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LEGISLATIVE CHOICE OF REGULATORY FORMS: LEGAL PROCESS OR ADMINISTRATIVE PROCESS?

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ABSTRACT

Perhaps because of the importance and visibility of some regulatory agencies and commissions, numerous observers have come to regard the administrative form of regulation as the ''logical'' or ''natural'' method of intervening in the economy or society. In fact, however, regulation comes in a variety of forms. The administrative form might seem all pervasive upon first consideration, but a variety of legislative enactments clearly regulatory in effect such as large portions of the tax code, direct government subsidies and so forth suggest that delegation of legislative authority to administrative entities is not so universal as is often assumed. Moreover, when viewed in historical perspective, choice of bureaucratic implementation of regulatory programs does not obviously emerge as the ''logical'' or ''natural'' method, at least not in the view of many political actors of the late nineteenth and early twentieth centuries. This paper surveys a heterogeneous body of literature on the subject of regulatory origin in order to identify proposed explanations for legislative choice of administrative forms of regulation in preference to judicial enforcement of legislative enactments. The focus of the survey is on the choices made by legislators and the considerations underlying their choices. Among the latter are (1) beliefs in the inherent superiority of administrative forms, (2) efforts to escape the costs, political and otherwise, of regulating directly, (3) ideologies supportive of delegation to administrators, and (4) uncertainty about the future operation of the regulatory process. These ideas are examined in an exploratory spirit; no firm conclusions are drawn at this time.

LEGISLATIVE CHOICE OF REGULATORY FORMS: I. LEGAL PROCESS OR ADMINISTRATIVE PROCESS?

Morris P. Fiorina

I. INTRODUCTION

Some time ago I was asked to prepare a paper addressing the stylized fact that Congress invariably chooses to regulate economic and social life by creating agencies and commissions rather than by adopting various market-like mechanisms which have been discussed in the economics literature.[1] Economists of differing ideological hues recognize the theoretical superiority of the latter, and even taking practical difficulties into account, many economists believe that the polity should curtail its reliance on ''command and control'' modes of regulation and instead pursue collectively determined ends by shaping decentralized individual decisions (Schultze, 1977).

Despite their necessity for the theoretical enterprise, stylized facts should be handled with a modicum of caution. If regulation is defined as economic or social intervention by bureaucratic entities governed by the administrative process, the stylized fact is trivially true and the explanatory question can be rephrased to ''Why regulate?''[2] If one adopts a broader definition of regulation, however, the accuracy of the stylized fact is problematic. Posner, for example, defines economic regulation to refer ''...to taxes and subsidies of all sorts as well as to explicit legislative and administrative controls over rates, entry, and other facets of economic activity'' (1974, p. 335, emphasis added).[3] If the definition of economic regulation is expanded to include the entire corpus of government subsidies, the tax code, direct statutes to be enforced via the legal system, etc., the extent of Congressional infatuation with regulatory agencies is not clear. Even so, we can still ask why regulatory agencies ever are chosen over market-like alternatives, or stated differently, under what conditions do legislatures create agencies to command and control rather than modify the incentives which underlie decentralized decisions?

When restated in the preceding form I find the question a very formidable one. In seeking to provide an answer at least three fields of knowledge are relevant. First, one needs an acquaintance with the nature and characteristics of the numerous possible regulatory instruments discussed in the literature of modern economics and public choice. Second, one needs a political scientist's understanding of our national legislature in order to theorize about the reactions of its denizens to the numerous possible alternatives. Third, one needs a reasonable knowledge of the history of regulatory politics in the United States, a kind of knowledge not common to either modern political science or economics. Consider that the ICC, whose experience has figured prominently in later political debate, was established in 1887. The Congresses of this era were different from those which established the New Deal agencies, which in turn were different from those which produced the ''new'' regulation of the 1970s. To mention just two of the relevant differences, in 1887 U.S. Senators were still chosen by state legislatures, and 42 percent of the Representatives were freshmen. In the 1964-1976 Congresses Senators were almost automatically Presidential Candidates, average House seniority was in the neighborhood of six terms, and the ''incumbency advantage'' was a common topic of discussion. The New

Deal Congresses fell between the 1880s and 1970s extremes. Even more important than such variations in membership stability and experience are temporal changes in the internal power structure of Congress. In the last quarter of the 19th Century the Congress (especially the House) made a passable approach to party government. Strong party leaders controlled the flow of legislation, prominent committee posts were used as payoffs to the winning side in the leadership contests, and the rank and file, unstable as it was, found itself considerably more at the mercy of the leadership for achievement of their goals than contemporary Congressmen could imagine. By the New Deal period the party leadership had weakened considerably, committee government was in full flower, and seniority was the key to Congressional advancement and success. By the late 1960s the party leadership had weakened even further, committees were beginning to feel the pressures of their component subcommittees, and the individual member had become beholden to no one outside his district (Dodd and Schott, 1979, Chs. 3, 4).

If we believe, as I do, that institutions matter, the changing character of our national legislature suggests that our theorizing about its choice of policy instruments should proceed against a backdrop of historical awareness. Admittedly there is a danger here. While a model which ignores the detail of the legislative process may be inherently incapable of enlightening us about legislative outcomes, a model which incorporates too much detail may provide a good accounting of the Occupational Safety and Health Act of 1970 (OSHA), but not of the Federal Communications Act of 1934 (FCC), or the Interstate Commerce Act of 1887 (ICC).

There is yet another reason to bear in mind the history of regulatory politics in the United States. Though social scientists hesitate to admit historical experience as an explanatory factor in their models, the regulatory debate at any particular time clearly reflects historical experience. We can translate the relevant considerations into more congenial terms the use of historical experience to reduce uncertainty, for example -- but current calculations incorporate historical experience just the same. In particular, the fact that politicians have data (or think they have) on the workings of some types of policy instruments but not others, might be expected to introduce certain asymmetries into their calculations.

Thus, in preparing this paper I began by studying the politics leading up to the Interstate Commerce Act and worked forward in an attempt to identify real world considerations relevant to Congressional choice of regulatory instruments. After immersion in the literature, however, I reached the judgment that the stylized fact which provides the starting point for this paper conflates two stylized facts each deserving of attention. The assertion that Congress ''almost always'' empowers regulatory agencies to promulgate rules and standards rather than create market-like arrangements, asserts first that Congress eschews the use of instruments which could more efficiently and less coercively achieve the intended goal, and second, <u>that Congress delegates power to regulatory agencies rather than pass laws and allow the courts to oversee their enforcement</u>.

Consider that Congress purportedly established the ICC to deal with

problems arising from cartelization of the railroad industry, then three years later passed the Sherman Act, purportedly to deal with similar problems. Sherman, however was to be enforced by the Courts, though the Attorney General was charged with initiating prosecutions.[4] Moving beyond economic regulation, some critics of current safety and health regulation argue that Congress could clarify the laws of liability, specify formulas for determining appropriate damages, and leave matters to tort law rather than to regulatory agencies. In the domain of civil rights the law could be implemented and enforced via litigation by individuals and classes of individuals rather than by federal commissions. Even environmental regulation does not require bureaucratic implementation. Congress theoretically could implement a full-blown emissions charge system without resort to any bureaucratic entity: specialized staff could determine charges, pollution sources could calculate their own bills, and the IRS could audit some fraction of the returns. Why is such a modified honor system deemed acceptable for collecting income taxes, but not elsewhere?

Considerations like the foregoing led me to divide the question posed earlier. Rather than ask under what conditions legislatures opt for bureaucratic command and control over the use of incentives, let us ask the dual questions, (1) under what conditions do legislatures opt for command and control rather than incentives, and (2) under what conditions do legislatures create agencies to do the commanding and controlling rather than utilize the legal process?[5] For a number of reasons I have chosen to begin with the second question. For one thing, it has temporal priority. As mentioned, the ICA and Sherman Acts were passed only three years apart,

the creation of a commission was a major part of the battle surrounding passage of the ICA, and the perceived problems (e.g. monopoly, ''destructive competition'') were not those which have given rise to modern suggested schemes for utilizing private incentives. (Even if they had been, Pigou was a mere stripling of 10, and no modern public choice theorist had yet been born.) The actors of the time took for granted that commmand and control was the policy instrument; the conflicts arose over the extent of command and control, and the identity of those who would exercise it.[6]

A second reason for beginning with the question of legislative v. administrative forms of government intervention stems from the current relevance of this question. At the present time our society is witness to a widespread debate about the existing regulatory order. In contrast to the academic debate, however, the political debate revolves less around the question of regulatory instruments than around the very legitimacy of government intervention (I detect little or no popular demand for substituting emissions taxes for EPA or even for replacing OSHA with a clear and toothy liability law). So, although thinking of possible replacements for command and control regulation warms the hearts of economists, I will stick closer to the political debate and begin with the question of why bureaucrats are given that control in the first place.

