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MODELS OF REGULATION

*James V. DeLong**

THE POLITICS OF REGULATION. Edited by *James Q. Wilson*. New York: Basic Books. 1980. Pp. xii, 468. $18.95.

In some ways, *The Politics of Regulation* is a bit shapeless. It has chapters by nine separate authors on nine different regulatory programs loosely grouped into three categories: "Traditional Regulation: Rates and Entry"; "Regulation of Competitive Practices"; and "The 'New' Regulation: Products and Processes."[1] While an introduction and tenth chapter on "The Politics of Regulation" by the editor, the eminent Harvard political scientist James Q. Wilson, provide some useful synthesis and interpretation, the overall approach remains diffuse. The editor himself acknowledges that the "agencies covered . . . [were] selected by no particular plan" (p. xi). The individual segments are uniformly well-written, easy to read, and even — for a connoisseur of the administrative process — entertaining, but one is often uncertain why a particular issue receives so much attention and another none at all, or how an individual chapter fits into any framework for the book as a whole. Nor is this an "important" work in the sense that it presents startling new data or original hypotheses about regulation. Professor Wilson's themes derive from prior political science work (including his own, of course), and the individual chapters are too unsystematic and idiosyncratic to be totally convincing unless one is predisposed to be convinced.

Nonetheless, *The Politics of Regulation* deserves a thoughtful reading by any lawyer involved in the regulatory process, whether as regulator, practitioner, academician, or judge, because its analysis

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1. The specific programs covered are Traditional Regulation: Rates and Entry (which includes chapters on State Regulation of Electric Utilities, The Federal Maritime Commission, and The Civil Aeronautics Board), Regulation of Competitive Practices (which includes chapters on The Antitrust Division of the Department of Justice and The Federal Trade Commission), and The "New" Regulation: Products and Processes (which includes chapters on The Food and Drug Administration, The Occupational Safety and Health Administration, The Environmental Protection Agency, and The Office for Civil Rights).

leads inexorably to some serious and long overdue questions about the state of contemporary administrative law.

To explain why this is so requires some setting of the stage.

I

The term "model" tends to create an image of an elaborately programmed computer spitting printouts, and, of course, a mathematical model relying on computer capability is one example of the genre. Actually, the word has a far broader meaning. A model is "a simplified representation of some aspect of the real world, . . . the purposeful reduction of a mass of information to a manageable size and shape."[2] An organization chart is a model of an institution and a work-flow chart a model of its internal processes. So, too, a model can be a verbal description of how an organization, including a federal agency, functions; any description contains, explicitly or implicitly, a whole series of simplifying assumptions about the purposes of the organization and its members, and about their interactions with each other and the outside world. A model highlights the important features of a situation or class of situations and eliminates the irrelevancies and details. It is a truism that everyone thinks in terms of models, whether they know it or not, and that how well a model reflects the relevant dimensions of the real world is a crucial determinant of its utility for any analysis of real problems.

Much of administrative law is based on a particular model of the administrative process handed down from the Progressive Era and the New Deal. In this model, agencies function as neutral professional administrators that apply some complicated and almost mystical expertise to promote congressionally mandated goals.[3] As Professor Richard Stewart has observed, the model is based on the presumption that an administrator enjoys little real discretion because "[t]he policy to be set is simply a function of the goal to be achieved and the state of the world, . . . [and] persons subject to the administrator's control are no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor."[4] Even when it is conceded that the administrator has more free will than allowed by this characterization, the dominant image is still one of a neutral expert working toward an undefinable but presumptively attainable goal of "the public interest."

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2. E. STOKEY & R. ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 8 (1978).

3. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671-88 (1975) (collecting sources).

4. *Id.* at 1678.

From this model flow several doctrinal consequences, including the presumption of agency expertise, the importance of deference to agency decisions, the virtual unreviewability of an agency's policy choices, the idea that the decision-making process within an agency should remain a closed box and the mind of the collective administrator unprobed, the assumption that an agency can be relied upon to make disinterested judgments about how best to build a record, and the inapplicability of such litigation-based concepts as ex parte communications, bias, and prejudgment.

