase political knowledge on as many issues as could reasonably be covered within the allotted time. Knowledgeable voters could detect and punish incumbent politicians’ efforts to manipulate the framework of Deliberation Day for their own benefit. *However, an electorate that knowledgeable would likely have little need for Deliberation Day in the first place.*⁷²

Somin proceeds to canvass additional reform proposals, from restricting the franchise to voters having a high level of education, to improving media coverage of politics, to delegating power to experts who are insulated from the political process.⁷³ However, the latter approach, while inevitable to a certain degree in any complex administrative state, can result in a lack of democratic accountability, just as widespread ignorance threatens democracy. Excessive delegation to experts can lead to lobbying by special interest groups to advance their own interests at the expense of the public, which can be exacerbated by public political ignorance. As Sunstein and Kuran have shown, public interests and cognitive biases may enable special interest groups to influence public opinion and create irresistible political pressure to make policy and significant expenditures on minor, even nonexistent health risks, while other more serious risks may go unaddressed.⁷⁴

Worse still, delegation to experts insulated from political influence may also insulate delegated experts from broader political accountability. Voters, on Somin’s theory, are unlikely to be effective monitors of elected officials’

⁷¹ ROBERT G. KAISER, SO MUCH DAMN MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT 358 (Knopf, 2009). *See also* Jason MacLean, *Striking at the Root Problem of Environmental Law: Identifying and Escaping Regulatory Capture*, 29 J. ENVTL. LAW & PRAC. 111 (2015).

⁷² SOMIN, *supra* note 63, at 180.

⁷³ *See e.g.*, CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW AND THE ENVIRONMENT (Oxford Univ. Press, 2002).

⁷⁴ Cass R. Sunstein & Timur Kuran, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

supervision of experts, again for the same reasons that necessitate the experts' insulation in the first place.⁷⁵ This insight has led to the call by a number of commentators to *embrace* rather than seek to avoid the political dimensions of public interest governance.⁷⁶

Before proceeding in the next section to set out an alternative democratic model of public participation applicable to environmental governance in general and Great Lakes governance in particular,⁷⁷ a word about Somin's proposed response to low citizen demand for political knowledge (and, by extension, participation) is in order. Somin argues that because voters' political knowledge can only be increased modestly at the margins, we should have "greater pessimism about democratic government and a willingness to leave more decisions under the control of the market, civil society, and decentralized political institutions.... At least for the foreseeable future, it seems unlikely that deliberative democracy is a realistic possibility."⁷⁸

Somin's ultimate argument for less government and more market governance, however, overlooks two important points. First, there is convincing empirical evidence (ignored by Somin) demonstrating that American voters already have little influence over the direction of public policy directions and outcomes. For example, in a widely discussed paper,⁷⁹ political scientists Martin Gilens and Benjamin Page pose an analytic question closely related to Somin's. Whereas Somin analyzes the threat of an uninformed electorate to democratic accountability, Gilens and Page analyze the risks associated with the electorate's

⁷⁵ SOMIN, *supra* note 63, at 184.

⁷⁶ See e.g., Drutman, *supra* note 59; see also K. Sabeel Rahman, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 HARV. J. LEGIS. 555 (2011); K. Sabeel Rahman, *Conceptualizing the Economic Role of the State: Laissez-Faire, Technocracy, and the Democratic Alternative*, 43 POLITY 264 (2011).

⁷⁷ For a preliminary analysis of the limitations of public participation in Great Lakes governance and planning, see THOMAS C. BEIRERLE & DAVID M. KONISKY, PUBLIC PARTICIPATION IN ENVIRONMENTAL PLANNING IN THE GREAT LAKES REGION, RES. FOR THE FUTURE (1999).

⁷⁸ SOMIN, *supra* note 63, at 192, 198.

