
American Environmental Policy, 1990–2006
Beyond Gridlock

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Environmental Policy Beyond Gridlock

Between 1964 and 1980, in the “golden era” of environmental lawmaking, the U.S. Congress enacted 22 major laws dealing with the control of pollution and the management of private lands, public lands, and wildlife. Passed with strong bipartisan support and riding a wave of legislative enthusiasm that overwhelmed most resistance, those laws triggered a profound expansion of government power in the service of emergent values and newly powerful interests. The anti-pollution laws broke new ground, giving the federal government a central role in protecting and improving air and water quality. New laws affecting the management of public lands and wildlife were layered atop existing statutes and agency practices, forcing green priorities on the Forest Service, the Army Corps of Engineers, and other agencies that had long favored extractive interests. The Endangered Species Act of 1973 typifies the politics of this moment in environmental policymaking. Growing out of concerns about the fate of the bald eagle and the bison, the Endangered Species Act was passed by a 345–4 vote in the House of Representatives and by a unanimous voice vote in the Senate. The act, which did not allow for economic considerations in decisions to place species on the endangered list, was signed into law by Republican President Richard Nixon.¹

Soon, though, as the economic, ideological, and even cultural consequences of the “golden era” laws became clear, the new environmental laws became a focal point for political struggle. Once again the Endangered Species Act was emblematic: a 1977 controversy over whether the protection of the endangered snail darter required the Tennessee Valley Authority to abandon an expensive dam project clarified the law’s disruptive force and gave a preview of later, bitter struggles. The highly

visible battles over species preservation have been mirrored in other high-stakes fights over public lands and wetlands, toxic waste, water pollution, air pollution—indeed, nearly every significant environmental policy issue of the past 30 years. Scholars have noted a loose public consensus on the need for strong environmental protections, but environmental issues have divided the parties and engendered a bitter interest-group politics marked by high levels of mobilization on all sides. There is considerable political distance between the golden era, in which Congress committed itself to an ambitious, broad-based attack on environmental problems and conservatives such as Senator Jesse Helms (R-North Carolina) could support the Endangered Species Act, and the present, where reform proposals run headlong into legislative gridlock, and policy initiative and policy struggles spin off beyond Congress onto a host of other policymaking pathways.

The lawmaking revolution of the 1960s and the 1970s left many blanks to be filled in and much work for implementing agencies, the courts, and Congress in sorting out the meaning of those laws. Yet for more than 20 years fundamental environmental policy questions, major ideological disputes over the role of the state, fights about risk and lost jobs and economic inefficiencies, and now—with the emergence of concerns about global warming—looming environmental catastrophe have been channeled around Congress onto alternative pathways. This book is largely devoted to an exploration of the many paths on which environmental policy is being made, places where environmental policymaking has flourished in the context of a gridlocked Congress. These five pathways include increasing use of appropriations politics (e.g., the *Salvage Rider*, 1995), increasing use of executive-branch policymaking (e.g., President George W. Bush's decision to exempt electric utility plant expansions from the New Source Review program of the Clean Air Act), increasing use of the courts (e.g., to alter development through the Endangered Species Act), an increase in collaboration-based politics (e.g., the Environmental Protection Agency's Project XL), and an increase in state-focused policymaking. These different nontraditional paths indicate a vibrant environmental policy arena at the beginning of the twenty-first century, as reform impulses confront the institutional and legal legacies of more than a century of state building and the forces that in recent years have tied up Congress on environmental issues.

Choosing an Environmental Policy Future?

Legislative gridlock on the environment has generated frustrations on all sides—frustrations that were clearly evident in the 1990s. Mainstream environmental groups—sometimes called “big green”—celebrate the successes of the 1960s and the 1970s, but remain dissatisfied with a lack of progress on environmental issues, pointing to potentially catastrophic hazards like global warming, continuing risks to human health from pollutants, and rising pressures on land and water resources. They were angered by the Clinton administration’s failure to press their concerns in the Democratic-controlled 103rd Congress, but that failure was predictable. President Bill Clinton had higher priorities, including economic recovery, the North American Free Trade Agreement, and health-care reform. Furthermore, legislators hostile to energy taxes and protective of the age-old regimes governing mining and grazing limited his leeway on the environment. The mainstream environmental groups seem well positioned to protect most of the gains of the past using their own substantial resources, the courts, and the considerable reservoir of general public support they enjoy. They can inflict pain to block conservative initiatives, as in 2001 when they tortured the Bush administration for its decision to review a Clinton rule (adopted in the waning days of his presidency) limiting allowable arsenic concentrations in drinking water and forced a Bush retreat. Yet their efforts to expand upon the legislative gains of the golden era in Congress have, with a few important exceptions, been fruitless: addressing global climate change; protecting the Arctic National Wildlife Refuge or other major wild landscapes; reforming existing public lands laws dealing with grazing, logging, and mining; strengthening existing pollution control laws; or establishing standards of environmental justice.

