The congressional foundations of agency performance*

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Abstract

When Congress delegates a policy mandate to a regulatory agency, Congress acts as a principal, choosing the institutional arrangements, or the ‘rules of the game’ for agency decision making. Individuals in the agency, acting as agents, take the rules of the game as given and do the best they can within these institutional arrangements. In this paper we develop a simple model that relates the congressional choice of institutional arrangements to two underlying environmental factors — uncertainty and conflict. We suggest that uncertainty and conflict of interest lead Congress, in delegating, to prescribe a greater scope of permissible regulatory activity, a wider array of regulatory instruments, and more confining regulatory procedures. Increased scope and stronger instruments tend to broaden the overall discretionary authority of the agency, while more confining procedures tend to narrow it. We conjecture that with increased uncertainty or conflict the narrowing tendency more than offsets the broadening tendency, for a net decrease in the agency’s overall discretionary authority. Lastly, we argue that the performance of a regulatory agency in fulfilling its mandate is determined in large measure by the foundations Congress constructs for the implementation of delegated authority.

1. Introduction

This paper focuses on the role Congress plays in agency performance. Its basic argument is that Congress determines, in large measure, the ability of an agency to pursue its policy mandate by the way it designs the agency’s decision processes in delegating authority to the agency. Previous studies of Congress and the design of regulation have focused largely upon the origins of regulation, and relatively little attention has been paid to how Congress exercises control over the subsequent bureaucratic selection of regulatory policy. This paper focuses on the how by developing a simple theoretical model of the design of institutional arrangements through which Congress attempts to control bureaucratic policy making.

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In delegating authority to an agency, Congress attempts to solve the principal's problem in a principal-agent relationship. Congress as the principal selects an institutional arrangement with its agent so as to maximize the benefit it derives from the agent's performance. Taking the institutional arrangement as given, individuals within the agency do 'the best they can.' This paper develops hypotheses concerning how and why Congress will solve its problem as principal and what exogenous forces will influence the shaping of this principal-agent relationship. Specifically, we are concerned with the institutional arrangements Congress chooses to constrain the bureaucracy's substantive discretionary authority. The substantive discretion available to an administrative agency is determined by the choices of scope of regulatory activities granted to the agency, the instruments by which the agency can implement its policy choices, and the procedures required for agency decision making. The model developed takes account of the influence that incomplete information and conflict of interest has on the choice of institutional arrangements. Such influence determines the ability of an administrative agency to perform the tasks delegated to it by Congress.

2. Legislative delegation

Delegating legislative authority to regulatory agencies has come to be regarded as the 'natural' method of intervening in the economy or society. Such delegation, however, is not universal. Congress has itself dealt directly in detail with a number of regulatory problems: directly prescribing auto emission levels in the Clean Air Act instead of delegating the choice to the EPA; writing specific requirements in the Toxic Substances Control Act (TSCA) to limit exposure to PCBs; and enacting regulatory legislation concerning cigarettes and saccharin, instead of allowing the FTC and FDA to promulgate regulations.

Thus, besides inquiring into the form of delegation, one may also ask why delegation takes place at all. There are several possible explanations. An obvious explanation, but one hardly mentioned in the literature, is that the job of regulating may require a division of labor. Just as in Adam Smith's pin factory, even when there are no specialized skills or comparative advantages, productivity may be increased by specializing tasks and delegating responsibilities. It is possible that by dividing labors delegation raises productivity. A second explanation, which has received somewhat more attention, emphasizes the technical complexity of modern society. To understand the technical detail of a regulatory problem such as toxic chemicals, and to deal with it effectively, requires years of experience. Long-term careers developing technical expertise are more likely to be acquired in the civil ser-
vice than in a congressional office, which may change with the next election. The complexity explanation points to the comparative advantage of different areas of government for different aspects of administrative and regulatory problems.

A third explanation, and the one currently receiving the most attention in the literature, emphasizes congressional incentives. According to Fiorina (1982a, b) there are strong incentives for congressmen to avoid the costs, political and otherwise, of regulating directly (see also Aranson, Gellhorn, and Robinson, 1982; Fiorina and Noll, 1979; Noll, 1971a, b; Noll, Peck and McGowan, 1974). In studying legislative delegation, however, Fiorina sets aside problems of agency. Administrators in Fiorina’s model are not strategic actors but rather are mechanisms which add ‘political daylight between the legislators and those who feel the incidence of legislative actions’ (Fiorina, 1982b: 19).

