Beyond Deregulation:
Explaining the Dynamics of Contemporary Regulatory Change

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In the United States, the dominant story of regulation in the postwar period involves the dramatic expansion of new social regulations in the late 1960s and early 1970s, followed by waves of deregulation, primarily in the late 1970s and 1980s. Although the movement from regulatory expansion to deregulatory retrenchment is quite important, it does not shed much light on the dynamics of regulatory change in subsequent decades. How, most importantly, can one explain the proliferation of voluntary programs and public-private partnerships? This is not really a case of deregulation: the core regulatory statutes passed in previous decades remain firmly in place. But there has been an expansion of regulatory capacity through the extralegal devolution of regulatory responsibilities to private sector actors.

This paper explores the dynamics of regulatory change in the past several decades. Rather than working within the regulation-deregulation dichotomy, it deploys some of the concepts that have proven quite useful in explaining policy and institutional change more broadly—in particular, conversion, layering, and drift. The paper proceeds in several steps. Part I provides the argument in brief, grounded in a discussion of institutional change. Part II explores the regulatory expansion of the late-1960s and early 1970s, and the core institutional design decisions, e.g., the passage of detailed statutes that constrained executive

authority and expanded rulemaking. Part III turns to the executive reaction: cost-benefit analysis-based regulatory review processes that raised formidable obstacles for new regulations. Part IV explores the problem posed by the growing partisan polarization in Congress. Given the detailed nature of the earlier regulatory statutes, polarization ensured regulatory drift. The new regulatory environment was one in which agencies were forced to rely on decades-old statutory authority, constrained budgets, protracted rulemaking, and executive review processes. The response to these factors can be found in the growing reliance on public-private partnerships and corporate voluntarism. Part V examines these changes in the two most important social regulatory agencies: the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA). The paper concludes with a discussion of the limited effectiveness of this approach to expanding regulatory capacity.

1. The Argument in Brief

Regulatory change is often viewed, explicitly or implicitly, through the lens of punctuated equilibrium theory. During periods of crisis, new regulatory initiatives are introduced. Once in place, an equilibrium forms around a policy area, linking actors and institutions with a common understanding of policy problems and goals, appropriate instruments, and acceptable distributions of costs and benefits. Commitments based on the assumption of stability raise the costs of significant change. Policies develop in a path dependent fashion, even if initial policy decisions appear suboptimal over time (Pierson 2000). On occasion, exogenous shocks or politically salient cases of regulatory failure may

lead to higher levels of mobilization, creating opportunities for significant change (Baumgartner and Jones 2009). In the case of regulation, variations of punctuated equilibrium theory have been used to explain regulatory expansion and deregulation. For example, the Great Depression stimulated new economic regulatory initiatives in multiple industries. Four decades later, stagflation punctuated the stable regulatory subsystems, leading to a wave of deregulation. In these cases, large exogenous shocks led to transformative changes (See Eisner 2000).

Various combinations of punctuated equilibrium and path dependency have prevailed in the scholarship in many policy areas (See True, Jones, and Baumgartner 2007). Without discounting the importance of dramatic episodes of rapid change, critics note that they are relatively rare. Policy history is more than a discontinuous succession of qualitatively different regimes, separated by the occasional exogenous shock (Schneiberg 2007). This realization has stimulated much scholarship in comparative political economy and social policy, leading to the identification of several different processes of gradual institutional change, including, *conversion*, *layering*, and *drift* (See Streeck and Thelen 2005, 19-30). These forms of change may exist within a discrete policy arena or agency; they may also be exhibited within a larger configuration of institutions (See Deeg 2005). A central goal of this paper is to apply these concepts to regulation, as a means of better understanding the dynamics of contemporary regulatory change and the proliferation of voluntary programs and public-private partnerships.

Let us turn briefly to the three processes of change: conversion, layering, and drift. Following Hacker (2005), the process of change that prevails is a product of (1) the extent to

which institutions are internally malleable and (2) the extent to which the political environment facilitates large scale external change, for example, the passage of new statutes. Where institutions are malleable but the political environment impedes external change, one can expect to see *conversion*. Reform advocates can introduce new goals, policy instruments, or coalition members to change the functions the institution serves (Thelen 2004, 36). Where institutions are more rigid but external change is nonetheless possible, one should expect to witness *layering*. Political coalitions may "lack the support, or perhaps the inclination, to replace existing institutions" so new policies are layered upon the old (Schickler 2001, 15). Finally, when there are significant impediments to internal and external change, one can expect a process of *drift* (Hacker 2004). Opponents of policy may prove incapable of enacting significant statutory changes, for example, but they can block new legislation. Over time, this creates a growing disjuncture between institutions and their larger environments.