⁷⁹ Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens* 12 PERSP. ON POL. 564 (2014). The paper generated a number of newspaper headlines, including one by the BBC. *Study: US is an Oligarchy, Not a Democracy* BBC (April 17, 2014), <http://www.bbc.com/news/blogs-echochambers-27074746> (last visited June 7, 2018). See also John Cassidy, *Is America an Oligarchy?*, THE NEW YORKER (Apr. 18, 2014), <https://www.newyorker.com/news/john-cassidy/is-america-an-oligarchy> (last visited June 7, 2018).

lack, not of political information, but of political influence. They frame the problem this way:

Americans do enjoy many features central to democratic governance, such as regular elections, freedom of speech and association, and a widespread (if still contested) franchise. But we believe that if policymaking is dominated by powerful business organizations and a small number of affluent Americans, then America's claims to being a democratic society are seriously threatened.⁸⁰

Gilens and Page conducted a multivariate analysis of 1,179 policy issues between 1981 and 2002 in which a national survey of the general public asked a "favor/oppose" question about a proposed policy change. For each case, the authors used background survey data to cross-reference responses to income levels. The authors then assessed whether or not the proposed policy change was actually adopted within four years after the question was asked. The authors concluded that in "the United States, our findings indicate, the majority does not rule—at least not in the causal sense of actually determining policy outcomes. When a majority of citizens disagrees with economic elites and/or with organized interests, they generally lose. Moreover ... even when fairly large majorities of Americans favor policy change, they generally do not get it."⁸¹

Interestingly, Gilens and Page anticipate Somin's argument about voter ignorance, and posit it as a potential response to their analysis. They write:

Average citizens are inattentive to politics and ignorant about public policy; why should we worry if their poorly informed preferences do not influence policy making? Perhaps economic elites and interest group leaders enjoy greater policy expertise than the average citizen does. Perhaps they know better which policies will benefit everyone, and perhaps they seek the common good, rather than selfish ends, when deciding which policies to support.... But we tend to doubt it.⁸²

⁸⁰ Gilens & Page, *supra* note 79, at 577.

⁸¹ *Id.* at 576.

⁸² *Id.*

Accordingly, an uninformed, disengaged citizenry does not create the *risk* of special interest influence, regulatory capture, and a lack of democratic accountability; these two features – voter ignorance and outsize special interest and elite influence – describe the *reality* of contemporary democratic governance. Indeed, citizen disengagement may be the result, direct or indirect, of the kind of bipartite bargaining between governments and industry that maligns much environmental decision-making.⁸³ As noted above in the introduction, this special interest influence especially plagues Great Lakes environmental governance, whereby provincial and state governments have succumbed to coordinated industry demands for – *inter alia* – weak controls on toxic chemical production.⁸⁴

Which leaves open the question of governance in the public interest, and the second issue that Somin’s otherwise perspicacious analysis overlooks, an issue that remains overlooked in legal and public policy analyses. Markets are not the diametrical opposite of government regulations. The so-called “free market” is very much a specific regulatory choice, and the product of very sophisticated state initiatives and institutions designed to recognize and enforce rights in property and contract, as well as to facilitate their identification and exchange.⁸⁵ Deregulation, therefore, is in essence *reregulation* where the delegates of regulatory power are not subjected to due process controls over the exercise of their delegated discretion. The relevant policy instrumentality choice is not a question of whether or not to regulate, or how much regulation is optimal. The choice is what kind of regulation to deploy in a given governance context.

Accordingly, in order to improve environmental governance, particularly the interconnected subnational, national, and international levels of Great Lakes environmental governance, and unmake the myth of transboundary environmental harm prevention, new instrumentalities for enhancing public participation are urgently needed.⁸⁶ But such new instrumentalities must address Somin’s account of the lack of popular public demand for political knowledge and participation. The next section of this article brings these two concepts together.

⁸³ See e.g., Winfield, *supra* note 51.

⁸⁴ Sugarman, *supra* note 19.

⁸⁵ See e.g., JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS (Yale Univ. Press, 2015).

⁸⁶ For an early analysis along these lines, see David M. Konisky & Thomas C. Beirle, *Innovations in Public Participation and Environmental Decision-Making: Examples from the Great Lakes Region*, 14 SOC’Y & NAT. RESOURCES 815 (2001); see also Mimi Larsen Becker, *The International Joint Commission and Public Participation: Past Experiences, Present Challenges, Future Tasks*, 33 NAT. RESOURCES J. 235 (1993).