The problem with the model is that no respectable thinker outside the legal profession, and few within — including the judges who use it every day — think that it adequately approximates reality. Since its heyday in the 1930s, it has been undermined by "the complexities of a managed economy in a welfare state, and . . . the corrosive seduction of welfare economics and pluralist political analysis . . . ."[5] This inadequacy has become manifest even in the traditional areas of regulation where an agency exercises broad discretion over a closely bounded area of the economy, such as railroads and trucks, airlines, or telecommunications. In the areas that have been subjected to explosive regulatory growth over the past fifteen years — the environment, safety and health, and consumer protection — this inadequacy increasingly slides over into absurdity.[6] Today, various agencies exercise tremendous power over millions of individual decisions in all sections of the economy, and no sensible person believes that this power is exercised in a spirit of neutral, disinterested technical expertise.[7]

In place of the model of the agency as Platonic Guardian there is now a varied collection of half-competitive, half-complementary models. Observers of the administrative process now speak of agencies captured by industry and agencies captured by clientele groups; of "iron triangles," each composed of an agency, an interest group, and a congressional committee; of bureaucrats who maximize budgets (or power, or future income, or security) and Congressmen who maximize votes; of the economics of collective action and the theory of political coalitions; of agencies as stakeholders for competing special interests; of market failures and their mirror image, the

5. *Id.* at 1683.

6. *See, e.g.*, DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 276-78 (1979).

7. *See, e.g.*, B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR (1981) (the book is subtitled, "How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers and What Should Be Done About It").

systematic failures of nonmarket mechanisms; of organizational incentive structures; of the bureaucratic territorial imperative; and, finally, probably of other concepts that have not crossed this reviewer's desk.[8] No one knows what model (or, more likely, what collection of models) of administrative action should replace the traditional one, but there is universal agreement that the old one is inoperative.

The erosion of the intellectual base of New Deal-style administrative law does not necessarily mean that the original "doctrinal consequences" no longer apply. Even if one believes that much agency expertise is a legal fiction, one can still take the view that a marginally expert agency that has studied a problem should not be overruled by an even less expert court. One can be concerned about capture of an agency by the interests that it is supposed to regulate and still regard the requirement of an adequate articulation of the basis for decision as a sufficient check. One can think that agency decision-making needs scrutiny and reform without wanting to open all of an agency's confidential files to discovery requests by the janissaries of the Washington bar. Most fundamentally, one can be certain that federal agencies' policy decisions need more rigorous oversight, review, and coordination without concluding that a court of appeals is the proper body to exercise this function.[9] Thus, there are some excellent reasons, aside from the natural inertia of any system built on precedent, for being reluctant to abandon traditional principles.

But if the presumptions supporting New Deal-style administrative law are not necessarily wrong, they are not necessarily right either, and at the very least the answers no longer come automatically. Browsing through the administrative law cases of the past ten years gives one a sense of the tension created by the dissonance between the conventional wisdom of the classic model and the courts' own

8. For an excellent synopsis of the development of these theories, see Schuck, Book Review, 90 YALE L.J. 702 (1981) (reviewing *The Politics of Regulation*). Another interesting work, and a rich bibliographical source, is P. Aranson, The Uncertain Search for Regulatory Reform (1978) (Working Paper No. 79-3, Law and Economics Center, University of Miami School of Law).

9. The judges seem to agree. On July 20, 1981, the Judicial Conference sent a letter to the Congress expressing concern about the degree to which pending regulatory reform legislation would increase the authority and responsibility of the courts with regard to Federal Regulation. *See* Legal Times of Washington, July 27, 1981, at 20, col. 1. In an interesting innovation, California has created an Office of Administrative Law within the Governor's Office to review agency regulations and reject those that are unnecessary, unauthorized, incomprehensible, or inconsistent with other extant laws. *See* M. PRICE, EXECUTIVE CONTROL OF RULEMAKING: THE OFFICE OF ADMINISTRATIVE LAW IN CALIFORNIA (1981) (Available from the Administrative Conference of the United States, Washington, D.C.)

appraisals of governmental realities.[10] Indeed, this reviewer has argued elsewhere that the hybrid rule-making doctrines developed in the 1970s were a creative effort to resolve this tension.[11] The dissonance also creates many problems for the bar. While these are less easy to document, in talking to Washington lawyers one is struck by the distinction between the realities of dealing with agencies and counselling clients, and the formal requirements of administrative law as a self-contained, logical system.[12]

Nor has the academic legal community been happy with the situation. Scholars accepted the hybrid rule-making cases surprisingly quickly,[13] most probably because they would have welcomed almost any effort to bring legal doctrine more into line with perceived reality.