In the next section of this paper I offer some general observations about the literature on regulatory origin. The third section contains the intended contribution of the paper. In that section I outline a number of models based on considerations present in the empirical literature on regulatory origin.

II. THE LITERATURE ON REGULATORY ORIGIN

This literature is both extensive and heterogeneous. It ranges from the detailed biographies and case studies of historians (eg. Nash, 1955) to the second order conditions of Peltzman's REGULATOR (Peltzman, 1976).[7] Despite its extent and diversity, however, the literature contains little that is systematic on the form which regulation takes (ie. legal v. administrative), or on the instruments through which regulation occurs (ie. command and control v. incentive-based mechanisms). Only an occasional article (eg. Buchanan and Tullock, 1975) constitutes an exception. In fact, it is probably fair to say that the literature on regulatory origin contains little that is systematic at all. The literature shows substantial agreement on a general, if obvious, proposition, namely that regulation occurs when ''political pressure'' (political scientists and historians) or ''demand'' (economists) becomes sufficiently strong. Unfortunately, the literature suggests little of a more precise nature that would enable us to identify such critical junctures in any real world situation.

The overarching question in the literature on regulatory origin appears to be ''who wanted it and who fought it?'' Historians answer by naming individuals and groups, while economists answer by characterizing individuals and groups in terms of their positions in the economy, but both are dealing with the same basic question. In constructing the research agenda around that question, however, real difficulties emerge. The method of the historians is to examine the record to see who said and wrote what. Kolko (1965), for example, advances an interpretation of the origin of the ICC which Chicago economists would find congenial. After reading letters,

speeches, materials in railroad magazines, etc. Kolko concludes that the railroads designed and supported regulation as a means of advancing their corporate interests.[8] Kolko's thesis is provocative and the supporting materials at fist convincing, but how is one to know what proportion of the universe of relevant data he has examined? Other historians (Martin, 1974; Purcell, 1967) argue that Kolko has overlooked letters, speeches, and materials in railroad magazines which do not support his thesis. Their evidence too seems convincing, at least sufficiently so to raise doubts about Kolko's thesis.

Even if we possessed the universe of speeches, letters, and other published materials, and could tabulate support and opposition to regulation on the part of various groups and interests, what would the data imply? In my opinion, not very much. Statements of support or opposition are typically relative statements. In the absence of full knowledge of the context in which they occur, they tell us little about the complete preferences of the relevant actors. In the case of the ICC, for example, the literature abounds in suggestions that railroad interests supported various national regulation proposals in order to head off other, less desirable, but not unlikely possibilities. In the decade prior to the passage of the Interstate Commerce Act more than 150 bills providing for some degree of federal regulation of the railroads had been introduced in Congress, and four had passed one house. Twenty-five states had some kind of railroad commission at the time, and in all states the courts exercised some control of the railroads which were considered common carriers under the common law. When the Supreme Court handed down its Wabash decision in

1886, invalidating state regulation of interstate railroads, it is understandable that some railroad executives might have anticipated renewed pressure for federal regulation. That they opted to work on channeling that pressure rather than be blown away by it does not indicate that federal regulation was their optimum optimorum. The full ambiguity of the situation may be seen via a simple illustration.

Imagine a legislature debating whether or not to regulate an industry or sector, and whether to regulate by a legislative enactment (L) to be enforced in the courts, or by establishment of an agency (A) empowered to issue administrative directives. Logically, a group might have any of six possible preference orderings over the two regulatory proposals and the status quo of no regulation (N). These are

1	2	3	4	5	6
L	A	N	N	L	A
A	L	L	A	N	N
N	N	A	L	A	L

Kolko argues that orderings 1 and 2, especially 2, characterize railroad preferences in 1887. The industry needed regulation because of ''ruinous competition''; ''only'' the form it would take was cause for disagreement. Most of the traditional accounts suggest that ordering 6 described railroad preferences. A friendly commission such as that provided for in the Senate bill (and those existing in many states) could advance railroad interests, but a stern law such as that embodied in the House bill was bitterly opposed. Orderings 3 and 4 might describe the preferences of interests

happy with the existing situation, eg. Standard Oil in 1886.[9] The point of all this is that relative preferences between A and L provide little information about the complete preference orderings of the actor. A letter or speech from a railroad executive advocating the Senate's commission could be made by one who held ordering 2 or 4 or 6, and in and of itself constitutes little basis for inferring that railroad regulation was a conspiracy foisted on the country by the regulatees.

In contrast to the method of the historians, the method of the economists is to infer support and opposition to regulation from the incidence of regulatory benefits and burdens. This methodology is at least as problematic as that of the historians. Without knowledge of the discount rates of various political actors it is doubtful that incidence patterns thirty years after the fact suggest much about the original motivations for regulation. Given the popular presumption of myopic politicians it is tempting to examine the incidence of benefits and costs in the immediate aftermath of the regulation,[10] but it is not obvious that politicians' constituents who provide political support are similarly myopic. Regulation is a process, not a one-shot disbursement of benefits and costs, and diverse political actors must calculate their anticipated returns as that process unfolds in an uncertain future. Everyone may calculate carefully and conscientiously, but the dice may simply come up wrong for some. Others may be fortunate to use better models in forming their anticipations. For example, the record shows that regulation by commission was favored by various railroad interests as well as by various Progressive elements who sought to bring the railroads to heel. Discounting Kolko's suggestion that

the Progressives were merely the running dogs of capitalism, there appear to be two explanations for these strange bedfellows. The first is that there was a consonance of interests among railroads, shippers, and consumers, a position held by some (Harbeson, 1967), but I daresay not one with which a majority of economists would agree. The second possibility is that one or the other of the bedfellows miscalculated. Their model of the expected future operation of the regulatory process was a poor one.[11]

One of the reasons miscalculations occur is that legislated regulation and realized regulation are not identical. Thus, railroads which had worked satisfactorily with state commissions of the Massachusetts type presumed that they could deal similarly with a federal commission of the proper sort; the Progressives appear to have been rather less worldly about how intent might translate into reality. To cite another example, a theory which demands that the actors of 1887 accurately anticipate the Supreme Court's emasculation of the ICC in the late 1890s is probably one which demands too much of those actors.[12]

None of the preceding is to assert that explanations of regulatory origin should be based on accidents and mistakes; quite the contrary. What political actors want and what they attempt to do should be the central elements of such explanations. We should not fixate, however, on regulatory outcomes; these should be the central focus of theories of the regulatory process. Such theories may or may not have much in common with theories of regulatory origin, though I believe that they will. In seeking to explain regulatory origin, I believe that we should model the calculations made by legislators. Such calculations may be more or less long-term and more or

less uncertain. They are made by actors who are agents of regulatory beneficiaries or bearers of regulatory costs, rather than directly by beneficiaries and cost-bearers. And such calculations take place in institutional contexts that may predictably alter the political impact of regulatory benefits and burdens. All of this will hopefully become clear as this paper develops.

The foregoing remarks are not intended to deny the value of the literature on regulatory origin, only to make evident its limitations. The economists are on the right track in my view: we should attempt to model the politics of the regulatory process via the simplified deductive methodology that has proved so useful in other areas of interest. Future models, however, should be considerably richer than existing ones, and they should focus on questions like choice of regulatory forms (legal v. administrative) and regulatory instruments (command and control v. incentives-based schemes). The desired richness, needless, to say, should reflect aspects of the story as told by historians and political scientists, however unsystematic the accounts may be, and however unfamiliar the language in which they are couched.