In this paper we take the political motivations to delegate as the starting point and begin with the premise that it is often in the interest of a decisive set of legislators to delegate legislative authority to an administrative entity. But we relax Fiorina’s assumptions of perfect agency.

3. Design options

In creating an administrative entity and authorizing it to make decisions within its delegated authority, Congress creates for itself the potential for a problem of agency: the administrative entity may not do what Congress wants it to do (for a survey of agency theory, see Moe, 1984). A conflict may exist between the goals and aspirations of the administrators and the preferences of Congress. Two circumstances make the problem only partially solvable, from the point of view of Congress: the instruments of control are imperfect and so is information. The problem is like walking a dog with an elastic leash on a dark night. The leash is not a perfect instrument of control to begin with, and control is made more difficult by being able to see only shadows and fragments of what is going on.

The challenge for Congress is to choose the decision making rules for the bureaucrats so as to mitigate the problems of agency. The strategies available for the congressional choice are the institutions that serve to establish the rules of the game for the bureaucracy. In choosing these institutions, congressmen will pursue their own individual goals (Mayhew, 1974; Fiorina, 1977). These goals may consist of retaining their seat in office, serving their constituents or closely affiliated groups, or attaining their own policy interests. In choosing the rules of the game, though, congressmen also will recognize that bureaucrats, in implementing the policy, will have their own goals: attaining political or policy aspirations; achieving
stability in their relationship with Congress; or possibly, increasing their budget and program jurisdiction.

The institutional arrangements by which Congress will attempt to exercise control over the administration of delegated authority we will refer to as the form of a regulatory intervention. Some of the arrangements are built into an act of Congress at the time it is passed — these we call structural arrangements. Others are taken during the course of agency implementation of the act — these we call management arrangements.

3.1 Structural arrangements

In designing a regulatory act Congress chooses the scope of the act, the regulatory instruments delegated to the agency, and the procedures required to use the instruments.

Scope. Congress defines the regulatory scope by specifying the domain of potential regulatory targets or problems the entity administering the regulation may address. For example, in the Toxic Substances Control Act (TSCA) Congress delegated authority to regulate approximately 55,000 chemicals in commerce, but expressly limited the scope by exempting tobacco, pesticides, food additives, drugs, cosmetics, and radioactive materials (most of which are regulated by other acts). In Resource Conservation and Recovery Act (RCRA) Congress delegated authority to regulate waste materials and their management but told the agency what chemicals to look at, what problems to address, and what objectives to seek.

Instruments. In delegating authority Congress spells out the legal tools or instruments that an administrative agency can use to implement the act. Generally, instruments are of the following types: command and control, provisions of information, direct provision of some public good, and decentralized economic incentives (on the distinction between incentive-based and command and control see Buchanan and Tullock, 1975). The set of regulatory instruments specifies how the administrator may regulate particular problems within its regulatory scope. Congress in TSCA allows EPA to ban or limit production and distribution of a chemical or category of chemicals; to require warnings or instructions; to require testing or monitorings; and to require record keeping and reporting. McCubbins and Sullivan (1984) have modelled the choice of regulatory instruments by reelection-seeking legislators.

Procedures. Third, Congress spells out the procedures required to use the instruments. As lawyers are fond of pointing out, procedural requirements are substantive in effect. The number and sizes of hoops to jump through shape and often constrain the delegated authority, affect the allocation of resources within the agency, and in some cases determine the regulatory outcomes. An act specifies the process of hearings, the standards of evidence
and burdens of proof in decision making, the points of access for outside parties, the opportunities for judicial review, and the standards for review. Regulatory procedures specify the path of legal requirements an administrator must follow to implement a regulation (e.g., the use of some instrument on a certain target). For example, the Occupational Safety and Health Administration is prohibited from promulgating regulations on various safety issues until directed to do so by The National Institute of Occupational Safety and Health.