The core argument, to be developed in greater detail below, can be stated rather succinctly. When Congress passed the core social regulatory laws in the early 1970s, it wrote detailed statutes to limit bureaucratic discretion, a means of impeding capture and executive departures from congressional will. By the mid 1970s, concerns over the economic consequences of regulation stimulated the countermobilization of business and efforts to promote deregulation and regulatory reform. While deregulation had significant implications for economic regulation, the social regulatory agencies retained the strong support of Democrats in Congress. With rigid institutions and opportunities for statutory reforms

foreclosed, Ronald Reagan imposed a cost-benefit analysis-based regulatory review process on executive branch regulators—a case of what was described above as layering.

Things would become more complicated by the 1990s. As a result of growing partisan polarization and gridlock, Congress proved incapable of passing significant statutes that might have updated the existing regulatory institutions. The design expedients adopted in the 1970s, moreover, limited the potential for conversion; agency executives intent on expanding regulatory capacity simply did not have the discretionary authority. The combination of detailed statutes and gridlock guaranteed regulatory drift. Under these conditions, voluntary programs and public private partnerships became attractive as a means of leveraging private sector resources and moving beyond the limitations of dated statutes. Yet, the same conditions that induced drift set distinct limitations on the extent to which voluntary initiatives could genuinely contribute to regulatory capacity.

2. Social Regulation and Institutional Design

The late 1960s and the early 1970s witnessed the greatest expansion of the regulatory state since the New Deal. Unlike the earlier episode that focused on economic regulation, the period in question brought significant new social regulations in environmental protection, occupational safety and health, and consumer protection. Between 1970 and 1972, Congress passed the Clean Air Act Amendments, the Federal Water Pollution Control Act Amendments (Clean Water Act), and the Occupational Safety and Health Act, extending federal regulatory authority on an economy-wide basis and introducing ambitious mandates that would impose unprecedented compliance costs.

The significance of the new statutes was magnified by important institutional design decisions. In the immediate postwar decades, regulatory agencies were widely understood as having the "institutional competence" to apply their expertise to policy formation. By the mid-1960s, whatever faith had existed in administrative neutrality and competence had been greatly eroded (Werhan 1992, 577-85). An administrative state that was once believed capable of promoting the public interest—however defined—was increasingly viewed as being particularly subject to capture (See Novak 2014). Several prominent social scientists—political scientists (e.g., Huntington 1952, Bernstein 1955, Lowi 1969), New Left historians (e.g., Kolko 1965, 1963, Weinstein 1968), and Chicago School economists (e.g., Stigler 1971)—contributed to the critique. While one cannot effectively gauge the effect this scholarship had on activists, it certainly found a popular expression in the exposés of regulatory failure written by Ralph Nader and Nader's Raiders (See Merrill 1997, 1061-65).

Although the Chicago School critique concluded that regulation was inferior to free markets, concerns over capture led more commonly to reform proposals. For members of Congress, one obvious means of preventing capture was to write more detailed legislation, limiting the discretionary authority granted to agencies, imposing strict ("action-forcing") deadlines and permitting citizen suits. For critics, traditional adjudicatory, case-by-case approaches to rulemaking appeared to be *ad hoc* interest bargaining that diffused accountability and facilitated capture. Moreover, it was wholly inadequate given the new economy-wide regulatory mandates. In its place, Congress required substantive rulemaking that provided expanded access for public interest groups (Magill 2004, 1398, McCann 1988, 390). Whereas the Administrative Procedure Act did not mandate oral hearings or a formal

record, by the 1970s, rulemaking "had increasingly taken on the tone of adjudications, with the public airing of conflicting testimony, formalized rebuttal requirements, a discrete record, and occasionally full blown trial-type techniques"(Schiller 2001, 1160).

Some of these design decisions were driven by, and found parallel expressions, in the courts. Pre-enforcement review of rules, judicial review of rulemaking processes, the "hard look" requirements that agencies consider the factual record and alternatives proposed by competing parties, an expansion of standing, and rights of private action dramatically increased the complexity of the regulatory process and created new points of access for citizen groups (See Merrill 1997). As Stewart (1975, 1712) observed: "Faced with the seemingly intractable problem of agency discretion, courts have changed the focus of judicial review (in the process expanding and transforming traditional procedural devices) so that its dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies."

Arguably, detailed legislation that limited bureaucratic discretion could prevent capture and a variety of principal-agent problems (e.g., slippage, shirking, opportunism). But these kinds of expedients made sense for broader political reasons. They could also constrain the ability of future presidents to counter congressional will via administrative means and provide the hope that congressional policy preferences would be extended into an uncertain future. Exhaustive statutes, in this sense, were analogous to detailed contracts. Some opponents of the new social regulations likely supported the institutional design decisions for another reason: the growing complexities of rulemaking, the expanded role of the judiciary,

and decentralized implementation slowed the regulatory process and created multiple access points for business interests (See Moe 1989).

