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Protecting the Environment—What Does That Mean

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"PROTECTING THE ENVIRONMENT"—WHAT DOES THAT MEAN?

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I. INTRODUCTION

For over a generation, accounts of environmental damage and steps to address it have filled our country's mass media and scholarly journals. But an extraordinary reluctance to set environmental goals for society, or even to seriously debate setting them, has attended that flood of ink and intellect. We have no consensus—not even competing "visions"—on how the United States would look if the environment were fully protected, or what institutions would provide that protection, or the national values this effort would diminish or promote, or how we would get there from here. Would a future, environmentally friendly America have more farms or fewer farms? More people in cities, or in the country? Carefully planned multiple use areas or pristine areas next to areas of uncontrolled land use? Strong local agencies or strong central control? Such questions are rarely addressed seriously, much less answered, in the policy debate.

With no tie to national institutions and values, our environmental programs operate largely without regard to that broader world and with remarkably little influence on it. Even within the restricted environmental sphere, our lack of meaningful goals drives the choice of environmental protection methods toward what is expedient, rather than what will actually accomplish the desired end. These defects in our ends and means reflect a failure of political dialogue—a failure to pay serious public attention to the design and function of government institutions, or to the values they embody.

In the age of Ross Perot, reluctance to address public issues in depth hardly stops with the environment. However, until we place environmental protection in a broader context, we largely lose both the chance to actually protect that environment and the chance to incorporate a genuinely new and perhaps rejuvenating element into our public life.

Buried in day-to-day pressures, our legislators and executives cannot develop broad goals by themselves, although they can revise, articulate,

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and act on goals developed by others. Accordingly, the first corrective steps must be taken outside the government. Academics, policy analysts, and activists of all persuasions must describe "relevant utopias"[1]—future American societies organized to protect the environment—with full attention to the institutional and value choices those societies would require. Meanwhile, elected and appointed officials must make room for those new ideas by more frankly admitting the many ways our current system really does not work as well as advertised. Moreover, they must help assure that these new ideas reflect an understanding of our present structure and its problems—an understanding that is often foreign to academic writing. Between wider speculation and more limited claims for what we have, a broader and more effective approach to protecting the environment may some day emerge.

II. WE HAVE NO ENVIRONMENTAL GOALS

A. Current Laws and Policies

The clearest way to show our lack of environmental goals is to analyze how thoroughly our present regulatory structure reflects their absence. That absence restricts our environmental protection efforts to an extraordinarily narrow front. For example, although government programs across the board—agricultural and transportation subsidies, flood insurance, timber leasing, and water pricing—affect water quality, our response has been to adopt not a clean water policy, but the Clean Water Act.[2] A law is far more suited than a policy to avoid broad goals. Inexpedient programs can be left out of a law, and the law can be designed to avoid intruding on the jurisdiction of other agencies or congressional committees. With a policy, however, such evasions—though still highly possible—become more apparent and embarrassing.

This compartmentalized approach also helps explain our virtually exclusive reliance on regulation to address environmental problems. To clean the water, our system would rather impose ten billion dollars in regulatory costs on the politically vulnerable than achieve a greater clean up, and save money, by eliminating subsidies and tax preferences. True, regulation is an expensive and generally weak agent of social change, but such characteristics can be turned to political advantage. A new regulatory program could give the political illusion of progress, and yet avoid

1. STANLEY HOFFMAN, CONTEMPORARY THEORY IN INTERNATIONAL RELATIONS 184 (1960).

2. Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1993)).

interfering with established programs and interests. That is scarcely true if subsidies are to be cut, taxes raised, or land-use preferences eliminated.

Once confined in this manner, the environmental "cause" has exercised extraordinarily little influence on the broader structures of government despite its claimed high public standing. How might we design a "green" federal budget, or a "green" tax code? Despite the huge stakes, such questions have scarcely been debated by academics, much less addressed by politicians. Since any change at this level would affect many interests and goals at once, the issues overtax our restricted analytic and political capacity and escape consideration.

