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Governing the Environment: The Transformation of Environmental Regulation

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Environmental Protection and Governance: An Introduction

he commitment to economic growth grounded in private property, free enterprise, and market exchange created unprecedented employment opportunities, incomes, and consumption choices in the United States; it also produced growing environmental degradation that became the source of growing public concern in the late 1960s. In 1970, President Richard Nixon and Congress responded to the wave of environmental concern by creating the Environmental Protection Agency (EPA) and passing landmark legislation that set the legal and institutional foundations for the contemporary environmental era. Subsequent decades would be punctuated by sharp political conflicts and hyperbolic rhetoric linking the EPA to a long list of maladies, including inflation, unemployment, and a loss of international competitiveness. Today, after nearly four decades, environmental protection policy is the most heavily funded regulatory responsibility in the United States-and, many would suggest, the most important. Although the EPA's budget is the largest of all federal regulatory agencies (\$7.6 billion in 2006), it pales in comparison to the costs borne by state and local regulatory governments, by corporations, and ultimately by consumers and taxpayers.

The EPA has never had a shortage of critics. Yet there is clear empirical evidence that its regulatory efforts have contributed to significant gains in environmental quality. There have been considerable achievements in the control of air and water pollution and solid and toxic wastes since the first Earth Day in 1970. This success is remarkable for several reasons. First, one must acknowledge the sheer complexity of the tasks involved. The EPA is responsible for regulating the generation and disposal of air, water, and solid wastes by virtually all companies in the United States. For this to occur, it must develop the scientific data to understand how various pollutants interact and pose threats to the health of human beings and a variety of ecosystems. It must translate the scientific determinations into policies managing the behavior of a diverse universe of public and private organiza-

tions. To accomplish these tasks, the EPA must work at the intersection of multiple scientific and social scientific disciplines and evolving research programs.

Second, the EPA has been responsible for enforcing regulatory statutes that are both highly complex and at times difficult to reconcile. Cognizant that the new environmental initiatives could be undermined by changes in the party composition of the presidency or future Congresses buffeted by mobilized interest groups, legislators wrote exhaustive regulatory statutes that defined the EPA's responsibilities with extraordinary detail. Congress severely constrained the agency's discretionary authority to set its own regulatory agenda, redeploy budgetary resources, and explore various means of managing pollution. It also sought to protect the new policies by providing environmental interest groups with the right to sue the EPA to force it to execute its nondiscretionary functions. Thus the technical complexity inherent in policy was mirrored by a procedural and administrative complexity unparalleled in other regulatory agencies.

Third, the nature and distribution of costs and benefits have created a remarkably difficult political climate. The costs of environmental policy are both significant and concentrated. They create strong incentives for businesses to mobilize in opposition to policy and in opposition to the EPA more generally. The political impact of these costs is only amplified by sharp partisan divisions and congressional localism. At the same time, benefits are often diffuse, probabilistic, and located in a distant future. By imposing regulatory controls, the EPA can reduce the magnitude of environmental risk, but the risks as experienced by individual citizens may not be great enough to create incentives to mobilize in support of policy. One should not be surprised that the EPA has been embroiled in controversies throughout its history. Although these controversies have not resulted in regulatory retrenchment, they have foreclosed any expansion of the EPA's mandate (e.g., the last significant changes to US air pollution laws occurred in 1990). Moreover, the EPA's budget has failed to keep pace with the growth of the economy and, when adjusted for inflation, has not grown since the mid-1970s.