Conservatives and business interests complain about the excessive economic and social costs of environmental regulations, infringements on property rights, and the growth of government symbolized by the far-reaching authority of the U.S. Environmental Protection Agency. After the Republican victories in the 1994 congressional elections, the new Republican leadership in the House claimed a mandate to weaken environmental regulations. It pushed regulatory reforms aimed at stopping or sharply limiting enforcement of many of the nation’s environmental

laws. House leaders announced their intentions to rewrite the Clean Air Act, the Clean Water Act, the Superfund law, the Safe Drinking Water Act, and the Endangered Species Act, to relax restrictions on logging in national forests, and to weaken limits on pesticides in food.

This all ended in political disaster for the Republicans. The House Republican conference split on some crucial issues, with northeastern Republicans flinching at the breadth of the attack on established laws and regulations. Much of the agenda that had been passed by the House of Representatives stalled in the Republican-controlled Senate, and the assault withered as it faced presidential vetoes. Clinton successfully cast the Republicans as extremists on the environment, fueling his own political recovery and humiliating Speaker of the House Newt Gingrich (R-Georgia) and his allies.² The conservatives had misread their mandate and miscalculated their prospects for winning changes in the basic environmental laws. By 1996 they had moderated their goals and pulled back their efforts to undo the policy legacies of the 1960s and the 1970s. The right has continued to face difficulties moving its environmental agenda—even with Republican control of the White House and both houses of Congress. In the wake of George W. Bush's victory in the 2004 presidential election, EPA Administrator Mike Leavitt claimed a "mandate" for the administration's environmental program. Yet Bush's environmental initiatives quickly fell toward the bottom of its list of priorities, and his centerpiece "Clear Skies" proposal fell into a legislative miasma from which it is unlikely to emerge.³ Like the greens, conservatives have pushed for significant changes to the nation's environmental policies, and, like the greens, they have been frustrated in the lawmaking process.

This legislative gridlock has been sobering to those on the environmental left and right, but it has not dampened optimism in the center that productive reform of environmental policy is possible. As battles over warming and wetlands and endangered species and arsenic in drinking water and other major issues have raged, the policy community—academics, practitioners, some stakeholders—has begun to develop a consensus on the practical problems of environmental policy and on fruitful next generation directions for reform.⁴ This next generation agenda draws on green concerns about the limited success of some environmental policies in achieving environmental protection, the right's

frustration with the economic and cultural costs of compliance with the golden era environmental laws, and the policy community's concerns about the inefficiencies of many current policies and excessive adversarialism in the policymaking process. Advocates of next generation reform seek more efficient, results-oriented policy and processes that will contribute to a better balancing of the many values in play in the environmental arena. These reformers think that the green wars of the 1980s and the 1990s have exhausted both sides, opening opportunities for compromise: sensible reforms of existing laws that will enhance their efficiency and improve cooperation across old boundaries.⁵ Donald Kettl nicely sums up the next generation agenda: "to develop new strategies for attacking new environmental problems . . . to develop better strategies for solving old ones, and . . . to do both in ways that are more efficient, less taxing, and engender less political opposition."⁶

The next generation school's critique of the legacies of the environmental policies of the 1960s and the 1970s and its dreams of more pragmatic, incentive-based, collaborative approaches now dominate discussions of the future of environmental policy. These reformers offer a classic "both and" agenda, seeking to achieve real improvements in environmental protection while accommodating the legitimate concerns of business leaders and others about the economic and social costs of the implementation of the golden era laws. It is an attractive vision, embracing both a hard-headed pragmatism and the ideals of local collaboration and participatory regulation that have long animated democratic theorists and administrative reformers.⁷ The next generation vision draws strength from three features of the political and intellectual context of environmental policymaking. First, there is a broad, if general, public consensus supporting environmental protection. Second, there is widespread agreement that the laws passed in the 1960s and the 1970s have not been entirely successful, and that the implementation of those statutes has generated excessive costs and political conflict. Third, over the years the policy community has generated innovative ideas for increasing the effectiveness and efficiency of environmental policy, both to improve its performance in achieving old objectives and to modernize policy to address emerging concerns. Yet with the great exception of the emissions trading program adopted with the Clean Air Act of 1990, next generation

reformers have been as unsuccessful in Congress as environmental groups and the conservative right.⁸