In the spirit of the preceding paragraph the discussion which follows examines various considerations relevant to explaining why a legislative majority intent upon a certain degree of economic, political, or social control would exercise that control by creating a regulatory agency rather than by expressing its intent in a clear law and allowing the legal process to take its course. The focus is on the legislators, whom I treat as maximizing actors, rather than passive registers of outside demands, thus

altering the emphasis which presently exists in the small relevant literature. The considerations examined are those found in the empirical literature. I have attempted to isolate and clarify them, incorporate them in very simple models of legislative decision, and suggest the kinds of conclusions they might produce. Thus, what follows is not one particular model pushed to its ultimate conclusions, but rather outlines for a number of models which eventually might be pushed to their logical conclusions. These models, incidentally, are not guaranteed to be mutually compatible. In fact, we are fortunate to have some conflicting hypotheses which appear to be testable in practice as well as in principle.

III. LEGISLATIVE CHOICE OF REGULATORY FORMS

This section explores the subject of how legislators from single-member districts view the choice between administrative and legal forms of regulation. The models to be outlined each focus on a consideration that appears in the descriptive literature on regulatory origin. In the interest of cumulation I have based the discussion on the Shepsle-Weingast (1980) model of legislative decision, which is in turn a refinement and generalization of previous models which have appeared in the literature. The model posits that a legislator elected by the j^{th} district seeks to maximize the following objective function:

$$N_j(x) = b_j(x) + c_{1j}(x) - c_{2j}(x) - t_j T(x) \qquad (1)$$

where $b' > 0$, $b'' < 0$

$c' > 0$, $c'' > 0$

$N_j(x)$ represents the net benefits to district j from a government activity, project or policy, x. The latter is assumed to be a scalar measure of government involvement, so it might represent the size of a project, the level of income redistribution, the scope of regulation, etc. $b_j(x)$ summarizes the benefits of the government activity to district j, while c_{1j} summarizes direct government expenditures on x which occur in district j. Notice that the legislator treats these as benefits, ie. c_1 costs appear with a plus sign in the net benefit function. Expenditures in the district are thought to benefit the local economy, and with a few exceptions (e.g. chemical warfare testing grounds) are eagerly sought by representatives.

In contrast to c_1 costs, c_2 costs are treated as true costs. The latter represent the indirect or external costs of the government activity which the j^{th} district incurs. Such costs might include destruction of farmland by a major water project, higher prices because of regulation, slower economic growth because of income redistribution, etc. Direct government expenditures in other districts are summarized in the overall tax bill, T(x) of which district j pays a share, t_j. Indirect or external costs on other districts are ignored by district j and its representative, as are the benefits which accrue to other districts.

The preceding formulation may strike economists as peculiar, but it has a solid grounding in the empirical literature on Congressional decision making.[13] Moreover, the model provides a simple explanation for such seemingly perverse phenomena as overwhelming support for patently inefficient government activities (Weingast, Shepsle, and Johnsen; 1981). Various types of policies can be analyzed as special cases of the general

formulation. In particular, sources as diverse as Green and Nader (1973) and Weidenbaum (1980) have noted that in the regulatory arena the direct costs of operating the regulatory process are trivial in comparison to the indirect or external costs of regulation. If the legislator ignores the former, (1) simplifies to (2)

$$N_j(x) = b_j(x) - c_{2j}(x) \qquad (2)$$

Shepsle and Weingast (1980) note that in this case concavity of the benefit function and convexity of the cost function produce single-peaked net benefit functions. Thus, assuming sincere behavior by the legislators, application of Black's median dominance theorem yields a majority rule equilibrium, namely the median of the individual legislators' maxima, $\text{med}_j \max_x N_j(x)$. If a majority of legislators achieve their maxima at a level of $x > 0$, some positive level of regulation will pass the legislature.

Formulation (2) is exceedingly simple and yields a determinate outcome. Like other related results (eg. Peltzman, 1976), however, (2) speaks only to the level or scale of regulation. The benefit and cost terms are assumed to be present values of future benefit and cost streams. Thus, questions of regulatory form and instruments, uncertainty, and other considerations are assumed to be resolved before writing down (2). In what follows I will attempt to step back a bit and break out some of the complications buried in the general formulation.

Good Government Models

Economists make a ritualistic practice of kicking around the

''public interest'' model of regulatory origin before settling down to serious analysis of the subject.[14] The political science-public administration version of the public interest model is the good government model. According to this model the administrative process is inherently superior to judicial enforcement of legislative enactments. Two principle advantages stand out.[15] First, administration is supposedly conducted by expert, non-political officials (or at least by well-meaning persons who have expert, non-political staff) who carry out the regulation as intended by Congress. In contrast, dependence on the legal system entails delays, prohibitive expenses, inconsistency of legal interpretation across jurisdictions, and so forth. Complaints about manipulation of the legal system are by no means limited to the modern era. In Congressional debate on the ICA, for example, numerous Congressmen rejected the notion of an even-handed judicial process. Among the comments cited by Cushman (1941, pp. 48-49) are these:

> Few indeed dare enter into litigation with railways. . . Those who can afford to fight the railways are those usually who enjoy their favor. (La Follette, Wisc.)

> He stands there alone, weak and poor and ignorant though he may be, with a ten-dollar case or a one-hundred-dollar case. He must make his own case against a wealthy corporation. He must do that, too, without technical knowledge of the matters litigated. He has no witnesses who are better informed than himself. The witnesses which must establish his care are the experts that

belong to the other side of the question. (Hepburn, Ia.)

> Railroads have employed statisticians and managers and lawyers to look up the statistics of this great transportation question from the railroad side of the case. But the people have never had any parties under their own control or in their employ exclusively for the purpose of looking up the facts of the transportation question from their side of the case. That is just what this commissioner system will give to them . . . (Peters, Kan.)

The second advantage supposedly enjoyed by the administrative process is the discretion or flexibility that process permits. Rather than write an inflexible, detailed law, Congress can state its intent in general terms and allow the agency or commission to fine-tune the law to fit changing social, economic and technological conditions. A specific law which is appropriate today may become inappropriate given changing conditions, whereas a flexible law can be interpreted so as to maintain the original level of regulation intended by Congress.

These and other subsidiary arguments underlie the conclusion of the good government model, namely that legislators should consider two net benefit functions, $A_j(x)$ and $L_j(x)$, which represent the net benefits from a level of regulation, x, carried out by the administrative and legal processes, respectively, and that $A_j(x) > L_j(x)$. The latter holds because the aforementioned inflexibility, uncertainty, and slippage in the legal process force a greater discounting of future benefits, thus yielding a

higher present value for $A_j(x)$.

Obviously, there is little in our historical experience with regulatory agencies and commissions to justify the benign view of them assumed in the good government model. In addition, the model implicitly assumes a consensus among the legislators that is extremely unlikely. Why should all or a majority of legislators prefer that the regulation be implemented exactly as adopted? The minority which prefers less regulation might prefer that the legislation be judicially sabotaged, and the minority which prefers more might prefer to gamble that aggressive judges will over-extend the legislation. There is little reason to believe that all legislators will have an aversion to the posited greater uncertainty of the legal process. Indeed, given historical experience there is little reason to posit that the legal process is more uncertain. Certainly in 1887 not everyone took that point of view. Cushman (1941, p. 50) notes that

> Judge Reagan and his supporters did not wish railroad regulation to be flexible. They wished it to be specific, rigid, and drastic. They looked with distrust upon any agency to which might be confided any discretion in softening or lightening the force of these rigorous penal provisions.

The Grange testified before Congress to similar effect (Cushman, 1941, p. 50). Uncertainty is clearly a relevant consideration in choosing between legal and administrative forms of regulation, but the good government model makes highly unrealistic assumptions about the universality of reactions to uncertainty. More general and more reasonable ways of bringing uncertainty

into the analysis will be discussed on the subsection on uncertainty models below.

There is a final problem with the good government model. Quite simply it does not explain why Congress ever passes a specific law rather than hand off the specifics to an agency. Why is the IRS not empowered to set tax rates and determine the other details of the tax code? Why are subsidy levels not always left to agencies to determine? In short, acceptance of the good government model would lead us to inquire why there are not even more numerous and more powerful agencies and commissions!