In many cases procedural requirements are specified by reference to the Administrative Procedures Act (APA) or the National Environmental Policy Act (NEPA). Many of the procedural requirements imposed by Congress on agency decision making are in response to court decisions (see Aranson, Gellhorn, and Robinson, 1982). Congress can, however, impose procedures over and beyond those required by the courts, APA, and NEPA, and does so for strategic reasons.

3.2 Management arrangements

Once a regulatory act is passed, and while it is being implemented, Congress has additional means of control through rewards, sanctions, and monitoring (and of course further structural controls are not ruled out, as Congress can amend the original act).

*Rewards and sanctions.* Rewards and sanctions arise largely through the exercise of Congress’ constitutionally defined powers of authorization, appropriation, and appointment. Weingast has argued that many of these powers are effective informally as potential threats, even when they are not used formally (Weingast and Moran, 1983; Calvert, Moran and Weingast, 1984; Weingast, 1984).

*Monitoring.* Congress may choose the methods and extent of monitoring the agency to determine whether it is complying with congressionally delegated goals and procedures (Fiorina, 1981; Weingast, 1984; McCubbins and Schwartz, 1984). McCubbins and Schwartz (1984) make the distinction between two forms of oversight: ‘police-patrol’ oversight which is comparatively centralized, active, and direct; and ‘fire-alarm’ oversight which is less centralized and involves less active and direct intervention (p. 166).

4. Determinants of regulatory discretion

Given that Congress has a range of choice over the scope, instruments, and procedures to be delegated, is there any way to predict how Congress will choose, for a future act, or to explain systematically the pattern of choice in previous acts? In this section we offer a simple theory which, we hope,
holds at least some predictive and explanatory power. In our theory, just as imperfect control and imperfect information are the fundamental problems Congress faces in delegating authority, the degree of conflict and amount of uncertainty are the principal determinants of the congressional choice of the form of delegation.

Most models of policy choice presuppose a world of certainty. Legislators are seen to make policy choices with complete information as to their distributional, welfare and efficiency efforts (for example, Stigler, 1971; Peltzman, 1976; Fiorina, 1982a). Legislators, however, may have incomplete information with respect to some aspects of their policy choices. This uncertainty may have to do with the nature of the problem regulation is supposed to redress (e.g., it is not known beforehand which new drugs are safe and efficacious). Alternatively, the uncertainty may have to do with the potential costs of controlling the activity to be regulated (e.g., at the time of regulation it was not known if the cost of reducing vinyl chloride emissions would be in the billions, as the industry claimed, or much less, as it eventually turned out). Legislators may be uncertain as to their ability to subsequently control the bureaucratic implementation of their chosen policy, or they may be uncertain as to the true preferences or powers of important groups. Since we are concerned with the decisions of individual legislators, we can measure uncertainty as the aggregate value of information (in utility terms) for each congressman, summed over all congressmen. The greater this sum, the greater the degree of uncertainty, from the point of view of the congressman.

Similarly, since congressmen represent different districts with different interests, their preferences over regulatory outcomes, and hence over regulatory institutions, may sometimes be in conflict. We can measure conflict by taking the difference between the utility each legislator would receive if all other legislators cooperated by choosing actions to maximize the individual legislator’s utility and the utility the legislator would receive from the noncooperative legislative outcome, summed for all legislators. If this sum is small, then what is good for one legislator is good for the others. This essentially sets up a Bayesian game between legislators, and provides us with tractable definitions of our exogenous influences.

We can now informally examine the comparative static properties of changes in the regulatory scope, procedures, and substantive discretion delegated to an administrative agency with respect to changes in uncertainty and conflict of interest. How does the choice of scope, instruments and procedures constrain and channel agency activity? Intuitively, the more instruments (bans, quotas, taxes, labels, testing and reporting requirements, etc.), the more regulatory opportunities an agency will have. However, not all regulatory actions are feasible. Before an action can be implemented it must be filtered through the required administrative procedures. What
comes out might be something different, something weakened, or nothing at all. The set of outcomes reachable by agency actions is the province of its substantive discretionary authority. This domain of policy choices is fashioned, in part, by Congress, through its particular delegation of regulatory scope and procedural requirements. The choice of regulatory scope defines the domain of feasible regulatory opportunities available to the regulatory entity, subject to procedural requirements. Procedural requirements then serve to reduce the set of outcomes reachable within this scope.