IV. ENHANCING PUBLIC PARTICIPATION IN THE WILD: A THOUSAND PICTURES IS WORTH A WORD (WITH POLICYMAKERS)

*There is a large number of jurisdictions in Canada working on the Great Lakes issues. Although numerous government organizations have public participation included in their agendas their actions often focus on public relations efforts to gain citizen approval on specific projects rather than incorporating citizens into the decision-making process.*⁸⁷

In order to make public participation in various forms of deliberative democracy – including environmental governance – more attractive, some scholars have turned their attention to the question of process design “in the wild” (*i.e.*, in the messy reality of everyday practice in forums committed to open participation). A pioneering example of such work is the comparative study lead by Cynthia Farina and Hoi Kong of two deliberative democracy field projects: the McGill University Online Design Studio (MODS),⁸⁸ which facilitates public participation in Canadian urban planning, and RegulationRoom,⁸⁹ which supports public comment in U.S. federal rulemaking.⁹⁰ The authors argue that “conscious attention to process design can make it more likely that more participants will engage in informed, thoughtful, civil, and inclusive discussion.”⁹¹

Both projects are ambitious attempts to support participants of varying competencies to invest the effort required for meaningful participation in the making of important public policy decisions.⁹² This is an enormously complex undertaking. Open – *i.e.*, truly democratic – participation necessarily implies a substantial lessening of control over the process and its participants (hence their

⁸⁷ CANADIAN INST. FOR ENVTL. LAW & POLICY, *supra* note 61, at 20.

⁸⁸ See Mark Witten, *Open Door Policy*, 8 HEADWAY 1, 9 (2014), https://www.mcgill.ca/research/files/research/hw8_1_eng_final_web.pdf (last visited July 20, 2018).

⁸⁹ *Regulation Room*, CORNELL UNIVERSITY, <http://regulationroom.org/> (last visited June 7, 2018).

⁹⁰ Cynthia R. Farina et al., *Democratic Deliberation in the Wild: The McGill Online Design Studio and the RegulationRoom Project*, 41 FORDHAM URB. L. J. 1527 (2014). For a review of related forms of deliberative democratic experiments, including National Issue Forums, citizen juries, and consensus conferences, see THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY (John Gastil & Peter Levine, eds., 2005).

⁹¹ Farina et al., *supra* note 90 at 1528.

⁹² *Id.* at 1533; see also Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Participation that Counts*, 2 MICH. J. ENVTL & ADMIN. L. 123, 160-62 (2012).

description as “democratic deliberation in the wild”).⁹³ And as noted above, when it comes to policymaking and rulemaking, sophisticated stakeholders such as large corporations, professional and trade associations, consultants and lobbyists, and national advocacy groups are masters of the process and can participate effectively, often at the expense of other groups of stakeholders – small business owners, community groups, newly-formed coalitions, concerned citizens – who tend to be less expert in navigating complex political processes, and who therefore tend to exercise negligible influence over the policymaking process.⁹⁴ As Farina and Kong put it: “the contributions of citizen participants new to the [policymaking] process will sound very different from the comments and other submissions that government officials are accustomed to getting from experienced stakeholders.”⁹⁵ Accordingly, it is critical to identify barriers to public participation that tend to shut out contributors other than the “usual suspects” and think through strategies for lowering, if not removing entirely, those barriers.

Through their comparison of MODS and RegulationRoom, Farina and Kong identify four principal barriers that tend to impede both broader and better public participation in complex policymaking processes: (1) lack of awareness of relevant, applicable policymaking processes; (2) information overload of highly complex and technical information; (3) low participation literacy, often resulting in limited and superficial public inputs to the policymaking process; and, most importantly, (4) motivational issues arising out of public cynicism regarding the fairness and efficacy of government that tends to lower the public’s demand for policymaking participation opportunities in the first place.⁹⁶

The lessons of the MODS and RegulationRoom projects are too complex and context-specific to adequately summarize here; their importance warrants full and direct consideration. But the authors’ overarching lesson is particularly instructive for the specific purposes of this article: “No clever democratic deliberation ‘app’ will be able to technologically obliterate the barriers that have historically kept missing stakeholders from meaningful participation. Getting

⁹³ Farina et al., *supra* note 90, at 1537.

⁹⁴ See Appelbaum, *supra* note 59; See also Cynthia R. Farina, *Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1186 (2012).

⁹⁵ Farina et al., *supra* note 90, at 1573.