3. The Executive Countermovement

Chastened by the regulatory defeats of the early 1970s, businesses rapidly mobilized to shape the policy debates. They dramatically increased levels of campaign spending via political action committees (Schlozman 1984), expanded their lobbying efforts, and invested in conservative think tanks that advocated a broad policy agenda that included deregulation and regulatory reform (Vogel 1983). Congress exhibited little concern with regulatory costs when it passed the core regulatory statutes. But these costs became increasingly salient, as stagflation—the politically toxic combination of high inflation and sluggish growth—created a window of opportunity for policy change. With macroeconomic policy at an impasse, attention turned to regulation (Campbell 1998). Scholars at think tanks—most notably, the American Enterprise Institute—proved quite influential, attributing up to 50 percent of the inflation, 20 percent of the reduction in business investment, and 4 percent of the reductions in growth to regulation (Jenkins and Eckert 2000, 321-22). One outcome was a wave of market-based deregulation, drawing on microeconomic arguments to eliminate well-established economic regulations in air and surface transportation, finance, energy and communications (Derthick and Quirk 1985).

As a result of original design decisions, the new social regulations proved difficult to deregulate via administrative means (Horwitz 1994, 160). Those intent on reform pursued a different strategy: the imposition of regulatory review via executive order. Presidents Nixon,

Ford and Carter had attempted this in the 1970s, albeit with little effect. However, Reagan's Executive Order 12291 (1981) marked a genuine sea change. It required executive branch agencies to submit proposed and final rules to the Office of Management and Budget's Office of Information and Regulatory Affairs (OMB-OIRA) along with a cost-benefit analysis-based regulatory impact analysis, including a discussion of alternative means of achieving regulatory goals at a lower cost. Under the executive order, agencies were directed to "refrain from publishing" in the Federal Register until the conclusion of the review and could be required to respond to concerns raised by the OMB-OIRA if rules were returned for reconsideration. In practice, the review process imposed significant costs and delays; approval would be forthcoming only if the agencies could demonstrate to the satisfaction of OMB-OIRA that they would generate net present benefits. Regulatory review was further strengthened with Executive Order 12498 (1985), requiring agencies to submit an annual regulatory program that identified all significant regulations that were planned or in progress. Henceforth, the OMB-OIRA could return for reconsideration any rule that had not been included in the regulatory program, regardless of whether it would meet the requirements of EO 12291 (See Percival 1987, Copeland 2009).

Although President Clinton revoked the Reagan-era executive orders, he replaced them with a new regulatory review process via Executive Order 12866 (1993) that retained cost-benefit analysis and continued the role of the OMB-OIRA in the review process (Pildes and Sunstein 1995). The fact that this cost-benefit analysis-based regulatory review process remains in place—albeit with some modifications—more than three decades later suggests that an appeal to Reagan's antiregulatory position provides an incomplete explanation (West

2005). The reassertion of executive authority in regulatory review can be best understood as an institutional countermovement, an effort on the part of presidents to reclaim the authority to manage the executive branch or, at the very least, reduce the political and economic impacts of what they could no longer control.

4. Polarization, Gridlock and the Problem of Drift

As detailed above, Congress wrote detailed statutes limiting the discretionary authority of administrative agencies. Exhaustive statutes—like detailed contracts—can be quite useful in managing a variety of principal-agent problems. Their utility diminishes, to extend the metaphor, if the terms of the contract cannot be renegotiated over time. Given the large bipartisan majorities that supported the core regulatory statutes of the early 1970s, Congress could not have anticipated that within a few decades the passage of new laws would prove increasingly difficult. As a reflection of growing polarization and gridlock, there has been a dramatic downward trend in the number of laws and the number of significant statutes enacted per year (See McCarty, Poole, and Rosenthal 2006).

Congress passed the landmark social regulatory statutes of the early 1970s by overwhelming margins. The Occupational Safety and Health Act of 1970 that created OSHA and "codified a new, more radical vision of worker rights" (Noble 1986, 95) passed 310-58 in the House and 83-3 in the Senate. The Clean Air Act Amendments of 1970 passed by even more impressive margins: 375-1 in the House and unanimously in the Senate. The Clean Water Act of 1972—arguably the most ambitious regulatory statute in US history—passed by wide margins as well: 380-14 in the House and 86-0 in the Senate.

