

Regulation, Coercion, and Popular Support

This book deals with an intrinsic problem facing democratic government: How to reconcile the necessary use of coercion in regulatory programs with the need to retain popular support. It is also about the more practical and prosaic issue of how governmental agencies in the business of regulation might be transformed to succeed in this endeavor. Our analysis is wrapped around a case study of how a highly coercive, and extraordinarily unpopular program—the federal Superfund program, charged with cleaning up the nation’s abandoned hazardous waste sites—saved itself from the ax of an antiregulation Congress bent on gutting the program. We believe this story holds lessons for how regulation can be made more acceptable, and more functional, while still retaining its inherently coercive qualities.¹

It is not surprising that coercion as a tool of government is universally disliked; this unpopularity is, of course, a particular problem in democratic polities. Economist Charles Schultze made the case for avoiding governmental compulsion in 1977 in his seminal book *The Public Use of Private Interest*. There he notes the irony of America’s reliance on command-and-control policy tools: “For a society that traditionally has boasted about the economic and social advantages of Adam Smith’s invisible hand, ours has been strangely loath to employ the same techniques for creative intervention. Instead of creating incentives so that public goals become private interests, private interests are left unchanged and obedience to the public goals is commanded.”² The closing decades of the twentieth cen-

tury saw waves of policy initiatives aimed at achieving the ends of government through means that depended on voluntary choice rather than coercion. Market-based reforms continue to be favored alternatives to command-and-control regulation in environmental policy, health care delivery, welfare, and a host of other policy domains. The Reinventing Government movement in vogue during the administration of President Bill Clinton had at its heart a consumer- and market-based notion of how government should interact with the public—an orientation in which coercion has little place. The recent corporate accounting scandals may have temporarily dulled this enthusiasm for deregulation and reliance on self-regulation and markets, but regulation-bashing remains a hardy perennial in the American political landscape.

Interestingly, the normative evils of coercion as a tool of government are seldom subjected to theoretical analysis. Most commentators accept what has been termed the Moral Superiority of Voluntary Compliance as largely self-evident.³ That much being said, we have uncovered no serious commentator who entertains the notion that coercion can be entirely removed from the government's tool box.⁴ Our analysis thus proceeds from the commonsense notion that although the mix of coercive and noncoercive policy tools may well be optimized at a different level than currently exists, government will need to retain the quintessentially coercive penal law to restrain the most elemental aspects of antisocial behavior. There is as well substantial evidence of the continuing need for command-and-control regulation. One need look only at the more egregious recent examples of unrestrained corporate greed: the recent accounting scandals and accompanying imposition of a new regulatory framework on heretofore sacrosanct corporate auditors, the catastrophic saving and loan and arbitrage scandals of the early 1990s, and the continuing evidence of failed environmental stewardship on the part of a wide variety of business interests. This book thus raises two critical questions: First, how might government use its coercive regulatory tools more effectively—in both a political and a programmatic sense? Second, how might existing regulatory agencies, seldom known for innovation and risk-taking, overcome institutional inertia, individual resistance, and external obstacles to such changes?

Regulation as a Policy Tool

Policy tools are identifiable methods through which collective action is structured to address a public problem.⁵ They are the means by which

government uses its inherent resources—the legitimate power to coerce and the attendant ability to tax and spend—to achieve policy goals such as a cleaner environment, a more productive economy, and public safety. Each policy tool, writes Lester Salamon, has “its own operating procedures, skill requirements, and delivery mechanisms, indeed its own ‘political economy.’”⁶ In addition, each tool generates a distinctive politics.

Policy scholars have produced a number of different taxonomies of policy tools.⁷ However arrayed, they differ on two important dimensions: the extent to which the identified tool relies on governmental coercion, and whether it focuses on providing either the motivation or the requisite capacity of individuals to behave as the government wishes.⁸ The more voluntary tools achieve their ends by augmenting capacity (by providing subsidies, loans, vouchers, or information,) or affecting motivation through “soft” techniques such as exhortation or market-like incentives.⁹ The less voluntary tools use coercion or its threat to motivate the desired behavior. Examples include social and economic regulation, mandating mechanisms, and the criminal law.¹⁰ All these latter techniques assume that the regulated or mandated parties are capable of doing what the state wants but that they must be motivated to do so by the threat of various punishments at the government’s disposal.¹¹

We begin with two propositions drawn from the policy literature. The first is that policies cause politics.¹² Policies shape the politics of policy-making and implementation by making issues of what is to be done, how participants are to relate to one another, and the basic challenges to be faced.¹³ The second proposition is that policy tools differ in their implementation. Regulation is among the most difficult of tools to use successfully because it typically requires government agencies with insufficient resources to meet broad responsibilities in a polarized environment.¹⁴ Moreover, regulatory policies are frequently unpopular because they rely on coercion, thereby promoting an adversarial relationship between government and at least some of its citizens.

