

# Book Reviews

## The Politics of Regulation

*The Politics of Regulation*. Edited by James Q. Wilson. New York: Basic Books, Inc., 1980. Pp. xii, 468. \$18.95.

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Perhaps only a political scientist would regard as “controversial” the proposition that there is a politics of regulation.<sup>1</sup> Consider some recent events: Congress nearly emasculated the Federal Trade Commission.<sup>2</sup> Deregulation initiatives<sup>3</sup> generated fierce and protracted opposition from regulated interests. New regulatory proposals,<sup>4</sup> and once-obscure regulatory appointments, produced hard-fought battles. Even regulatory-reform proposals directed at administrative technique and judicial review—hardly the stuff of which political controversy is ordinarily made—became mired in prolonged conflict.<sup>5</sup> In truth, regulation has become the Stalingrad of domestic political warfare.

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1. See Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 357 (J. Wilson ed. 1980) [book hereinafter cited without cross-reference].

2. See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980); HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, FEDERAL TRADE COMMISSION IMPROVEMENTS ACT OF 1979, H.R. REP. NO. 181, 96th Cong., 1st Sess. 9 (1979) (recommending legislative veto of agency rules, exemption of savings and loan associations from agency jurisdiction, and prohibition of agency actions under Lanham Trademark Act); SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, FEDERAL TRADE COMMISSION ACT OF 1979, S. REP. NO. 500, 96th Cong., 1st Sess. 5-7 (1979) (proposing limitation of FTC regulation of insurance business, commercial advertising, and used car warranties).

3. *E.g.*, Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Railroad Transportation Policy Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

4. *E.g.*, Comprehensive Environmental Responses, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980); 42 C.F.R. §§ 124.501-.607 (1979) (Hill-Burton Act regulations). The Hill-Burton Act regulations were challenged in *American Hosp. Ass'n v. Harris*, 477 F. Supp. 665 (N.D. Ill. 1979) (denying motion for preliminary injunction against regulations taking effect).

5. *E.g.*, S. 401, 97th Cong., 1st Sess. (1981) (Regulatory Cost Reduction Act of 1981) (providing, *inter alia*, for judicial review of regulatory impact analysis); S. 67, 97th Cong., 1st Sess. (1981) (Administrative Procedure Act Amendments of 1981) (providing for de novo review of agency interpretations of statutes, eliminating any presumption of validity of agency regulations, and imposing more demanding standard of review on agency actions). Each of these measures was the subject of considerable controversy during the Ninety-sixth Congress, S. 67 having actually passed the Senate.

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How is this battle actually being waged? What is at stake? What is the likely outcome? In *The Politics of Regulation*, Harvard political scientist James Q. Wilson seeks to shed light on these questions. He has commissioned nine essays on individual regulatory and enforcement programs, adding a magisterial essay of his own that attempts to integrate the major implications of the case studies into a broad theoretical perspective on regulatory politics and behavior. To the meager regulatory theories that now underlie discourse on the subject, Wilson would add more enriching fare.

### I

By insisting on a distinctive politics of regulation, Wilson is not simply reiterating the obvious. He is stalking bigger game: the "economic" theory of regulation advanced by the economist George Stigler,<sup>6</sup> and "political" theories advanced by political scientists such as Theodore Lowi<sup>7</sup> and Marver Bernstein.<sup>8</sup>

In classic Chicago-school fashion, Stigler's theory holds that regulation is wholly epiphenomenal. The activity of regulation is not actuated by autonomous political or ideological factors; rather, it reflects the play of market forces. In this view, firms seek to preserve or expand their market shares by demanding protection from competition. Politicians, responding to this demand, supply influence, legal authority, and a regulatory apparatus that imposes costs, often at prohibitive levels, on actual or potential competitors of the regulated firms. The agency, by building walls around the regulated sector, resembles a medieval lord who protects the economic interests of those sellers fortunate or prescient enough to have already gained shelter within the citadel. Consumers must either pay the monopolistic prices that the sheltered firms can command or manage to do without. Of course, politicians in the legislature and in the agency can prescribe legal rules capable of constraining the market power of regulated firms. In deciding whether and how to exercise this control, however, politicians seek to maximize their self-interest. They know that organizational and political activity generates different costs and benefits for different interests,<sup>9</sup> that regulated firms can better bear those costs and reap those benefits than consumers, and that firms

6. See Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 1 (1971).

7. See T. LOWI, *THE END OF LIBERALISM* 125-56 (1969).

8. See M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 263-67 (1955).

9. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 21, 33-36 (rev. ed. 1971).

can more easily furnish politicians what they most desire—political, programmatic, and financial support of various kinds, and a secure job upon retirement from public life.<sup>10</sup> Accordingly, politicians succor the regulated firms and neglect the consumer. The agency becomes the communications center of an ongoing cartel, the signaling apparatus for a legalized conspiracy in restraint of trade. The relationship of regulatory agency to regulated industry becomes one of abject subordination, a debasement reflected in rhetorical metaphors: “indentured servant,” “tool,” and “captive.”

In contrast to Stigler's concern with the *economic* calculations of politicians and regulated firms, other students of regulation emphasize techniques of *political* influence: the formation of coalitions, the weaving of intricate networks of influence over agency officials, the appointment of sympathetic officials, the interplay of legal rules and discretion, and the manipulation of symbols.<sup>11</sup> Yet political and economic theories of regulatory behavior predict much the same thing: domination by regulated interests over the personnel, policies, and performance of regulatory agencies.

Since the mid-1960s, this shared academic view of regulatory behavior has shaped the attitudes of policymakers, scholars, “public interest” activists, journalists, and ordinary citizens. Doubtless, this influence is attributable less to the popularity of the *Bell Journal of Economics and Management Science* and of the classics of antipluralist political science than it is to the efforts of enterprising, politically active observers of regulation, who have found congenial the theorists' descriptive propositions, if not always their policy prescriptions. Ralph Nader and his epigones,<sup>12</sup> “consumer oriented” congressional committees and their burgeoning staffs,<sup>13</sup> investigative journalists,<sup>14</sup> and others in positions of influence have distilled from these theories several essential premises that constitute a kind of reformer's creed. First, the behavior of a regulatory agency, and indeed of government

10. See Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 85-86 (1969); Stigler, *supra* note 6, at 12-13.

11. See, e.g., M. BERNSTEIN, *supra* note 8, at 278-79; M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 188-94 (1977); H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 1-26 (1962); T. LOWI, *supra* note 7, at 288-97.

12. See, e.g., R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION* 311-25 (1970); J. TURNER, *THE CHEMICAL FEAST* 3-4 (1970).

13. See, e.g., HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, *COMM. ON INTERSTATE AND FOREIGN COMMERCE, FEDERAL REGULATION AND REGULATORY REFORM*, H.R. DOC. NO. 134, 95th Cong., 1st Sess. (1976); SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., *STUDY ON FEDERAL REGULATION* (Comm. Print 1977) (five volumes).