Although the EPA's achievements to date are rather impressive, there is reason for concern. Many fear that this record of achievement may not extend into the future unless significant changes are made in the design of the US system of environmental protection. Further progress will require a shift from end-of-the-pipe controls to pollution prevention. This, in turn, requires changes in product and process design that are simply beyond the reach of public policy. A central goal of this book is to explore the potential for a significant reformation of the system of environmental protection. The core argument, to be developed throughout the following chapters, is simply stated: Over the course of the past several decades, there have been a number of important innovations in the private sector, including advances in corporate environmental management, the development of environmental codes by trade associations, and the global dissemination of international environmental standards. These innovations have come in response to a complex set of factors, including regulatory requirements and the desire to preempt new regulations, corporate concerns over liability, and pressures from consumer markets, financial markets, and corporate supply chains. These innovations may not be a substitute for public regulation. However, if they are integrated into public regulation in a meaningful fashion, they can provide a means of getting at precisely the set of issues that are central to pollution prevention. This integration would involve transforming traditional environmental regulation into a system of environmental governance wherein regulators, standard-setting organizations, associations, and corporations act with greater coordination to address a commonly recognized set of problems. The core elements of this system are currently in place. The question is whether they will be integrated or whether they will exist as systems that sometimes reinforce, and sometimes conflict with, one another.

Overview of the Book

This volume is designed to expansively and critically analyze the potential for transitioning to a system of environmental governance without simultaneously sacrificing the significant advances in environmental quality realized over the course of the past several decades. In Part 1, by necessity, we begin with an overview of environmental policy and politics. Chapter 2 provides a primer on environmental regulation, exploring the justification for environmental regulation, the array of policy instruments available to regulators, and the core regulatory statutes enforced by the EPA. Chapter 3 turns to the environmental policy subsystem (e.g., the EPA, Congress, the presidency, the bureaucracy, the courts, and the interest group universe). This examination provides an overview of the complex set of political-institutional actors involved in the definition and implementation of environmental policy.

The chapters that constitute Part 2 of the volume explore the original regulatory design decisions and subsequent efforts to manage some of the negative consequences of these decisions. Chapter 4 examines regulatory design and performance. When Congress passed the major environmental protection statutes of the 1970s, it made an explicit decision to employ command-and-control regulatory instruments. That is, regulations dictated pollution control technologies for broad classes of companies and imposed ambitious compliance timetables backed with significant penalties. It would have been impossible to tailor regulatory requirements to meet the specific

technologies and processes in each regulated firm. The decision to apply a "one size fits all" approach (or, more accurately, a "one size fits many" approach) allowed for greater certainty of results under conditions of information scarcity. However, it resulted in the imposition of extraordinary compliance costs. Some firms were overregulated, others were underregulated; few would suggest that the solutions prescribed by policy constituted the most cost-effective means of controlling pollutants. But this was a tradeoff that Congress was willing to make. Even though regulatory design has resulted in unnecessary costs and rigidities, the EPA has been a qualified success. Yet as will be argued, advocates' efforts to keep environmental protection on the agenda by portraying an environment in crisis undercut public recognition of the EPA's performance record, thereby creating the political space for ongoing reform efforts.

During the 1970s, poor macroeconomic performance combined with heightened business mobilization to create ongoing pressure for reform. Each president responded by imposing elaborate review processes that forced regulators to take costs into account, thereby challenging the original regulatory design decisions and adding another level of complexity to environmental policy. These efforts are explored in Chapter 5. By the 1990s, many recognized that environmental policies had generated positive results; the largest corporations were now in compliance (or "beyond compliance" in many cases). Yet there were concerns that further advances would be limited as long as environmental policy was constrained by original regulatory design decisions. Thus the Clinton administration worked to "reinvent" regulation and make the EPA more responsive, flexible, and results-oriented, and to create new partnerships to reinforce policy. Reinvention was hamstrung, however, by original regulatory design decisions; it was difficult to integrate the new partnerships into a regulatory system premised on command-and-control instruments and adversarial relationships with business, as explored in Chapter 6. During the George W. Bush presidency, voluntary partnerships have continued to flourish. Yet given the slow rate of regulatory rule making and the dearth of well-developed regulatory initiatives, partnerships have been embraced as a substitute for policy rather than a means of improving regulation, as explored in Chapter 7.