⁹⁶ *Id.* at 1550. It is important to note that broader participation, without attention to design, does not necessarily imply better participation. These goals must be treated as analytically distinct, if nonetheless closely related.

broader, better citizen engagement in government decision making will be effortful for government as well as for citizens.”⁹⁷

This rich governance lesson is really three lessons: (1) as the authors state earlier in their analysis, deliberation is hard work;⁹⁸ (2) no matter how well a process is designed, no matter how accessible the process is made for ordinary citizens, citizens may still stay home – even if you build it, they may not come; and (3) government support is indispensable.

Let us take the third lesson – governments must step up – first. Farina and Kong suggest (rightly) that where there are groups of citizens who will be affected by policies who have historically not engaged in policymaking processes, and who are likely to have experiential, “situated” knowledge relevant to policymaking processes, and where it is reasonably possible to facilitate the policymaking participation of such stakeholders, “government officials can identify the policymaking initiatives in which an investment in deliberative structures for broader citizen engagement is most likely to produce valuable and satisfying results.”⁹⁹

This is eminently reasonable, but it elides the question of “valuable and satisfying” to whom? Recall the research of Gilens and Page discussed above.¹⁰⁰ In the largest empirical study of actual policy decisions by the U.S. government in the history of political science, they show that “[w]hen the preferences of economic elites and the stands of organized interest groups are controlled for, *the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy.*”¹⁰¹ More specifically in the context of Great Lakes governance, recall too the complaints of environmental activists and scholars alike that the governments around the Great lakes have little interest in mitigating the risks of chemical pollution in the face of coordinated industry opposition.¹⁰²

Accordingly, when Farina and Kong suggest, once again eminently reasonably, that “[i]f officials listen in an open-minded and active way to the outputs of public participation, they can identify what really matters to various

⁹⁷ *Id.* at 1579.

⁹⁸ *Id.* at 1559.

⁹⁹ *Id.* at 1567-68.

¹⁰⁰ Gilens & Page, *supra* note 79.

¹⁰¹ *Id.* at 575 (emphasis added).

¹⁰² *See infra* Part I.

participants,”¹⁰³ suffice it to say that is a *really big if*. Once again in the context of Great Lakes governance, environmental groups and scholars have also called for preventing the entrance of invasive species and prohibiting the transport of chemical-laden toxic energy sources near or on the Great Lakes and St. Lawrence River. All to no avail.

Thus when Farina and Kong suggest that “policymakers who believe in the value of public participation are likely to gain insight and guidance from the addition of historically silent voices; those who do not expect to learn much from broader citizen involvement probably will not,”¹⁰⁴ their analysis is correct but incomplete. Correct, because greater public participation in policymaking would be a marked departure from the status quo and would therefore require greater care and consideration than policymakers have hitherto been required to commit; but incomplete, because the more pressing question is how to bring about this change in the status quo in the first place in the face of the catch-22 nature of incumbency inertia and regulatory capture.¹⁰⁵

Which brings us to the remaining two lessons, which can be grouped into a single issue: how to bring about broader, better public participation in the policymaking process, including the meta-process of bringing about broader, better public pressure for governments’ support of broader, better public participation in the policymaking process? In Farina and Kong’s analytic framework, this requires not only winning the “battle for attention”¹⁰⁶ but also overcoming what they describe as the most intransigent motivational barrier to citizen participation in policymaking processes: “the belief that government is indifferent to the considered views of the citizenry.”¹⁰⁷

¹⁰³ Farina et al., *supra* note 90, at 1578.

¹⁰⁴ *Id.* at 1580.

¹⁰⁵ See *infra* Part III. This analytic oversight is not limited to the otherwise path-breaking work of Farina and Kong. Recall in Part III above Somin’s critique of Ackerman and Fishkin’s DELIBERATION DAY as being ultimately dependent on a citizenry so informed as to make such a “Deliberation Day” utterly superfluous. Or consider the intriguing approach of Lerner, who argues that when governments use the principles of game design to design their policymaking processes, public participation becomes more attractive, effective, and transparent. Lerner’s argument, however, does not address how the principles of game design might be marshaled to convince governments to deploy the principles of game design to their policymaking processes. See JOSH LERNER, MAKING DEMOCRACY FUN: HOW GAME DESIGN CAN EMPOWER CITIZENS AND TRANSFORM POLITICS (2014).

