BOOK REVIEWS

REFORMING FEDERAL REGULATION
By Robert E. Liton and William D. Nordhaus
New Haven: Yale University Press, 1983. Pp. 224, $25.00 hardcover, $7.95 paper.

Reviewed by *Walter Olson**

It is a common complaint that to let elected officials influence the outcome of the regulatory process is to invite a sellout to the "special interests." This complaint is even heard from the elected officials themselves: Representative James Florio (D-N.J.) recently said that letting Congress and the President pass on certain environmental regulations would amount to "politicizing the rule-making process" and would provide "a great opportunity for all the special interests to stop regulations from taking effect."[1]

Of course, it is a perfectly plausible and traditional view that Congress lacks the time, unity of purpose, or expertise to handle the details of regulatory implementation. But there are also objections when executive political officials try to influence regulatory matters—and not just at the "independent" commissions, but at such executive branch agencies as the EPA. Many political moralists who favor "democratic accountability" in other contexts thus find themselves in the strange position of opposing "interference" in regulatory matters by either of the elected branches of government. In effect, the only parts of government that can make ongoing regulatory policy decisions with some show of legitimacy are the civil service and the courts—both of which are virtually free from voter scrutiny, and enjoy (*de facto* and *de jure*, respectively) life tenure in their jobs.

Robert Litan and William Nordhaus are unapologetic about rejecting this line of argument. They write that politicizing the regulatory process "is precisely the objective. The regulatory process *is* a political process."[2] Moreover, they argue, if the elected branches of government take a stronger role in the rulemaking process, the resulting regulations are likely to be not only more democratically arrived at but also, on average, more economically efficient.

The authors preface their recommendations with a clear and succinct statement of the mainstream regulatory reform position. That

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1. Washington Post, November 5, 1983, at A4, col. 4.
2. LITAN AND NORDHAUS, REFORMING FEDERAL REGULATION 180 (1983).

position predicts that agency bureaucracies isolated from voter influence are likely to go astray in a number of ways. Much regulation, the authors note, is undertaken to correct "externalities": for example, the water pollution that a steel mill emits because it has no incentive to take into account the costs it is imposing on downstream users. The problem with this approach, they say, is that a regulatory agency has equally incomplete incentives, but in reverse: the agency is instructed to concern itself only with the costs to downstream users and not with the costs of compliance that it inflicts. The result is that it tends to regulate inefficiently, not only by choosing the "wrong" level of required emissions, but, at least as important, by choosing an overly costly means of achieving that level. Often the inefficiency involves relying on "command-and-control" regulations instead of incentive-based measures such as taxes, sliding financial penalties, and marketable rights.[3]

Moreover, each agency and each division of each agency will attempt to pursue its mission single-mindedly with less heed to other and perhaps more important societal goals. Not all agencies will enjoy equal success in their mission, however, which will lead to a patchwork of stringent and less than stringent regulation. One result is that there is an enormous range in the values that agencies implicitly place on life and health—all the way from as little as $34,000 per life for guardrails and certain other traffic safety improvements, through $22,000,000 for coal mine safety standards, to as much as $1,000,000,000 per life saved for nuclear-waste disposal requirements.[4] This discrepancy implies that society would be both richer and safer if some of the resources now used on nuclear waste disposal were devoted to traffic safety instead.

Some of these problems can be remedied by inducing agencies to carry out better analysis of their regulatory decisions. The past four presidential administrations have been trying to do this, with gradually increasing success. Litan and Nordhaus provide a broad survey of the efforts of the Carter Administration (within which they served, Nordhaus as a member and Litan as a staffer of the Council of Economic Advisers) to foster better regulatory analysis through the Regulatory Analysis Review Group and the Regulatory Council. The Reagan Administration's Executive Order 12291[5] can be understood as a logical extension of these earlier Carter efforts, although perhaps one great enough to amount to a difference in kind.