14. See, e.g., L. KOHLMEIER, *THE REGULATORS* 29-128 (1969); M. MINTZ & J. COHEN, *AMERICA, INC.* 237-53 (1971).

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in general, is determined by the political power of those interests seeking to influence it. Second, the political power of those interests depends on their economic resources (for example, dollars, lawyers, control over jobs) and on their special access to politicians. Third, regulatory politics is at bottom a Manichean struggle between a discrete and powerful "corporate interest" and an equally well-defined, but politically feeble, consumer (or "public") interest. Finally, that struggle, which is nothing but the interaction of those two vectors of force, leads to only one, melancholy outcome.

This creed, elaborated and embellished in a rhetoric suitable for public consumption, was rendered as a theory of agency "capture." The theory soon acquired the commanding status of conventional wisdom, confidently asserted and rarely questioned. So powerful did its dominion become that an entire generation of congressional staffers, political activists, journalists, and students has come to political maturity armed with its certitudes.

The capture theory could not have taken hold as it did, of course, had it not accurately and vividly described the conditions of many, perhaps most, regulatory agencies in the early 1970s. Certainly, the symptoms of regulatory pathology to which we have become so accustomed—stifled competition, gross inefficiency, hostility to public participation in agency processes, frustration of innovation, administrative chaos and delay, secrecy, absence of long-range planning, and indifference to competing social objectives—amply justified the jeremiads of the agencies' critics, as most of the case studies in the Wilson volume confirm. George Stigler, Theodore Lowi, and Ralph Nader could find overwhelming evidence for their indictments in the Civil Aeronautics Board's refusal to certify new trunk lines,<sup>15</sup> its unauthorized imposition of a route moratorium,<sup>16</sup> and its flagrantly illegal administration of the fare structure.<sup>17</sup> Similar support could be found in the Food and Drug Administration's failure to implement the efficacy requirements of the 1962 drug legislation,<sup>18</sup> and in much other regulatory misbehavior.

Nevertheless, even the most ardent capture theorist should have been struck by certain persistent anomalies and contradictory data. Many old-line regulatory agencies, for example, had succeeded ad-

15. See Behrman, *Civil Aeronautics Board*, in *THE POLITICS OF REGULATION* at 75, 88.

16. See *id.* at 97-98.

17. See *Moss v. CAB*, 430 F.2d 891, 902 (D.C. Cir. 1970) (tariffs established through cooperation of airlines and CAB without public notice and hearing were unlawful).

18. See *American Pub. Health Ass'n v. Veneman*, 349 F. Supp. 1311, 1317 (D.D.C. 1972).

mirably in performing some of the statutory tasks that Congress had thrust upon them. They had nurtured fledgling transportation industries in a developing economy, created a vast and intricate communications network to unify a far-flung people, and protected regional and rural interests in an increasingly urban society. If some inefficiency was the price of these achievements, who could say that the redistributive gains did not justify it?<sup>19</sup> Who could say that messy political, administrative, and operational facts not easily incorporated into economists' models did not appropriately shape agency behavior? If the agencies now seemed anachronistic, was that because conditions had changed or because economists' theories had changed?

More important, the capture theory could not readily explain certain stubborn regulatory patterns. The Federal Power Commission (FPC), for example, had long maintained rates for interstate natural gas far below the levels prevailing in the intrastate market, thereby discouraging production and encouraging wasteful uses,<sup>20</sup> hardly a strategy calculated to endear the FPC to politically well-connected producers. If the FPC was indeed captured, its captors must have been those consumers in the nonproducing states fortunate enough to be hooked into a utility system with long term supply contracts. Similarly, the Securities and Exchange Commission (SEC) had become the scourge of the corporate community, regulating it vigorously in the interests of the uninformed investor. The Office of Civil Rights (OCR), established in the Department of Health, Education, and Welfare shortly after the enactment of the 1964 Civil Rights Act, had been remarkably effective in securing the racial integration of southern schools by the early 1970s despite well-organized, politically potent opposition.<sup>21</sup> Did consumers of natural gas, small investors, and southern blacks possess economic power or political influence that had somehow escaped notice, an influence capable of dictating policy? Were the FPC, SEC, and OCR merely exceptions that proved the rule of agency subservience to the regulated? Or was the conventional wisdom simply wrong?

The answer was not long in doubt. The anomalies proliferated so

19. Welfare economists traditionally define a point B as Pareto superior to point A if efficiency gains are so great that gainers *could* compensate losers and still be better off at point B than at point A. Politicians, however, may properly conclude that such a move is not acceptable unless the losers are *actually* compensated by the gainers, and that where this transfer is not feasible, point A is to be preferred to point B despite B's greater efficiency.

20. See S. BREYER & P. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 69-72 (1974).

21. See Rabkin, *Office for Civil Rights*, in THE POLITICS OF REGULATION at 304, 312-13.

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rapidly during the Nixon-Ford years that the capture theory's predictions became more exception than rule. Administrations profoundly sympathetic to corporate interests actively supported or acquiesced in a veritable flood of new regulatory programs that business bitterly opposed.<sup>22</sup> Between 1970 and 1975, at least thirty important regulatory statutes were enacted, establishing new agencies and vastly expanding the authority of existing ones.<sup>23</sup> In many of those measures, the hands of Ralph Nader and of other capture theorists were plainly visible.<sup>24</sup> When the Carter Administration acceded to power in 1977, this regulatory establishment, swollen to unimagined dimensions, was entrusted to many former (and perhaps future) public interest activists.<sup>25</sup> Strongly committed to the ideologies of consumerism, environmentalism, and community action, those individuals accepted uncritically the premises of the capture theory, even though they had devoted their careers to struggling against its political implications. Their official positions now confirmed its inadequacy. Far from feeling indentured to the regulated industries, those officials were profoundly suspicious of them, if not actually hostile. They quickly seized the opportunity to act on those suspicions.<sup>26</sup>

The capture theory was devastated by these remarkable developments;<sup>27</sup> even refinements in the theory could not rehabilitate it. It was plausible to think, for example, that agencies that regulate many industries, such as the Federal Trade Commission and the Environmental Protection Agency, might be less vulnerable to capture than those that regulate only one, but this notion left unexplained the

22. For example, the Nixon Administration actively supported federal regulation of environmental quality and occupational health and safety, albeit in a somewhat different form than the statutes ultimately enacted by Congress. See Kelman, *Occupational Safety and Health Administration*, in *THE POLITICS OF REGULATION* at 236, 241-42; Marcus, *Environmental Protection Agency*, in *THE POLITICS OF REGULATION* at 267, 273.

23. See Lilley & Miller, *The New "Social Regulation,"* *PUB. INTEREST*, Spring 1977, at 49.

24. See, e.g., Katzmann, *Federal Trade Commission*, in *THE POLITICS OF REGULATION* at 152, 177, 423 nn.61-63 (reorganization of FTC in early 1970s reflected recommendations of Nader report and ABA Commission study); Marcus, *supra* note 22, at 270-72 (1970 clean-air amendments significantly influenced by Ralph Nader).

25. Prominent examples include Joan Claybrook, a fierce critic of the automobile industry who became its safety regulator as head of the National Highway Traffic and Safety Administration; Michael Pertschuk, who designed much of the consumer legislation of the 1960s and 1970s as a Senate aide and became chairman of the Federal Trade Commission; and Carol Tucker Foreman, a consumer activist and *bete noire* of the food industry who became its regulator as Assistant Secretary for Food and Consumer Affairs in the Department of Agriculture.