Legislator Benefit Models

In the substantive literature the most common explanations for legislative choice of administrative forms of regulation focus on the benefits which accrue to legislators as a result of delegation. Certainly legislators have political incentives to function as faithful agents of their constituents, but the preferences of the agent and the principal are seldom identical. Various features of real political processes create benefits and costs for legislators that are not perceived as such by constituents. Thus, legislators may have induced preferences for certain types of policy options rather than others where constituents might be indifferent. Moreover, other features of the political process may create disparities between the induced preferences of legislators over policy options and the preferences of constituents subject to those options. Thus, legislators may not choose exactly as their districts would in some form of direct democratic process. Both lines of argument are common in the literature.

1. Decision-Making Costs

Abstract models of the legislative process presume that legislators have infinite time and patience and/or that legislative decisions are made costlessly and instantaneously. In reality, of course, legislators are human. They do not like screams and threats and endless debate. In every session there are hundreds of decisions to be made; time spent on any one competes with opportunities presented by others. Moreover, time spent on decision-making may actually be politically counter-productive as editorialists and interest group spokesmen begin to complain about legislative delays, stalemate, incapacity to govern, and so forth. Considerations like these have led many observers, particularly lawyers, to comment on the use of administrative agencies to cut legislative decision costs. Often this observation goes hand in hand with one pointing out the vagueness of regulatory mandates. A good example is provided by Judge Landis' discussion of the Public Utility Holding Company Act of 1935. The Senate Bill provided for the outlawing of all holding companies except where a provision of state public utilities law required them. In the House an amendment was added to permit the FTC to suspend the former provision when the exemption was found to be consistent with the public interest. Landis (1938, p. 56) writes with dismay:

> The House amendment, ... turned over the whole burning issue of the future of the holding company in the public utility field to the Commission itself without any indication of what it should do with it other than that the public interest should be the guide for Commission action. It was obvious at once that, for the

> Commission, this was an impossible responsibility. It meant nothing less than that the Commission, rather than the Congress, would become the focal point for all the pressures and counter-pressures that had kept the Congress and the press at a white heat for months. Instead of the controversy being concluded, it would have been protracted interminably with the rooms of the Commission the place of the debate rather than the halls of the Congress.

It is easy to understand why legislators would just as soon not live in ''a white heat for months.'' Other things equal, passing the tough decisions on to someone else has much to recommend it. If things were always equal, however, everything would be delegated. Congress does choose to take the ''white heat'' over 90 percent reductions in vehicle emissions, and it does not empower the IRS to suspend the tax code when IRS determines such suspension to be in the public interest. The decision costs explanation is clearly relevant, but not complete.

2. Shift the Responsibility

Many of those who discuss Congressional delegation of power to regulatory agencies see more than a simple attempt to shift decision-making costs; they see a deliberate attempt to shift political costs as well. Woll (1977, p. 173) comments in a section on administrative rule-making:

> A major reason for the power of the bureaucracy in policy formulation is the frequent lack of congressional incentives to adhere to the Schechter rule and establish explicit standards for

> administrative action. This is particularly true in the regulatory realm, an area involving political conflict that legislators often wish to avoid. Congress is always willing to deal <u>rhetorically</u> with problems requiring regulation and with the area of regulatory reform but real decisions on the part of the legislature will undoubtedly raise the ire of powerful pressure groups on one side or the other that are affected by government regulation.

By charging an agency with the implementation of a general regulatory mandate, legislators not only avoid the time and trouble of making specific decisions, they avoid or at least disguise their responsiblity for the consequences of the decisions ultimately made. Aggrieved constituents receive a sympathetic ear, a speech denouncing the independent commissioner, presidential appointee, or arbitrary bureaucrat, and a promise to look into the matter.

Essential to the ''shift the responsibility'' model is the presumption that the actual net benefits of regulation to the district differ systematically from the perceived net benefits stemming from the legislator's actions on the issue. This presumption turns out to have a rather interesting array of implications.

Assume that legislators wish to maximize the net benefits from regulation <u>for which they are held accountable</u>. In accord with the ''shift the responsibility'' model, perceived responsibility varies between legal and administrative forms of regulation. Specifically,

$$L_j(x) = b_j^1(x) - c_j^1(x)$$

$$A_j(x) = b_j^a(x) - c_j^a(x) \qquad (3)$$

where

$$c_j^a(x) \lesssim c_j^1(x) \lesssim c_j(x)$$

$$b_j^a(x) \lesssim b_j^1(x) \lesssim b_j(x) \qquad (4)$$

I will refer to the pair of inequalities (4) as the ''shift the responsibility'' or SR assumptions. The first embodies the notion that delegation dilutes the costs of regulation which constituents attribute to legislative action. The second inequality embodies a similar assumption on benefits: if delegation enables legislators to avoid some blame, it seems reasonable that it should prevent them from claiming full credit as well.

For a given level of regulation, x, a legislator prefers the administrative over the legal form if

$$c_j^1(x) - c_j^a(x) \rangle b_j^1(x) - b_j^a(x) \qquad (5)$$

The general effects of the SR assumptions are visible in (5): <u>ceteris paribus</u>, a big perceptual slippage on the cost side predisposes the legislator toward the administrative form, whereas a big perceptual slippage on the benefit side predisposes him toward the legal form. Note, however, that in contrast to previous models the SR assumptions which produce condition (5) separate legislators into classes who differentially prefer

the legal or administrative form. In order to pursue the description of these classes let us examine a special case of (4) where

$$b_j^a(x) = k_1 b_j^1(x), \quad 0 < k_1 < 1$$
$$c_j^a(x) = k_2 c_j^1(x), \quad 0 < k_2 < 1$$

(This specific functional form is not critical to the discussion which follows; it merely provides an easily manipulable representation of the benefit and cost slippages.) Under these conditions (5) becomes (5'):

$$c_j^1(x)(1-k_2) \rangle b_j^1(x)(1-k_1) \qquad (5')$$

From (5') we see that <u>ceteris paribus</u>, preferences for the administrative process over the legal process are enhanced by high costs from regulation and low benefits. Conversely, support for a law to be enforced by the courts should be most common among those legislators whose districts are high net beneficiaries under the proposed regulation. The SR effects are just the special case of those mentioned earlier: an ability to shift blame (low k_2) is conducive to agency preferences, as is an ability to claim credit (high k_1).

A common theme in the literature on Congress is that national policy making processes are structured so as to facilitate Congressional credit-claiming on the one hand, and blame-shifting on the other (eg. Mayhew, 1974, passim). What is the consequence of explicitly recognizing this institutional characteristic in the model by assuming that $k_1 \geq k_2$ in general? Under this condition, <u>all</u> net losers from regulation ($b_j^1 < c_j^1$) prefer that the proposed regulation be implemented via the administrative

process, ie.

$$\left.\begin{array}{l} k_1 \geq k_2 \\ b_j^1 < c_j^1 \end{array}\right\} \Rightarrow c_j^1(x)(1-k_2) > b_j^1(x)(1-k_1)$$

Having a net loser district is sufficient but not necessary, of course. For example, a legislator for whom $k_1 = .8$ and $k_2 = .4$ would prefer the administrative over the legal implementation of the proposed regulation so long as its benefit/cost ratio was less than three.

Summing up, the SR model has a variety of implications for the advocacy stage of the legislative process. First, we might expect to see widespread support for precise legislation to be enforced via ordinary court procedures where a large proportion of legislative districts genuinely benefit from the proposed regulation. Conversely, widespread support for a regulatory agency might make us suspicious about the scope of the anticipated benefits from regulation.[16] A historical footnote: in 1887 the Senate strongly supported a commission whereas the House held out for reliance on normal legal procedures. A possibility consistent with the SR model is that the proportion of loser states was greater than the proportion of loser Congressional districts under the proposed regulation.

A second implication of the SR model is that conditions which facilitate credit-claiming and blame-shifting simultaneously facilitate preferences for regulatory agencies. This implication may have some bearing on the importance of interest group organization in the regulatory arena. Wilson (1974), Stigler (1971) and others have noted the relevance of the degree of concentration among regulatory beneficiaries and cost-bearers.