¹⁰⁶ Farina et al., *supra* note 90, at 1564 (quoting Arthur Lupia, *Deliberation Disconnected: What it Takes to Improve Civic Competence*, 65 LAW & CONTEMP. PROBS. 133, 143-45 (2002)).

¹⁰⁷ *Id.* at 1565.

Providing a single or comprehensive solution capable of overcoming this intransigent barrier – which is made all the more intransigent given the empirical evidence suggesting that the public’s belief may well be true in a disquieting number of policymaking instances – is plainly beyond the scope of this article. There is no silver bullet, no “killer app” capable of neatly resolving this fundamental problem. There is, however, a particularly promising line of research that scholars and practitioners of deliberative democracy and environmental governance would do well to begin to further explore and integrate into their work in order to circumvent the catch-22 dilemma associated with reforming policymaking processes – direct stakeholder empowerment via Photovoice.

Photovoice is a research and advocacy process through which stakeholders can identify, represent, and enhance their communities through a specific photographic and dialogic research technique. As a practice rooted in the production of knowledge, Photovoice has three main goals: (1) enable people to record and reflect their lived and epistemic communities’ strengths and concerns; (2) promote critical dialogue and knowledge about important issues through large and small group discussion of photographs; and (3) reach and influence policymakers.¹⁰⁸

As a participation-action research methodology, Photovoice is premised on the axiom that people are experts on their own lives. First used with village women in the Yunnan Province of China,¹⁰⁹ participants speak about and through the photographs they take in order to raise critical questions, such as: “Why does this situation exist?” “Do we want to change it?” “And if so, how?” By documenting their own worlds through photographs and narratives about those photographs, participant stakeholders can initiate grassroots political change on their own terms.

Epistemologically, Photovoice is founded on a position of feminist theory elegantly described by art historian Griselda Pollock in which “[e]veryone has a specific story, a particular experience of the configurations of class, race, gender,

¹⁰⁸ See Caroline C. Wang & Marry Ann Burris, *Photovoice: Concept, Methodology, and Use for Participatory Needs Assessment*, 24 HEALTH EDUC. BEHAV. 369 (1997).

¹⁰⁹ Caroline C. Wang, *Chinese Village Women as Visual Anthropologists: A Participatory Approach to Reaching Policymakers*, 42 SOC. SCI. MED. 1391 (1996).

sexuality, family, country, displacement, alliance.... Those stories are mediated by the forms of representation available in the culture.”¹¹⁰

Accordingly, Photovoice methodology raises community awareness by expanding the forms of representation and the diversity of voices capable of helping define and improve our social, political, and environmental realities.¹¹¹ The Indigenous Health Adaptation to Climate Change (IHACC) Photovoice project in the Canadian Territory of Nunavut neatly exemplifies the accessibility of Photovoice (PV):

PV was used in IHACC pilot study because it is a method that allows communities to actively engage in research and define priorities. Participants take ownership of the research and have the time to tailor their participation into their daily schedule, recording issues throughout their daily activities. For example, IHACC pilot study participants would take their cameras to their fields and on their fishing boats. Unlike most participatory methodologies, PV does not require long workshops where participants are made to think and reflect on their lives on the spot. PV allows participants to take their time to consider the research questions, think about what they want to communicate to the research team and policy makers, before coming back to the group for discussion. Consequently, PV is a means for the community to talk about issues that might otherwise be left unheard. During pilot research, PV emerged as particularly useful for documenting the importance of traditional medicines and approaches to health, and effective for oral cultures with their focus on narrative, context, stories, and sharing.¹¹²

¹¹⁰ GENERATIONS AND GEOGRAPHIES IN THE VISUAL ARTS (Griselda Pollock, ed. 1996). For a skeptical take on the contemporary trend to communicating more with images than text, see e.g. Catherine Shoard, THE GUARDIAN WEEKLY 48 (July 29-Aug. 4 2006) (“Soon we won’t have to worry about plagiarism or mistranslation. Image is growing ever more powerful and people are saying less and less with words.”).

¹¹¹ Caroline C. Wang et al., *Flint Photovoice: Community Building Among Youths, Adults, and Policymakers*, 94 AM. J. PUB. HEALTH 911 (2004). For a review of the use of Photovoice in research on environmental issues, see Meredith C.F. Powers & Darcy A. Freedman, *Applying a Social Justice Framework to Photovoice Research on Environmental Issues: A Comprehensive Literature Review*, 13 CRITICAL SOC. WORK 80 (2012).