In relating uncertainty and conflicts of interest to the choice of regulatory scope and procedures, we focus on the motivations of an individual legislator. We recognize, however, that these choices are collective choices, and will reflect the structure of the collective choice institutions. What we are assuming is that the collective decisions of the legislature (positively) reflect changes in an individual member's preferences. We are cautious in light of the instability results of the last two decades (e.g., McKelvey, 1979; Schofield, 1984; Tullock, 1959): this assumption may not always be satisfied. There are good reasons, however, that it might frequently be satisfied: the rules of procedure in Congress may induce a structural equilibrium that will be responsive to changes in individual preferences (Shepsle, 1979; Shepsle and Weingast, 1982; Tullock, 1967, 1981). Specifically, the committee system in Congress provides the institutional agenda by which legislative policies are developed. The decentralized system of semiautonomous committees and subcommittees, on which membership is largely self-selected, establishes a framework in which much of the available power over a given regulatory issue is held by just a few congressmen who care the most about it and who share similar preferences concerning its outcome (see Shepsle, 1978; Weingast, 1984; Calvert, Moran and Weingast, 1984; Cox, McCubbins and Sullivan, 1984). This near monopoly power granted to subcommittees provides committee members individually with extraordinary influence over the choice and implementation of regulatory policy. This tendency for decentralized policy control is further strengthened through widely accepted norms of universalism and reciprocity, wherein members of different committees, interested in different policies, implicitly logroll across issues in order to guarantee majority support for their respective proposals.

Our theory of how uncertainty and conflict affect the congressional choice of delegated authority is stated in three propositions:

**Proposition 1**: Under the same level of conflict, an increase in uncertainty leads Congress to delegate:

a. a broader scope of regulatory authority and more instruments,

b. more confining procedures.
With increased uncertainty congressmen would prefer to delegate a broader scope of authority and more instruments for two reasons. First, with greater uncertainty the optimal policy choice for legislators is less clear: greater uncertainty implies that the range of alternative policy choices concerning which the legislator has little or no information, and thus among which the legislator cannot discern a clear optimum, is large. With little or no information with which to evaluate the possible alternatives, and with conceivably large political risks associated with uncertain choices, legislators would prefer to delegate an increasingly large domain of alternative regulatory targets to the agency. Control can be maintained while the potential losses associated with uncertain choices can be mitigated. The legislator can claim credit for addressing an important policy problem while at the same time avoid blame for making hard policy choices. Thus, greater uncertainty will increase the incentive for legislators to delegate a large domain of target problems to a regulatory agency. This means delegating both a larger scope and a larger set of instruments.

Second, under uncertainty there is, naturally enough, a greater need for information: because congressmen will not know beforehand what their interests will ultimately be. They would like constituents and interest groups to reveal their preferences and powers before being pinned down to particular substantive solutions to particular problems. Their need for information grows relative to their uncertainty. Congressmen and congressional staffs are capable of eliciting information concerning the various policy alternatives. Such information retrieval, however, may have high opportunity costs, taking away time and resources from other electorally-oriented activities. On the other hand, the problem of choice, along with the costs of eliciting information, can be delegated to an administrative agency. Insofar as Congress can exercise a great deal of control over the activities of regulatory agencies, congressmen may prefer to delegate the regulatory choices, and therewith a large portion of the information costs, to the agency and sit back in an oversight role awaiting clarification of the issue. This costs congressmen little in terms of policy control and enables them to pass the costs of decision making on to the agency.

Increasing uncertainty leads to more restrictive procedural requirements for two reasons. As the domain of scope and instruments broaden, so does the congressional need to maintain control. Monitoring agency activities becomes of increased importance to congressmen. McCubbins and Schwartz (1984) argue that decentralized oversight techniques will be preferred by reelection-seeking legislators. Weingast (1984) similarly argues that such decentralized techniques will be effective in giving Congress control over agency activities. Decentralized oversight techniques rely, in large measure, upon labyrinthine and intrusive regulatory procedures. Thus, with increased uncertainty congressmen will prefer to prescribe an increasingly
extensive array of regulatory procedures for agency decision making.