These statutes were emblematic of a highly productive Congress. As Mayhew's (2005, appendix) work reveals, during the period from the mid-1960s to the mid-1970s (the 89th through the 93rd Congresses), Congress passed an average of 9.8 significant statutes per year, including 27 significant regulatory statutes that dramatically expanded social regulation, extending policy to consumer protection, environmental protection, and occupational safety and health. In sharp contrast, between 1990 and 2012, Congress passed an average of 5.6 significant statutes per year. While 1990 witnessed the passage of the Clean Air Act Amendments, since that time Congress has passed one significant new environmental statute (the Safe Drinking Water Amendments of 1996) and no new significant statutes in occupational safety and health.[1]

The lack of new statutory authority was combined with other problems, most notably, the slow growth or decline of inflation-adjusted regulatory budgets. Adjusted for inflation, the EPA's budget peaked in the late 1970s. The deep cuts of the Reagan years were followed by a period of budgetary growth until the mid-1990s. The budget for 1995 ($11.3 billion, in 2014 dollars) was greater than in any subsequent year. Indeed, by 2014, the EPA's budget of $8.2 billion was less than the inflation-adjusted average for the eight years of the Reagan presidency ($9.2 billion, in 2014 dollars). OSHA fared somewhat better, but from 1992 to 2014, its inflation adjusted budget increased by a meager 10 percent (from $501 million to $552 million, in 2014 dollars). Even if OSHA's budget grew modestly, it was forced to operate with congressionally imposed restrictions on its use of funds (e.g., riders prohibiting rulemaking and data collection on repetitive stress injuries).

[1] Information on the post 2002 period is drawn from Mayhew's updated data set, available at http://davidmayhew.commons.yale.edu/datasets-divided-we-govern

Detailed statutes passed in the 1970s, when combined with growing congressional gridlock, virtually ensured a problem of drift. Although the EPA and OSHA avoided the explicit deregulatory efforts that targeted economic regulation and thus appeared superficially stable, the core statutes were not routinely updated and thus increasingly failed to serve their intended purpose. As Streeck and Thelen (2005, 24) explain: "institutions require active maintenance; to remain what they are they need to be reset and refocused, or sometimes more fundamentally recalibrated and renegotiated, in response to changes in the political and economic environment in which they are embedded." Under these conditions, agencies had few avenues available to address the disjunction between their regulatory mandates and the larger environment. Ultimately, voluntary programs and public-private partnerships became the only means by which they could develop regulatory capacity.

5. Reinvention and the Privatization of Regulation

Although regulatory voluntarism has a long pedigree in the US (See Hawley 1974, Berk 2009), we are concerned with the contemporary period. Reagan's Assistant Secretary of Labor, Thorne Auchter, pledged to eliminate the adversarial spirit at OSHA and transform it into a "cooperative regulator." In 1982, OSHA introduced the Voluntary Protection Program to reward employers with quality safety and health programs with a lower inspection priority, justified by the claim that it would free agency resources to target enforcement based on occupational illness and injury data. Much of this was interpreted as an assault on regulation, given that it was combined with a drop in inspections, laxity of

enforcement, delays in rulemaking, and persistent claims that OSHA was ignoring the scientific justification for new rules (GAO 1990, Shabecoff 1982, Noble 1986, 193-96).

Voluntarism reemerged in the 1990s with a different justification. The Clinton administration's "reinvention of government" (or REGO) efforts were designed, in part, to apply lessons from the corporate world that could make government more efficient, effective and responsive. Coercive hierarchies could be replaced with cooperative partnerships. Citizens could be engaged as stakeholders. Elected officials could leverage private sector resources to serve public purposes—an appealing thought given the salience of budget deficits and debt (Osborne and Gaebler 1992). As Arnold (1995, 414) observed, REGO was both an attempt to acknowledge "a widespread, public distaste for government" and "an effort to cut the knot of fiscal constraints in an environment in which "large budgetary deficits and political sensitivities over taxes severely constrained President Clinton's freedom for generating new policy initiatives."

The REGO efforts had important implications for social regulation. At OSHA, reinvention involved building on the Reagan era Voluntary Protection Program (VPP) to provide employers with a choice between traditional enforcement and a partnership. Firms that chose the second path could work with OSHA in designing programs to reduce injuries and illnesses; performance would be rewarded with recognition, low inspection priority and penalty reductions. In 1997, OSHA attempted to build on the VPP with the Cooperative Compliance Program, drawing on an earlier 1993 pilot program (Maine 200) that encouraged partnerships (Shapiro and Rabinowitz 1997). Under the Cooperative Compliance Program, OSHA identified the 12,250 workplaces with the highest illness and

injury rates, subjected the top 500 to automatic inspections; the remainder were given the option to participate in a partnership or face mandatory inspections. The goal, ultimately, was to use partnerships to promote workplace protections that could not be secured through rulemaking. In a legal challenge filed by business, however, the court struck down the program, concluding OSHA's directive was "the practical equivalent of a rule that obliges an employer to comply or to suffer the consequences; the voluntary form of the rule is but a veil for the threat it obscures." Because it was a *de facto* rule, the agency was required to conduct a notice-and-comment rulemaking (*Chamber of Commerce v. OSHA* 174 F.3d 206 D.C. Cir 1999). Although the Cooperative Compliance Program was stillborn, the VPP continued to expand from 100 to 571 firms, including many of the nation's largest employers (GAO 2004, 4-9).