26. See, e.g., *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1155-56 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (upholding refusal of FTC Chairman Pertschuk, who advocated regulation of television advertising in speeches, interviews, and periodicals, to excuse himself from rulemaking proceedings).

27. Wilson, *supra* note 1, at 361-63.

deregulation policies of several single-industry agencies, such as the Federal Communications Commission under Chairman Charles Ferris, the Interstate Commerce Commission under Chairmen Dan O'Neal and Darius Gaskins, and the Civil Aeronautics Board under Chairmen John Robson, Alfred Kahn, and Marvin Cohen.<sup>28</sup> Another contention, that changes such as deregulation are merely cosmetic, was belied by the fierce opposition that those policy shifts in fact aroused among some of America's most powerful corporations and unions and their congressional allies.<sup>29</sup>

Prevailing theories, it appears, cannot begin to explain much of the observed political reality of the last decade. How, then, are we to understand it? Wilson provides us with some guidance, but we cannot evaluate his offering without first considering an element of regulatory politics to which his essay devotes surprisingly little attention: the changing character of regulation since 1965.

I have mentioned the striking fact that many who most vigorously attacked the performance and legitimacy of the regulatory apparatus prior to 1977 soon found themselves in firm control of its machinery. From their official perches, they administered a regulatory domain vastly enlarged through their own heroic efforts. Is this result paradoxical? I think not. It rather reflects dynamic forces that animated the regulatory explosion of the 1970s and will, *mutatis mutandis*, continue to shape the regulatory politics of the 1980s. Three forces are especially noteworthy. First, a distinctive mode of public intervention, so-called "social" regulation, has emerged with unique political, social, and economic characteristics. Second, markets have evolved in ways highly subversive of old-line "economic" regulation and highly conducive to social regulation. Third, important institutions have developed in ways likely to sustain and augment these forces.

*Social Regulation.* Proponents of the new regulation, many of whom adhere to the capture theory, stress that it differs fundamentally from the old regulation of the New Deal era.<sup>30</sup> They point out that "economic" or cartel regulation of a market was designed to control rates, entry, and basic patterns of service, that by suppressing competitive forces, such regulation often generated substantial efficiency losses and distributional inequities, and that its legal and administra-

28. See Behrman, *supra* note 15, at 104-20 (discussing CAB deregulation).

29. See *id.* at 117-20. Preliminary indications are that their opposition may not have been myopic. See Pace, '80 Airlines Loss to be a Record, N.Y. Times, Dec. 26, 1980, § D, at 1, col. 6 (domestic airlines reported losses of between \$150 and \$200 million during 1980).

30. See M. GREEN & N. WAITZMAN, BUSINESS WAR ON THE LAW at iii (1979).

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tive machinery was so susceptible to industry manipulation that it amounted to "corporate socialism," pernicious in origin<sup>31</sup> and perverse in execution. The newer "social" regulation, in contrast, was designed to enhance health, safety, the environment, equal opportunity, and the quality of life. By internalizing the social costs generated by private decisions, it would minimize them. Innovative legal and administrative arrangements would ensure that capture did not occur. Social regulation would not simply yield economic efficiency; it was, above all, an essential element of a just and humane society, protecting those most vulnerable to the depredations inevitable in an industrial setting. With perfect consistency, then, reformers could oppose economic regulation and support social regulation.

If the aspirations implicit in the theoretical foundations of social regulation could readily be implemented, the politics of regulation would almost certainly have taken a very different form than it has. In fact, this account, though accurate as far as it goes, neglects important political, economic, and administrative dimensions of social regulation that determine the nature and scope of regulatory conflict. Of these, I shall discuss four.

First, most programs of social regulation confer exceedingly broad regulatory authority, often extending to all industries in the society, all firms doing business with the government, or all federally assisted activities. The ambit of social regulation, then, far exceeds that of classic economic regulation, which embraced firms within only a single industry. Cross-industry jurisdiction may well reduce the likelihood that the agency will be captured by any particular industry, but it also raises certain obstacles to effective regulation: the need for (and paucity of) information, expertise, resources, and political support, and the need to fine-tune policies and rules to accommodate the far greater diversity of the regulated domain. When those high demands are not met, regulatory failure, igniting intense political controversy, is likely.<sup>32</sup>

Second, social regulation entails many of the same kinds of undesirable consequences as economic regulation, while spreading those consequences across far larger sectors of the economy. The costs of complying with uniform standards, whether those of the Environmen-

31. For the classic exposition of the theory that regulation was advanced at the behest of large corporations in order to frustrate competition, see G. KOLKO, *RAILROADS AND REGULATION 1877-1916* (1965), and G. KOLKO, *THE TRIUMPH OF CONSERVATISM* (1963). The historical accounts in *The Politics of Regulation* tend to support Wilson's conclusion that recent scholarship "demolish[es]" Kolko's argument. Wilson, *supra* note 1, at 365 n.9.

32. See Schuck, *Regulation: Asking the Right Questions*, 11 *NAT'L J.* 711, 711-17 (1979).



tal Protection Agency or of the Interstate Commerce Commission, are similar in character. They often render marginal firms unprofitable, discourage new entry and investment, stifle innovation, regressively tax consumers when passed on in product prices, diminish consumer choice, surround capital investment decisions with great uncertainties, and violate norms of horizontal equity. This is not to deny that social regulation often generates benefits; doubtless it does, although available data do not establish conclusively or even persuasively that benefits always exceed costs.<sup>33</sup> The point here is that those costs are no less problematic simply because the regulation is social rather than economic. If anything, the contrary is true.<sup>34</sup>

Third, social regulation seeks to advance many ends—for example, life, health, racial equality, ecological balance—that cannot readily be objectively valued. Even if a satisfactory method for doing so existed, any effort to quantify explicitly those ends or to trade them off against others would be highly vulnerable to political attack as callous, indifferent to human suffering, and subservient to corporate interests.<sup>35</sup> Because those ends are embraced with special, even theological, fervor and are couched in the constraint-denying language of “rights,”<sup>36</sup> social regulation often assumes a highly ideological, uncompromising charac-

33. See, e.g., L. BACOW, BARGAINING FOR JOB SAFETY AND HEALTH 24-50 (1980); T. SOWELL, AFFIRMATIVE ACTION RECONSIDERED 34-39 (1975). On the other hand, the data typically fail to establish conclusively that benefits do not exceed costs. See Schuck, *supra* note 32, at 711-12. Given limitations on information and on the conclusiveness of cost-benefit analysis of most programs of social regulation, perhaps the most that can be said is that there are strong reasons to doubt that all social regulation is worth what it costs.