Policies Cause Politics

Policies cause politics, Theodore Lowi argued, because the choice of policies influences who wins and who loses.¹⁵ Lowi, a political scientist, was analyzing policies and politics on a grand scale, but a similar point has been made about the relationship between policy tools and the politics of tool choice.¹⁶ Lowi distinguished the politics of policies in terms of how

the potential winners and losers are distributed and aggregated: the most polarizing policies redistribute resources between classes, while the least controversial programs distribute benefits to particular individuals or groups.

Distributive policies are popular among recipients and create supportive constituencies. Such policies pose administrative problems primarily related to determining eligibility. Their main political problem is keeping benefits targeted amid calls for greater dispersion.¹⁷ More coercive policy tools are seldom popular with the groups most directly affected, while the constituencies that support the use of such tools tend to be dispersed and disorganized. Administrative problems include the whole panoply of regulatory conundrums, especially definition of rules and standards, and choice of enforcement policies and practices.

Distributive and coercive tools also differ in how they define those who pay and those who benefit. Distributive policies often depend on the success of a strategy of collecting money as quietly as possible and distributing it as noisily as possible.¹⁸ Sustaining political support for distributive policies, then, depends on dispersing the costs to minimize the pain, or at least the awareness of pain, and concentrating the benefits to maximize gratitude. Regulatory and other coercive policies turn the equation around—a small population is forced to do things they do not want to do so that a larger public will benefit. The costs of regulation are borne by the regulated while most benefits go to others. Here pain is concentrated while whatever pleasure is to be derived is spread over a much larger population, one that may not even be aware that it is benefiting from harms that do not occur or catastrophes that do not happen. The central political problem of using coercive techniques is maintaining essential political support for such policies when detractors are often unified and powerful and supporters are diffused across a population. At a minimum, regulatory policies depend for their support on keeping beneficiaries aware of benefits received while finessing serious hostility from powerful interests in the regulated population. Experience has shown that few regulatory agencies are successful in this balancing act for extended periods of time.

Controversial Means

Policy tools are accompanied by characteristic machinery for putting policies into effect. Particular tools deliver distinctive social benefits and

rely on characteristic delivery vehicles, with accompanying rules and procedures suited to implementing the policy. Coercion is cheap, at least in the short run, and promises to be effective, since the compliance that spells policy success is required of—and paid for by—others. But coercive programs inevitably create an adversarial relationship between government and those whose behavior the government is trying to influence. The hard edge of such programs is captured by Malcolm Sparrow, a professor at Harvard's Kennedy School, who has written that:

The core mission [of regulatory and law enforcement agencies] involves the imposition of duties. They deliver obligations rather than services. . . . Society entrusts regulatory and enforcement agencies with awesome powers. They can impose economic penalties, place liens upon or seize property, limit business practices, suspend professional licenses, destroy livelihoods. They can restrict liberty, use force, and even kill—either in the heat of some dangerous moment on the street or through the cold calculations of the execution room. They use these powers not against foreigners in war but against citizens in peacetime. How regulatory and enforcement agencies use these powers fundamentally affects the nature and quality of life in a democracy. Not surprisingly, regulators are scrutinized more closely and criticized more regularly for their uses or abuses of power than for their stewardship of public resources.¹⁹

With power comes the possibility of the abuse of power and the virtual certainty of distrust and disagreement from those toward whom the coercive power is directed.²⁰ In the case of law enforcement and the criminal law, the target population has little political muscle, at least outside the area of white collar and corporate crime. Moreover, the social need for a criminal justice system is undisputed. Regulation, conversely, negatively affects powerful social and economic interests, and the need, effectiveness, reach, and operation of regulatory agencies is more controversial. Indeed, controversy and criticism seem to inhere in regulation.