Although *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[14] has placed in doubt the continuing validity of the hybrid rule-making cases, the underlying pressure for change still exists, and is finding a number of outlets. During the past fifteen years, Congress has enacted many statutes requiring particular procedures and processes in rule-making;[15] three successive Presidents have promulgated reform-minded Executive Orders;[16] and more general regulatory reform legislation seems imminent. It is clear that legal change has come and will continue, but its exact direction and the implicit or explicit models of regulation on which it will be based remain uncertain.

II

It is this context of tension and change that should make the *Politics of Regulation* interesting to the legal profession, particularly because the authors are concerned more with description than

10. *See, e.g.*, Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (*en banc*) (various opinions setting forth contrasting views about the EPA), *cert. denied*, 426 U.S. 941 (1976).

11. *See* DeLong, *supra* note 6, *passim*.

12. For one practicing lawyer's candid views of an agency with which he was embroiled, see R. Wald, After the Hearing is Over (Speech for the Practicing Law Institute's Conference on FTC Rulemaking Procedures and Practice, Washington, D.C., Mar. 8, 1977).

13. *See* Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

14. 435 U.S. 519 (1978). For contrasting views on the impact of this case, *compare* Scalia, *supra* note 13, *with* DeLong, *supra* note 6, at 309-19.

15. *See*, DeLong, *supra* note 6, at 275-76 (collecting sources).

16. President Reagan: Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981); President Carter: Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978); President Ford: Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (1974).

abstraction, and with effective communication rather than academic jargon. In Professor Wilson's words:

> [T]he authors conferred on the scope, organization, and style of the essays to ensure that they would address some common issues: how the agency was created and its fundamental legislation passed; what the agency normally does (how it defines its task); what major controversies have erupted over its rule-making or rule-enforcing procedures; and how one might best explain the agencies' preference for one course of action rather than another. All these agencies exercise discretionary authority, some under statutes so vague as to provide little more than a general hunting license. The authors are interested in competing theories about why an agency uses its discretion in one way rather than another. [P. xii.]

Thus, the book is about politics in the broad sense — the interaction of ideas, interests, and expectations in the society at large, in Congress, and in the agencies that determine "how goals [are] determined, conflict resolved or managed, standards set, and policy enforced" (p. xi).

Since, as the title implies, the book is an analytic survey of "the politics of regulation," rather than a narrowly designed monograph with a specific thesis, neither the book as a whole nor Professor Wilson's final essay reaches any overarching conclusions. Wilson finds conventional capture theory — the view that regulatory outcomes are determined by the interests of the regulated — much too simplistic, and the thought that this would probably turn out to be the case seems to have been a primary motive for writing the book (pp. 357-63). But Wilson does not attempt to replace capture theory with an explanation of his own because, as he notes in the conclusion, "[a] single-explanation theory of regulatory politics is about as helpful as a single explanation of politics generally, or of disease" (p. 393).

Nonetheless, because Wilson does identify a number of recurring problems, as well as new ways of analyzing them, the book is filled with intriguing insights into the realities of the administrative process.

Some of his insights remain fairly abstract. Professor Wilson's "most distinctive contribution to regulatory theory,"[17] according to one scholar, is his emphasis on the kinds of regulatory politics that arise under different distributions of costs and benefits in a particular sector of the economy. When both costs and benefits are widely distributed among the populace, a different regulatory structure is produced than when they are narrowly concentrated in identifiable groups. Still other structures are produced when costs are widely

17. Schuck, *supra* note 8, at 717.

distributed and benefits concentrated, or costs concentrated and benefits diffused. Wilson labels the types of interactions resulting from these four situations as, respectively: (1) Majoritarian politics; (2) Interest group politics; (3) Client politics; and (4) Entrepreneurial politics (pp. 366-69).[18]

The book also discusses a number of more immediately practical issues, though many are touched on only briefly. For example, a recurring theme is the importance of the norms and standards of various professions — law (pp. 46, 173-78), economics (pp. 166-73), health and safety consulting (pp. 250-51), engineering (p. 36), and so on — in determining how an agency actually carries out its tasks. The idea of capture, whether by industry or by client groups, naturally receives attention, again with emphasis on the specific context under discussion (pp. 62-68, 328-38). The book also seeks to explain at least some regulatory politics in terms of the considerations that originally led to the creation of a given agency or program. An agency's early history, the authors find, can often affect its development years later (pp. 79-90).