The same forces warp our environmental protection programs even within their narrow sphere. Since our system is purely regulatory and lacks the support of broadly debated and adopted goals, it focuses on the tasks that regulation can accomplish at small political cost. That means a focus on the following:

(1) *Individual Sources and Chemicals.* A command and control regulatory system, with its constant need for new decisions, naturally leads the government to fragment decisions into little pieces in order to make each individual decision easy. For this reason, it also leads to technology based emission standards that require the decision maker to approach problems on a case-by-case basis with minimal attention to larger costs or benefits.

(2) *Major Sources.* Regulatory decisions impose information-processing and procedural costs that cannot be justified for small sources and activities, even when those sources add up to major shares of the problem. Our system works better to squeeze an extra 500 pounds of emissions out of a large source than to squeeze an extra 5000 pounds out of several small ones.

(3) *Prohibitions.* Regulations that fine tune conduct are hard to set and unlikely to work, compared with regulations that impose simple bans or limits on emissions. The ban or limit approach has now produced demands that industry eliminate the use of toxic chemicals altogether and suggestions for trading a strictly limited quantity of pollution on the open market. These items have become fashionable as much for their compatibility with our existing framework as for their actual environmental protection merit.

(4) *Simple-Minded Approaches Centered on Human Health Protection.* Individual chemicals and discharges can be plugged into mathematical models to project individual cancer risk. After performing that limited task, the government can base a regulatory decision on the find-

ing. Here too, because cancer risk is something our current approach can quantify, it naturally attracts regulatory attention.

By the same token, our regulatory system shuns the following:

(1) *General Statements of Goals that Might Actually Influence Policy*. Once a law states clear and meaningful goals, the efforts to achieve them almost always demonstrate the inadequacy of a case-by-case approach focused on major sources and simple commands. That in turn can suggest a need to reconcile environmental goals with other social values in a broader synthesis—always a politically difficult and unwelcome task. Conversely, with no goals stated, it is much harder to know whether, when, or why the program has failed. Perhaps for such reasons, our laws to regulate pesticides and solid waste articulate no meaningful generic goals at all. Our water pollution law pays lip service to clean water everywhere, but denies the government power to impose the land-use controls that would be needed to produce it. Occasional exceptions to this rule—as in the Clean Air Act Amendments of 1977's[3] "ambient air quality standards,"[4] and the Endangered Species Act's[5] command to preserve species[6]—have indeed suggested the need to adopt a broader set of goals or a wider range of measures. But even there the general response often has been to water down or postpone the offending requirement rather than to fit it into that larger context.

(2) *Any Controls on Land Use*. Clean water will always be out of reach without controls on nonpoint sources—essentially, runoff from farming, construction, and paved roads. Clean air and energy conservation may require a transportation system less dependent on continued growth in road construction and automobile traffic. Wildlife protection may require stronger measures to protect wildlife habitats, and especially to protect large roadless areas. Protecting air quality in national parks may require controls on land use in their vicinity. In general, our public debate has carefully avoided addressing or even raising these issues.

(3) *Controls on Personal Conduct*. As a rule, our control efforts avoid any measures to address the conduct of individuals or small business—for example, farmers, builders, or motorists—despite their often major contributions to water and pollution and habitat destruction.

(4) *Nature Protection*. Finally, our system avoids or minimizes measures to protect nature. Unlike health-based regulation, such meas-

3. Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

4. 42 U.S.C. § 106(c)(iv) (1988).

5. 16 U.S.C. §§ 1531-1544 (1988 & Supp. IV 1992).

6. *Id.* § 1537a(e)(2)(C) (1988).

ures cannot be based on simple risk models supporting a simple linear command. Instead, they demand choices among competing values like local economic freedom, the right to use property, and the value of wild animals or natural beauty. At the technical level, they call for complicated regional analysis of ecological factors leading to an evaluation of the ecological or aesthetic benefits of controls on land use or private conduct. These are exactly the issues our current framework was designed to avoid.