3. Although it is not part of their main line of reasoning, the authors make one point about regulatory efficiency that is too timely not to quote, in view of the controversy over the AT&T divestiture:

> By and large, we do not consider the regulatory system an appropriate tool for income redistribution. To use regulation rather than taxation for distribution of income to truckers or farmers is generally wasteful: a considerable fraction of the revenue goes to the wrong persons, and an unnecessary outlay of real resources is . . . involved.

Id. at 7.

4. *See generally* R. WILSON & E. CROUCH, RISK/BENEFIT ANALYSIS (1982).

5. Exec. Order No. 12291, 3 C.F.R. 127 (1982).

Even if agencies have the best analysis in the world, unfortunately they may not be allowed to act on it. For instance, Congress still prevents agencies in many instances from balancing costs and benefits, as in the case of the Delaney Clause,[6] which forbids the use in food of any substance linked to cancer in animals (such as saccharin), no matter how tiny the cancer risk or how great the benefit involved. Similarly, the Clean Air Act provisions require the Environmental Protection Agency to set its air quality standards without regard to costs.[7] Such zero-risk statecraft might be called "Alpo legislation": environmentalists seem to enjoy the idea that unnatural substances have been kept below detectable thresholds in the same way that Alpo buyers seem to enjoy knowing that they aren't feeding their dogs even "a speck of cereal"—whether or not the dogs themselves would know the difference if they did.

But it is not enough, the authors say, simply to remove the bars to cost-benefit analysis or even to require that agencies take cost-benefit findings into account when they regulate. There is still no setting of priorities, no "cross-agency rationality." If the government tried to enact all arguably beneficial regulations in a single year, the economy could not stand the cost burden, just as taxpayers could not stand it if the government tried to appropriate money for all worthy causes at the same time. There is, so to speak, a liquidity as well as a solvency constraint. Thus the need arises for some ordering of priorities across agencies—in effect, to budget their activities.

The courts are peculiarly ill-suited to assume this sort of grand managerial role if only because they receive for review a mere fraction of regulatory decisions. That leaves Congress and the executive branch. The Reagan Administration has made more than a casual effort to make executive oversight systematic, again through Executive Order 12291.[8] The White House's oversight of executive branch agencies seems to have survived court challenge,[9] but its oversight of the independent agencies remains rather weak. As the authors say, "executive oversight of regulation has finally pulled out of the station, but it is a long distance from its final destination."[10]

If taken to its most ambitious extreme, centralized oversight of regulatory activity would take the form of a regulatory budget. Such a budget would be an "impositions budget." That is, it would consist of annual ceilings on the amounts each agency could require private parties to spend. Imposition costs are a sort of funny money, something like "tax expenditures." Both concepts may seem plausible on the micro level, but they begin to lose analytical utility as they move to the

6. 21 U.S.C. § 348(c)(3)(A) (1976).
7. 42 U.S.C. § 7401 (Supp. V 1981).
8. Exec. Order No. 12291, 3 C.F.R. 127 (1982).
9. The key case is Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).
10. LITAN & NORDHAUS, *supra* note 2, at 81.

macro level because of problems with double counting, joint causation, data uncertainty, and so on. "Assume, for example, that the costs of meeting environmental rules on a coal-fired electricity generating plant became so large that a utility decided to build a nuclear plant whose costs were virtually all mandated. What fraction of the nuclear power plant cost should be imputed to regulation?"[11]

The idea of budgeting such costs sounds visionary, and no wonder. On straight spending issues, the Federal Government followed the traditional authorization/appropriations pattern for about 140 years before the executive branch ever began submitting budgets to Congress by law, and it was another sixty years before Congress adopted its own separate budgeting process. In the case of regulations, on the other hand, there has never been even the equivalent of an appropriations process—just authorizations, and vague authorizations at that. After Congress enacts something like the Clean Water Act, having little or no idea what it will cost the private sector, the relevant agency walks off with the issue without needing further congressional consent.