An agency's development can be further influenced by the attitudes of its staff members — whether they identify their careers and rewards with the agency, hope to use it as a springboard to better things, or regard other members of a professional group as their significant reference point (pp. 372-82). Federal officials, moreover, are often primarily concerned with avoiding catastrophe, and the operational definition of "catastrophe" can profoundly affect an agency's decisions.[19] Almost as important as avoiding catastrophe is avoiding ridicule, since doing something silly or something that lends itself to easy caricature can make opponents out of people who normally have little interest in the agency's activities (pp. 375-76).[20] Professor Wilson notes that fear of catastrophe or ridicule often produces rules dealing with even the remotest contingencies. He comments:

Critics of regulatory agencies notice this proliferation of rules and sup-

18. Professor Schuck raises a crucial question about this typology: What about the common situation where no one knows how the costs and benefits are going to be distributed? *Id.* at 718-19.

19. For example, to an FDA official a drug catastrophe is thalidomide babies, or approval of something that turns out to have carcinogenic effect, however slight, rather than the deaths of patients who might (or might not) have been saved by a drug that has not yet been approved by the FDA. To the CAB or the FMC the catastrophe to be feared has been the bankruptcy of a major carrier, not the consumer loss caused by lack of competition and inflated rates. Pp. 375-76.

20. OSHA got into more trouble for requiring split toilet seats and for publishing a booklet warning farmers about the dangers of slipping on manure than for any of its more important actions. The EPA would not seriously consider imposing effluent charges for fear of the tag that it was "selling licenses to pollute." Pp. 376-77.

> pose that it is the result of the "imperialistic" or expansionist instincts of bureaucratic organizations. Though there are such examples, I am struck more by the defensive, threat-avoiding, scandal minimizing instincts of these agencies. [Pp. 377-78.]

An agency can appear most power hungry, in other words, precisely when it is acting most defensively.

Bureaucratic politics, finally, can provide only an incomplete explanation for much of what agencies do. *The Politics of Regulation* consistently emphasizes the importance of ideas in regulatory policymaking (pp. 393-94). However influential the interplay of material interests, it takes place in a context of attitudes and ideas that have an important role in determining the nature of the ultimate decisions. "To the extent an agency can choose, its choices will be importantly shaped by what its executives learned in college a decade or two earlier" (p. 393).

Professor Wilson could have added that this makes the effort to understand the politics of the regulatory process one that by definition can never be completed. The very existence of any model that achieves intellectual currency will itself affect the process in ways that will in turn require the construction of new models, which will affect the process, and so on. No one could deny, for example, that the development and acceptance of capture theory has itself had a tremendous impact on the regulatory politics of the 1960s and 1970s.[21] It seems almost inevitable that some of the newer theories, such as those based on bureaucratic self-interest or on Professor Wilson's four-cell matrix, will similarly affect regulatory politics in the future.

III

For the administrative lawyer, the question remains: What do I get out of the book besides a Sunday's entertainment and a few war stories? Does it change my behavior on Monday morning? The answer is that it probably should. At least it should change the way that the lawyer thinks about the administrative process on Monday morning, and this is likely to change his behavior on Tuesday, because thinking in terms of the broad political and bureaucratic considerations discussed in the book creates new insights into legal problems.

This point is best argued by illustration, and a good vehicle is the 1979 case, *Association of National Advertisers, Inc. v. FTC*.[22] In

21. *See, e.g.*, Schuck, *supra* note 8, at 706-07.

22. 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

1978, the FTC started a rule-making proceeding looking toward restrictions on television advertising directed at children. Before the proceeding had begun, Chairman Michael Pertschuk had made speeches and written letters strongly indicating that he believed such advertising was indeed unfair under the vague standards of section 5 of the Federal Trade Commission Act.[23] One could reasonably draw the conclusion from his statements that he regarded the impending proceeding as a device to provide the formal underpinnings for this conclusion, not as an open inquiry into the desirability of his policy choice.