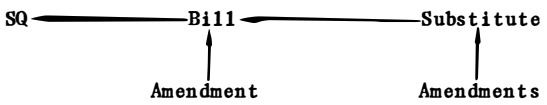
Concentration would facilitate credit claiming in that an organized group with regularized channels of communication would be aware of Congressional action in setting up and overseeing an agency. For the same reason concentration would hinder blame-shifting since the group would be better able to penetrate the Congressional facade. Lack of concentration would have the opposite effects. Members of an unorganized, inchoate group would be unlikely to see further than the agency overtly responsible for specific decisions. Legislators would not be blamed by such a group, but the agency would appropriate the political credit as well as the blame.

All of the preceding relates to legislator preferences -- what they might advocate in the legislature. What would pass, however? In particular, what level of x would the legislature decide upon, and would they choose an administrative or legal form of implementation?

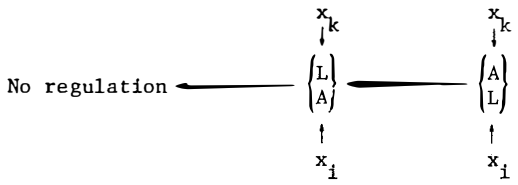
In order to address the preceding questions let us think of each legislator as having two ideal proposals:

$$\max_x L_j(x)$$
$$\max_x A_j(x)$$

The significance of these proposals emerges from a consideration of the standard amendment process (Riker, 1958). Under that process a bill is proposed to alter the status quo, the bill is subject to amendment, a substitute to the bill is allowed, the substitute is also subject to amendment, the perfected substitute is voted against the perfected bill, and the latter is voted against the status quo. Schematically:



In the case of regulatory origin we can think of the status quo as no regulation. The original bill proposes to regulate at some level either via an agency or the normal legal process, and amendments to the bill propose increases or decreases in the level of regulation. The substitute bill proposes to regulate by the form not selected in the original bill, and amendments to the substitute propose to alter the level of regulation provided for in the substitute. Schematically,[17]



Under this kind of amendment procedure the penultimate vote in the legislature is between

$$\underset{j}{\text{med}} \max_{x} L_j(x) = L(x^*)$$

$$\underset{j}{\text{med}} \max_{x} A_j(x) = A(x^{**})$$

And if the winner provides for a positive level of x, regulation occurs at that level in the winning form.

Two natural questions which arise at this point are, first, under what conditions is x^{**} greater than x^*, and second, under what conditions does $A(x^{**})$ defeat $L(x^*)$?[18] I have not had the opportunity as yet to explore these questions at any great length. It turns out that in the special case we have been examining, $x^{**} \geq x^*$:

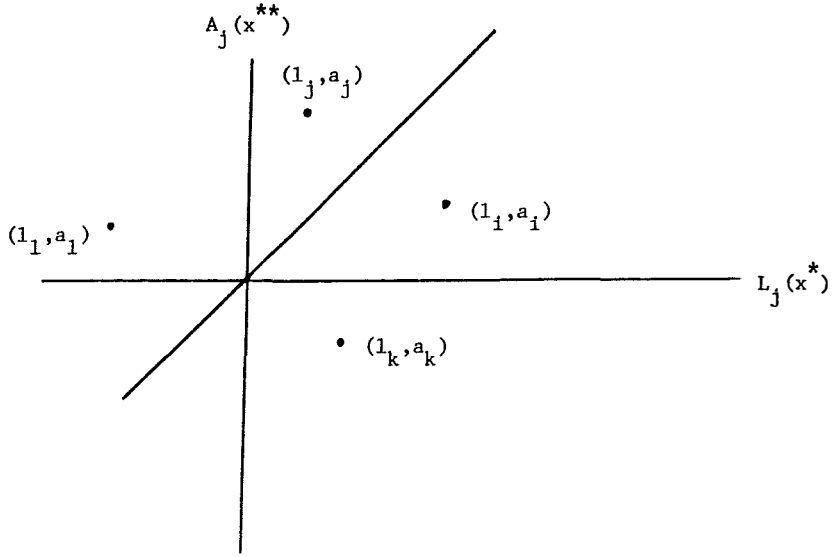
$$\frac{\partial L_j(x)}{\partial x} = b_j'(x) - c_j'(x)$$

$$\frac{\partial A_j(x)}{\partial x} = k_{j1}b_j'(x) - k_{j2}c_j'(x)$$

$$\text{And} \begin{cases} b_j'(x) - c_j'(x) = 0 \Rightarrow \dfrac{b_j'(x)}{c_j'(x)} = 1 \\ k_{j1}b_j'(x) - k_{j2}c_j'(x) = 0 \Rightarrow \dfrac{b_j'(x)}{c_j'(x)} = \dfrac{k_{j2}}{k_{j1}} \leq 1 \end{cases}$$

which given that $b_j(x)$ is concave in x and $c_j(x)$ convex in x implies that $x_j^{**} \geq x_j^*$ for each legislator j. This result is not general, however.

The answer to the second question appears to be that a wide variety of conditions will allow $A(x^{**})$ to defeat $L(x^*)$. If we plot all legislator's net benefits at x^{**} and x^* in a two dimensional space as follows;



Then $A(x^{**})$ defeats $L(x^*)$ if a majority of the ordered pairs lie above the 45 degree line through the origin. Clearly, given the general assumption that delegation facilitates blame-shifting more than it inhibits credit-claiming (eg. $k_1 \geq k_2$), the condition is not hard to meet. Of course, the amendment process we have assumed adds a great deal of structure to the situation. In a completely open majority rule process it would no doubt require stringent conditions to produce an equilibrium in the dual choice of regulatory level and form, though given the dichotomous conceptualization of the latter the situation will probably be less chaotic than the case of majority rule over a multidimensional policy space (McKelvey, 1979).

Summing up, I think it is clear that the SR model is a fruitful one to extend and explore. Its basic premise -- that delegation creates an altered perception of benefits and costs -- is widely accepted in the substantive literature. The implications of the model are rich and varied. From the standpoint of empirical research an especially nice feature of the SR model is that it makes no across-the-board prediction that legislators favor administrative over legal forms of regulation, as do many of the other models I have isolated. Instead the SR model identifies variables and conditions which affect legislator preference for regulatory forms.

3. Legislative Rent-Seeking

All the delegation models have in common the recognition that the real world of policy adoption and implementation is characterized by various kinds of frictions and imperfections. We have already seen that legislators have incentives to shift the costs of making decisions and to take advantage of imperfect information on the part of constituents by evading

responsibility for the consequences of policy decisions. In this subsection I will briefly note how additional considerations give rise to opportunities for legislators to appropriate rents generated by their policy choices.

Regulation is not automatically and costlessly implemented. It is a continuing process characterized by a certain amount of conflict over interpretation and application of the regulatory mandate, and often by continuing efforts to modify that mandate. If the legislature writes a clear law containing the regulatory decision and charges the courts with enforcement, the demand for lawyers' services is thereby increased. As I have argued elsewhere, however, if the legislature writes a vague law and empowers an agency to interpret and enforce it, the demand for legislative ombudsman services is thereby increased (Fiorina, 1977). Of course, the legal alternative offers some opportunities for legislators. They can propose amendments to the law, but majorities of two chambers and the executive must go along. They can file a brief with the court, but they have little leverage over a judge. The administrative alternative clearly offers more extensive opportunities for legislators to facilitate their constituents' dealings with the regulatory process. The administrator can receive a friendly phone call, an invitation to appear before the subcommittee, a line item budget cut, etc. Other things equal the administrative alternative allows legislators to transform potential legal fees into potential electoral support.[19] In the formulation previously used,

$$\left.\begin{aligned} L_j(x) &= b_j(x) - c_j(x) + f_j^l(x) \\ A_j(x) &= b_j(x) - c_j(x) + f_j^a(x) \end{aligned}\right\} \qquad f_j^l(x) < f_j^a(x)$$

where f_j^l and f_j^a signify facilitation benefits to the legislator from the legal and administrative alternatives, respectively. Thus, this model produces an across the board preference for the administrative process, ceteris paribus, without assuming that legislators escape full responsibility for the consequences of their decisions (the model is formally identical to the decision costs model). Roger Noll and I have used the rent-seeking notion as an element in a more general explanation of why government policies are excessively bureaucratized (Fiorina and Noll, 1978).