Perhaps just as important, the fundamental regulatory tasks—deciding how people should behave, monitoring their behavior, and enforcing standards against resistance—are seldom easy. Eugene Bardach has suggested some of the characteristic difficulties encountered by command-and-control regulatory programs: “Regulation is vulnerable to errors of

underregulation or overregulation or to both simultaneously. Political pressures and scientific uncertainty can lead to overly stringent or overly lax standards. Standards can also be too prescriptive or too ambiguous. The enforcement process is vulnerable to budgetary strictures, over-concentration on symbolic targets, go-by-the-book rigidity, and in some cases corruption.”²¹

Statutory obligations on regulators are often demanding because the public wants high levels of protection, particularly if someone else is paying for it.²² Legislators often avoid making trade-offs between competing values, leaving this determination to regulators. The scientific base for making regulatory decisions about how-safe-is-safe-enough or how-clean-is-clean-enough is typically weak.²³ Final decisions are therefore shaped by cultural dispositions, the politics of conflicting interests or, increasingly, in adversary proceedings in court.²⁴

Though critics of command-and-control policy tools may be unhappy with the activities of regulatory agencies, they have had limited success in repealing or significantly modifying major regulatory legislation.²⁵ As a result, legislators have frequently resorted to placing procedural and resource obstacles in the way of agencies that are attempting to issue and enforce rules and regulations. These developments have not spawned an extensive literature, however, on how government regulators should respond to the problems presented by broad, often conflicting, statutory obligations, with too few resources, against the resistance and opposition of motivated opponents.

Organizational Change in Regulatory Agencies

If regulatory agencies are to respond to these challenges, they must change the way they do business. Of course, statutory provisions can be revised to force changes in the behavior of regulators. Repeal of authorizing legislation or sunset provisions, for example, can effectively terminate a program. And less draconian legislative or budgetary attacks can effectively cripple an agency or fundamentally alter its mission and mode of operation. But much of the criticism of regulation centers more on the behavior of regulators than on the design of statutes, and there is frequently inadequate political support for fundamental alteration in statutory frame-

works. Given the difficulty of obtaining legislative consensus on major alterations in ongoing regulatory programs, many of the hopes for more effective regulation come from efforts to change the behavior of regulators without an accompanying modification in their statutory responsibilities or powers.

Achieving regulatory reform through administrative, rather than statutory, means has been advocated in the literature on regulatory enforcement, much of which focuses on the evils of “regulatory unreasonableness” and the practice of “going by the book.”²⁶ It has also been advocated in more general terms as a means by which regulators can moderate some of the inherent difficulties in regulation.²⁷ Sparrow, a primary spokesman for this latter position, argues that regulators should take the bull by the horns: define priorities among their many responsibilities based on an assessment of comparative risk, design innovative ways to address those risks, and do not be especially concerned about legal and political constraints in the process. This approach holds substantial appeal in an environment in which statutory change is glacial and not always positive, and where the entrenched and unproductive behavior of some regulators exposes the entire enterprise to criticism.

This approach—regulatory reform through administrative restructuring—has had success in a variety of contexts, including the Superfund program, which is examined in the central chapters of this book. But experience from a variety of policy contexts counsels caution for two important reasons: First, federal judges have shown themselves to be increasingly suspicious of regulators who stray very far from a narrow interpretation of their statutory authority; this trend complicates the lot of the conscientious regulator bent on rationalizing the allocation of agency resources among competing dangers and using innovative means to address risks. Increasingly, administrators must justify such policy choices to generalist judges in an adversary proceeding. The safer and easier path, both legally and politically, is thus often a narrow and mechanistic application of the authorizing statute. Reinforcing the appeal of this seemingly safe harbor is the second obstacle to the call for administrative reform—the pull of organizational culture and the pervasive disincentives for change in regulatory agencies. These issues are discussed in detail in chapter 3. We now turn to a brief description of the case study upon which the findings of our research are based.

Superfund

Superfund, the program designed to clean up America's inactive hazardous waste sites, is one of the most expensive and controversial environmental programs in history. The program is immense: it consumes a substantial portion of the entire staff and financial resources of the Environmental Protection Agency (EPA) and involves the agency in work—often lasting many years—at hundreds of sites located in every state of the Union.

Superfund is not the prototypical regulatory program. Most regulation seeks to control current activities in order to moderate future dangers. Superfund, however, looks backward: its primary purpose is to clean up the results of past environmental harms rather than to prevent new ones. These cleanups can be accomplished through governmental action in a conventional public works mode, but the guts of the program—its most controversial and significant provisions—consist of a liability scheme that imposes expansive retroactive responsibility for cleanup of hazardous waste sites on a very broad categorization of potentially responsible parties (or PRPs). Virtually any individual, business, or governmental entity with some relationship to a hazardous waste site—as owner, producer of waste, or transporter—can find itself caught in the liability web, which can then require expenditure of vast sums of money for cleanup activities or, at the least, substantial legal expenses to escape or moderate liability.