Mary Graham was essentially right when she observed that

the need to resolve novel conflicts between economic and environmental interests . . . has given rise to a new pragmatism in environmental politics. In the absence of congressional action to revise basic environmental laws, workable compromises to resolve emerging problems have been jury-rigged around and within the existing labyrinth of rules. Economic incentives are employed more frequently to further federal and state objectives. In Washington, debate often remains polarized. But around the country, the nation is in the midst of a rich, experimental time in environmental policy.⁹

Yet it is important to recognize that this new pragmatism is *a* tendency, but hardly the *central* tendency in modern environmental policymaking. Debates in this area engage some of the most ideologically, culturally, and economically contentious domestic issues of our time, and neither the loose public consensus supporting environmental protection nor persuasive arguments that we can achieve higher levels of protection at lower costs can easily contain these conflicts and generate lasting momentum toward a pragmatic next generation policy.

Consider also the frustrations of some next generation policy advocates interested in increasing the efficiency of environmental policy with selected policies of George W. Bush's administration. The environmental policy analyst Jan Mazurek criticized Bush for abandoning next generation ideas, arguing that in important areas the administration ignored a broad consensus on reform, letting "progress toward a long-overdue modernization of U.S. environmental policy grind to a halt." This should not surprise anyone. The preference for more collaborative, efficient policies is an important part of modern environmental policymaking, but these approaches do not exhaust the agendas of policymakers and interest groups. All of the tactics used by the Bush administration are as much a part of modern environmental policymaking as the next generation approaches, and it is unsurprising that the administration used its authority and open policy pathways to pursue its policy agenda. Frustrated in Congress, it turned to rulemaking, litigation, appointments—to whatever tools it could find to press its goals. It is equally unsurprising that, despite the ideology of accommodation that has gripped parts of the policy community, determined environmental groups like the Center for

Biological Diversity use their resources and the leverage of the Endangered Species Act to attack development and land-management policies, typically using the courts. While the Clinton and Bush administrations were weakening enforcement of the ESA (albeit in different ways and for different reasons, with Clinton particularly citing the need for collaboration and compromise), the CBD—operating on a tiny budget—forced new species listings, new critical habitat designations, and expensive modifications to federal land management and developers’ plans (see chapter 5).¹⁰ Much like the Bush administration, the CBD has pursued an aggressive strategy rather than accepting the limitations of the consensus on pragmatism and collaboration that has such influence in the policy community. From our vantage point, President Bush’s actions and those of the CBD are just as much a vibrant part of the “next generation” story of environmental policymaking as collaboration and state action.

Further, managing the conflicts that mark this field in pursuit of pragmatism and collaboration is complicated by two important institutional features of the American political system, one general and one specific to environmental policy.

First, it is true that congressional gridlock has pushed environmental policymaking onto new paths, yet not all of these paths lead to next generation reform. The American political system offers many points of access to the policymaking process, and policy initiative has moved off in many new directions, both within the legislature itself (an increasing reliance on policy riders to appropriation bills and the budget process rather than the conventional lawmaking process); to executive politics, including the use of unilateral executive authority and rulemaking; to the judicial process; as well as to state, local, and private-sector efforts at achieving efficiency, collaboration, and sustainability that have been at the center of the next generation vision. As the bitter political conflicts that mark the environmental field spread across this complex institutional terrain, following a host of policymaking pathways, specific compromises “jury-rigged within and around the existing labyrinth of rules” are vulnerable to attack and the prospects for a larger movement toward a more pragmatic, efficient, and collaborative environmental policy seem limited. Consider the fate of the Oregon Salmon Plan aimed at preserving some West Coast runs of coho salmon. Worried about the potentially