¹¹² *PhotoVoice*, INDIGENOUS HEALTH ADAPTATION TO CLIMATE CHANGE, <http://ihacc.ca/photovoice#pv> (last visited June 7, 2018).

Although still very much at a preliminary stage, the EarthCare Climate Adaptation Photovoice Project¹¹³ similarly illustrates the potential of Photovoice to broaden and enhance public participation in environmental governance. Bringing together citizens, local municipal government staff members, and university researchers in public health and education, the EarthCare Photovoice project is part of the efforts of the City of Thunder Bay to develop a sustainability plan and climate change adaptation strategy. Specifically, the goals of the project include (1) using photographs to raise community awareness of climate change, adaptation, and resilience, and (2) documenting potential actions that local citizens and the municipal government can take. Citizen participants are encouraged to think about visualizing and documenting locally-relevant actions and solutions. Because previous survey work has found (unsurprisingly) that most residents are not familiar in any great depth with what “adaptation” and “resilience” mean in the context of climate change, participants are encouraged to use photographs to engage citizens where they live, learn, work, and play in order to illustrate specific actions that citizens and the municipal government can take. Ultimately, the project will culminate in an open house displaying the photographs and their accompanying descriptions, along with a presentation to the City Council for the purposes of informing the City’s sustainability and climate change adaptation policymaking. Tellingly, the EarthCare Photovoice project participants intuitively understand the political context within which they are pursuing their goals. As one citizen participant expressed during a preliminary brainstorming workshop focused on selecting the photographs to be featured in the exhibit and presentation, “we need leadership from our municipal policymakers, but to get that, we have to generate enough community awareness and pressure to force the City to act.”¹¹⁴ More telling still was how this political intuition emerged out of the group’s discussion of the initial collection of the participants’ photographs when one participant noted the relative *absence* of photographs depicting local forms of political action.¹¹⁵

¹¹³ *EarthCare Thunder Bay*, CITY OF THUNDER BAY, http://www.thunderbay.ca/Living/Environment/EarthCare_Thunder_Bay.htm (last visited June 7, 2018). EarthCare Thunder Bay is a partnership between the City of Thunder Bay, located at the head of Lake Superior in the Canadian province of Ontario, local community members, and academic researchers in public health and education to work together on issues of community sustainability, climate adaptation, and greenhouse gas emissions reduction. EarthCare’s mission is to lead the community in securing the environmental health of the region, and thereby improve the social, cultural, and economic well-being of future generations.

¹¹⁴ EarthCare Climate Adaptation Working Group Photovoice Project, Group Dialogue Workshop, Aug. 16, 2016, Thunder Bay, Ontario.

¹¹⁵ *Id.*

Photovoice methodology is a compelling strategy for enhancing public participation in policymaking in the “wild” that flips the approach of Farina and Kong – embodied in the RegulationRoom and MODS projects – on its head. Whereas their approach argues that “efforts to make public participation processes more deliberative must include ways to present the information people need in forms that they are able and willing to consume,” the operative idea behind Photovoice methodology is that citizens’ own voices are themselves capable of meaningfully informing and influencing policymaking processes.¹¹⁶

Community participation-based research and advocacy operates from the premise, not that the highly technocratic policymaking process must be translated into terms cognizable by ordinary citizens, but that the lived experience of ordinary citizens is itself capable of driving policymaking. Photovoice in particular is a form of stakeholder research and advocacy that starts from citizens’ own situated knowledge and expertise – what U.S. President Barack Obama calls the “[k]nowledge [that] is widely dispersed in society¹¹⁷ – that may be expressed in ways that are difficult for policymakers to ignore.

This is particularly important because overly technocratic policymaking is not only ripe for capture by sophisticated special interests at the expense of ordinary citizens and historically missing stakeholders, but its focus on official expertise, research, and data also tends to obscure the underlying and often tacit normative dimensions of otherwise ostensibly technical policy issues.¹¹⁸ The displacement of normative debate can have the effect of chilling the participation of affected stakeholders, who tend to be either unaware of the key implications of regulatory debates or simply unable to participate in the debate itself when it is conducted using technocratic discourse and procedures.¹¹⁹ Governments cannot be relied on to translate technocratic issues and processes into more accessible language, and that task is often too onerous for civil society groups.¹²⁰ The better

¹¹⁶ Farina et al., *supra* note 90, at 1553.