It also follows that reelection-seeking legislators will prefer to focus the agency’s regulatory discretion away from targets with potentially high political costs. With increased uncertainty the political risks associated with virtually all regulatory alternatives are increased. Fewer alternatives are unambiguously preferred by the membership to the status quo. More and more of the alternatives in an expanded regulatory scope are politically risky for the members. Members will seek to procedurally limit the agency from taking action relative to these alternative regulatory targets. Legislators would prefer, then, to make these choices more difficult, by extending the procedural requirements necessary for the promulgation of a regulation.

For example, the TSCA presented Congress with a regulatory problem immersed in uncertainty and conflict. The uncertainty had to do with the nature of the problem regulation was intended to redress, as well as with the potential costs of controlling hazards. Under Section 4 of the Act, the EPA must promulgate test rules for those chemicals which it requires to be tested. Such tests are used to generate information about the health and environmental effects of the chemical in question. The chemical manufacturing firms have to pay for the tests. Procedural safeguards were put into TSCA to prevent EPA from requiring tests which were redundant or which did not produce useful information. Indeed, the case of one of EPA’s first ‘priority’ chemicals, chloromethane, these procedural requirements were interpreted so strictly by the agency that it spent several hundred thousand dollars and several years writing the draft test rule (which was nearly 1000 pages long). The cost of writing a rule requiring testing was several times the cost of performing the test.

**Proposition 2:** Under the same structure of information, an increase in conflict of interests among members leads Congress to delegate

a. a broader scope of regulatory authority and more instruments,

b. more confining procedures.

Increased conflict also leads to the pattern of broader scope, more instruments and narrowed procedures. With single member districts and with constituents’ interest varying across districts, increased conflict means more disagreement among groups of constituents and hence among members of Congress concerning what should be the regulatory mandate. This makes it harder for a decisive coalition in Congress to narrow down the range of regulatory targets to be delegated to the agency. Excluding policy alternatives which are points of controversy during the writing of the legislation will increase the likelihood of defections from the legislative coalition. Since controversial decisions need not be made during the writing of the legislation the solution will be to leave the number of policy alternatives included
in the domain of regulatory targets, the agent's regulatory scope, large.

Again, with increased domain of regulatory opportunity there is an increased need to exercise control over agency decision making. There is an incentive to increase the level of regulatory procedures in order to establish control. With increased conflict there are increased political risks and thus increased incentive to direct the choice of regulation by the agency, through the imposition of extensive procedural requirements, away from potentially costly alternatives.

The idea that increased decision uncertainty and increased conflict among members leads to an increased delegation of regulatory scope to an administrative agency is in some respects counter intuitive. With increased uncertainty and conflict comes increased political risks for legislators. It would be expected, then, that congressmen would want more direct control of the regulatory process, not less, when the stakes are high. What is argued here, however, is not that congressmen prefer less control in such situations rather, but that they prefer to exercise their control indirectly.

We are suggesting that with greater uncertainty and greater conflict there is a stronger incentive for Congress to pass the hot potato to the agency by broadening the scope and instruments of delegated authority. But while passing on the hot potato, there is no need to send over a loose cannon. With one hand Congress broadens the scope and instruments; with the other, tightens the procedural requirements. What Congress gives with one hand, Congress takes away with the other.

**Proposition 3:** Under the same level of conflict, an increase in uncertainty leads Congress to delegate a narrower substantive discretion. Similarly, under the same structure of information an increase in conflict among members leads Congress to delegate a narrower substantive discretion.

This proposition is basically a conjecture based on several qualitative case studies. We have noted that with increased uncertainty and/or conflict the tendencies toward broader scope and instruments and narrower procedures work in opposite directions, the first leading to more substantive discretionary authority, the second to less. It is our conjecture that the need for control (via procedures) more than offsets the legislature's inability to narrow the scope of the delegation. Thus, to insure control, the substantive discretionary authority of the agent, decreases with increasing conflict and/or uncertainty (cf. McCubbins, 1985).