devastating economic and social effects of an ESA listing, and trying to avoid the kind of train wreck caused by listings of several salmon species in the Columbia River basin, Oregon policymakers worked closely with many local groups to develop a solid recovery plan. The National Marine Fisheries Service agreed not to list the species because the local process seemed worthy and the resulting plan appeared sensible. In many ways this was a wonderful example of pragmatic collaboration in action. Yet several environmental groups and the Pacific Coast Federation of Fisherman's Association disagreed, and sued. The NMFS lacked the legal discretion to refuse to list a species and to implement a recovery process, even where it judged that locals had moved aggressively to tackle the problem. Environmentalists feared the precedent and used the courts to force the NMFS to retreat from pragmatism and cooperation to the rigidities of the law.¹¹ Environmentalists frustrated by the collaborative pathway found another, intersecting path that they could use to block a compromise that even some greens thought was sensible. There is no reason that the development of paths “within and around” existing rules and statutes will trump those rules or provide a stable basis for a new policy agenda centered on liberalism or conservatism or pragmatism. Without statutory changes to protect these collaborative experiments, they will often be vulnerable in a political system that offers many points of access, many points of attack.

Second, modern environmental policy choices are being made within frameworks set by the policy legacies of the 1960s and the 1970s and by even deeper legacies stretching back to choices made in the late nineteenth century and the early years of the twentieth century in what we will call “the American green state.”¹² Pollution control policies, conservation policies, and natural resources policies represent basic commitments of American government rooted in statutes, the institutional structure and culture of implementing agencies, and public expectations aggressively articulated by powerful environmental groups and business corporations and various property rights interests. These laws, institutions, and expectations were built over time through policy decisions reflecting values and interests at play in particular historical periods and designed to achieve policy goals specific to those periods. The construction of these laws, institutions, and expectations—of a green state—did not proceed

smoothly, or through a process of demolition of old institutions and the creation of new ones to replace them. Instead, each new movement layered new institutions and agendas atop the old and empowered new interests even while preserving many of the legal and institutional bases of the claims made by old interests.¹³

The resilience of these pre-existing policy commitments at once constrains systematic policy reform from the left, right, or the center and energizes an intense environmental politics. Conservatives' attacks on the institutions created during the golden era of environmental lawmaking merely served to highlight the strength of the policy status quo. Environmentalists have long chafed at older policy commitments privileging ranchers, miners, and loggers, among others, but they have been unable to root them out despite changes in the economy, values, and the constellation of political forces in the society. The environmental policy arena is a site for what Karen Orren and Stephen Skowronek call the crashing and grinding of "multiple orders," or "intercurrence," a politics privileging multiple and conflicting interests and values simultaneously. These values (e.g., the importance of private property and personal freedom and business prerogatives, the need for scientific management of natural resources, the value of green spaces and wild places and species protection, and rigorous protections against environmental risks) are embedded in laws and institutions that are not necessarily consistent with one another and that are not easily changed. The green state legitimizes the conflicting claims of contending interests and gives them the weight of law, at once shaping environmental politics and frustrating efforts to impose comprehensive new ordering visions.¹⁴

For example, the Endangered Species Act was layered atop old policy choices on water and timber and land and property rights, sometimes disturbing but not completely displacing old claims, old values, and existing laws. So when the federal government diverted water from Oregon's Klamath River Basin to help endangered fish species, farmers complained that the government had broken its commitments to them and environmentalists insisted that the ESA is the law of the land and the fish must be protected. To a large degree, both parties were correct and both had strong statutory claims. Next generation reformers rightly see the need to find some way to balance these claims, but the intensity of

the conflict and the ways that competing values and interests are privileged by different laws and institutions yield a politics in which any particular policy outcome is contingent, always vulnerable to competing claims in different venues. It is hard to know what “balance” means or how to find it when policy flows from a mix of choices made in different and disconnected institutional venues at different times, and all of the choices in one way or another satisfy claims with some strong statutory, political, and cultural grounding. As Charles Wilkinson argued in *Crossing the Next Meridian*, the policies governing grazing, mining, timber, and water in the West are still dominated by the “lords of yesterday,” laws and values dominant in the period of westward expansion. He is right, but it is also true—simultaneously true—that we are governed by the “lords of a little while ago,” laws and institutions adopted in the 1960s and the 1970s that empower new interests and new values and new institutions to shape environmental policy.¹⁵ This reality energizes all politics, certainly modern environmental politics, and there is no escape from the crashing and grinding of multiple orders in this field.