It is hardly surprising, therefore, that proponents of regulatory budgeting have failed to come up with a convincing blueprint. They face the task of creating from scratch a mechanism whose model took centuries to develop. The problem of measuring compliance costs might be resolved, Litan and Nordhaus suggest, if some independent agency like the General Accounting Office were charged with the task of verifying the estimates. But they acknowledge that other severe problems would remain in implementing any regulatory budget. Agencies could evade the budgetary constraints in various ways. For example, many agencies can choose between adjudication and rulemaking as a way to introduce new regulatory requirements, and if it becomes harder for them to pursue rulemaking they may simply switch to adjudication instead.[12] Moreover, it is not easy to come up with sanctions to discipline agencies caught overstepping their permissible burden limits.

One year's budget would, for reasons of practical workability, probably have to cover only proposals for new regulation, rather than the much larger ongoing cost of old regulations. It would also have to include in the current year's budget the whole stream of future costs imposed by the proposed regulations, discounted at some appropriate rate. The compliance costs of different regulations follow very different time streams. Redesigning a baby's crib may impose a one-time expense on manufacturers. But banning the construction of a particular kind of industrial plant may impose small costs at first and gradually growing costs in later years as existing plants become older and less well suited to changing market needs. Yet both types of imposition will

11. LITAN & NORDHAUS, *supra* note 2, at 150.
12. *See* Scalia, *Back to Basics: Making Laws Without Making Rules*, REGULATION, July/Aug. 1981.

be reduced to the same sort of single figure in a regulatory budget—leaving the "liquidity" rationale for the budget in limbo.

In fact, the sort of liquidity rationale that underlies ordinary budgeting is hardly present at all in impositions budgeting. If we assume that each individual regulation is cost-benefit justified, but that its burdens fall on a different party than its benefits, then even a rather small regulatory burden may be intolerable if it is concentrated too narrowly on one small part of the economy. Contrariwise, a seemingly huge set of impositions may be positively helpful to the economy provided its burdens and benefits are widely spread. Suppose that one law benefits consumers more than it hurts automakers, while another benefits automakers more than it hurts consumers. Enacting both laws might not harm anyone's welfare or even, what is at issue here, anyone's liquidity.

Although the authors cite many serious problems of implementation, they are not utterly daunted by them. They do, however, admit that a regulatory budget is politically impractical at the moment. In the meantime, they propose a more modest reform that they call a legislated regulatory calendar. Without going into the details of this idea (which would undoubtedly be changed in congressional consideration before enactment), suffice it to say that it would provide a constitutionally valid way for Congress to consider and vote on each year's coming crop of important regulations. It would also require an affirmative vote to let regulations go through. Many such schemes are being considered by Congress in the wake of the Supreme Court's *Chadha*[13] decision. The distinctive thing about this one is that, by making each year's regulatory votes a package deal, it would encourage Congress to treat regulation as an ongoing issue in itself (deserving, perhaps, its own committee in each House) and to consider explicit trade-offs between different agencies' activities. Whether or not the members of Congress decide to adopt such an idea, they could profit greatly from this book—if only because of the arguments it furnishes to vindicate congressional involvement in regulatory policymaking.

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13. Immigration & Naturalization Service v. Chadha, — U.S. —, 103 S. Ct. 2764 (1983).

THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES
By Mancur Olson

New Haven and London: Yale University Press, 1982. Pp. xi, 242, notes, index. $14.95 hardcover.

Reviewed by ***Jim Jaffe*** *

Stability is a drag and long-term stability can become a paralyzing economic malady. So writes Mancur Olson, who explains that calm allows the painstakingly difficult creation of special interests that inevitably are the enemies of the public interest. When the United States brags that it is the longest-running democracy around, Olson apparently argues, it may be pointing to a curse rather than a blessing. Distributional coalitions, a.k.a. special interests, apparently are something like temperamental plants. Few seeds germinate. But the ones that do grow with a vengeance, becoming an economic kudzu that can threaten the entire society.