34. Because of the broad sweep of environmental and workplace regulation, the costs of even small or isolated inefficiencies in such efforts could loom quite large relative to those of a clearly inefficient program of economic regulation, such as surface transportation regulation by the Interstate Commerce Commission. This is especially true for environmental regulation, which often requires extensive capital investment. Thus, the welfare loss associated with the ICC railroad regulation was estimated at \$742 million per year as of 1972. See Levin, *Railroad Rates, Profitability and Welfare Under Deregulation* (forthcoming 12 BELL J. ECON. (1981)). In contrast, the costs of meeting a single proposed environmental standard, that for ozone, was estimated by the Council on Wage and Price Stability in the range of \$14.3 to \$18.8 billion per year, with no demonstrated gains in long-term health effects. See Council on Wage and Price Stability, Report of the Regulatory Analysis Review Group 2 (Oct. 16, 1978) (on file with *Yale Law Journal*). The Environmental Protection Agency has estimated the costs of meeting its New Source Performance Standard for coal-fired utilities to be \$4.1 billion in 1995. In their recent study, Ackerman and Hassler concluded that this standard will in fact exacerbate air pollution in certain parts of the country. See Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1540-41 (1980).

35. See, e.g., M. GREEN & N. WAITZMAN, *supra* note 30, at 63-75 (criticizing use of market incentives and cost-benefit analyses to determine allocation of health, safety, and environmental protection).

36. Cf. R. DWORKIN, TAKING RIGHTS SERIOUSLY at xi (1978) (possession of rights permits individuals to trump collective goals).

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ter that encourages efforts to expand and to perfect regulatory controls with little regard to costs.<sup>37</sup>

Fourth, quite apart from the nature of its ends, the types of risks with which social regulation is increasingly concerned—for example, the dangers of environmental or biological insults, of invidious discrimination, of offenses to one's personal integrity<sup>38</sup>—are often difficult to identify, or literally invisible. In an important sense, their very existence may be a function of precarious scientific judgments, the state of laboratory technology, and ill-defined or inconsistent public attitudes towards uncertainty. The contingent, evanescent character of these risks, the fundamental human values that they implicate, and the large number of people affected ensure that the politics of regulating these risks will be volatile. They will be rooted less in fact and analysis than in theory and *ipse dixit*, less in reasoned inferences from human experience than in extrapolations from transitory and inevitably speculative laboratory findings. The question, "How high shall the rate of return to natural gas producers be?" is a formidable intellectual and political problem, but the question, "How safe shall the air be?" is far more controversial and elusive. Finally, the unusual difficulty in predicting outcomes of health, safety, and other social regulation tends to create a broad zone of uncertainty and subjective judgment in which regulators' redistributive efforts, inefficient as such schemes may be, will nonetheless flourish.<sup>39</sup>

To the extent, then, that social regulation supplements or supplants economic regulation, regulatory struggle assumes new, more polarizing forms that yield less readily to persuasion, compromise, and other conventional processes of political accommodation.

*Changing Patterns of Market Failure.* The legitimacy of economic and social regulation is anchored in different kinds of market failure. The former is usually premised, rightly or wrongly, on the existence of a natural monopoly, the risk of "destructive competition," the ability of producers to extract rents, or the need to allocate scarcity.<sup>40</sup> Social regulation, in contrast, is ordinarily justified by the need to

37. See Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27, 85-91 (1979).

38. See, e.g., Basic HHS Policy for Protection of Human Research Subjects, 46 Fed. Reg. 8,386-91 (1981) (to be codified in 45 C.F.R. §§ 46.101-.124).

39. R. ZECKHAUSER, USING THE WRONG TOOL 9-11 (1981). An interesting implication of Zeckhauser's analysis appears to be that regulators bent upon redistribution will often refrain from seeking to improve their information.

40. See Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 553-60 (1979) (reviewing market failure justifications for economic regulation).

correct externalities, improve information, override socially pernicious preferences, redress inequalities in bargaining power, or ensure that services purchased with public funds meet minimum standards.<sup>41</sup>

The demand for regulation during the 1970s has reflected a new configuration of market failures and new public attitudes towards those failures. In this changed context, traditional market-failure justifications for economic regulation are increasingly suspect. Technological advances have eliminated certain apparent market failures, unleashing vital economic forces in industries long thought to be unsuited to competition. Electronic funds-transfer systems, for example, have made sluggish, artificially segmented financial institutions both fiercely competitive and increasingly innovative. Cablecasting and other technologies have rendered obsolete the scarcity justification for restriction of broadcasting franchises by the Federal Communications Commission. A host of telecommunications entrepreneurs are successfully eroding AT&T's "natural monopoly" in microwave transmission.<sup>42</sup>

Similarly, fears that unregulated industrial concentration would cause poor market performance have been somewhat allayed by a "new learning" stressing the importance of scale efficiencies, international competition, and other market-strengthening conditions.<sup>43</sup> Finally, chronic inflation has increasingly come to be viewed as a special kind of market failure for which price controls, the conventional nostrum of economic regulation, would be a poor remedy.<sup>44</sup> In short, structural changes in the economy have seriously undermined the theory and practice of economic regulation.

Social regulation, in contrast, responds to very different conditions. The kinds of market failure that purport to justify social regulation are now more prevalent, not less. In an interdependent, urban society, externalities are ubiquitous. Urbanization implies that one's activities are more likely to affect one's neighbors, and to do so in ways that cause social and private welfare to diverge. The level of these externalities, however, is not simply a function of such physical or geographical variables. It also reflects more fundamental changes in public preferences and attitudes. Regulation of smoking in public areas,

41. See M. GREEN & N. WAITZMAN, *supra* note 30, at 7-17 (reviewing market failure justifications for social regulation).

42. See Breyer, *supra* note 40, at 599-603.

43. See generally INDUSTRIAL CONCENTRATION (H. Goldschmid, H. Mann, & J. Weston eds. 1974).

44. See M. KOSTERS, CONTROLS AND INFLATION 109-17 (1975). It is a striking confirmation of the ill repute in which economic regulation is increasingly held that persistent double-digit inflation has led to few calls, even by politicians of the left, for reimposition of wage-price controls.

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for example, has not become politically salient simply because of research demonstrating adverse health effects upon nonsmokers (that link was always suspected), or because *per capita* smoking has increased (it has actually declined). Rather, nonsmokers have grown less tolerant of smokers, and have acquired the numerical strength to work their will in legislative arenas. Other consumption decisions that in an earlier day were considered entirely a private affair are today thought to affect the welfare of the larger society, even in the absence of any physical interaction. Whether those responses reflect increased altruism or greater officiousness, the universe of such “merit” goods and bads, thought to justify public efforts to influence consumption patterns, has steadily grown. And one form of intervention leads almost inexorably to others. Thus, health care for the poor was originally subsidized as a merit good. Once public dollars were involved, however, health care quickly became a highly regulated activity.<sup>45</sup>

Objective conditions and attitudinal changes have conspired to create or to exacerbate other kinds of market failure. The pronounced separation of production and consumption in a technologically sophisticated society, for example, has left consumers poorly informed about much that they consume and relatively ill-equipped to evaluate nonobvious risks.<sup>46</sup> Moreover, society increasingly values public goods, such as clean air and equal justice, that the market cannot adequately provide, and rejects a distribution of income thought to affect market behavior in undesirable ways.