What does this imply about the structure of various regulatory agencies? Joskow and Noll (1975) have suggested that environmental and health regulation entails a relatively greater degree of decision making uncertainty than does economic regulation. McCubbins (1985) has argued that environmental and health issues often present a relatively greater level of con-
flict than do economic regulatory issues. If indeed there is more uncertainty and more conflict in environmental and health regulation than in economic regulation, then the model predicts a difference in the form of regulation for these two areas. Specifically, we have a series of, in principle, testable hypotheses.

(1) A broader scope of substantive authority is delegated to the Administrator under environmental and health regulation compared with economic regulation.

(2) There are more procedural requirements for decision making in environmental and health regulation as compared with economic regulation: more public hearings and comment, more points of access to agency decision making by outside parties, more access to judicial review and more strenuous burdens of proof and standards of evidence.

(3) Consequently greater substantive discretion is granted to economic regulatory entities as compared with environmental and health regulatory entities.

The model also helps to explain differences between existing regulatory acts in the same environmental area. TSCA was passed after six years of bitter congressional struggle. There was a great deal of explicit conflict between the Commerce Department, which reflected industry interests, and EPA and the Council on Environmental Quality, which reflected the broader interests of those at risk. These conflicts were mirrored in Congress. At the same time several sources of uncertainty were widely perceived. There were 50 to 70 thousand chemicals in commerce (no one knew how many) which needed to be addressed because some of them (no one knew how many) were toxic (with various unknown potencies and type of toxicity). It was widely perceived that there was little toxicity information existing for the vast majority of the chemicals in commerce (this turned out to be correct), but there were widely conflicting estimates of the cost and need for testing, and the cost and need for regulation.

In contrast, RCRA was enacted with little controversy. It was widely perceived (wrongly it turns out) that management of waste materials including hazardous wastes was straightforward and the cradle-to-grave approach of the manifest system would be feasible and effective. In contrast with TSCA, there was little perceived conflict or uncertainty associated with the passage of RCRA.

The acts themselves are quite different. TSCA is known as one of the most complicated 'organic' acts, with a sweeping mandate, wide scope, and a large stock of instruments – and voluminous and confining procedures. RCRA is a much simpler act with simpler procedures and a more focused scope and set of instruments.

Some evidence for the hypotheses just developed exists in the secondary literature. West (1981) documents how congressionally prescribed pro-
cedural requirements at the FTC were expanded in response to increased controversy surrounding FTC activities; Fritschler (1969) tells a similar story concerning the congressional reaction to the attempt by the FTC to regulate cigarette advertising; Calvert, Moran and Weingast (1986) chronicle how increased controversy surrounding FTC activities in 1979 led to an increase in procedural restrictions and a legislative veto and ultimately to a cut in the Commission’s substantive discretion which ‘restricted several proposed or ongoing regulations’ (p. 19). In particular, ‘(1) the agency was barred from conducting any study of the insurance industry except at the specific request of either the Senate or House Commerce Committee; (2) the 1974 Magnuson-Moss bill was interpreted as not giving FTC any authority to regulate trade groups that set industry standards; (3) the bill suspended for three years the “unfairness” standard for determining improper advertising . . . (4) the agency was prohibited from pursuing its efforts to cancel trademarks that had become generic words’ (p. 19).

In further examples, Jackson’s (1970) case study of the enactment of the Federal Food, Drug, and Cosmetics Act of 1938 chronicles the influence that conflict of interest had upon the regulatory scope and procedural requirements at the FDA; Marcus (1980) documents how Congress expanded the procedural requirements at the EPA in response to growing conflict surrounding its activities; Weingast (1980) shows how a procedural bottleneck at the Nuclear Regulatory Commission, induced by congressional concern over the controversial nature of nuclear energy, led to a sharp decline in the number of regulations produced.

5. Implications for regulatory performance

The form of the legislative delegation has important implications for the performance of regulation. If an agency has stringent procedural requirements which allow little discretion, regulatory actions are likely to be few and far between. If an agency has broad discretion in its substantive authority in addition to narrow procedural discretion, there may be more attempted actions (again with few results) and, therewith, more frustrations inside the agency as well.