This somewhat flip summary may be a disservice to Olson, who is nothing if not serious. Only the pitch is flamboyant, with jacket copy that resembles a patent medicine ad, promising to explain "the rapid postwar growth of West Germany, Japan, Korea . . . , the slow growth and ungovernability of Britain in recent times . . . , the decline of old cities in the midst of expanding countries, unemployment, depression and stagflation" as well as, believe it or not, "a great deal more." Only a cure for cancer is missing.

The good news is that Olson seems to come close to making good on this vast promise. The bad is that the book is dense. The enthusiastic and diligent reader senses that there is a best-seller fighting to extract itself from the lengthy discussion of monocausality. John Naisbitt could have discovered a megatrend here. It isn't new, but does provide more insight into how our nation works than do many pop theories.

Given time, the theory goes, people will organize. Stability provides the needed environment. Organizations will work to maximize the economic clout of members. A group can generally win a quicker, easier gain by trying to get itself a bigger piece of the existing pie rather than by joining a coalition to bake a bigger pie.

The flaw in this strategy becomes evident when times are tough and the pie begins to shrink while the organized players use their collusive power to hold the size of their share constant. So the problem gets worse over time. The unorganized create their own groups to protect

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their rations from shrinking during future hard times and the competitive segment of the economy contracts. That's why the poor remain in poverty. And the Reagan budget cuts were aimed at the poor who were already hungry rather than at the middle class where a diet might have been more logical.

A few subthemes flesh out the theory. If organizations are unavoidable, large, broad-scale ones are to be preferred to small, narrow ones. In other words, industrial unions are less of a threat than craft unions. This explains what politicians intuitively grasp—that small groups are more powerful than large groups. Strength in numbers is an overrated strategy because large groups must encompass a range of interests that weakens their focus. Similarly, large markets are better than small markets because they are more difficult to cartelize. For the same reason, young markets are preferable to mature markets. That's why the United States, with the world's largest and most dynamic market, did so well for so long.

On this point, in a discussion of the value of customs unions, Olson comes as close to being rhapsodic as his prose style will permit. Free trade is good because it creates larger markets. But some say the Japanese experience defies this logic. They claim that the Japanese encourage collusion and thereby become stronger. Olson says the miracle of modern Japan lies not in the destruction of industrial capacity in World War II that forced collective efforts to create efficient new factories, but rather in the war's destruction of powerful discrete groups that were able to protect themselves. The racial homogeneity of Japan may make the creation of broad groups more feasible, but there is also some evidence that stability is beginning to take its toll.

Is Olson right? If he is, is there something we can do short of losing a major war to break free of this creeping paralysis? His analysis is impressive—facts from all over the world and a variety of eras agreeably march on stage and fit themselves into the theory. They suggest a process that is inevitable and perhaps irreversible. Recent events in the United States, however, suggest otherwise.

What about the cable television industry? How could such upstarts challenge the theory and prevail? Why is the percentage of the American labor force in unions steadily declining? Whatever motivated a group of politicians to push so hard and so successfully for the deregulation of the transportation and communications industries in America? Does anyone believe that the special interests here have more power now than they did a century ago when they provided the trustbusters with such an inviting target?

This doesn't deny that special interests still threaten to overwhelm the public interest. But what's to be done? Olson and some airline managers seem to see bidding the labor price down as one strategy for a return to health. Whatever logic this view has is limited by the negative political reaction. Perhaps more palatable is Lester Thurow's sug-

gestion that workers be provided with guarantees of security that will wean them away from special interest groups and let nature take its course. The rest of the remedy isn't clear.

There is, of course, a theory holding that stability promotes the type of ossification that makes powerful, large institutions vulnerable to small, creative new challengers. And there are even some who would argue that America's stability has proven to be a strength rather than a weakness.