Taken together, these longrun changes in social conditions and preferences suggest that, while the kinds of market failure that have traditionally supported economic regulation are receding in importance, those thought to justify social regulation are proliferating rapidly. To the extent that disputes over economic and social regulation implicate different interests, conditions, issues, processes, and dimensions

45. See, e.g., National Health Planning and Development Act of 1974, 42 U.S.C. §§ 300e-4, 300k-300t (1976 & Supp. III 1979) (establishing national health planning and development programs); Social Security Amendments of 1972, § 249F, 42 U.S.C. §§ 1320c to 1320c-19 (1976 & Supp. III 1979) (establishing Professional Standards Review Organization).

46. One court made this observation in the following way:  
Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture.  
*Micallef v. Michle Co.*, 39 N.Y.2d 376, 385, 348 N.E.2d 571, 577, 384 N.Y.S.2d 115, 121 (1976).

of conflict, these developments imply a fundamental transformation in the politics of regulation now and in the future.

*Institutional Environment.* Social regulation, I have maintained, is a broad, surging current fed by powerful tributaries. It is possible, however, that this current could be dammed or diverted. Regulation, after all, possesses its own characteristic shortcomings—Charles Wolf has labeled these “non-market failures”<sup>47</sup>—and the contemporary politics of regulation demonstrates that the existence of regulatory failure has become widely acknowledged. Despite these realities, however, the institutions that increasingly shape our politics—public interest organizations, national media, Congress, and government bureaucracies—seem far more likely, at least in the long run, to propel the regulatory tide than to restrain it.

An influential sector of nonprofit organizations staffed by a cadre of effective political activists has, in a few short years, radically altered the *dramatis personae* and scope of regulatory debate.<sup>48</sup> Due largely to their success in advocating legal reforms and developing new fundraising practices, their effective access to the political process, as Wilson observes, has been dramatically increased in the last decade or two.<sup>49</sup> Many of these groups have strong vested interests—ideological, political, and economic—in maintaining and expanding social regulation, especially those programs that they helped to establish. Their position will be buttressed by more conventional allies: regulated interests sheltered or nourished by the program,<sup>50</sup> industries whose products or services would be needed to comply with regulatory standards,<sup>51</sup> and labor unions whose members’ jobs and wage levels are thought to be protected by the program.<sup>52</sup> Groups with growing demographic importance and political power, such as blacks, Hispanics, and the elderly, seem likely to demand additional protection from the deprivations of both marketplace and bureaucracy.

The editorial and reportorial content of the national media tends

47. Wolf, *A Theory of Non-Market Failure*, PUB. INTEREST, Spring 1979, at 114.

48. See A. McFARLAND, PUBLIC INTEREST LOBBIES 2-4 (1976); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 177-78 (1974); Schuck, *Public Interest Groups and the Policy Process*, 37 PUB. AD. REV. 132, 133-34 (1977).

49. Wilson, *supra* note 1, at 385-86.

50. These need not be corporate entities, but may include the “helping professions” and others whose services are demanded by the program. See, e.g., M. DERTHICK, UNCONTROLLABLE SPENDING FOR SOCIAL SERVICES GRANTS 113 (1975) (HEW officials administering state grants needed protection against professional social workers as well as politicians).

51. These may include manufacturers of pollution control equipment, lawyers, accountants, and the like.

52. See Behrman, *supra* note 15, at 117 (airline labor “vehemently opposed” to regulatory reform or deregulation).

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to be liberal, cosmopolitan, critical of existing institutions and social conditions, and sympathetic to the reformist agenda. The debunking of established authority and institutions, the ideology of secular humanism, and the pursuit of social reform are the warp and woof of network news and public-affairs programming. These influences have almost certainly guided the public's political consciousness toward those values.<sup>53</sup> A conservative administration, especially one of avowedly parochial orientation, will provide even more grist for the adversary journalist's mill.

Fueled by an extraordinary profusion of staff resources,<sup>54</sup> Congress has become a powerful engine of social regulation. Members of the congressional committees with responsibility for an established program tend to possess strong personal, political, and policy interests in its continuation and growth. Important new regulatory statutes are unlikely to be enacted in the wake of the 1980 elections, but this seems less significant than the fact that ample, not-yet-exploited regulatory authority is already on the books. Indeed, far-reaching regulations, carrying multibillion dollar price tags, are already scheduled for issuance in the early 1980s.<sup>55</sup>

Short-term political appointees, like members of Congress themselves, cannot easily contain this dynamic process. Many regulations are mandated by existing law. Others are justified by the plausible and conservative, albeit often illusory, purpose of improving the effectiveness of those controls already in place.<sup>56</sup> Moreover, one need not subscribe to reductionist theories of bureaucracy to recognize that the career officials who administer a regulatory program tend to have personal and professional stakes in its survival and success, however measured, and to identify intensely with its goals. Finally, mounting budgetary pressures, which will intensify if congressional or constitutional limits on spending are adopted, tempt hard-pressed officials to accomplish important political and policy objectives by extracting private expenditures through regulation rather than through direct expenditure of scarce public funds.<sup>57</sup>

53. See E. EPSTEIN, *NEWS FROM NOWHERE* 200-36 (1973).

54. See M. MALBIN, *UNELECTED REPRESENTATIVES* 9-19 (1980).

55. See, e.g., Clark, *If Reagan Wants to Trump the Regulators, Here's OMB's Target List for Openers*, 13 *NAT'L J.* 94 (1981). President Reagan's 60-day freeze on the issuance of new regulations, 46 *Fed. Reg.* 11,227-28 (1981), does not apply to the independent regulatory agencies. Its long-term impact remains to be seen.

56. E.g., *Natural Gas Policy Act of 1978*, Pub. L. No. 95-261, 92 Stat. 3352 (codified at 15 U.S.C. §§ 3301-3432 (Supp. III 1979)).

57. See, e.g., C. DeMuth, *Regulatory Costs and the "Regulatory Budget"* 6-7 (Dec. 1979) (unpublished Faculty Project on Regulation, John F. Kennedy School of Government, Harvard University).

None of this is to say, of course, that the outcome of any particular regulatory struggle is preordained or that regulatory growth is inexorable. The instances of deregulation, largely confined thus far to the realm of economic regulation, testify eloquently to the contrary. So do some early actions of the Reagan administration. Nevertheless, the interests supporting regulation will often prevail, especially where the struggle is waged in the administrative and judicial arenas, in which they are more influential, rather than in the legislative arena.

### III

Wilson wishes to clear away the intellectual debris left by this whirlwind of change, and to fashion in its stead a theoretical framework that can better account for the raging political battles over regulation. He advances somewhat ambivalent claims for his construction. Eschewing any pretense to rigor, assuring us that the "discipline" of political science is "as inelegant, disorderly, and changeable as its subject matter,"<sup>58</sup> he nonetheless aspires to identify "continuities, if not cosmic generalizations" about regulation.<sup>59</sup> Indeed, he hopes to approach "[a] complete theory of regulatory politics."<sup>60</sup> This confusion is heightened by Wilson's failure to clarify precisely what it is that his generalizations are supposed to explain.<sup>61</sup>

A "complete theory of regulatory politics," or even a comprehensive set of "continuities," would seek to explain at least the following phenomena: the appearance of a regulatory proposal on the political agenda; the ability of that issue to attain priority over all the other issues pressing for recognition and resolution by the political system; the adoption of the proposal in a particular legislative or administrative form; its subsequent institutionalization in an administrative milieu; the staffing patterns for the regulatory program; the substantive decisions resulting from the regulatory activities; and the program's evolution, which occasionally leads to its eventual demise.