There are several ways to evaluate the performance of a regulatory agency. It can be evaluated in terms of the economic efficiency of its regulations, or its addition to social welfare. Alternatively, the agency can be evaluated from its own perspective — did it accomplish its goals, did it generate a large number of significant regulations? Performance can be measured from the point of view of the legislature as well. Though we shall discuss a few of these views, the model is predictive in nature and does not depend on any particular definition of performance.
Economists have argued for over a decade that regulation has generally failed by relying too heavily on command and control instruments, and not heavily enough on decentralized economic incentives. Kneese and Schulz (1975) suggest a reason for the 'over-emphasis' on command and control instruments—discipline bias; most congressmen are lawyers and their education, therefore, makes them familiar and comfortable with regulation by legal order. But while education is likely to be a factor in the choice of regulatory instrument, would not legislators become familiar and comfortable with decentralized economic incentives if it were in their interest to choose them?

The model provides another explanation (beyond discipline bias) for congressional preferences for command and control over decentralized economic incentives in regulation. When there is more conflict and greater uncertainty, congressmen have greater concern with procedural safeguards. The very flexibility of economic incentives (the source of their strength to economists) is interpreted by the congressman as uncontrolled uncertainty. A more favorable political climate for decentralized economic incentives is where there is little conflict and uncertainty. For example, in establishing the CAB, where there was relatively little conflict and uncertainty, a decentralized instrument, price setting, was in fact delegated to the agency. (But note that some of the uncertainty associated with price setting was controlled by also delegating power to restrict industry entry.)

Inside an agency, performance is evaluated not in terms of a global concept of economic efficiency, but in terms of its own structure of incentives. To grow and prosper the agency must show some visible signs of accomplishment toward its policy mandate and its specific goals as spelled out in its substantive authority.

To communicate with Congress and to have its accomplishments believed, it is useful for the agency to be concrete about its accomplishments. To say 'we improved the public health' is too vague without considerable evidence, especially of a quantitative nature. To say 'we banned dioxin' carries more weight as the achievement is easily verifiable. When there is a greater conflict and more uncertainty there is greater peril for the agency and incidentally a greater need to justify its actions before Congress. To maintain the support of its congressional sponsors, without whom the agency could not survive, the agency must report, very concretely, its achievements (because the sponsors are particularly sensitive to criticisms that the agency is 'doing nothing'). The agency's activities are described in terms of its 'planned program achievements,' or p.p.a.'s, or 'beans' (as they are sometimes referred to in the agency). Beans have the advantage of being countable and verifiable. Banning dioxin is a bean. On the other hand, instituting an effluent tax is less of a bean.

Thus the agency will respond to the form of the regulatory intervention
mandated by Congress and the environmental factors of conflict and uncertainty by pursuing only the more concrete and highly visible regulations. Such regulations have disadvantages, however, as they become targets for congressional critics who represent interest groups hurt by the planned program accomplishments. The agency, realizing this vulnerability, has an added incentive to make its accomplishments defensible. Increasing the defendability of the concrete, and visible, regulations in turn adds to the already high fixed cost per regulation. The result is the 1000 page regulation, infrequent but well fortified. And to justify its large (fixed) cost of promulgation, often large in scale.

The strategy of a few big beans has led at times to a sense of frustration within the agency. Some regulatory attempts become too cumbersome to make it through the agency — for example, after 48 tries, an attempt to regulate asbestos was abandoned, having never gone beyond EPA’s Office of Pesticides and Toxic Substances. It would have been a billion dollar regulation. Other billion dollar regulations, such as that on benzene, are remanded by the courts. And though a few big regulations survive, only a minute fraction of the problems are being addressed.

A final characteristic of such regulatory process follows from the reliance on command and control. Having chosen, partly in response to congressional wishes, regulation by legal order, the agency often finds itself dictating specific technologic solutions. To survive court tests and political pressures for defendability the agency must understand, or claim to understand, specific technological processes as well as do experts in the affected industry. Having maneuvered itself into a position where it needs this type of specific information, the agency puts itself at a particular disadvantage relative to the regulated firms, which specialize in this information in the course of their business.

Within Congress, performance of an agency is often evaluated in terms of whether the agency has on balance benefitted the constituencies of individual congressmen. When the answer is negative, the agency is likely to find out during oversight hearings, by hostile queries, by legislative veto, or by reduced authorization or reduced budget.