By the Bush presidency, the VPP was reconfigured to have three different tiers. Employers in the top tier ("Stars") were considered "self sufficient in their ability to control hazards," and were given exemptions from routine inspections (Barab 2012). At the same time, the number of employers participating in the VPP grew exponentially, from 100 in 1993 to 864 in 2002 and 2,043 in 2008. The rapid growth of the VPP raised some distinct concerns. In 2004, the Government Accountability Office (GAO) reported that while there was some evidence of reduced compliance costs and improved relationships with employers, OSHA lacked the data to assess the effectiveness of the VPP. Moreover, funds devoted to voluntary compliance were consuming "a significant and growing portion of the agency's limited resources," while the enforcement budget had fallen (GAO 2004, 21-22). Five years later, the GAO found that OSHA had still "not developed goals or measures to assess the

performance of the VPP, and the agency's efforts to evaluate the program's effectiveness." Moreover, there was evidence that VPP expansion had reduced resources for inspecting non-VPP sites and some VPP sites "with serious safety and health deficiencies that contributed to fatalities have remained in the program, which has affected its integrity." (GAO 2009, 19). In sum, voluntary partnerships had become a substitute for standard regulation, albeit without the oversight and internal controls necessary to ensure workplace safety.

At EPA, REGO found its most dramatic expressions. The Clinton administration provided a clear justification: "better decisions result from a collaborative process with people working together, rather that from an adversarial one that pits them against each other…. regulations that provide flexibility—but require accountability—can provide greater protection at a lower cost."(Clinton and Gore 1995). The next several years witnessed a proliferation of REGO projects, including the Common Sense Initiative (1994), wherein the EPA created subcommittees of corporate stakeholders to identify "cleaner, cheaper, and smarter" ways to prevent pollution on an industry-specific basis and develop projects to test innovative approaches (See GAO 1997). The next year, the EPA introduced Project XL (for eXcellence in Leadership), that provided a select number of organizations with regulatory flexibility to experiment with new ways of going beyond regulation "based on the premise that these participants know better than the federal government how to reduce their pollution" (EPA 1998, 41). Project XL was but one of the twenty-five REGO projects (known collectively as "Partners for the Environment) introduced in 1995. The various programs were designed to leverage the expertise and resources of corporations, research labs, environmental groups, and state and local regulators to develop means of preventing

pollution or going beyond the confines of existing regulations. Some of these partnerships were industry specific (e.g., AgStar, Coalbed Methane Outreach, Energy Star) whereas others focused on business processes (e.g., Consumer Labeling Initiative) or on larger environmental problems like climate change (Climate Wise), indoor air pollution (Indoor Air Quality), or municipal solid waste (WasteWise).

The EPA also developed a regulatory green track (modeled, in part, on OSHA's VPP). In 2000, the Clinton EPA introduced the National Environmental Performance Track (NEPT), based on the experiences of the states and the Star Track Program in EPA Region 1 (Speir 2001). Like its state and regional predecessors, NEPT was designed to promote high quality environmental management systems (EMSs) among organizations that had distinguished themselves as leaders. The basic assumption underlying the program was a simple one: firms with an environmental policy, a commitment to continuous improvement, a high quality EMS, and a strong regulatory compliance record should be given greater flexibility in managing their environmental impacts and subjected to lower levels of regulatory scrutiny than firms that are organizationally incompetent or fail to exhibit these traits. NEPT was fully implemented during the Bush presidency.

Participants were given a host of benefits, including public recognition, awards, and the use of the Performance Track logo. The EPA promoted information sharing among members and provide regulatory benefits, including a lower inspection priority, expedited permitting, and streamlined reporting and paperwork requirements (See EPA 2005). Between 2000 and 2008, the number of members increased from 228 to 547, including Xerox, Baxter Healthcare, and Johnson & Johnson, each of which were designated as

"Corporate Leaders." Through the Performance Track Network, the EPA forged relationships with trade associations, some of which (e.g., the American Chemistry Council) had developed EMS codes for their members. Because most inspection and permitting activity has been delegated to the states, the EPA negotiated memoranda of agreement with 14 states to coordinate the requirements of the federal and state-level performance-based programs (EPA 2009, 1, 3).