Delegation as Ideology

Theodore Lowi's (1979) brilliant indictment of contemporary American government includes as an important special case a condemnation of Congressional delegation of power to regulatory agencies. Lowi's objection is not to delegation in principle, but to delegation without standards, a practice he attributes to widespread acceptance of the public philosophy of ''interest group liberalism.'' The latter ''. . . sees as both necessary and good a policy agenda that is accessible to all organized interests and makes no independent judgment of their claims . . . it defines the public interest as the amalgamation of various claims (Lowi, 1979, p. 51). Lowi sees interest group liberalism as the public philosophy which underpins modern American politics. It constitutes a perversion of a descriptive model -- pluralism -- into a normative justification for various features of pluralist politics -- bargaining, log-rolling, and veto-groups, for example. Under interest group liberalism government becomes simply one among many interest groups, and if flexibility, bargaining and compromise are desirable (ie. system-maintaining) for interest group politics in general, they are

desirable for government as well. In Lowi's words (1979, p. 63), interest group liberalism

> ...impairs legitimacy by converting government from a moralistic to a mechanistic institution. It impairs the potential of positive law to correct itself by allowing the law to become anything that eventually bargains itself out as acceptable to the bargainers. It impairs the very process of administration itself by delegating to administration alien material -- policies that are not laws and authorizations that must be made into policies. Interest-group liberalism seeks pluralistic government, in which there is no formal specification of means or of ends. In a pluralistic government there is, therefore, no substance. Neither is there procedure. There is only process.

Clearly, Lowi's explanation of legislative reliance on the administrative process differs from those previously discussed. He views political actors as moved by the power of ideas. Political practices and choices reflect acceptance of an ideology or philosophy which justifies those practices and choices. Much of Lowi's analysis is compelling; his description of the pathologies of American politics and government is unsurpassed. From a purely scientific standpoint, however, there is a question about the necessity of his explanation. Are politicians moved by their philosophies? Or do their philosophies rationalize that which their self-interest dictates? As we have seen, there are a number of self-interested reasons for legislators to delegate regulatory authority. Does

interest group liberalism provide an additional explanation, or is it rhetorical cloth which enshrouds naked interest?

Uncertainty Models

Uncertainty is a pervasive theme, or collection of themes, in the literature on regulatory origin. On the one hand, potential regulatees may regard regulation as a means of reducing the uncertainties inherent in market competition. This is the view developed by Owen and Braeutigam (1978) in their analysis of the regulatory process, but also a view which appears frequently in the historical literature. Discussions of the creation of the FTC for example, emphasize the extent to which businessmen saw the commission as a means of reducing their uncertainty about what constituted illegal business practices, though it should be noted that their uncertainty in part stemmed from inconsistent applications of existing government regulation such as the Sherman Act.

On the other hand, regulation itself involves uncertainty. Because regulation is a process which operates through time, various kinds of social economic and technological change may impinge on that process and later its outcomes. We have thus far assumed, and will continue to assume that this kind of uncertainty is somehow reflected in the net benefit functions. After all, such uncertainty is no different from that which investors in a completely unregulated economy must deal with in making their decisions.

What I will address in this section is a second variety of actor uncertainty that arises from the political process itself. Whereas uncertainty about future developments requires judgments about the actual impact of x^* (the level of regulation adopted) as the world changes, process

uncertainty demands calculations about the actual level of regulation imposed, given that the legislature has chosen x^*. In other words, implementation of a regulatory decision is itself a highly uncertain process, particularly in the pre-regulatory stage. Perhaps there was little uncertainty about what the ICC would do with the Transportation Act of 1940, but what it would do with the Act of 1887 was not so obvious. Haney's (1910) discussion of Senate debate on the short haul-long haul provision of the ICA exquisitely illuminates a situation of legislator uncertainty. The Conference Report provided that railroads could not charge more for a short haul between two points than was charged for the same distance embedded in a long haul where ''substantially similar circumstances and conditions'' prevailed (the commission could suspend the provision ''in special cases'' upon investigation). Comments Haney (1910, pp. 306-307):

> There was great confusion in the minds of congressmen as to the exact significance of the long-and-short-haul clause. ''Where one member says, 'I will vote for that phraseology, because it means so and so;' and another says, 'I will vote for it means exactly the reverse,' I say in that case there is not that consensus of legislative intention which makes the proper enactment of law, . . . The most serious haziness occurred with regard to the phrase, ''substantially similar conditions.'' Did competition in any form constitute a condition? Did export trade? There was a determined effort to get an expression of opinion on this point from the Senate conferees, but these gentlemen stated that the interpretation of the measure was a

> matter for the courts to decide and that each member in voting was to consider what he thought the courts' interpretation would be [emphasis added].

Clearly, no member of the U.S. Senate in 1887 knew for certain exactly what level of regulation would result from passage of the Interstate Commerce Act.

The standard way of treating such uncertainties is to generalize the notion of a legislative proposal from a certain to an uncertain prospect. Thus, a legislator regards a proposal that an agency should regulate at a level, x^*, as the uncertain prospect, $\tilde{x}^*$, where

$$A(\tilde{x}^*) = \int_{x^a}^{x^{a'}} xq(x)dx$$

The legislator believes that the agency will transform the proposed regulation, x^*, into some level of regulation in the interval, $(x^a, x^{a'})$, those beliefs reflecting his subjective probability distribution, $q(x)$.

If we assume that legislators have Von Neuman Morgenstern utility functions increasing in $(b(x) - c(x))$, then for any arbitrary legislator,

$$u_j(A(x^*)) = \int_{x^a}^{x^{a'}} u_j[b_j(x) - c_j(x)]q(x)dx$$

As a first cut let us assume the following:

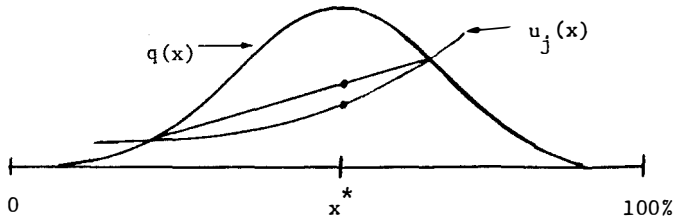
(1) $E(q(x)) = x^*$

(2) $q(x)$ is distributed symmetrically about x^*

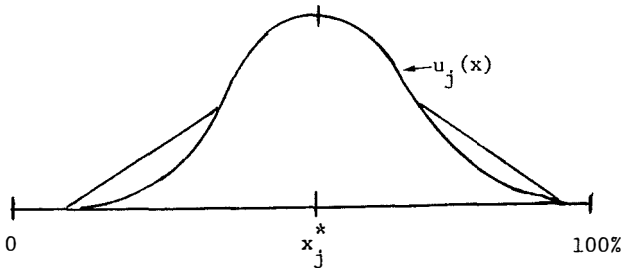
(3) $L(x^*) = x^*, u_j(L(x^*)) = u_j(x^*)$

(ie. the legal alternative is viewed as riskless)

Not a great deal can be said about the specifics of collective choice among uncertain prospects, but the situation just constructed is one of the exceptions. Shepsle (1972) has proved a theorem which translated into our terminology states that if a majority of legislators is risk-acceptant in some interval about x^*, <u>any</u> prospect with expectation at x^* defeats x^*. The following figure shows the familiar situation for a single decision-maker.



The obvious question then, is who is likely to be risk-acceptant in the neighborhood of x^*? This question takes us willy-nilly into the realm of functional forms, but in an exploratory spirit let us go on. If we assume that each legislator has the same bell-shaped utility function symmetric about his individual maximum, x_j^*, then each legislator will be risk-acceptant in the area of proposals ''far from'' his maximum:[20]



Thus, if the legislature appears to be gravitating toward some median preferred level of regulation, x^*, this formulation suggests that legislators who regard the median as significantly ''too little'' or ''too much'' would be most likely to support an administrative form of regulation. Conversely, those whose ideal points are near the median would be most likely to support a legal form.