In sum, then, conditions of high conflict of interest and great uncertainty will lead to broad scope and many instruments, but confining procedures, and, on balance, little substantive discretion for the administering agency. Under such conditions, and with such a regulatory form, the relatively few regulations which are developed are likely to be complicated and costly. Conditions of less conflict of interest and less uncertainty, on the other hand, will lead to greater procedural discretion over a smaller, more focused range of regulatory targets. Under such conditions, and with such a regulatory form, regulatory interventions will tend to be more flexible and less controversial from the standpoint of both Congress and the agency.
6. Prospects of reform

We have suggested that increased conflict and uncertainty are prime ingredients of regulatory inaction. Some of this conflict and uncertainty has roots in the American Constitutional system itself. Single-member constituency districts may accentuate conflicts between regional interests, the division of labor provided by the committee system may lead to jurisdictional conflicts within Congress, and the separation of powers prescribed by the Constitution provides a natural avenue for the proliferation of competing interests. These institutional features may then lead to increased uncertainty over the effects of governmental action.

We are not suggesting, however, that environmental and health regulation has failed altogether or that its limitations are completely due to our particular system of democracy. A very large factor is the large amount of uncertainty associated with potential environmental risks. For example, in the toxics area uncertainty arises from our limited understanding of cancer mechanisms, the transport of toxic chemicals in groundwater, and so on. The uncertainty is part of the nature of the problem. It is augmented in many cases by long latency periods (twenty to forty years for carcinogens).

Nor are we suggesting that attempts to improve regulatory performance depend upon changing the basic features of American democracy. It appears that there are possible, less fundamental, changes which might improve the prospects of environmental regulation (see also Breyer, 1982). To illustrate the implications of our theory, let us assume that, as many economists would argue, the efficiency of environmental regulation would be improved by a greater reliance on decentralized instruments and less on command and control. If we are on the right track, decentralized instruments are not going to increase in usage merely because of economists' exhortations. The present factors of environmental uncertainty and conflict will overwhelm such a strategy. A more effective strategy to implement decentralized incentives is to focus on ways to decrease conflict and uncertainty in environmental policy making and, more specifically, ways in which the decentralized instruments themselves can be designed to decrease group conflict and uncertainty. For example, marketable pollution quotas decrease uncertainty as to the resulting levels of air or water quality, compared with effluent effects. Distributing quota revenues within the polluting industry may reduce group conflict. Other compensation systems may be tied to decentralized instruments promoting efficiency. Liability rules may be tied to conditions of behavior which limit liability. A current development is the rapid increase in the number and success of toxic tort suits. While this process is decentralized, it is highly uncertain and conflict laden. If this development continues, decentralized instruments, such as hazard taxes, implemented by government agencies may be seen as decreasing
uncertainty and conflict. Moreover, uncertainty can be reduced directly by research on environmental and health effects. Just as thalidomide led to the 1962 Food and Drug Amendments and Three Mile Island led to a change in political and administrative climate for nuclear power, increases in the assessment of hazard potential change the balance of uncertainty and conflict in legislative and bureaucratic politics.

NOTES

1. The problem of structuring the principal–agent relationship between Congress and the regulatory agency bears many similarities to the problem of structuring Congress’ relationship with its own committees (see Buchanan and Tullock, 1962; Shepsle, 1979; Shepsle and Weingast, 1982).

2. Congress must prescribe explicit statutory limitations on administrative discretion for the delegation of legislative authority to fit within the framework established by the courts in Panama Refining Co. v. Ryan, 1935 (243 v.s. 388), A.L.A. Schechter Poultry Corp. v. United States, 1935 (245 v.s. 495), and Carter v. Carter Coal Co., 1936 (298 v.s. 238).

   Broad delegations of authority by the legislature must be accompanied with procedural protections or an opportunity for judicial review (see also Yakus v. United States, 1944 (321 v.s. 414)). However, there will still be a great difference among the procedures prescribed for various acts which fit within the framework of the delegation doctrine.

3. The standard way of modeling one individual’s uncertainty about others’ preferences and interests is to view nature as choosing, among other things, individuals’ utility functions.


5. Tullock (1965) and Niskanen (1975) have modelled how decision making within the agency can lead to the kinds of biases that we suggest here.

REFERENCES


