
Distributional Consequences Part II

DOMESTIC ENVIRONMENTAL POLICY

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The notion that environmental policy has distributional consequences is hardly surprising. But we are only now becoming aware of the true complexity of assessing these consequences, formulating appropriate policies, and structuring the policymaking process accordingly. This is in large part because the nature of environmental regulation, the problems it addresses, and the legal context have evolved considerably since the initial phases of the environmental protection movement.¹ Thus, it is both timely and appropriate that the *Kansas Journal of Law & Public Policy* address in its inaugural issue the distributional consequences of environmental policy. It is my pleasure to introduce the articles addressing these issues in the domestic arena.

In the early days of what might be called the first generation of environmental protection, much public opinion, most legislative and regulatory action, and many judicial decisions operated on a simple, bipolar model of the consequences of environmental policy. Under this model, environmental policy choices reflected a tension between the competing goals of economic development and environmental protection. In other words, the more development the less environmental protection, and vice versa. Of course, this is not always true; environmental regulation has produced new industries such as pollution control technology and recycling ventures. Still, in many instances, the tension was real and much of our environmental policy reflected this trade-off.²

This bipolar model was especially attractive in the early years of environmental regulation. Environmental harms were obvious and widespread. Great and broadly felt environmental gains could be achieved at a relatively low cost. Thus, the distributional consequences of environmental protection seemed clear. More environmental protection would benefit the general public, who would breathe cleaner air, drink purer water, and live in a healthier and more aesthetically pleasing environment. The only "losers" would be wealthy industrialists and developers who could readily afford to sacrifice some profits in furtherance of the greater public good.

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This view of the distributional consequences of environmental policy had important implications for the process of environmental decision-making. There appeared to be a general consensus and congressional mandate in favor of environmental protection. The question of how to implement this goal efficiently and effectively appeared to be a technical one best resolved through an expert administrative agency. The principal threat to the administrative process under this model was interest group politics. In particular, there was concern that environmental interests would be underrepresented in the administrative process and that agencies would therefore be unduly influenced by industrial and developmental interests.³

Interest group theory suggests this would happen because the consequences of environmental policy for industrial and developmental interests are highly concentrated and very substantial. Thus, these groups have great incentives and organizational advantages that enable them to influence the process in their favor. In contrast, the interest in having a cleaner environment is widely shared, but diffuse. At the individual level this interest may seem insignificant. Thus, pro-environment interests lack the necessary incentives to mobilize and face organizational difficulties that limit their ability to influence the administrative process.⁴

The bipolar model, although reasonably accurate in many situations, oversimplifies matters and has proven to be inadequate as we have moved into the second generation of environmental regulation. In the second generation, the environmental gains to be had are less clear cut, less evenly distributed, and more costly. Moreover, experience has shown that some environmental benefits are not readily attained or are attained only at great cost. These costs are born not only by industrialists and developers, but by various segments of society that are dependent upon particular industries and by the public as a whole. At the same time, contrary to the predictions of interest group theory, powerful pro-environmental interest groups have arisen. These groups are skilled at using the political, administrative, and legal processes to achieve their policy objectives. These pro-environmental policy objectives may produce benefits that are not widely shared, or they may skew the investment of environmental resources away from more pressing or

worthwhile projects. Thus, environmental policy is not a matter of consensus; it inherently involves political choices.⁵

In many respects, the catalyst for our newfound appreciation of environmental policy's complex distributional consequences has been the accumulation of evidence suggesting that environmental harms disproportionately affect the poor and disadvantaged minorities. Thus, it is fitting that in the first article on domestic environmental policy, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, Professors Regina Austin and Michael H. Schill explore this phenomenon and the reaction of minority communities to it. They describe a community-based public health activism that stands in stark contrast to and is sharply critical of the "mainstream environmental movement." This community-based activism has developed its own policy objectives and tactics for achieving them.

Grassroots political activism, however, is by no means limited to minority groups. Particularly when it comes to siting of activities perceived to threaten environmental harm, such as landfills and other waste disposal facilities, neighborhoods are apt to mobilize in an effort to prevent such facilities from being located in their vicinity.⁶ Such efforts have their own distributional consequences. Those in the vicinity of environmentally undesirable activities bear the brunt of the environmental cost, while the public as a whole enjoys the economic benefit of the activity in question. Neighborhood opposition may mean that a landfill is sited elsewhere and some other neighborhood, perhaps politically or economically less powerful, will bear the cost. Opposition to sites may decrease the supply of waste disposal facilities, resulting in increased industry costs and ultimately higher consumer prices. Thus, the general public may end up bearing the costs of protecting aesthetic interests or maintaining the property values of those with political clout.