Several interesting substantive implications accompany this very tentative theoretical proposition. For one thing, those who propound very different models of the future operation of the regulatory process may not be in disagreement so much as emphasizing possibilities differentially important to them. Progressive elements who favored stronger regulation than actually passed, and industry interests who favored weaker may each have been willing to gamble (and try to convince those similar to them to gamble) on the possibility that administrative regulation would produce an outcome closer to their ideal than the legal proposals which were the alternative. Under this interpretation Progressives were not naive and stupid, just players of a long-shot who lost.

A second implication is that uncertainty considerations may drive legislators in a direction different from SR considerations under some circumstances. Take a situation in which the expected net benefits of regulation order legislators in the same fashion as preferred level of regulation (I have no idea of the empirical likelihood of this condition holding). In such a situation the SR model predicts that administrative preferences prevail from the negative end of the ordering to somewhere past the median, whereas the simple uncertainty model developed above predicts

that both ends of the ordering will show administrative preferences against the legal preferences expressed by the middle. Techniques for scaling Congressional roll call votes provide the technology for an examination of such hypotheses, providing that we can find some means of approximating the net benefits to districts and states.

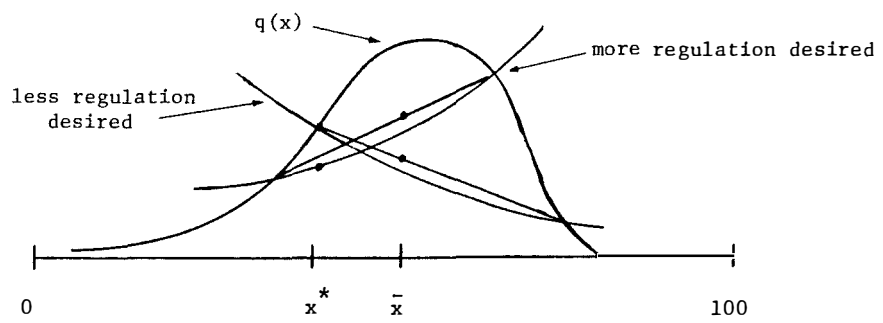
The major problem with the simple formulation just discussed is that the literature contains abundant evidence that judgments about the future operation of the regulatory process are anything but unbiased. Predictions abound, but they tend to be either dire or rosy, seldom neutral. In the case of the ICC, for example, numerous railroad representatives took a sanguine view of the possibilities of dealing with the new commission. The position of Richard Olney, a railroad lawyer who later became Cleveland's Attorney General is relatively common, though not universal. As paraphrased by Hoogenboom and Hoogenboom (1976, p. 33), Olney argued (1892)

> that ''the part of wisdom is not to destroy the Commission but to utilize it.'' Olney stressed that an attempt to destroy the ICC would probably fail and might backfire by inspiring efforts to strengthen the commission. Since the ICC has recently been limited by the courts, he emphasized that its supervision was ''almost entirely nominal'' while it satisfied the ''popular clamor'' for regulation and could be useful to railroads. As the commission grew older, Olney further suggested it would ''take the business and railroad view of things'' and protect railroad corporations from ''hasty and crude legislation'' as well as from the people.

Olney was not alone in his judgment. The Grange opposed the creation of the ICC on the basis of beliefs similar to Olney's. Judge Reagan himself said in debate (Cushman, 1941, p. 52):

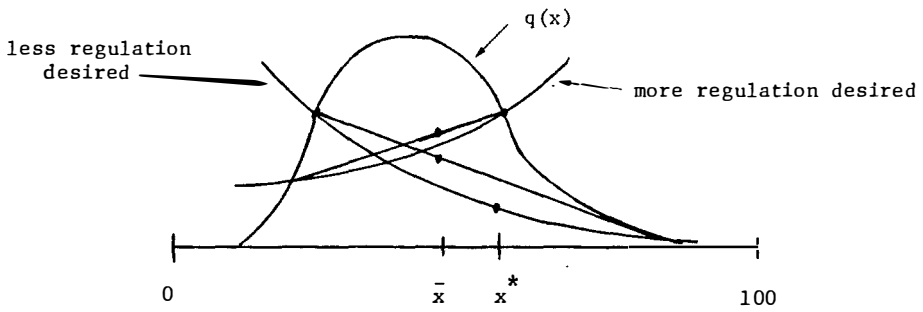
> I shall fear that the railroad interests will combine their power to control the appointment of the commissioners in their own interest. We all understand how easy it is for a few persons controlling large interests to unite their influence to carry out their wishes. . . . The notorious facts as to how railroad managers have corruptly controlled Legislatures, courts, governors, and Congress in the past give us sufficient warning as to what may be expected of them in the future. . .

Myriad comments like the preceding suggest that in general $E(q(x)) \neq x^*$. What consequences flow from this modification of our simple formulation? Consider the case in which $E(q(x) > x^*$:



It seems that in this case our earlier conclusion is reinforced for those who desire <u>more</u> regulation ie. the expected utility of the risky alternative (administrative) exceeds the utility of x^* by an even larger amount than

when q(x) is symmetrically distributed about x^*. In contrast, the conclusion no longer holds for those who desire less regulation. Now consider the case where $E(q(x)) < x^*$:



In this case those who want less regulation than x^* are even more likely to prefer the risky administrative alternative than in the symmetric case, whereas those who prefer a higher level of regulation may now opt for the legal alternative.

What we see then is that wishful thinking or an optimistic outlook reinforces our preceding conclusions: if you want more regulation (less regulation) and believe that an agency would be likely to regulate more than (less than) x^*, the administrative alternative looks relatively more attractive. Given the experience of railroads with state commissions prior to 1886, they are likely to have had a rather optimistic outlook about their prospects under a commission. In contrast, a pessimistic or paranoid outlook vitiates our earlier conclusion: if you want more regulation (less regulation), and believe that an agency would be likely to do less than (more than) x^*, the legal alternative looks relatively more attractive. Given their experience with state commissions the Grangers opted for the

law:

> The people want no board of railroad commissioners. They want just and wholesome laws, with well defined provisions for enforcing them. . . We want an absolute law, if you can consistently give it to us, and we do not want our justice strained though a commission, because our experience with a commission . . . is that they are not only worthless, but worse than worthless (quoted in Cushman, 1941, p. 50).

The next step obviously would be to allow the legal alternative to be a risk too. Thus,

$$L(\tilde{x}^*) = \int_{x^1}^{x^{1'}} xp(x)dx$$

A natural starting assumption might be that both p(x) and q(x) are distributed symmetrically about x^*, and that the variance of p is less than the variance of q. As yet, I have not found anything in the technical literature which speaks to this case.

Summary

A paper like this does not lend itself to conclusions. The unifying theme of the paper is a question: when and why does Congress choose to modify social and/or economic behavior by establishing a regulatory agency rather than by writing a law to be enforced in the courts? This is a special case of the more general question of why politicians delegate their power to administrators. I have not sought to answer that question in any

definite way; rather, I have tried to identify some of the potential answers, most of which are mutually compatible, all of which have some support in the literature, and few of which have been dealt with systematically by modern political economists. I have ignored certain answers that appear in the literature -- the complexity of modern problems, the demands on legislator time, and so forth. These may have some effect on what Congress decides to delegate, but in the main I believe they are largely rationalizations which scholars are too quick to believe. Where politicians have the incentive, they manage to deal with complexity, and they find the time to do it. It is our job to identify those incentives and trace their implications for the formation of public policy in this country. Without denigrating the work that has been done, it is fair to say that our work is only beginning, despite the extravagant claims of some authors to the contrary.

FOOTNOTES

1. The Congressional predilection for regulatory agencies is a genuine stylized fact. In addition to Allan Meltzer, who commissioned this paper, Buchanan and Tullock believe that

> Economists of divergent political persuasions agree on the superior efficacy of penalty taxes as instruments for controlling significant external diseconomies which involve the interaction of many parties. However, political leaders and bureaucratic administrators, charged with doing something about these problems, appear to favor direct controls (1975, p. 139).