Norman Vig and Michael Kraft concluded their overview of contemporary environmental politics and policy with the powerful assertion that “we have no alternative but to decide what kind of future we want,” and it is likely—indeed we are hopeful—that that future will draw on ideas about sustainability and the next generation vision of greater efficiency and cooperation.¹⁶ But the possibilities of pragmatic choice, of reform driven long and hard by the next generation agenda—like the prospects for systematic reforms envisioned by conservatives or environmentalists—are sharply limited by the political realities of the present, and the ways that those intersect with the institutional legacies of the past. Environmental policy choices will be contingent, reversible, contended, reflecting both the constellation of political and ideological forces in society and the connections of those forces to different, embedded layers of the American green state.

Into the Labyrinth: Paths to the Environmental Policy Future

Far from leaving us with policy gridlock, then, the inability of Congress to respond to demands from the left, the right, or the center for changes

to the laws governing pollution, conservation, and natural resources policy has ratcheted up the importance of other policymaking pathways. A sound description of modern environmental policymaking must strike out across this complex terrain, exploring all of these paths and the ways they have shaped policy. Unfortunately, most current political science research on legislative “gridlock” and its consequences has focused exclusively on lawmaking, equating this with gridlock on policy. We think that it is crucial to extend the discussion of the implications of legislative gridlock to the larger policymaking process, because, at least in the environmental field, congressional gridlock has channeled tremendous political energies down other policymaking pathways, creating considerable instability in policy as policymakers and interest groups have pursued their agendas—sometimes momentous policy shifts—in other venues.¹⁷

The legislative stalemate has, of course, limited the policy achievements of both greens and conservatives, and the absence of congressional sanction has decisively limited the advance of next generation reforms. Graham’s “compromises . . . jury-rigged around and within the existing labyrinth of rules” are, like the Oregon Salmon Plan, typically vulnerable to challenge as they butt up against other agendas and statutory requirements. The norm is motion, continuing policy disruption, with movement from venue to venue and victory to defeat and back again for contending interests. Contrary to the expectations of those who see in modern American government the mobilization of so many contending interests that we have arrived at “demosclerosis” (hopelessly gridlocked policy), intense mobilization by interest groups has helped to move policy initiative around the stalemated Congress to multiple venues simultaneously.¹⁸

Similarly, the institutionalization of past environmental choices—which might at first blush be taken to yield a basic stability to policy, and some insulation of policy commitments from election results—has done neither. In part this is due to the layering of contradictory policy commitments within the American green state that will be explored in the next chapter. As Eric Schickler observed, “rather than providing stability and coherence, as the metaphor of institutions as equilibria suggests, institutions embody contradictory purposes, which provide for an ongoing, churning process of development.” Orren and Skowronek find that

“political reform is often incomplete, that adverse principles and methods of operation remain in place . . . the normal condition of the policy will be that of multiple, incongruous authorities operating simultaneously.”¹⁹

And in part this policy instability results from the prominent role that presidential leadership has played on many of the pathways around legislative gridlock. Always important, the tools of presidential leadership have become even more significant in this closely fought, contentious field, despite the institutionalization of the central commitments of several generations of environmental policy. In the absence of powerful “warrants” to reconstruct environmental policy, presidents have used the many tools at their disposal in defending policy regimes with which they are associated (e.g., Clinton used executive powers to protect the Endangered Species Act and the Clean Water Act from Republican attacks; George W. Bush defended mining and grazing interests challenged by green concerns) and in trying to weaken established regimes to which they are opposed.²⁰ Despite the lack of significant movement in the lawmaking process in decades, and despite the institutionalization of environmental policy commitments, presidential leadership has energized movement along many of the pathways around gridlock, and has been a crucial source of policy instability.

Why does this matter? First, we think that exploring the policymaking pathways beyond legislative gridlock will provide a useful descriptive map of the current contours and patterns of environmental policymaking. Second, we think that this analysis throws up analytical challenges to students of environmental policy who see in this “rich, experimental time” in environmental policymaking harbingers of a more pragmatic and collaborative next generation policy regime. These experiments will play an important role in shaping the future of environmental policy, but we think that basic characteristics of the American policymaking system—the existence of multiple points of access and policy pathways—and the institutional legacies of the past sharply limit the reconstructive potential of the next generation reforms. There are problems with the existing environmental laws, and there is a need for reform. Yet there is no easy escape from the past, when environmental policy choices were rarely driven by pragmatic balancing, and there is no escape from politics to a world dominated by cooperation among interests still

sharply divided and all empowered by various and contradictory laws and cultural premises.