The essays in Wilson's book cast a somewhat uneven light on these matters, illuminating some and neglecting others. The chapter on electric utility regulation, for example, presents a rather confusing, apo-

58. Wilson, *supra* note 1, at 363.

59. *Id.* at 391.

60. *Id.* at 372.

61. Wilson affirms that "[a]nyone who purports to explain the behavior of regulatory agencies must first make clear what behavior is worth explaining." *Id.* at 372. Wilson himself fails to do so, however, noting only that "industry-serving behavior"—an ambiguous and problematic concept in its own right—is too narrow a focus. *Id.* at 372-73.

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litical picture of its political origins. Utility tycoon Samuel Insull, we are told, advocated *state* regulation of his industry “as an alternative to local competition and political bargaining.”<sup>62</sup> Several obvious questions are ignored: Why would a local utility like Commonwealth Electric not have preferred regulation at the municipal level, which was within the orbit of its influence? Why did Insull, contrary to other utility entrepreneurs, not fear municipal ownership?<sup>63</sup> Why did industrial and commercial consumers of power, presumably influential advocates for stringent regulation, play no discernible political role? Despite such omissions, however, the book as a whole provides an important corrective to reductionist explanations of regulatory origins. Its case studies, for example, reveal that some agencies, such as the Civil Aeronautics Board, were created as a result of political pressures from the regulated industry,<sup>64</sup> that some, such as the Shipping Board, now the Federal Maritime Commission, were established over the industry’s fierce opposition,<sup>65</sup> and that others, such as the Office of Civil Rights, began without regulated interests being much involved one way or the other.<sup>66</sup>

Wilson’s most distinctive contribution to regulatory theory is his effort to systematize this diversity. Constructing a four-cell matrix based on the distribution of the costs and benefits of any particular regulatory scheme,<sup>67</sup> Wilson distinguishes four “political situations” that reflect different patterns in which issues are generated and coalitions formed. *Majoritarian politics* occurs when both costs and benefits are widely distributed; the Social Security and Sherman Acts are offered as examples.<sup>68</sup> In this mode, interest-group activity is minimal, presumably because of organizational “free-rider” problems.<sup>69</sup> *Interest-group politics* occurs when both costs and benefits are narrowly distributed; the labor laws and the Shipping Act are mentioned.<sup>70</sup> Here, specialized but highly motivated interests compete; typically, the result is compromise. *Client politics* occurs when costs are widely distributed but benefits are concentrated; state licensing laws are

62. Anderson, *State Regulation of Electric Utilities*, in *THE POLITICS OF REGULATION* at 3, 6.

63. *See id.* at 6-7.

64. *See* Behrman, *supra* note 15, at 79-85.

65. *See* Mansfield, *Federal Maritime Commission*, in *THE POLITICS OF REGULATION* at 42, 43-48.

66. *See* Rabkin, *supra* note 21, at 309-12, 335-37.

67. Wilson, *supra* note 1, at 366-67.

68. *Id.* at 367-68.

69. *See* M. OLSON, *supra* note 9, at 14-15.

70. Wilson, *supra* note 1, at 368. *But cf.* Mansfield, *supra* note 65, at 47 (Shipping Act enacted under conditions of majoritarian politics).



cited.<sup>71</sup> Ordinarily, the special interests that benefit have the field to themselves, as the cost-bearing consumers or taxpayers have little incentive to organize in opposition. Finally, *entrepreneurial politics* occurs when benefits are widely distributed and costs are highly concentrated; environmental and auto-safety regulation are given as examples. In this mode, a political entrepreneur like Ralph Nader or Estes Kefauver somehow manages to mobilize diffuse public concerns and to overcome strong resistance by the regulated sector.<sup>72</sup>

This typology is both original and provocative,<sup>73</sup> suggesting patterns of regulatory behavior far richer and more complex than those conjured up by the bromidic axioms of capture theory. Emphasizing the importance of the motivations of regulatory officials, Wilson uncovers further layers of meaning in regulatory behavior. Thus, he distinguishes among *careerists* motivated by organizational bureaucratic concerns; *politicians* ambitious for higher appointive or elective office; and *professionals* responsive to norms and interests emanating from the larger occupational community outside the agency.<sup>74</sup> This analysis is buttressed by two excellent case studies—one on the Anti-trust Division of the Justice Department,<sup>75</sup> the other on the Federal Trade Commission<sup>76</sup>—that demonstrate how agency routines, case selection, interbureau conflict, and regulatory policies are shaped by the distinctive training, professional orientation, and career paths of staff lawyers and economists. Analyses of the Office of Civil Rights and of the airline-deregulation controversy also remind us that academic theories and politically unconventional ideas can profoundly influence the course of administrative law and regulatory *realpolitik*.

Despite these considerable virtues, however, Wilson's analytical construct is ultimately of little value to one who would *predict* regulatory behavior rather than simply explain it *ex post*. Most of the important questions remain unanswered and many new ones are raised. Thus, Wilson suggests that entrepreneurial politics has become a com-

71. Wilson, *supra* note 1, at 369-70. In noting that the origins of the Civil Aeronautics Board and state public utility commissions differ from the predicted pattern of client politics, *id.* at 369, Wilson indirectly acknowledges that his categories do not adequately explain the complexities of regulatory politics.

72. *Id.* at 370-71.

73. For an earlier elaboration of Wilson's typology, see Wilson, *The Politics of Regulation*, in *SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT* 135, 141-46 (J. McKie ed. 1974).

74. Wilson, *supra* note 1, at 374-82.

75. Weaver, *Antitrust Division of the Department of Justice*, in *THE POLITICS OF REGULATION* at 123.

76. Katzmann, *supra* note 24, at 152.

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mon feature of regulatory life,<sup>77</sup> yet that hardly constitutes a theory or even an explanation. The political arena, after all, has always been thick with policy entrepreneurs: congressional staffers searching for a “big issue,” special interest lobbyists stalking competitive advantage or special benefits, public interest advocates pursuing their visions of reform, and journalists hoping to develop a long-running front-page story. Why do some flourish while others go out of business? Why did that quintessential policy entrepreneur, Ralph Nader, strike oil with auto safety and wholesome meat regulation, but drill dry holes with corporate chartering, tax reform, and proposals for a consumer protection agency? If regulatory legislation is often preceded by “scandal” or “crisis,” as Wilson suggests,<sup>78</sup> what factors determine which events are so characterized and which are not?

The answers to these questions probably have much to do with the modes of political discourse to which different kinds of regulatory issues lend themselves, and with the ways in which the mass media, a formidable influence that Wilson scarcely mentions, choose to treat such issues. Some regulatory issues are more susceptible to vivid and simplified presentation than others. A congressional hearing at which the diseased lungs of deceased coal miners are exhibited is gripping theater; the consequences of other, equally insidious environmental insults are less dramatically conveyed. As with any market commodity, the demand for entrepreneurship waxes and wanes; popular appetites for apocalypse, crisis, outrage, and reform evidently can become surfeited.