¹¹⁷ Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, on the Open Gov’t Directive, to the Heads of Exec. Dep’ts & Agencies (Dec. 8, 2009) (on file with the author).

¹¹⁸ See e.g., Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271 (1986); See also Hoi Kong, *The Deliberative City*, 28 WINDSOR Y.B. ACCESS TO JUST. 411, 416-19 (2010).

¹¹⁹ See e.g., Daniel Carpenter & Gisela Sin, *Political Tragedy and the Emergence of Regulation: The Food, Drug, and Cosmetic Act of 1938*, 21 STUD. AM. POL. DEV. 149 (2007).

¹²⁰ As Farina et al. rightly observe, policymaking material “is rarely comprehensible to [laypeople] without help. Often voluminous and filled with technical, legal, or other jargon, such material is virtually always written from the ‘inside’ perspective of the professional consultant, regulator, or

approach is to mobilize and frame public participation in forms already intimately understood by citizen stakeholders – documented forms of their own expert situated knowledge. As the emerging literature on the use of Photovoice illustrates, this comparatively simplified, community-based practice may be better suited to both broadening and enhancing public participation in policymaking, and is particularly well suited to environmental policymaking.¹²¹

Finally, simplified, community-based, and stakeholder-centered practices may help to incrementally reform policymaking processes more generally. While it is beyond serious dispute that the policymaking issues – particularly environmental policy issues – confronting modern states are of a super wicked complexity,¹²² it does not necessarily follow that policymaking *processes* must themselves also be complex. As Cass Sunstein convincingly argues, “government can be far more effective, far less confusing, far less counterproductive, and far more helpful if it opts, wherever it can, for greater simplicity.... All large institutions, including governments, can do a lot more to make things more automatic and enlist simplicity, seeking to match their products and services to what people find natural and intuitive.”¹²³

V. CONCLUSION

During the University of Minnesota Sea Grant’s Upper Great Lakes Law and Policy Symposium on “Managing Water Across Boundaries” held in March 2016, whether the discussion focused on water diversions and water levels, non-native aquatic species, contaminants, climate change, or other emerging issues, a common, cross-cutting theme was the crucial importance of increasing the public’s involvement in Great Lakes environmental governance. This article has sought to extend this discussion by situating Great Lakes environmental governance in the larger international environmental law and political context of the “myth” of transboundary pollution prevention – specifically, the failure of subnational and national governments around the Great Lakes to commit to this

planner—with little effort to present context, problems, constraints, and options in terms that make sense to ordinary people.” Farina et al., *supra* note 90, at 1553.

¹²¹ At the same time, however, neither Photovoice nor community-based research and policymaking processes more generally can completely substitute for technical expertise. Further research is required into possible means of integrating community-based knowledge with expert knowledge, which is no mean task.

¹²² See e.g. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009).

¹²³ CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 11, 14 (2013).

norm. In particular, this article attempts to illustrate how broader and deeper public participation in Great Lakes governance – and environmental governance more generally – is uniquely capable of compelling relevant levels of government to commit to greater protection of the Great Lakes and thereby begin to unmake the myth of transboundary environmental protection. To that end, this article reviewed the emerging literature on a particularly promising community-based, stakeholder-centered methodology – Photovoice – that empowers stakeholders to engage policymakers and initiate social and political change on their own terms. While nearly every analysis of public participation in policymaking calls for governments to do more to encourage and facilitate the public’s involvement, this article breaks with this trend, acknowledging the uncomfortable fact that governments are often either unable or unwilling to meaningfully incorporate the public into its processes. This article suggests instead that civil society groups, and academic researchers in particular, must begin to play a far larger role in bringing important environmental issues and policymaking opportunities to the public’s attention, and crafting methodologies that bring more of the concerned public into meaningful and influential dialogue with relevant policymakers. This is a particularly pressing objective for Great Lakes environmental governance in light of the critical lack of baseline data plaguing policymaking in both Canada and the United States. Broader and better public participation in Great Lakes governance may be the key both to spurring responsible governments to act and to assisting in filling this knowledge gap.