Further, the movement of environmental policy initiative onto pathways around legislative gridlock raises important issues of legitimacy and accountability in environmental policymaking. In some ways this is a new problem in this field. The laws passed in the golden era, supported by both parties and powerful environmental groups, challenged business prerogatives in ways not seen since the rise of industrial unionism in the 1930s. The emergence of the modern environmental movement fed a sweeping democratization of American society and politics, altering political balances in ways that opened the system to new interests and made environmental policymaking more representative than ever before. Yet the consequences of legislative gridlock and the increasing importance of paths around the legislative process raise difficult questions about the democratic character of modern environmental policymaking.

The legitimacy issue has several dimensions. Most simply, since the environmentalists' great legislative victories in the 1960s and the 1970s there has been a decided right turn in American politics. To protect their earlier gains and to try to expand upon them, environmental groups have depended heavily on the courts and their ability to shape the rulemaking process (with the threat of legal action looming in the background). In the 1990s, at first frustrated by the low priority the Clinton administration gave environmental issues and then pushed hard by the Republican-controlled Congress after 1994, environmentalists ended up applauding Clinton for his aggressive use of executive power to protect public lands, celebrating a legacy that rested heavily on an arguably heavy-handed use of the Antiquities Act to protect large tracts of land. Under the new Bush administration, environmental interests cling tightly to the statutory language of the 1960s and the 1970s and hope that the courts, coupled with the Republicans' squeamishness about being on the wrong side of environmental issues, will rein in the backlash agenda. The environmental movement, once a powerful democratizing force, hangs on in Congress and increasingly pursues its goals outside the more democratic channels of American government.

On the other side, the populist impulse of the anti-green backlash has been channeled into some of the least visible, least well understood

arenas in the policymaking process. Ronald Reagan's early appointees at the EPA and Interior pushed hard, using administrative strategies to gut environmental enforcement and to ease access to public lands for drilling, logging, and mining interests. In the 104th Congress, bold Republican "revolutionaries" came to power claiming a popular mandate to weaken environmental regulation. They suffered defeat after defeat in the legislative process and were reduced to seeking major changes to environmental policy in appropriations riders, trying to tie the rollback agenda to must-pass bills because it was obvious that they could not pass legislation to achieve these goals. Even this effort was largely unsuccessful, and the central success of the strategy—the "salvage rider" that opened vast tracts of land to logging in the Pacific Northwest—was helped along by court decisions that vastly expanded the rider's scope. (See chapter 3.) The George W. Bush administration has pursued administrative and legal strategies aimed at weakening the green state, drawing the ire of environmentalists and centrist, next generation reformers. It really is a new day for environmental policy when judicial appointments become a pressing issue, crucial both to greens and conservatives, and one must know the subtleties of lawsuits and out-of-court settlements to understand policies affecting health risks and millions of acres of public land.

Beyond this are important problems of accountability. Much of environmental policymaking has been pushed into venues—the appropriations process, executive politics, the courts—where public attention and understanding is often quite limited and where it is difficult to hold policymakers accountable. Even pathways that invite public participation, from collaborative conservation to participatory rulemaking to ballot initiatives, suffer from significant legitimacy problems. Collaboration and participatory rulemaking are attractive, but these efforts always raise serious questions about participation (who gets to participate?), accountability (how do we hold participants in these processes accountable for their choices?), and the integrity of law (should the requirements of the Endangered Species Act or the National Forest Management Act or the Clean Water Act be negotiable?). Excluded interests complain bitterly and some scholars have raised concerns that in this field we are making ad hoc "policy without law," thus handing over too much power

to private interest groups.²¹ Citizen initiatives have a populist flavor, but the initiative process is too often dominated by narrowly interested groups with extreme political agendas, and the use of this pathway complicates the pragmatic balancing of interests and values.²² How will the institutionalization of the green revolution, and the inevitable reaction from the right to the environmentalists' successes, shape the future of American democracy? Advocates of localism and collaboration in rule-making and resource management have a vision of environmental democracy, but it is unclear that that vision can discipline the roiling politics of the green state and force crucial choices onto well-lit pathways.