Wilson’s typology also begs important questions. He correctly observes that values in political life are not given, but emerge only in the course of political processes.<sup>79</sup> This truth, however, necessarily implies that actors often cannot know *a priori* what counts as a cost or a benefit to them. Evaluation not only precedes, but grows out of, political action. Moreover, the very identity of costs and benefits, not merely their distribution, will often be opaque at each stage of the regulatory process. Any regulated industry experiences a configuration of costs and benefits that is complex and in constant flux and redefinition. The “oil industry” is in fact a congeries of producers, pipelines, refiners, resellers, jobbers, retailers, dealers, brokers, and other groups selling to an even more diverse array of users. Not only do the interests of those groups clash, but each is itself extremely hetero-

77. Wilson, *supra* note 1, at 370.

78. *Id.* at 371.

79. *Id.* at 363.

geneous, with interests varying according to geographical location, product mix, historical marketing pattern, and a host of other attributes. For Wilson's typology to be at all serviceable, one must first know how broadly or narrowly the costs and benefits of regulation will be distributed in the myriad, constantly changing markets that the constellations of these groups create. That knowledge, needless to say, would be devilishly hard to come by.

And even if we assume that a discrete, well-defined market can be isolated for analysis, what do we really know of the regulatory costs and benefits? If social science has established anything during the last decade, surely it is that regulation of complex markets and institutions produces many unpredictable, uncontrolled consequences.<sup>80</sup> And passing the rather awesome empirical questions of what a regulation's effects will be and which of those effects should count as costs and as benefits, it remains a matter of singular difficulty to determine who in fact will ultimately bear them. Who, for example, will bear the costs of complying with regulations requiring certain federally assisted hospitals to provide uncompensated care to the poor?<sup>81</sup> The hospital's donors? Its employees? Its uninsured patients? Blue Cross subscribers in the community? Those ill persons turned away as a result? Overcrowded municipal hospitals?<sup>82</sup>

If the answers to the distributional questions are not straightforward ones, how are we to apply Wilson's typology at all? Perhaps we could observe which organizations favor a particular regulatory proposal and which oppose it, and could then simply infer the actual distribution of costs and benefits from that configuration of interests. But in order to pursue that strategy, we would need to wait until the lines were drawn and the armies massed; at that point, Wilson's matrix could only confirm what we already knew. To put the dilemma another way, the matrix could come into play as a plausible predictive device only when either we can answer a number of questions that are unlikely, in the interesting cases, to be answerable, or we are prepared to make extremely simplistic assumptions about the probable consequences of a regulatory proposal.<sup>83</sup> Still, for all its in-

80. See, e.g., S. BREYER & P. MACAVOY, *supra* note 20, at 121-24 (Federal Power Commission regulation benefited some consumers but not others; natural gas price regulation produced harmful shortages).

81. 42 C.F.R. §§ 124.501-.607 (1979).

82. See Note, *The Hill-Burton Act, 1946-1980: Asynchrony in the Delivery of Health Care to the Poor*, 39 MD. L. REV. 316, 367-74 (1979) (discussing distribution of costs of uncompensated care).

83. Wilson also leaves unanswered the question of whether his typology is meant to

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determinacies and gaps, Wilson's analysis of regulatory politics remains the most sophisticated account of this quotidian phenomenon that we possess, a telling commentary on the impoverished state of our contemporary political theory.

### IV

Regulatory politics without the courts is like *Hamlet* without—Polonius. Yet Wilson and his collaborators apparently attach importance only to those relatively infrequent occasions on which courts adjudicate a regulatory dispute, and simply lament the case-by-case, uncertainty-enhancing character of judicial review of regulatory actions.<sup>84</sup> The influence of the courts on the regulatory process, however, although easily exaggerated (especially by lawyers), is more systematic. In conjunction with Congress and the agencies, courts embed regulatory conflicts in particular procedural structures. In their own right, courts clothe an agency's policy judgments in the legitimating mantle of principle, an especially important function in those situations in which exercises of broad, legislative-type discretion, rather than adjudications, are under review. Indeed, Congress would not, and constitutionally perhaps could not, confer broad decisional authority upon the agencies unless it were confident that Article III courts would confine exercises of that authority within statutory and constitutional limits.<sup>85</sup> In a number of respects, then, courts form essential parts of the institutional background against which allocations of regulatory power are made, evaluated, and legitimated.

Even at the more mundane level of reviewing particular regulatory decisions, courts may influence regulatory politics in important ways. First, courts define the nature of the decisionmaking process by prescribing how regulatory issues are to be raised and resolved. Although often procedural and technical in form, such judicial decisions may nevertheless have far-reaching substantive implications. Thus, by insisting that an administrative decision employ certain procedures, a court may affect the interests that are represented, the

describe the politics of regulatory legislation, of postenactment regulatory administration, or both. The political forces shaping each of those processes will often be quite different.

84. Wilson, *supra* note 1, at 390.

85. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 366 (1974); *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (en banc) (Leventhal, J., concurring). *But see* *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958) (when agency's duty to act depends on inference from "large or loose statutory terms," construction of statute committed to agency discretion).

record that is developed, the weight to be accorded agency expertise, and the appropriateness of political influences on the substantive outcome.

In addition, courts influence what resources and remedies are available to participants in the regulatory process. By deciding which interests have standing to challenge agency action, when litigation costs may be shifted between parties, to which types of information participants may have access, and under which circumstances private citizens may proceed directly against a regulated firm, courts redesign the political process and environment in which the agency exercises regulatory power.

Courts also define the contours of the agency's regulatory discretion. By deciding which issues an agency may or must resolve and which criteria of decision constrain it, the court in effect allocates regulatory power between legislature, court, agency, and citizens. Indeed, by construing the agency's discretion very narrowly, the court may effectively determine a policy decision. And when a court compels a reluctant agency to enforce statutory rights, it shifts the balance of power among those private interests affected by the agency's authority.<sup>86</sup>

Finally, and more generally, courts constitute a significant strategic resource, for the mere availability of judicial review is an important weapon in regulatory conflict. Each element ancillary to judicial review of a regulatory decision—the delay, the expense, the probability of particular substantive outcomes, the imposition on the dispute of judicial forms of resolution—advantages certain interests at the expense of others.

In each instance, courts influence the structure and substance of regulatory politics in ways that have little to do with the analytical categories employed by Wilson's distributional matrix, but instead reify a conception of appropriate judicial role. That conception in turn reflects the court's confidence in a particular agency's decision processes, the extent to which the issue seems to demand the specialized expertise that an agency may be thought to possess, and the particular functions—among those discussed above—that the court feels obliged to perform.

The chief architects of administrative law, most notably the Court of Appeals for the District of Columbia Circuit, have not yet embraced any consistent conception of judicial role in the review of in-

86. See *Adams v. Richardson*, 480 F.2d 1159, 1161 (D.C. Cir. 1973) (ordering HEW to begin compliance reviews and enforcement proceedings after finding agency "derelict in [its] duty to enforce Title VI").