Rather than establishing operating constraints on ongoing enterprises—the usual approach of regulatory agencies—Superfund extracts money from businesses and state and local governmental entities in the service of a goal that has no direct connection to their current activities. Most regulatory programs, despite their undeniably coercive character, at least offer the regulated population the opportunity to continue productive activities, albeit with increased costs, decreased production, or modified procedures. Superfund offers its targets merely the opportunity to escape, at least temporarily, from the punitive elements of its liability scheme.²⁸

Although there are important differences between Superfund and more conventional social regulation, the similarities are substantial. Superfund, like typical social regulation, achieves its collective goals by loading costs on narrowly selected publics. Like conventional regulation, Superfund substitutes a publicly determined standard of behavior for individual choices

and markets. As with other regulatory programs, it operates under laws that define government responsibilities broadly, but in an administrative context of limited resources that ensures that the agency cannot fulfill all its assigned obligations. When the inevitable choices are made among competing demands, they must be justified in what is often a hostile and partisan political environment.

Superfund, then, represents regulation in what is perhaps its most unpalatable and politically vulnerable form. Its liability scheme, grounded in the broadest possible notion of the “polluter pays” principle, offends many elemental principles of fairness.²⁹ It uses these controversial liability principles to extract—under threat of treble damages—vast sums of money from entities ranging from corporate titans to cash-poor municipalities to mom-and-pop dry-cleaning establishments. These extractions typically have nothing to do with the current operations of these businesses or governmental units. Rather, compliance is commanded in a highly adversarial and quasi-prosecutorial forum in which the program’s targets—regardless of their previous or current actions—are often treated more like criminals than responsible citizens and businesses. Finally, in terms of both governmental and private resources committed to the mission of Superfund, the program is immense. Throughout the 1990s spending on Superfund dwarfed all other programs in the EPA combined; estimates—which now appear to be reasonably accurate—suggested a total cleanup bill of at least \$100 billion.³⁰ For these and other reasons, Robert Kagan, a lawyer and political scientist at the University of California at Berkeley, has described Superfund as a definitional example of the evils of “adversarial legalism” in the regulatory forum:

Adversarial legalism’s combination of higher lawyering costs, accountability costs, and opportunity costs probably reaches its apotheosis in the Superfund program, launched by Congress in 1980 to clean up non-operative hazardous waste disposal sites and abandoned dumps. In contrast to parallel European regulatory programs . . . the Superfund program operates as if it were designed by a plaintiff’s personal injury lawyer. Thanks in part to expansive judicial rulings, it imposed absolute, joint and several and retroactive liability for cleanup costs on any enterprise whose wastes found their way into the disposal site—regardless of the disposer’s share of the

wastes, regardless of whether it acted lawfully under the legal rules and containment practices prevailing at the time of disposal, and regardless of demonstrated current harm to human health. EPA enforcement officials bring lawsuits against a few large corporate waste disposers, who then sue other potentially responsible parties. . . . As Landy and Hague describe the result, “the shovels often remain in the tool shed while the EPA pursues [potentially responsible parties] along the slow and tortuous path of litigation.”³¹

Contrasted to its highly visible costs and powerful detractors, Superfund’s benefits suffer the ills of other forms of regulation: direct beneficiaries are typically diverse, disorganized, and politically unsophisticated. While national environmental organizations can usually be counted upon to counteract some of the political weight opposing traditional environmental programs such as those dealing with air and water pollution, these organizations are much less attentive to issues surrounding Superfund.

Unsurprisingly, in light of the foregoing, Superfund was at the center of a political firestorm during the first two decades of its existence. Its continuation was repeatedly threatened both from Capitol Hill and the White House. We have followed the development of Superfund almost from its inception. In our first comprehensive analysis of the program in 1993, the program that we described seemed neither politically nor administratively viable:

Superfund has been roundly criticized for lengthy delays, high costs, and limited accomplishments. Some of these criticisms have ignored the program’s successes. . . . Nevertheless, we suspect that the overall picture that emerges from our descriptions of the operation of Superfund . . . at actual hazardous waste sites, will do little to allay concerns in the environmental policy community about either the operation or the design and organization of America’s hazardous waste cleanup program. . . . While some of the sites we have described moved toward cleanup more expeditiously than others, with less acrimony and fewer seemingly gratuitous transaction costs, the overall picture presented is one of lengthy delays, high costs, and conflict within the Environmental Protection Agency, between EPA and other government agencies, between the government and potentially responsible parties, and among the PRPs themselves.”³²

Indeed, not long after we wrote those words, President Bill Clinton announced in his 1993 State of the Union address that Superfund was “broken,” thus joining a chain of presidents frustrated by the excessive costs and unimpressive accomplishments of the program. This negative assessment was echoed by the top leadership at the Environmental Protection Agency. Criticism of the program reached its apex after the election of 1994, when control of both the Senate and House of Representatives moved to the Republican Party, and the House Republicans’ Contract with America included a promise to radically alter the Superfund program.