By the mid-2000s, the EPA had over fifty initiatives, including NEPT. Although the EPA proclaimed the environmental benefits of its programs, evaluations by the EPA Inspector General raised profound concerns. One of the problems came in the area of data collection. In 2006, the Inspector General noted that the greatest barrier to getting data on outcomes were the simple facts that "a partnership program cannot require data submission" and "collected data may not be completely accurate." The implications were clear: "Without needed data, these programs may be hindered in their ability to demonstrate program success or adapt to changing partner and participant needs" (EPA OIG 2006, 13). In 2007, the Inspector General's report found several additional problems. Because of the lack of a standard definition of what constitutes a voluntary program, the EPA's own estimates of numbers of programs ranged from 54 to 133, depending on the year. More important, the EPA failed to implement "a systematic management approach for developing new programs or for evaluating existing programs. As a result, EPA cannot consistently identify its voluntary program population; determine the overall environmental impact of its broader voluntary program effort; or systematically design, evaluate, and model programs that are effective at achieving environmental results" (EPA OIG2007, 7).

According to the EPA (2005, 2), NEPT was "designed to recognize and encourage top environmental performers–those who go beyond compliance with regulatory requirements to attain levels of environmental performance and management that benefit people, communities, and the environment." One should not be surprised that this proved an elusive goal. Coglianese and Nash (2014) have conducted the most comprehensive evaluation of NEPT to date. Their comparison of NEPT participants and comparable firms revealed no evidence that the performance of the former exceeded that of the latter. As they (2014, 62) explain: "nothing in the design or EPA's evaluation of the program enabled the agency to determine that the program in fact recognized top environmental performers within any industrial sector." At best, it attracted "organizational extroverts" that "appear to have been generally the strongest in their desire for public recognition. Of course, if it were not for opportunity costs and scarcity of governmental resources, there would presumably be nothing inherently wrong with EPA engaging with firms that value the agency's attention and appreciation"(61).

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In March 2009, Obama EPA Administrator Lisa Jackson (2009) terminated NEPT, remarking that it "was developed in a different era" and noting the concerns from members of Congress and stakeholders regarding the program's benefits. The EPA cancelled its memoranda of agreement with the states and eliminated the regulatory incentives that had been provided to members. Most of the voluntary programs, however, survived the transition to the Obama presidency. The Bush era Climate Leaders, a voluntary program, like the Clinton era Climate Partner before it, designed to promote reduction of greenhouse gasses,

was eliminated. But by 2012, the Obama EPA had created a new Center for Corporate Climate Leadership, largely replicating Climate Leaders. At OSHA, the VPP continued to thrive. In August 2014, Assistant Secretary for Labor David Michaels told members of the Voluntary Protection Programs Participants' Association that 2,293 active VPP facilities represented the "cream of the crop when it comes to protecting the safety and health of workers." He assured them: "Administrations change, but our commitment to the program doesn't waver"(Michaels 2014). This assurance was recognition of reality: in the absence of new statutory authority and budgetary growth, voluntary programs at EPA and OSHA appeared to be the only options.

6. Regulation By Proxy, Voluntarism By Necessity

The devolution of authority to regulated parties via voluntary programs and public-private partnerships is, in some ways, similar to a broader trend in government: the emergence of "government by proxy" (Kettl 1988). Since the late 1980s, several scholars have noted the growing reliance on third parties in the delivery of government services. As Salamon (1989, 9) explains: "The federal government in particular does increasingly little itself…Instead, it operates through other entities—states, cities, counties, banks, industrial corporations, hospitals, nonprofit organizations, and a host of other nonfederal third parties. Indeed, we have created a system of third-party government, in which government establishes priorities and generates funds but leaves the actual delivery of services and the operation of public programs to a variety of nonfederal third parties." Similarly, Milward and Provan (2000, 362) coined the term "the hollow state" to refer "to any joint production

situation where a governmental agency relies on others (firms, nonprofits, or other governmental agencies) to jointly deliver public services." Most recently, Mettler (2011, 4) has described the "conglomeration of federal policies that function by providing incentives, subsidies, or payments to private organizations or households to encourage or reimburse them for conducting activities deemed to serve a public purpose" as the "submerged state."

The devolution of authority, the reliance on third parties, and the use of the various expedients of the submerged state are usually explained by a few factors. First, from a practical perspective, the expansive functions that have been assumed by the federal government are simply beyond the reach of any single organization, thereby necessitating a greater reliance on third parties. Second, this trend occurred in a period marked by the salience of the budget deficit and debt and statutory constraints on spending (e.g., the Budget Enforcement Act of 1990). Some of the policy instruments adopted in the submerged state (e.g., tax expenditures and loan guarantees to incentivize certain behaviors) were easier to achieve than annual appropriations and they could be kept conveniently off budget (Mettler 2011, 19-20). Finally, the reliance on third parties provided a means to reconcile the ideological discomfort with a large public sector and the demands for public provision. Even if the era of big government was over, government's reach could continue to expand (See Kettl 1988, 7-11).