Further, to circle back to the question of legislative gridlock, there is the difficulty of actually achieving reform—even sensible, pragmatic reform of the green state—without congressional sanction. That is, without new statutes it will be difficult to push ahead with even the tinkering and pragmatic adjustment that the next generation of environmental policy requires. This became clear in the Clinton years, when the administration's experimental efforts to bring regulated interests into the policymaking process, to create cross-media programs at the plant level and to cut pragmatic and sensible deals with polluters, often foundered on the fear that the deals would not stand up in court.²³ That is, participants needed the stamp of legitimacy on their experiments that only statutory language could provide. It will be difficult to realize changes in the basic premises of the regulatory system without changing laws, and of course changing the laws is extraordinarily problematic. The “lords of yesterday” and “the lords of a little while ago” throw up major barriers to statutory change even while their confrontations energize a vibrant, contentious, and creative politics.

The Plan of the Book

In this book we explore the pathways beyond legislative gridlock along which modern environmental policy is being made. In chapter 2 we describe the main factors leading environmental policymaking to become gridlocked in Congress. We then describe the building of the green state: the set of laws, institutions, and expectations dealing with conservation and environmental policy that have been established throughout American

history. We emphasize how gridlock and the historical construction of the green state have driven environmental policymaking onto new policy pathways, and the ways that the existence of multiple points of access to the political process and the nature of the green state have contributed to considerable instability and real barriers to the development of any new order in environmental policymaking.

In chapters 3–8 we examine, in turn, several policy pathways. In chapter 3 we focus on how Congress itself has altered its environmental policymaking process as legislators have sought paths around gridlock on major environmental policy questions, relying on appropriations riders and budget politics to achieve their policy goals. We include case studies of the two most significant examples of this pathway: the Salvage Rider and efforts to allow oil drilling in the Arctic National Wildlife Refuge through the budget reconciliation process.

In chapter 4 we examine the increasing importance of executive policymaking, focusing on three cases: President Bill Clinton's use of the Antiquities Act to create or expand national monuments, Clinton's use of the rulemaking process to protect nearly 60 million acres of national forest lands from roads and logging through the "roadless rule," and President George W. Bush's use of the rulemaking process to fundamentally change the new source review program, a crucial component of the Clean Air Act. As Congress has stalemated, presidents have pressed for policy changes of great moment using their unilateral powers and broader executive authority.

In chapter 5 we turn to the role of the courts in the policymaking process. Although the courts have been major actors in environmental policymaking since the passage of the major environmental laws of the 1960s and the 1970s, with Congress gridlocked their policymaking role has become even more important. We illustrate this by examining the use of the Endangered Species Act to alter development in Arizona, industry's efforts to fundamentally re-make air quality policy through the courts in the *American Trucking Associations v. EPA* case, and the Bush administration's administrative strategies to use this pathway, through politicizing appointments and the use of the sue and settle strategy. Although there is widespread scholarly concern about the negative consequences of "adversarial legalism" for policymaking on the environment, the choices

made by Congress (and courts themselves) in the 1960s and the 1970s embed adversarial legalism in the policymaking process and create enormous barriers to those trying to hack new pathways “within and around the labyrinth” of judicially-enforceable laws and rules.

In chapter 6 we examine the collaboration pathway, which is crucial to the next generation vision of environmental policymaking. This chapter highlights the strengths and weaknesses of the increasingly powerful ideology of collaboration in the environmental policy field by examining several examples of this approach in practice: habitat conservation planning through the Endangered Species Act, efforts to improve pollution control policy through the Negotiated Rulemaking Act and EPA’s Common Sense Initiative and Project XL, and collaborative conservation efforts on the public lands. In many areas, we find the absence of statutory grounding for these experiments—as well as crucial questions about the quality and legitimacy of collaborative decisions—has limited their reach and potential.

In chapter 7 we explore environmental policymaking in the states. We begin with a discussion of innovative policymaking at the state level. Even at that level, innovative next-generation-style policymaking is only one part of a complex story. We examine environmental policymaking via the use of initiatives and referenda to illustrate the bitterness of struggles and the complexity of the policy labyrinth in state politics. Further, we examine conflict between the states and the federal government and the increasingly significant role of states as actors in environmental policymaking.

In chapter 8 we return to the forces leading to gridlock. We argue that these forces are unlikely to dissipate anytime soon and that, given this situation, the president and the powers at his or her disposal will be of signal importance in animating environmental policy. We next turn to a discussion of why we think the nation has moved in the direction favored by environmentalists, what we term green drift, despite this congressional gridlock and the move of the nation as a whole to the right. This green drift, we argue, is due largely to the dynamic created by the existing green state and mobilized environmental interests.