Such siting issues are discussed from an industry perspective by Joan S. Bernstein, Vice President for Environmental Policy and Ethical Standards, Waste Management, Inc., in our second article, *The Siting of Commercial Waste Facilities: An Evolution of Community Land Use Decisions*. She suggests that community opposition to waste disposal facilities is often based on misinformation and that properly managed facilities confer sizable economic benefits on neighborhoods in their vicinity without imposing significant environmental costs. Thus, the apparent conflict between the local interest in avoiding waste disposal facilities and the general public interest in the availability of waste disposal facilities may be illusory.

Whatever the exact costs and benefits of particular

environmental policy decisions, the complexity of their distributional consequences has important implications for the process of environmental policymaking. Different groups within our society have differing assessments of relative costs and benefits, differing priorities between economic well-being and environmental protection, and differing environmental priorities. Thus, "who decides" will often determine what policy choices are made.

In our third article, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, Professor Judith V. Royster examines "who decides" in the particular context of the regulation of Native American lands where the broader problem of self-determination intersects with the important issues of environmental policy. Whether and to what extent a tribe may wish to embark on a policy of preserving its lands or a policy of economic development is a crucial question facing many tribes. It is a question that many tribes will answer differently. Professor Royster considers the ability of Native American tribes to make such decisions for themselves in light of a recent Supreme Court decision limiting tribal land use authority with respect to land of mixed Indian and non-Indian ownership and in light of federal legislation that increases the role of tribes in the development of environmental regulation.

In a similar vein, the complex distributional consequences of environmental policy raise fundamental questions about the process of environmental policymaking. Because the burdens and benefits of environmental policy are not evenly distributed throughout society and various groups may have differing environmental and economic priorities, environmental decisions are inherently political in nature. Scientific and technical expertise cannot be expected to produce a "best" means for implementing a nonexistent consensus policy. Arguably, the administrative process is insufficiently politically accountable, given the importance of the environmental policy choices to be made.⁷

The implications of distributional consequences for the process of environmental policymaking are explored by Dean Joseph P. Tomain in *Distributional Consequences of Environmental Regulation: Economics, Politics, and Environmental Policymaking*. Dean Tomain creates a hypothetical community that must evaluate the merits of specific hypothetical environmental policy options. After considering the possible costs and benefits of each option for various segments of the hypothetical community, he concludes that although technical expertise can help to illuminate the realistic consequences of particular policy options, the final choice is ultimately political and is best left

to the political process.

Like the administrative and political processes, the legal system has a role to play in making environmental policy choices with distributional consequences. In particular, the availability of legal remedies for environmental harms may force those who engage in pollution causing activities to internalize the costs of these harms. The internalization of costs may in turn cause consumer prices to rise or force some businesses to close, outcomes that may affect various segments of our society in different ways.

Thus, in the final contribution to this section, *Legal Remedies for Victims of Pesticide Exposure*, Mary Cabrera, staff member of the *Journal*, discusses potential remedies available to those who have been exposed to pesticides, a problem of particular concern for agricultural workers. Many of these workers are migrant farmworkers, of whom a

majority are undocumented Mexicans working in the United States. Given the reluctance of undocumented workers to resort to the legal system and various legal doctrines that present obstacles to recovery under federal statutory or state tort law, Ms. Cabrera concludes that traditional legal remedies are likely to prove ineffective in redressing the problems of pesticide exposure. She suggests that education and alternative compensation schemes are the best means for addressing the problem of pesticide exposure.

Each of these articles addresses the broad theme of environmental policy's distributional consequences. They cannot and do not attempt to provide all the answers to all the difficult environmental questions facing us. They do, however, improve our understanding of these questions. I trust the reader will find them to be as thought provoking as I have.

Notes

*Professor Levy wishes to thank Robert Glicksman for his helpful suggestions.

1. See generally Glicksman & Schroeder, *EPA and the Courts: Twenty Years of Law and Politics* (forthcoming, LAW & CONTEMP. PROBS.).

2. For the application of such a model in analyzing the distributional consequences of United States Supreme Court decisions' environmental policy outcomes, see Levy & Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND L. REV. 343 (1989).

3. See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

4. For example, this sort of reasoning is evident in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411, 412 (1971).

5. Compare, for example, the Supreme Court's assessment of the EPA's statutory mandate in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984), with the attitude reflected in *Overton Park*, *supra* note 4.

6. A recent local example of this "not in my backyard" phenomenon is the successful public opposition to the siting of a large landfill in southern Kansas City, Missouri. See *Kansas City Star*, April 5, 1991, at C1, col. 4.

7. For example, Justice Rehnquist argues in his concurring opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 685-86 (1980), that the nondelegation doctrine requires fundamental policy choices, such as whether workplace environmental protection should be based on cost-benefit analysis, be made by Congress because Congress is the most politically responsive branch of government. Interestingly, in other contexts the Court, including Justice Rehnquist, has indicated that ambiguity in an environmental statute reflects an implicit delegation to EPA of authority to accommodate competing policy objectives, and that administrative resolution of such policy issues is both appropriate and entitled to judicial deference. See *Chevron*, 467 U.S. at 842-45.

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