This lopsided approach has corrected some major environmental problems quickly and effectively—for example, by banning lead in gasoline, banning ozone-depleting chemicals, banning DDT and similar pesticides, or, perhaps, capping sulfur emissions from power plants. But these successes required a fortunate match between the "shape" of the problem and the design of our regulatory system. In each case, the problem could be cured by simple controls on a product with only a few suppliers. Absent such a happy coincidence, our system leans to "pretend" solutions—like a hazardous waste control system that regulates ten percent of all waste with unparalleled complexity and leaves ninety percent completely unaddressed—or ignores the problem almost altogether, as with nonpoint sources of water pollution. This partial approach also produces counterproductive results—as when case-by-case environmental clean-up standards drive new development into pristine country because use of urban sites has become too expensive.

As regulatory efforts continue, our environmental problems will stem increasingly from causes our current system cannot effectively address. Logically, that should lead us to explore new approaches, but recent history demonstrates that obscuring the real issues will be a hard habit to break. The two most recent environmental statutes—the Water Quality Act of 1987[7] and the Clean Air Act Amendments of 1990[8]—depend just as much on regulation as their predecessors in 1977, and work just as hard to bury problems that do not fit the regulatory model.

B. Earth in the Balance

In other fields, the works of advocates and scholars operate to place legislative and policy defects in a larger context. But a review of the broadest and most impressive new attempt in the environmental field—the recent best seller *Earth in the Balance*[9]—shows that even this

7. Pub. L. No. 100-4, 101 Stat. 7 (codified as amended in scattered sections of 33 U.S.C.).
8. Pub. L. No. 101-549, 104 Stat. 2399 (codified in scattered sections of 42 U.S.C.).
9. AL GORE, EARTH IN THE BALANCE (1992).

ground-breaking discussion does not address either goals or methods in truly meaningful detail.

The Vice President's book breaks new ground largely in its description of environmental problems. It ranks them, in order of seriousness, into "global" problems like overpopulation, loss of biodiversity, and global warming, "regional" problems like acid rain and watershed pollution, and "local" problems like hazardous waste dumps.[10] By arguing for a reordering of regulatory priorities along these lines, it makes a new and major contribution. Beyond that, the book is fun to read, clearly and even eloquently written, generally balanced despite its emotional tone, factual and full of information, intellectually ambitious, and often refreshingly quirky.

However, the same focus on global issues allows the book to ignore the problems of conflicting goals and designing institutions that have lain unaddressed for so long in our domestic polity—and indeed, the book does ignore them.

Far from setting out a "model" of a society that protects the environment, and the institutions and specific values it would rest on, *Earth in the Balance* very often treats "environmental protections" as a self-defining term. At times it suggests that we would all agree on our goals if only our spiritual blindness were removed.[11]

Where the problem is huge and uncontrolled—as the Vice President claims is true for global warming or deforestation—no precise definition may be needed at the first stages of addressing it. This approach, however, does not fit domestic environmental problems. How should we balance the constraints on personal freedom needed to restore pure water in a populated river basin with the value of that restoration? And how pure is "pure"? To what extent should the watershed also be restored to natural conditions? Does it matter that a second river in its natural state already flows through a nearby wilderness area? There is no framework in which to answer such questions short of a full political and institutional analysis.

Because Vice President Gore's book fails to address these difficult questions of clashing goals and values, it likewise fails to address the need for environmental protection institutions that would balance those contending forces. Although it suggests a "Global Marshall Plan"[12] to deal with worldwide issues,[13] the scope and novelty of that task quite under-

10. *Id.* at 28-29.
11. *Id.* at 220-65.
12. *Id.* at 297.
13. *Id.*

standably lead to sketchy detail. Where the regulatory problem is older and closer to home—for example, how to promote less chemical-dependent agriculture, or create a less auto-dependent transportation system—the book has very little to say. However, if we cannot even design and operate such institutions in our own country, the Global Marshall Plan is unlikely to get very far.