And Charles Schultze, who takes a more sanguine view of government intervention than do Meltzer, Buchanan and Tullock comments

> But our political system almost always chooses the command-and-control response and seldom tries the other alternative, regardless of whether that mode of response fits the problem (1977, p. 13).

2. Defining regulation in terms of the administrative process is the preference of many economists who work in the area. Schultze, for example, notes that ''The virtually universal characteristic of public policy in these circumstances [externalities -- MF] is to start from the conclusion that regulation is the obvious answer; the pricing alternative is never considered'' (1977, p. 47). Similarly, Noll (1979) argues that the most useful definition of regulation involves a

focus on bureaucratic authorities operating in accord with procedural rules such as those codified in the Administrative Procedures Act.

3. Stigler (1971) adopts a similarly broad view of economic regulation, specifically including excise taxes (whiskey, playing cards), import quotas, protective tariffs, some subsidies, and direct legislative enactments which advantage one economic interest vis-a-vis others.

4. Of Sherman, Cushman (1941, p. 177) writes:

> This was a disciplinary measure designed to forbid and punish. In its legislative history was no suggestion that its enforcement be given to an independent administrative agency patterned after the three-year-old Interstate Commerce Commission. The prohibitions of the Act were made absolute, and the Department of Justice and the courts were charged with its execution.

5. This dichotomization of the administrative and legal systems is an admitted over-simplification. In contemporary America the enforcement of few public policies is left entirely to the initiative of the individual litigant; administrative involvement is the rule. Conversely, even where the administrative system has primary responsibility for the enforcement of a statute, the courts loom in the background. Some would contend that this reality vitiates the usefulness of the distinction I have drawn.

I am sensitive to such arguments but would offer two comments in reply. First, the arguments reflect a contemporary, if not an

ahistorical perspective. At one time the dichotomy was clearly perceived and was the basis for major political conflict (see note 6 below). If, as the years went by, delegation of legislative power to administrators became easier (ie. less controversial), and seemingly more "natural," the historical question remains: what factors led to increased reliance on the administrative process? Second, even if historical evidence of a political choice between administrative and legal forms of regulation were not in evidence, the logical question would remain: why not attempt to regulate without reliance on bureaucratic entities? The scientific status of this question is no different from that with which this paper began: why are logically possible though empirically untried "market-like" mechanisms not adopted as regulatory instruments? In either case it is a meaningful question to ask what factors underlie the contemporary reliance on the administrative agency for the implementation of collective decisions.

6. Again, Cushman (1941, p. 45) observes:

> The first major problem and also the last which confronted those working for the federal regulation of railways was whether or not a commission should be set up to administer the law. It was generally agreed that federal control had become imperative, but those supporting such control were divided into two camps. The first, led by Judge Reagan of Texas, and chairman of the House Committee on Interstate and Foreign Commerce, demanded drastic regulation by statute to be enforced directly by the Department of Justice and the

courts. Reagan was able to carry the House with him down to the very last. The other group, headed by Senator Cullom, a former governor of Illinois insisted that federal regulation of railways should be administered through a commission set up for that purpose. This vital difference of opinion persisted throughout the entire period of discussion and was only adjusted, as we have seen, in conference committee a few weeks before the actual passage of the Act of 1887.

7. Mitnick's (1980) exhaustive survey of the literature on regulation contains a 162 page chapter on regulatory origin. The chapter is short on summary and synthesis, a lack which appears to reflect the state of the literature more than the failing of the author.

8. In another work (Kolko, 1963) generalizes his thesis to other regulatory interventons of the Progressive era such as the establishment of the Federal Trade Commission and the Federal Reserve System.

9. Ordering 5 seems at first glance empirically unlikely. Actually, it might be rather common where the logical custodian of a new regulatory mandate is an existing agency unfriendly to the soon-to-be-affected parties. In recent years, for example, environmentalists have been somewhat choosy about the bureaucratic enforcers of environmental laws; business interests too are not unconcerned about such decisions.

10. Spann and Erickson (1970) and Zerbe (1980) differ over the welfare

effects of ICC regulation as of 1890. Even if we accept Zerbe's contention that the effects were positive, however, we are not logically driven to a public interest explanation of the 1887 Act.

11. In exploring the literature on regulatory origin I am struck by the extent to which many economists (see Hilton, 1966, for a notable exception) unnecessarily burden themselves with strict adherence to what one might call the principle of intentionality: whatever exists was deliberately planned by some pivotal actor. At the individual level intentionality is the linchpin of modern political economy, but it is a fallacy to transfer that principle to the collective level. We now know that in the abstract majority rule has little in the way of consistency, let alone responsiveness properties (eg. McKelvey, 1979). Even in the special cases in which majority rule is well-behaved (ie. single-peaked preferences in the unidimensional case) common political institutions may deflect the process from the theoretically expected outcome (eg. Romer and Rosenthal, 1978). Only the most naive view of the democratic political process postulates any necessary correspondence between political outcomes and the desires of any particular actor.

12. As I will mention in connection with the uncertainty model below, however, political actors were aware that court decisions would determine the resolution of ambiguities in the law of 1887.

13. Note that the legislator might adopt such an objective function for several different reasons. Most obviously, one might suppose that

probability of re-election is directly related to the net benefits procured by the legislator. But even a selfless legislator might decide that the proper function of the dutiful representative is to maximize district net benefits. Thus, interest and duty may be mutually reinforcing for the individual legislator, though this is not to say that the sum total of individually maximizing legislators would produce collectively desirable outcomes. For an analysis of the disjunction see Weingast, Shepsle, and Johnsen, (1980).

14. See for example, Stigler (1971), Posner (1974). Interestingly, though, public interest models continually re-emerge in the literature, eg. Levine (1980), Zerbe and Urban (1980). Even some VPI scholars do not completely dismiss public interest notions (Mackay and Reid, 1979).

15. The full Progressive litany is summarized by Mitnick (1980, p. 31):

> the administrative agency -- whether bureau or commission -- is supposed to be characterized by expertise in its managers/heads and staff, who are able to give full-time attention to oversight of the regulated area; capability to handle large numbers of cases rapidly and relatively economically through specialization of function; continuity of policy through continuity of personnel and institutional existence and actions, and ability to plan; flexibility in its ability to respond to changing environmental and technological conditions; absence of political distortions through independence and judicialization of its procedures;

> and representation of the public and other interested parties through procedures like public hearings and staff representation of the public interest.

16. Bear in mind that given a proposed level of regulation, x, all net losers would prefer that it be implemented through the administrative process. This is not to say that they would support the level of regulation, x, however. The question of the ultimate choice of level and form of regulation by the legislature is considered in the text below.

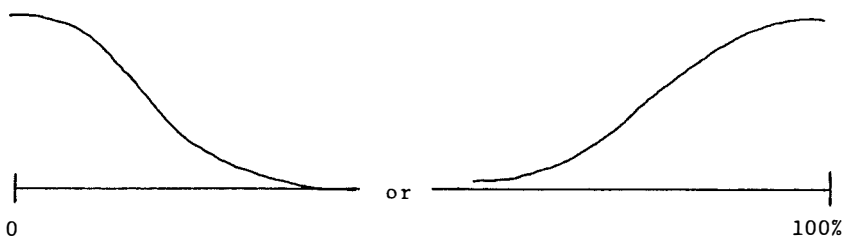
17. This interpretation of the amendment process is not woven out of whole cloth. It is actually a reasonably faithful, if highly simplified, description of the legislative histories of the House and Senate bills of 1887.

18. The third natural question, when is the winner, x^* or x^{**} positive, is implicitly answered in this formulation. That is, $L(x^*)$ defeats all amendment including $L(0)$ if $x^* \neq 0$, and similarly for $A(x^{**})$. Thus, if the winner $L(x^*)$ or $A(x^{**})$ provides for a positive level of regulation, that will be the choice of the legislature.

19. Actually, given the judicialization of agency proceedings and the complexity of administrative law, it may well be that the administrative alternative allows legislators and lawyers to play a cooperative positive-sum game.

20. For legislators whose ideal points are near the extremes of no

regulation or complete nationalization, assume a truncated utility function such as



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