Regardless of the terms used—government by proxy, third party government, the hollow or submerged state—scholars raised a common set of concerns. Simple principal-agent relationships can be subject to miscommunication, shirking, and opportunism, and these problems can be more distinct under conditions of informational asymmetry (Perrow

1986, 224). When the effectiveness of government programs depends, increasingly, on the performance of multiple private sector actors engaged in extensive and complex networks of relationships, one may ask whether it is possible for any government agency to exercise sufficient control. All of this raises concerns of political accountability. Private-sector actors are simply not subjected to the same norms of transparency and political accountability as their public sector counterparts. As for-profit entities, they serve two masters—political principals and shareholders—whose preferences may not be compatible.

While there are be some intrinsic weaknesses in government by proxy, are these same problems evident in regulation? The proliferation of voluntary programs and public-private partnerships coincided with growing scholarly interest in a new generation of policy instruments and alternative regulatory models (See Friedman, Downing, and Gunn 2000). Traditionally, social regulations relied on highly detailed, prescriptive, command-and-control regulations. But there was a growing recognition that these instruments had their limitations. To the extent that regulated entities were heterogeneous, the technical demands of prescribing specific technologies could exceed the administrative capacity of regulators, leading to delays in permitting and overly inclusive rules that contributed to an adversarial regulatory culture (See Bardach and Kagan 1982). The problems intrinsic in command-and-control regulation found one expression in the growing reliance on performance-based standards and various incentive-based economic instruments like tradable pollution permits (Stavins 2000). But there were also regulatory problems that were particularly difficult to address with technology- or performance-based standards. Because regulated entities were heterogeneous, technological standards were ill-suited. At the same time, because outputs

were difficult to measure, they were unfit for performance-based standards. Following Coglianese and Lazer (2003), under these conditions there was a powerful case for management-based standards. Regulators, in essence, could grant firms the flexibility to design their own management systems. Of course, this raised important questions about the level and quality of regulatory supervision post delegation.

There was also a wealth of fascinating work on alternative regulatory designs. Following the work of Braithwaite (1982), there were compelling arguments that regulatory systems should be designed to distinguish between firms based on their capacity for self-regulation, employing an explicit enforcement pyramid. In what Ayers and Braithwaite (1992) describe as "responsive regulation," authorities could deploy an escalating range of enforcement strategies, extending from self-regulation to command-and-control regulation. Other scholars argued that greater progress could be made toward the realization of policy goals through an embrace of "regulatory pluralism" (Gunningham and Sinclair 1999). That is, in addition to traditional policy instruments, one could leverage supply chain and market forces and use a variety of regulatory surrogates (e.g., trade associations, standard setting organizations, third-party auditing) to shape performance. Associations could prove important, some argued, for developing an "industrial morality" that furthered regulatory goals, particularly when the fate of an industry rested on the performance of its members (Rees 1994, Gunningham and Rees 1997). Following Prakash and Potoski (2006), one could view the associations through the lens of club theory. Associations—whether private or created via government programs—could require members to achieve higher levels of environmental or health and safety performance, while allowing members to claim a host of

benefits that would be denied to nonmembers (e.g., enhanced reputations to improve access to supply chains and investment funds).

One could look to this literature and discover a resemblance to some of the initiatives adopted by OSHA and EPA. Clinton's REGO was clearly premised on a recognition of the limits of command-and-control and the potential virtues of a newer generation of regulatory tools. The various partnership programs sought to engage corporations and trade associations as surrogate regulators, leveraging their knowledge and resources to achieve regulatory goals. Many of the EPA's voluntary initiatives appeared to fit the theory of clubs, offering members a range of benefits for their commitment to go beyond regulation. Programs like VPP and NEPT granted high performing firms with quality safety or environmental management systems greater flexibility and a lower inspection priority, much as one would expect to see in a system informed by the research on responsive regulation.

But there are clear limitations. As noted above, the voluntary programs and partnerships were layered on top of existing statutes rather than legally authorized and integrated into existing policies. Rather than becoming core elements in a system of co-regulation (See Balleisen and Eisner 2009), they exist as disjointed programs with uncertain effects on regulatory goals. In the vast majority of programs, conditions of participation are far from demanding and, unsurprisingly, levels of participation are inversely related to the stringency of the requirements for entry (Coglianese and Nash 2009). Because there are few demands placed on participants and few benefits awarded, the lack of verifiable results may be relatively unobjectionable, unless one is relying on the programs to extend regulatory capacity. But if the voluntary programs and partnerships are to have a consequential impact,

they require statutory authorization. Unfortunately, the same political and institutional factors that induced drift and increased the attraction of voluntary programs simultaneously limits their impact.