With the necessary new institutions so ill defined, the book cannot describe how to create them. Hence, it relies on awakening public opinion to the true scope of our problems, and promoting a spiritual transformation to cure our alienation from the natural world.

Yet public opinion by itself will not suffice despite its undeniable vital importance. As the often ineffectual efforts of the past twenty-five years have shown, in the short run public opinion alone is both easily titillated and easily appeased. Without a deep understanding of the political and institutional changes required to accomplish results, the public will not know what to demand and its representatives will not know what to supply. In those circumstances, public alarm will be—and often has been—bought off with half measures, or false measures, packaged as full answers, at least until the next "crisis" leads to another trip around the cycle.

Moreover, if we must rely on spiritual transformation, we are in real trouble. Contrary to the Vice President's suggestion, humans have almost never lived in voluntary harmony with their environment in a widespread "state of nature."[14] It is our physical power to damage the environment that has changed in recent years, far more than our spiritual willingness to do so. As with other spiritual causes, a spiritual reverence for protecting the earth will always be confined to a minority. Nor can we expect that the spiritually awakened will agree on specific environmental protection measures any more than they historically have agreed on other things.

III. TOWARD THE FUTURE

A. Relevant Utopias

By now, the limits in our current approaches have become so ingrained that we often fail to see that they are there. Once we have seen them, describing the choices and institutions that might give our environmental aspirations concrete form is far too "blue sky" a task to be begun by elected or appointed politicians. Only those our society employs to think speculatively can realistically undertake to describe such a worka-

14. *Id.* at 258-60.

ble future. Environmental protection goals will not define themselves, no matter how much we refine our analytic tools. Such questions as how much land to devote to national parks or how or whether to protect family farms will always present choices among values and legitimate political interests. Much of our current focus on new instruments of environmental protection—like market-based approaches to air pollution, new clean-up technology, or changes to economic accounting methods to reflect environmental damage—serves at least in part to suppress the extent to which environmental solutions may require changes in social institutions and behavior. Accordingly, we must define these goals based not just on physical and biological facts, but on the type of future we find consistent with all our hopes and values. This undertaking will require the imagining of "relevant utopias" that combine a vision of an environmentally harmonious society with a description of the institutions and value choices they would rest on. Here are some of the neglected issues that this undertaking might address:

(1) *Liberalism*. By almost universal consensus, protecting the environment is a "liberal" issue. That may be true. But how does it relate—if at all—to other liberal values such as concern for the disadvantaged, urban redevelopment, or greater public responsibility for the economy? To what extent could new government agencies, such as river basin authorities or agricultural or transportation planning systems, improve environmental protection? How necessary are they? What other goals might they serve? How would those institutions work, and how might they fail?

(2) *Conservatism*. We also need a "conservative" model of environmental protection. How much could we accomplish by reducing the role of government—cutting subsidies, eliminating insurance programs, or repealing counterproductive laws and regulations? Can we realistically hope to achieve "balance" between environmental protection and personal and economic freedom in every geographic area? Would we be better off confining the strictest degree of nature protection to a system of parks and wilderness areas (perhaps an expanded system) and cutting back the regulatory burden elsewhere?

(3) *Individualism*. Despite the endless debate on the issue, probably no real conflict need exist between economic prosperity and environmental protection. But the extent to which environmental protection might or must reduce personal freedom deserves far more focused attention. While our environmental laws—steadily and almost without debate—reduce *corporate* freedom, they almost always retreat where restraints on

individual freedom are concerned. Real costs in environmental protection have attended that retreat.

