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## FOREWORD

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On November 15-16, 1990, a group of distinguished practitioners and scholars assembled at Duke Law School to commemorate the twentieth anniversary of the creation of the Environmental Protection Agency ("EPA"). At that time, the articles in this volume were presented for critical discussion and commentary. Sponsored by both Duke Law School and Washington University School of Law, the function of the 1990 symposium was to evaluate EPA as an institution.

Over the past two decades, EPA has been the major federal agency implementing federal environmental policy. The substance of that policy was a target of evaluation and analysis prior to EPA's creation, and such scrutiny has continued throughout EPA's existence. The substantive debates raised by the federal government's role in the control of pollution, the regulation of hazardous waste, the effort to clean up old dump sites, the protection of wetlands, and the regulation of automobiles are certain to continue.

In the legitimate concern to debate substance, evaluating and analyzing the institution charged with implementing federal policy should not be neglected. When environmental policy moves from legislation to implementation, it enters a complex institutional environment, one shaped by internal and external incentives and pressures. Without a sufficient appreciation of EPA's institutional environment, substantive environmental policy decisions can be deflected, stalled, or altered in unintended ways.

After twenty years, we have a record of agency experience from which to extract lessons about the institutional and organizational constraints under which the agency operates. Those lessons may have implications for how Congress drafts legislation, for how the Executive Office of the President reconciles federal environmental policy with other national priorities, for how the courts review agency action, and for how EPA can best be organized to

address the problems of the 1990s and of the twenty-first century. Accordingly, the articles published in this volume examine EPA as an institution, concentrating on its internal functions and external influences on its behavior.

Two articles examine different aspects of EPA's internal operations. Alfred Marcus re-examines a debate as old as EPA itself over whether EPA might function more effectively if it were organized differently.<sup>1</sup> Marcus reviews the original debate within the Nixon Administration, and between the administration and Congress, over whether to create a department that combined supervision of natural resources and control of pollution or to create a separate pollution control agency. After explaining why EPA was organized as a pollution control agency, Marcus traces internal agency efforts to organize departments along broad functional lines instead of along medium-specific lines, with separate programs overseeing the programs directed at air, water, solid waste, pesticides, and radiation. Despite early planning efforts anticipating the functional design, the agency's early organization coalesced along medium-specific lines, where it has remained. Lakshman Guruswamy's comment examines more closely the case for integrated pollution control and suggests how EPA can begin to implement such a system.<sup>2</sup>

Tom McGarity's article examines the decisionmaking procedures within EPA as it exists today.<sup>3</sup> He describes the agency's efforts to ensure comprehensive participation in and review of major rulemaking initiatives within the organization, and he analyzes the influence of the various program offices and other offices on each other.

EPA's mission places it at the intersection of technology, science, and economics. The articles by McGarity and Marcus each touch upon EPA's efforts to institutionalize its understanding of all three bodies of knowledge. The article by Arthur Fraas details EPA's efforts to incorporate economic analysis into its decisions, as well as the efforts of the Office of Management and Budget to ensure that such analyses are reliably conducted.<sup>4</sup>

Three papers explore the relationship between the agency and the three constitutionally created branches of the federal government. Bob Percival's paper studies the efforts of every president since Nixon to coordinate environmental regulation from some bureau within the Executive Office of the President.<sup>5</sup> Percival explains how such oversight has consistently been justified as a means of ensuring rationality in policymaking and coordination

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1. Alfred A. Marcus, *EPA's Organizational Structure*, 54 L & Contemp Probs 5 (Autumn 1991).

2. Lakshman Guruswamy, *The Case for Integrated Pollution Control*, 54 L & Contemp Probs 41 (Autumn 1991).

3. Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 L & Contemp Probs 57 (Autumn 1991).

4. Arthur Fraas, *The Role of Economic Analysis in Shaping Environmental Policy*, 54 L & Contemp Probs 113 (Autumn 1991).

5. Robert V. Percival, *Checks without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L & Contemp Probs 127 (Autumn 1991).

of environmental policy with other aspects of domestic and foreign policy, and yet how it has often functioned as a means of providing regulatory relief to regulated firms and industries. He makes proposals for advancing the laudable goals of increased coordination and accountability in policymaking without subjecting EPA decisions to undue political influence.

Richard Lazarus's article on congressional oversight subjects Congress's relationship with EPA to similarly critical analysis.<sup>6</sup> Drawing on significant recent empirical work from political science, Lazarus emphasizes that enacting substantive environmental legislation is by no means the only contact Congress has with the EPA. Numerous committees and subcommittees of both the Senate and the House engage in frequent oversight of the agency through hearings, to such an extent that the sheer volume of oversight response work done by the agency can have an appreciable impact on its ability to accomplish its substantive missions. Not only is oversight time consuming, but its fragmented, uncoordinated, and undisciplined character threaten, in Lazarus's view, any prospect for major shifts in EPA programs or approaches to problems that may well be called for in the years ahead. Steven Shimberg's comment reexamines the disadvantages of oversight found by Lazarus.<sup>7</sup>

A common theme running through Percival's and Lazarus's articles is that any evaluation of EPA's performance is radically incomplete without a thorough understanding of the political forces shaping and influencing the agency. Chris Schroeder's and Rob Glickman's paper on EPA and the courts also studies the influence of politics on the agency, although only indirectly.<sup>8</sup> Our article studies how changes in political assumptions concerning the legitimacy of agency decisionmaking, the nature of congressional decisionmaking, and the status of environmental protection as a social value have all influenced federal judicial review of EPA rulemaking. We argue that changes in the legal doctrines being applied to such decisions are ultimately traceable to these underlying shifts in political assumptions.

Finally, a second contribution by Richard Lazarus presents a synoptic picture of EPA's performance over the past twenty years.<sup>9</sup> He argues that an unfortunate yet pervasive atmosphere of distrust of the agency has from the beginning restricted its capacity to carry out the ambitious mandates given to it through environmental legislation. Indeed, the practically unachievable ambition of much of this legislation has contributed to a cycle of promise, failure, and recrimination that perpetuates the distrusting atmosphere he describes. He recommends steps that might be taken to rehabilitate the

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6. Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 L & Contemp Probs 205 (Autumn 1991).

7. Steven Shimberg, *Checks and Balance: Limitations on the Power of Congressional Oversight*, 54 L & Contemp Probs 241 (Autumn 1991).

8. Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L & Contemp Probs 249 (Autumn 1991).

9. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L & Contemp Probs 311 (Autumn 1991).

agency, including a lowering of expectations, an increase in the agency's capacity to engage in long-term planning, elimination of some of the redundant congressional oversight, and a recognition that the public has by and large had the benefit of conscientious public employees in the agency.

Without any pretense of comprehensive coverage, these articles and comments do provide a number of valuable insights into the internal workings of EPA. They also usefully stress the importance of understanding the larger political environment within which the agency functions and which must be accounted for in any overall assessment of agency performance. Along the way, they advance a number of useful suggestions for changes in either the internal operations of the agency or the external environment within which it functions, suggestions that will help inform the ongoing debate over EPA's role in implementing national environmental policy.