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creasingly complex regulatory decisions.<sup>87</sup> In view of the competing values at stake and the diverse factors affecting agency decisionmaking, they are unlikely to do so in the future. It is all the more striking, then, that several of the regulatory reform proposals that have attracted political support envision a significantly enhanced role for the courts in the regulatory process.<sup>88</sup> Not the least of the ironies of the recent conservative triumph may well be a new spasm of judicial activism in administrative law, one precipitated by a Congress determined to use the courts as a weapon in the regulatory battles of the 1980s.

### V

In the end, the politics of regulation turns less on the dynamics of coalition formation, the behavior of regulatory officials, or the rulings of courts, important as these are, than on the dominant vision of the larger society in which nationally organized interests, policy entrepreneurs, bureaucrats, and courts are merely highly specialized, and often unrepresentative, manifestations. That vision encompasses a conception of the good society and of the place of the citizen in that society, a notion of the proper boundaries between public and private, and of the appropriate domains of community norms and individual freedom. That vision, whatever its content, ultimately prescribes the tolerance within which conventional regulatory politics can be conducted.

Any politics of regulation surely must be directed first and foremost to these fundamental questions of individual autonomy and social purpose. Significantly, it is this "metapolitics" of regulation that has been transformed in recent decades. One regrets, then, that Wilson, after acknowledging the importance of ideas to regulatory politics, leaves it at that. Ideology thus remains as so much unexplained variance, as a black box. Yet it seems clear that a new public philosophy has deeply eroded the traditional, ideological restraints upon the objects and intrusiveness of regulatory intervention—restraints based, perhaps, on notions of federalism, of limits of law, of individual responsibility, or of unacceptable levels of "non-market failure." Until quite recently—and long after economic regulation had become a prominent component of our public law—it remained almost inconceivable that problems of sexual harassment in the workplace,<sup>89</sup> the

87. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 66-69 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) (en banc) (Bazelon, J., and Leventhal, J., concurring).

88. See note 5 *supra* (citing recently introduced congressional bills).

89. See 45 Fed. Reg. 74,676-77 (1980) (to be codified in 29 C.F.R. § 1604.11).

conduct of behavioral research,<sup>90</sup> and the editorial policies of magazine publishers,<sup>91</sup> to select some recent examples, would be subject to national rules and potential legal sanctions. Such interventions, however, have become commonplace, suggesting that any limits to the utopian sweep of the regulatory vision are evidently limits of political expediency, not of principle. Transitory, elastic, and highly vulnerable to momentary shifts in the winds of public opinion, those boundaries cannot readily withstand the long term pressures to extend regulation's reach.

What is the source of those sparks that so readily ignite the regulatory tinder? Doubtless there are many, but a few seem especially significant. First, American society has for the past fifteen years experienced the continuous exigencies of war, economic turmoil, and social change. These conditions are perennially the most dependable precursors and powerful progenitors of statism. Dislocations in energy markets spawned a vast regulatory system, thrusting governmental power, and thus political conflict, into the very core of the nation's economic decisionmaking apparatus. Persistent inflation growing out of war-related deficits precipitated three years of extensive wage-price controls, with a legacy of encompassing regulation in increasingly critical economic sectors, such as health care.<sup>92</sup> Newly mobilized social groups have pressed their claims for equal treatment, and in some cases preference, through civil rights regulations.<sup>93</sup>

Second, the ineffectiveness of much regulation has encouraged its expansion, confirming the cynic's observation that nothing succeeds like failure. The failure of natural gas price regulation did not prevent its extension to the previously unregulated intrastate market.<sup>94</sup> Similarly, the inability of state certificate-of-need laws to contain hospital costs has led both to the expansion of their regulatory jurisdiction to cover physicians' offices and specialized nonhospital facilities, and to rate or revenue controls over hospitals.<sup>95</sup> This "tar-baby ef-

90. See 46 Fed. Reg. 8,386-91 (1981) (to be codified in 45 C.F.R. § 46.101-124).

91. See Pound, 2 *Publishers Accuse U.S. Election Agency of Rights Violations*, N.Y. Times, Feb. 16, 1981, at 1, col. 4.

92. See, e.g., Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760h (1976 & Supp. III 1979); National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300k-300t (1976 & Supp. III 1979).

93. See Schuck, *supra* note 37, at 29 n.14.

94. See Natural Gas Policy Act of 1978, Pub. L. No. 95-261, 92 Stat. 3352 (codified at 15 U.S.C. §§ 3301-3432 (Supp. III 1979)).

95. See, e.g., Md. ANN. CODE art. 43, §§ 568H-568Z (1980); N.Y. PUB. HEALTH LAW §§ 2803, 2807-2808 (McKinney 1971 & Supp. 1976-77); H.R. 2626, 96th Cong., 1st Sess. (1979) (Hospital Cost Containment Act). See generally U.S. CONGRESSIONAL BUDGET OFFICE, CONTROLLING RISING HOSPITAL COSTS (1979) (discussing state and federal proposals).

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fect," as it has aptly been called,<sup>96</sup> has been observed in many other regulatory contexts, and its causes—political risk-aversion on the part of regulators, the desire to control the unanticipated consequences of existing regulation, redistributive efforts, and considerations of horizontal equity<sup>97</sup>—are persistent and systematic.

Third, as discussed above, powerful elements of American society have acquired a considerable vested interest in the continuation and expansion of regulation, and a transformed reality has lent plausibility to their alarums of market failure. Finally, and perhaps most importantly, American society appears to have come to a new view of the role and possibilities of law and politics in the pursuit of the good society. Until quite recently, Americans regarded inequalities, dashed hopes, and personal misfortunes not as pervasive social injustices to be extirpated but as discrete obstacles—due to the will of God, the victim's own deficiencies, or simple bad luck—to be surmounted by individual effort or endured with stoic resignation. Even if a condition were regarded as intolerable, a federal regulatory statute would have seemed a most unlikely instrument of reform.

Today, in contrast, injustices are readily perceived, their tractability is widely assumed, and collective intervention by legal rule appears to be the remedy of choice. As our perception of imperfection has grown, our tolerance for it has diminished. These attitudes no doubt reflect a complex evolution in morality, ideas, and politics. Whatever their cultural sources, they have fused in a melioristic, not to say utopian, ambition to reform a disagreeable social reality through the affirmative application of public power. That impulse has virtually obliterated the moral, constitutional, and political boundaries that once contained it, and the social consensus that once domesticated it.<sup>98</sup> In shaping the human and institutional materials standing between that energizing impulse and that beckoning vision of social justice, however, we are limited to the same old tools: politics, law, and administration.<sup>99</sup> If past is indeed prologue, there is precious little reason to believe, but much reason to hope, that those crude instruments can be made equal to the increasingly demanding tasks that will be set for them.

96. See McKie, *Regulation and the Free Market: The Problem of Boundaries*, 1 BELL J. ECON. & MANAGEMENT SCI. 6, 9 (1970).

97. Wilson, *supra* note 1, at 377.

98. For a somewhat analogous analysis attempting to explain an asserted increased failure by the Supreme Court in constitutional adjudication, see Deutsch, *Neutrality, Legitimacy, and the Supreme Court*, 20 STAN. L. REV. 169, 223-29 (1968).

99. See J. PRESSMAN & A. WILDAVSKY, *IMPLEMENTATION* 161-62 (1973); Schuck, *supra* note 32, at 19-20.