The advertisers sued to disqualify Pertschuk on the grounds of bias and prejudgment. They used two basic arguments. First, Congress has mandated that FTC rule-making proceedings incorporate such special devices as oral hearings, opportunities for cross-examination and rebuttal, and detailed statements of basis and purpose. This, the advertisers said, made the proceedings "adjudicative" or "quasi-adjudicative," and thus subject to the normal standards applicable in any judicial proceeding. These standards would rather clearly proscribe the statements made. And second, even if a looser standard were applied, the Chairman had shown sufficient bias to be disqualified.[24]

The advertisers lost. Concerning the first argument, the court noted that FTC rule-making was designed to produce a legislative judgment about wise policy, and that the mere engrafting of some quasi-judicial procedural limitations on the FTC's powers in no way affected the essentially legislative character of the agency's mandate. Concerning the second, the court emphasized that policy-making administrators cannot act like neutral adjudicators; they must debate issues, muster political support, and shape the agency's agenda. Before proposing a rule, the Commissioners must necessarily reach some tentative conclusions, even if they change their minds after the full hearing. A Commissioner should be disqualified, the court concluded, only upon a "clear and convincing showing that [he] has an unalterably closed mind on matters critical to the disposition of the proceeding."[25] Pertschuk's statements were not strong enough to fall under the rule.

Thus far, the decision seems unexceptionable. The argument that rule-making is not really rule-making is extremely tenuous; the

23. 15 U.S.C. § 45(a)(1) (1976).

24. 627 F.2d at 1158.

25. 627 F.2d at 1170.

attempt to impose constitutional due process requirements on rulemaking has been rejected by the Supreme Court;[26] and the contention that an FTC Chairman should have no opinions on the applicability of the statute that he is required to enforce is far-fetched.

Nonetheless, if one thinks in Professor Wilson's terms, one sees another, more respectable, dimension to the advertisers' case. The plaintiffs focused only on Pertschuk's responsibility to vote on any final rule and on whether his statements indicated that he could not carry out this function fairly. Viewed this way, the court seems clearly right; the fact that a Chairman thinks the evidence in a full-scale proceeding will come out in a particular way is not an adequate ground to assume that he will refuse to listen to arguments that it has come out differently. But Pertschuk has another bureaucratic role in addition to that of decision-maker. He is the hierarchical chief of a large staff whose future promotions and career prospects depend on his good will. One of the most iron laws of bureaucratic survival is that one does not leave one's boss hanging out to dry in an unsupportable position, or get into a situation where the newspapers will write, "FTC staff says its Chairman shot his mouth off without knowing what he was talking about." Even if the Chairman could have heard contradictory evidence with an open mind, simply by committing himself publicly to a position from which it would be embarrassing to retreat he ensured that his staff had strong disincentives to develop any such contradictory evidence. Since in the FTC system most information is filtered through the staff,[27] it was thus unlikely that he — or any of the other Commissioners, for that matter — would ever be exposed to it at all. According to this analysis, the real problem in determining the proper standard of disqualification concerned the impact on the organization, not on the Chairman himself.

That this argument would have won for the advertisers is doubtful; it is a little too unfamiliar. But it is a better argument than any they had, and, more importantly from the standpoint of their long-term strategic interests, the need to answer it might have caused the FTC to examine, and possibly change, its own internal incentive structures.

Another illustration from a totally different context provides an

26. Most recently in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

27. *See generally* B. Boyer, Trade Regulation Rulemaking Procedures of the Federal Trade Commission (May 1979 & June 1980) (A Report to the Administrative Conference of the United States, Washington, D.C.).

interesting contrast. In the current debates over regulatory reform legislation, some private groups seem convinced that procedural changes will solve their problems, that adding cross-examination or requirements for more elaborate written justification will change the way that agencies approach their regulatory tasks. In some cases this hope seems ephemeral because it represents an effort to find procedural solutions to substantive problems. If an agency is forbidden to consider costs, for example, no amount of cross-examination is going to improve its cost-benefit analysis. Equally serious, though, is that it also represents an effort to find procedural solutions to political problems. If an agency thinks that it should redistribute wealth to the clientele group from which it derives its political support, requiring it to jump through some extra procedural hoops may slow it down a little, at least until it learns the game, but is unlikely to have any very permanent impact. The real question, according to the kind of analysis undertaken in *The Politics of Regulation*, may be how to shift the internal incentive structures or the external political context to change the nature of the pressures on agency personnel.

One could find a number of other examples from other cases and contexts, but these two are sufficient to make the basic point: The explicit use of some of the models of agency behavior that are being developed by the political scientists, economists, and organization theorists can provide some new insights into legal problems. This is enough to justify saying that *The Politics of Regulation* is not only an interesting book but a useful one as well.