When thinking of environmental protection, it is common to imagine regulating factories with bellowing smokestacks and mills pouring endless streams of sludge into nearby waterways. Yet seldom considered are the myriad decisions made by corporations on a daily basis regarding product design, the selection of inputs, and the disposition of multiple waste streams—decisions that have enormous environmental ramifications even if they are largely invisible to external observers. Pollution prevention requires many changes in product and process design at the level of the firm. These changes cannot be imposed from above using traditional regulatory instruments. Rather it may be necessary to delegate greater authority to corporations, which possess the greatest knowledge about their technologies, products, and markets, and to create incentives for innovations in pollution control and prevention. This, in turn, raises important questions regarding the monitoring of corporate compliance and the maintenance of some semblance of public accountability. Without some means of forcing accountability, "reform" may be little more than an abdication of regulatory responsibility.

As noted above, the past two decades have witnessed some rather remarkable innovations in the private sector. These innovations are the subject of Part 3 of the book. Corporations are increasingly integrating environmental concerns and business strategies, designing products with the goal of minimizing waste flows, and implementing environmental management systems to systematically reduce pollution. This trend in corporate environmentalism is the subject of Chapter 8. Trade associations have also embarked upon some interesting self-regulatory efforts, in many cases requiring their members to abide by ambitious environmental codes subject to third-party certification. Moreover, the International Organization for Standardization has promulgated a set of standards for environmental management systems requiring third-party certification. These code- and standard-based systems of self-regulation are examined in Chapter 9. The question remains: How can one integrate such initiatives with policy? Chapter 10 offers an initial response to this question by examining hybrid forms of regulation, including the Dutch covenants and the EPA's National Environmental Performance Track.

Global environmental protection is the topic of Part 4 of the volume. At present, there are few credible international environmental regulatory institutions. For international regulatory institutions to be effective, they must be able to impose regulations on nation-states, monitor compliance, and impose credible sanctions for noncompliance. A number of factors militate against the creation of such institutions, as discussed in Chapter 11. Yet the lack of such institutions need not be definitive in foreclosing a search for cooperative solutions. The Montreal Protocol, which addresses substances that deplete the ozone layer, provides an example of successful international cooperation in banning chlorofluorocarbons. The success of the Montreal Protocol gave hope to many that such agreements could provide a means of managing other global environmental problems, such as biodiversity and climate change. Yet one must question whether the protocol's success was the product of a unique set of factors (e.g., a strong scientific consensus, supportive public opinion, preexisting domestic commitments backed by domestic regulatory agencies) that are absent in the area of climate change. Chapter 12 compares the Montreal Protocol to the Kyoto Protocol, which addresses global climate change.

6 Governing the Environment

The Montreal and Kyoto Protocols seek to address discrete environmental problems. But these problems pale in complexity compared to the larger issue of sustainable development. Beginning in the early 1990s, many environmental analysts and the United Nations called on countries to take seriously the need for sustainable development, and to change the trajectory of economic development, in order to prevent further degradation and to ensure that future generations have opportunities comparable to those available today. Chapter 13 examines the sustainable development debates in detail. Pursuant to Agenda 21, countries formed national councils on sustainable development to explore how domestic policies and practices might be tailored to promote sustainability. In the United States, the President's Council on Sustainable Development recommended a number of changes that would involve heavy reliance on some of the innovations examined in Chapters 8–10. Whether the concept of "sustainable development" is a useful focus for policy, the council envisioned a system in which cooperation would replace adversarialism, leading ideally to a politically sustainable system of governance.

To what extent can any of the alternative approaches to environmental protection offer a solution to domestic and global challenges? In the absence of such institutions, can sufficient gains be made by reconfiguring policy to promote pollution prevention efforts on the part of corporations, and to harness market forces to reinforce regulatory goals? In concluding the volume, Chapter 14 develops a broad proposal for genuine regulatory reinvention in the United States. The core argument is that the current system of environmental regulation must be transformed into a system of environmental governance, one that seeks the integration of standard public policy tools, market forces, and association and standard-based self-regulation. Before this argument can be developed with sufficient care, we must examine in greater detail the EPA and the larger policy subsystem responsible for making and implementing policy.