Is such reluctance to interfere with our most basic national value always justified? If not, what environmental system will function at minimum cost to liberty? Should it rest on local or regional institutions in which all participate, to create a sense of local community more satisfying than an unconstrained personal right to choose? Should we attempt "free-market" and "preservationist" approaches that avoid the need for continuing government intervention? Should we elect some combination? If so, what combination?

In addressing such issues, we would clarify, in a reciprocal dialogue, not just the methods of environmental protection, but its goals as well. For example, a full examination of our official goal of pristine water everywhere might lead us to prefer extending full protection only to some watersheds and to adopt the full range of controls on land use and personal conduct needed to provide it in that limited sphere.

Imagining these utopias is a task for academics and policy advocates. It is for academics—even law professors—because of the need for close attention to institutional and regulatory detail. The Vice President may be right or wrong when he calls for environmental protection to become "the central organizing principle for civilization."[15] But describing how this country, or an individual state, would look if he *were* right certainly presents a more intellectually ambitious and rewarding challenge than the narrow-gauge analyses of special issues, or the abstract discussions of theory, that fill the law reviews at present.

Imagining these relevant utopias is a task for policy advocates because in imagining utopias they would suggest to our government both the goals for their efforts and the political and institutional context for achieving them. That in turn would open up the element of political choice that is so lacking at present. Political choice is necessary to define our problems correctly and to move towards solving them. To break out of its ghetto, environmental protection will need to make common cause with many different interests. Neither the free market economists who would support restricting environmentally damaging water subsidies, nor the farmers who would oppose it, are likely to be decisively motivated or deterred by respect for the environment. A relevant utopia, by setting such different values in context, would provide a framework for discussing the policies that affect them.

15. *Id.* at 269.

The public and policy communities seem hungry for such broader perspectives. A wide-ranging argument for decentralized energy supply—*Soft Energy Paths*—published sixteen years ago,[16] and a more recent survey of Environmental Protection Agency[17] professionals suggesting major changes in our regulatory priorities are both constantly discussed and cited, and have significantly shaped our laws and regulations.

These could only be fragments of any full-scale future relevant utopia. But the interest they attract suggests the likely demand for that broader product.

B. Elected and Appointed Officials

Utopias (happily) are impractical almost by definition. We need them, not as programs to be enacted, but as the raw materials from which the design of such programs can start in the political world. We cannot expect elected and appointed officials to "reinvent" environmental protection amidst all their other pressures and responsibilities. However, they *can* prepare the ground for that debate by admitting more candidly the ways our current system *does not* work and the problems it *does not* address. Appointed officials also can serve as critics. Even today, academic work in our field all too often fails to appreciate the legal, factual, and political complexity of our issues, so that its analyses omit critical details and its suggestions become completely irrelevant. Those omissions will be far more fatally damaging to the larger task suggested here. Public officials can help fill the gap by taking such efforts far more seriously than they have by viewing such speculation as an essential part of our society's long-run policy debate, and in particular by making themselves and their staffs regularly available to supply a real-world correction to the inevitable academic omissions.

The complexity of environmental issues and the short attention span of the media allow fake claims of victory and disaster to be taken—all too often—at face value. Here, as in other walks of life, candor about our failings at both the public and the academic levels will be the indispensable prelude to progress in the future.

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16. AMORY B. LOVINS, SOFT ENERGY PATHS: TOWARD A DURABLE PEACE (1977).

17. EPA, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS (1987).

IV. CONCLUSION

The architects of our environmental protection system shrank from any definition of goals that might provoke conflict with powerful established social groups or values. Instead, they created a lopsided and increasingly obsolete approach that could only address a limited set of questions.

Any effective reform of that system must focus on what "environmental protection" means for society as a whole. Since this is precisely the question our current approach was designed to obscure, making that change will necessarily be difficult. Moreover, any responsible political debate on that issue would need something to work with. By designing relevant utopias that describe how a country, a state, a sector of the economy, or an industry would look if the environment were fully protected, we can help supply the now absent foundation for meaningful reform.