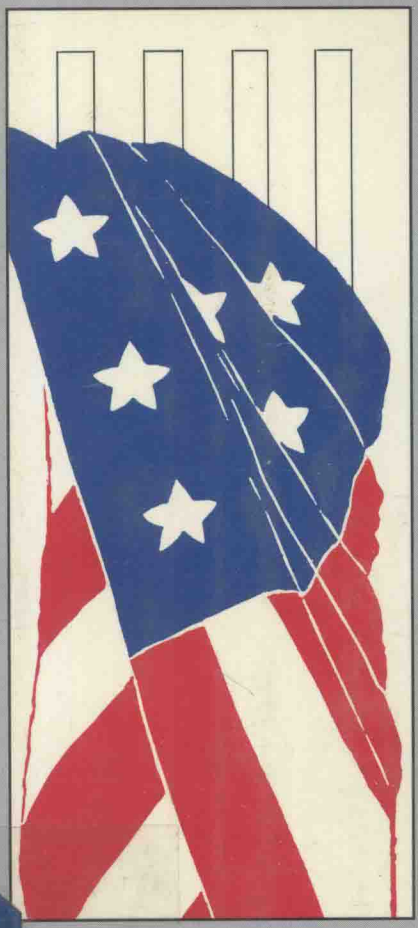
JUDICIAL COMPULSIONS



HOW PUBLIC LAW DISTORTS PUBLIC POLICY

JEREMY RABKIN

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To the memory of Herbert Storing,
who taught patience for the intractable,
and to the honor of Antonin Scalia,
who still urges intransigence
against the indefensible.

PREFACE

THE ARGUMENT of this book is rather abstract. I have tried to illustrate the force of the argument with detailed case studies in Part III, but many readers may still regard the overall argument as excessively formal or ideological. Faced with an argument of this sort, many readers may quickly begin to wonder about the author's "real" agenda or about the "real" point of the argument. Others, of course, may simply find themselves losing interest.

For suspicious readers, it may be useful to start with a few words about how I came to write this book and what I take to be its real point. For other readers, it may provide encouragement to keep reading if I start with this brief account of what kept me writing. As is often true with formal arguments, this one does have a personal story of sorts behind it. And the story goes back a good number of years.

In the summer of 1976, as a graduate student at Harvard, I received a grant to study the Office for Civil Rights (then in the Department of Health, Education and Welfare). I had originally intended to study a very different agency. The Atomic Energy Commission had recently been divided into separate regulatory and promotional agencies and I had thought it might be interesting to study the way the new arrangements had affected the regulation of the nuclear power industry. But my academic advisor persuaded me that the regulation of nuclear power would be a rather technical and unrewarding subject for a political scientist. It was a remarkably short-sighted judgment, but revealing of how much even the shrewdest observers underestimated the emerging pattern of public interest politics in the mid-1970s.

So I was persuaded to study the Office for Civil Rights instead. OCR was then the subject of much controversy on college campuses because of its efforts to enforce affirmative action hiring requirements on college faculties. But that aspect of its operation was soon transferred to the Labor Department and was not the main thing that absorbed my attention. Instead, as fate would have it, what most engaged my interest was an elaborate suit by various civil rights organizations to redirect the agency's enforcement operations, a suit which already had asserted jurisdiction over some 80 percent of the agency's efforts. In the summer of 1976, OCR officials were boasting of having achieved a final settlement in this litigation. It turned out to be the first of many "final

settlements"—as the reader will discover in chapter 5. By chance, I had stumbled on one of the handful of agencies most likely to turn one's attention from the politics of regulation to the new mode of politics by litigation. A summer at the Nuclear Regulatory Commission could not have turned my attention in this direction any more surely.

What bothered me at the time was not that judicial intervention had a terrible effect on the agency; OCR had taken on a whole range of ambitious new regulatory responsibilities in the mid-1970s and would have been a rather disordered and confused agency under any circumstances. What most troubled me was the legal or constitutional question of how a court could claim the authority to embark on such a broad-ranging reform effort in the first place. When I returned to study OCR some years later, it seemed to me that judicial intervention had, in fact, done more harm than good. But at the outset I wondered how a court could try its skill in such matters at all.