This is true for two reasons. First, even if there is a strong theoretical case for devolving greater authority on to regulated entities charged with designing and implementing their own management systems, there is nonetheless a need for a significant regulatory enforcement presence to ensure that the results are both acceptable and verifiable (Coglianese and Lazer 2003). It is clear that in the two most ambitious programs, VPP and NEPT, oversight was anemic, making it difficult to substantiate the claims that the programs were actually rewarding exceptional performance (GAO 2009, Coglianese and Nash 2014). Clearly, more resources would facilitate a higher level of oversight. But when regulatory budgets have been stagnant or declining, the devotion of scarce resources to relatively marginal programs may be difficult to justify, particularly when they are not mandated by law.

Secondly, the voluntary programs and partnerships cannot have much of an impact without significant expansion. At the time of its termination in 2009, NEPT had 547 members (EPA 2009). Although OSHA's VPP had a far more impressive 2,293 participants in 2014, in the end they accounted for some 875,000 workers in a workforce of 120 million (Michaels 2014). There are only two paths to expansion—a high road and a low road. On the former, higher levels of participation might be promoted through the provision of greater regulatory benefits. But these rewards would require statutory authorization, and thus we return to the initial problem of gridlock. Moreover, they would demand higher levels of

oversight. As requirements for entry become more stringent and more costly for firms, there is little to suggest that they would find participation in demanding programs preferable to less consequential programs that impose fewer costs but nonetheless provide some reputational benefits. The second road to expansion is obvious: reduce the demands placed on participants. Programs with permissive standards may prove far more attractive for firms that have little commitment to incurring the costs associated with higher levels of performance. Of course, these programs may be little more than symbolic, signaling ongoing improvement in regulation where none is to be found.

None of this is to say that corporations may not exceed regulatory requirements absent the voluntary programs created by regulators. As Vandenbergh (2005) has demonstrated, a network of "second order" agreements exists in the shadow of the law. There are provisions in corporate acquisition, credit, real estate, and product sale and service agreements that create powerful incentives for firms to monitor and document their environmental performance, meeting standards that often go beyond regulation. Moreover, there is a large literature on corporate self-regulation that argues that there is a strong business case for managing environmental, safety and health risks as a means of achieving efficiencies, limiting liabilities, protecting reputations, and maintaining access to critical supply chains. To the extent that these practices make economic sense, voluntary programs that facilitate these activities may be superfluous. There is also much to suggest, however, that the empirical support for claims that socially responsible production leads to higher profitability is weak. Markets for virtue commonly fail (Vogel 2005). One may also question

whether corporate self-regulation is sufficiently robust or whether it will be contingent on the business cycle and corporate profitability more generally (Eisner 2011).

7. Conclusion

Standard accounts of regulation typically identify a wave of new social regulations in the late 1960s and 1970s, followed by a period of deregulation. With the exception of the finance, there have been few significant deregulatory or regulatory statutes passed since 1990. The subsequent quarter century is nonetheless significant. As argued in this paper, some of the concepts developed in comparative political economy and social policy—most notably, conversion, layering, and drift—can help us better understand the underlying dynamic. In many ways, the origins of the current regulatory dynamic can be found in the strategies adopted in the late 1960s and early 1970s. Fearful of capture and committed to expanding the representative capacity of the administrative state, Congress wrote detailed statutes that constrained the discretionary authority of the president. The imposition of cost-benefit analysis-based regulatory review via executive order was, in part, a response to the expansion of congressional authority and an important example of layering. Although regulatory review greatly complicated the regulatory process, things would become ever more difficult as Congress became highly polarized. Congress was no longer capable of passing new regulatory statutes and expanding regulatory budgets. The constraints imposed in earlier decades locked in a particular regulatory architecture while denying administrators the flexibility to adapt existing programs to emerging regulatory problems. Under these conditions, drift was

inevitable and the reliance on voluntary programs and public-private partnerships became the only avenue open for building new regulatory capacity.

Although the initiatives of the post deregulation era appear to be justified by the research on alternative regulatory designs, they have not been integrated into the regulatory state in such a fashion as to provide a genuine expansion of capacity. Rather, they have been layered on top of rigid structures defined by the earlier regulatory statutes and rules. In most cases, the voluntary programs and partnerships demand little in the way of commitment and generate little in the way of verifiable results. More is possible, as exhibited by the above-mentioned research. But the same factors that induce regulatory drift sets distinct limits on how much flexibility agencies can grant and the kinds of benefits they can offer to even the highest performing firms. Drift continues unabated, but obscured by decades of novel initiatives that may be of more symbolic than practical importance.

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