Yet in the six-year period from 1994 to 2000 something extraordinary happened to Superfund. The program was not a campaign issue, even a platform plank, in the 2000 presidential election. Despite the change in party control of the White House from Democrat to Republican, Christine Todd Whitman became the first EPA administrator in memory who did not enter office with a plan for reforming and reshaping Superfund. Indeed, she announced shortly after taking office that the program was “sound.”³³ Bills to change various aspects of Superfund, previously as common as efforts to reinstitute prayer in the schools, largely disappeared from the congressional agenda. In the words of one congressional staffer we interviewed, Superfund “disappeared from the radar screen.” Perhaps even more surprising, the manufacturing, chemical, and insurance industries, which had previously waged an expensive and vituperative campaign against the program, were quiescent; some leaders of major industry groups even expressed grudging approval of the way Superfund was operating.³⁴ And if the environmental lobby was unhappy with the changes EPA had wrought in the program, it did not announce so publicly. Moreover, the continuity of these changes initiated under President Clinton did not depend on Democratic victories in electoral politics. Although they were designed and implemented during the Clinton administration, the essential elements were retained by his Republican successor.

Obviously something important changed in Superfund, and this change was not brought about by legislation. We believe that the changed position of the program can be traced in large part to a group of administrative reforms implemented in the six years from 1994 to 2000. These changes took place in an organizational context that implementation researchers would have considered stacked against success: a legal environment in-

creasingly unfriendly to administrative exercise of discretion, and a highly decentralized administrative structure based in semi-autonomous regions, with important decisionmaking authority vested in other federal and state agencies. The difficulties of bringing about change in such contexts have provided grist for many implementation scholars' mills and have proven to be the undoing of many earlier attempts at comprehensive change in Superfund.

It is, of course, easy to overstate the degree of equanimity facing the Superfund program at the moment. The changes discussed here are at the national level, and decisions at specific Superfund sites remain hotly disputed in many cases.³⁵ Still, the national turnaround is important and unmistakable. It means that the current national political consensus is firm enough for EPA, the responsible parties, and other groups to operate in a predictable and stable environment, one in which privately funded cleanups are likely to remain the norm in the foreseeable future.

It is true that the Republican Congress elected in 1994, bent on broad reform in all areas of environmental regulation, was singularly unsuccessful in its efforts. In the face of loud and persistent congressional attacks, however, the goal of most environmental programs in this period was simply to "hang on." It was not necessary for these programs to remake themselves in order to survive. Yet that is what the Superfund program did—recasting itself from within the EPA. We believe the internal efforts to change the operation of Superfund hold lessons for the regulatory enterprise, and more particularly, for efforts to make the coercive elements of regulation more politically palatable.

Plan of the Book

In this chapter we have suggested some of the reasons why coercive policy tools meet frequent and energetic challenges to their legitimacy and why efforts to reform such programs pose special administrative and implementation challenges. These two issues are explored in more depth in chapters 2 and 3, respectively. In chapter 2 we examine the theoretical and practical criticisms leveled against regulatory policy tools over the past half century to explain why proponents of these policies have found themselves on the defensive. Despite the often one-sided theoretical debate, we observe that regulation and other coercive tools remain effective and some-

times necessary tools for the achievement of public policy purposes. Chapter 3 deals with the challenges of changing regulatory behavior from inside an agency, through administrative rather than legislative reforms.

Chapters 4 and 5 describe how changes in the Superfund program were designed and implemented. Chapter 6 sets out our assessment of why the reforms succeeded despite the obstacles. In Chapter 7 we draw general lessons about the prospects for other unpopular but necessary regulatory programs.

Superfund has faced continuing and serious challenges to its legitimacy, challenges that magnify the critiques leveled against regulation in general. The program is highly coercive and arguably inherently unfair. It has a very broad mandate, necessarily leading to selective enforcement. Administrative resources are both inadequate and internally divided, and the program operates in an environment that makes internal reform difficult. So the task of changing Superfund presented the type of hard case that has often frustrated those who sought to implement administrative changes in other settings. Finally, it is a story of unexpected success—an unusual subject for scholars of policy implementation and organizational change.