Preface

The landmark legislation that Congress enacted during the 1960s and 1970s to protect the environment and individual health and safety has come increasingly under attack in the last two decades. Collectively, this legislation is known as "risk regulation" because it addresses the risk of harm that technology creates for individuals and the environment. Employing a utilitarian philosophy and analytical tools such as cost-benefit analysis, the critics claim that risk regulation is excessive and irrational, wasting millions of dollars that could be put to more productive uses. Supporters of risk regulation deny these claims, and they argue that cost-benefit analysis is inappropriate for evaluating risk regulation. The supporters, however, do not employ a systematic theme similar to the critics' use of utilitarianism. Unlike the critics, who are all singing the same tune, the supporters of risk regulation have appeared to be singing different tunes.

Risk regulation appears to lack a common theme for several reasons. As this book explains, Congress clearly rejected utilitarian premises as the basis for the risk reduction legislation, but it did not specify another unified set of premises as the basis for the legislation. The legislation also appears to be disjointed because it employs a number of different regulatory standards, rather than basing regulation on a common cost-benefit standard. It is also difficult to see a universal basis for risk regulation because of its complexity. The relevant statutes take up hundreds of pages in the U.S. Code.

As academics who have written about risk regulation for the past twenty years, and who have participated in the debate over the wisdom of current risk regulation, we were challenged by the apparent lack of a unifying scheme or set of ideas that may explain risk regulation. There are environmental philosophies that support important aspects of risk regulation, but risk reg-

ulation protects consumers and workers in contexts that do not relate to environmental protection. Moreover, important risk regulation statutes, such as the Clean Air Act, seek to protect both the environment and the public health. Environmental philosophies can explain this health protection as an effort to return the environment to its prior, cleaner status (or to prevent its deterioration), but people also directly value the act's public health goals.

This book responds to the vacuum we perceive: is there a common basis or set of ideas that can explain, clarify, and provide a basis for analyzing risk regulation? Our original intuition was that Congress designed risk legislation to be a lawyer's system of decision-making. That is, it employs methods of analysis that are familiar to lawyers (and perhaps for that reason are unpleasing to economic analysts). In turn, we were led to an emerging literature that explores the affinity between the American philosophical tradition of pragmatism and the role of judicial review in our legal system.[1] Proponents of pragmatism contend that it offers a useful methodology for addressing how judicial review should function. One of the principal proponents of using pragmatism to guide judicial review, Professor Daniel Farber, has suggested that pragmatism might play a similar role in the context of environmental policy.[2] Professor Farber's suggestion led us more broadly to consider whether pragmatism furnishes the missing basis for risk regulation. We concluded that it does.

Our claim is that the structure of risk regulation is consistent with pragmatic principles, and that pragmatism is an appropriate baseline from which to design and implement risk regulation. In response to the critics' reliance on utilitarian principles, we contend that pragmatism offers a better way of conceiving and implementing risk regulation than the economic paradigm favored by its critics.

Although Professor Farber pointed the way, his book offers only a brief justification for applying pragmatism to environmental law. Moreover, whereas Professor Farber considers environmental policy, we address the body of risk reduction regulation enacted primarily in the 1960s and 1970s, which, besides environmental law, also includes other safety and health regimes, such as those administered by the Occupational Safety and Health Administration, the National Highway Traffic Administration, and the Food and Drug Administration. As we explain in Chapter 1, all of this legislation

shares a common denominator. These laws are designed to reduce human and environmental injury before it occurs. We are therefore interested in justifying this essential trait and in explaining how it relates to other important social values, particularly avoiding adverse economic impacts attributable to reducing these risks.

We extend the use of pragmatism in analyzing risk regulation in two other ways. In Chapter 3 we map a structure of risk regulation that has not been previously recognized. Our map allows us to identify the key common features of risk reduction legislation. Our argument that risk regulation statutes are consistent with pragmatic principles is based on the key common features of risk regulation identified in this map. Finally, we break new ground by applying pragmatic principles to relevant important issues of risk policy: the role of regulatory impact studies (Chapter 7), the debate over alternative regulatory methods (Chapter 8), the importance of incremental adjustments to regulatory policy (Chapter 8), and the comparative suitability of alternative forms of regulatory oversight (Chapter 9).

The possibility that pragmatism might play this role would come as no surprise to the founders of the American philosophical tradition of pragmatism. As originally conceived by, among others, Charles Sanders Peirce, Williams James, and John Dewey, pragmatism was the dominant mode of social analysis in the early decades of the twentieth century. Pragmatism, according to Charles Anderson, "shaped the distinctly American disciplines of political science and institutional economics," "greatly influenced our theories of philosophy, education, and law," and "formed part of the intellectual background for Progressive Reform and the New Deal."[3] Although pragmatism fell into a relative decline for a time after these events, there recently has been renewed interest in pragmatism in philosophy and other disciplines—including law, as mentioned earlier.[4]

We employ pragmatism in this book not only to support risk regulation against arguments by its critics but also to agree with some of these criticisms and level criticisms of our own. Thus, while pragmatism offers a methodology or set of ideas to support risk regulation as it was originally conceived, it also offers a perspective from which risk regulation can be held up to critical appraisal. In the end, we reject the picture painted by the critics of widely excessive and irrational regulation, but we do not entirely exonerate risk regu-

lation either. Our pragmatic perspective leads us to a number of ideas about how risk regulation might be usefully reformed, although these are often different reforms than those favored by critics who are influenced by utilitarianism.

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