To pursue this question, I enrolled in the standard administrative law course at the Harvard Law School in the fall of 1976. By the end of the term, I was no less confused about how a court could claim such authority. But I had learned that leading legal scholars did not regard such an enterprise of judicially directed reform as at all peculiar or problematic. I discovered that law students in Cambridge and practicing attorneys in Washington held to the same view. And I came to realize that the litigation that engulfed the Office for Civil Rights was not, in fact, an aberrant case, but simply the logical culmination of the broad trend in American public law. It took me some years of further study and reflection to conclude that my initial, incredulous reaction was, after all, well grounded and that the trend in public law during the 1970s was fundamentally misguided.

By the early 1980s, however, judicial activism seemed to be in retreat and I began to think that a presentation of the traditional arguments against an inflated judicial role in administrative affairs would amount to beating a dying horse. What persuaded me to return to this project was the realization that the trend of the 1970s had actually gained a second wind during the 1980s, and not even the advent of numerous Reagan appointees to the federal bench had done much to undermine the strange premises of the earlier, general trend. The *Adams* litigation, itself—the litigation against the Office for Civil Rights that had initially engaged my interest in the new trend in administrative law—droned on through the end of the second Reagan administration. So did similar kinds of litigation involving other regulatory agencies, as the case studies in Part III of this book confirm. Patterns of judicial control that might once have been attributed to partisan enthusiasm thus continued through the 1980s under judges of very different leanings. The judiciary seemed in the grip of a strange compulsion.

This compulsion can be readily described. The policy decisions of regulatory agencies are frequently criticized and disputed, particularly by the most immediately concerned political constituencies or interest groups. And these criticisms are routinely couched in legal terms as claims that the relevant agency is not adhering to its policy obligations "under the law." The compulsion of judges is to believe that if an advocacy group can show that it would obtain better results from a different construction of an agency's legal duties, the group deserves a day in court to urge its own view of what the law requires. And if the judge then thinks there is merit in the legal argument, he feels compelled to push the agency in this direction. The inevitable result is that interest groups are encouraged to regard their policy preferences as claims of legal "right," and policy decisions become mired in legalism. Judicial compulsions become policy compulsions. The way to break the compulsion is to return to the traditional constitutional view that only individual persons have rights and that legally protected rights must involve individualized claims, like liberty or property.

I have tried to set out the argument for this traditional perspective in the course of this book. It is fundamentally an argument about perspective, and for this reason does not descend to detailed doctrinal criticism or doctrinal prescription in the style of the law reviews. I have tried to remain on that middle ground where political theory merges with the broad lines of constitutional doctrine. The book offers an extended argument about how we ought to think about law and courts in general, not an argument about how courts should describe what they are doing or how they ought to manage occasional, necessary exceptions.

The larger target of this book is not the activity of judges but the climate of legalism in which contemporary judicial compulsions have thrived. Even when not dragged into court, the Reagan administration was continually berated—and frequently intimidated—by charges that it was defying or disregarding legal obligations. The Bush administration is likely to encounter similar charges and may well be similarly damaged or similarly intimidated by them. Extended judicial oversight ratifies and stimulates this larger pattern by suggesting that even where no individual rights are involved, "the law" does and should have a commanding force apart from considerations of policy or consequence. The larger point of this book is that such legalism is a distraction from the genuine policy issues that ought to dominate public debate about regulatory performance. It may seem strange to offer a formal or legal argument to counter excessive reliance on legal arguments. In the current climate, however, I believe that this sort of formal argument is necessary to clear the way for debate on more substantive questions of policy.

Much of the response to this book, however, will surely be "realistic" and

partisan rather than formal or legal. It will be said that to depreciate legalism in this setting is to imply that administrative officials need not be overly concerned with the legislative intentions behind the laws they implement. And this implication, it will be said, is calculated to inflate the policy preferences of Republican officials as against the legal enactments of a Democratic Congress. There is certainly some truth in this objection. My point is that it is foolish to make long-term constitutional assumptions on the basis of the particular partisan configurations of any particular era. Part of the value of formal or constitutional argument is that, by its abstraction, it helps to check the tendency toward short-sighted partisan calculation.

In the interest of full disclosure, however, I will confess here that my own policy views often do not run parallel with the substantive policy priorities of the Washington advocacy groups described in this book. But I can also say, in all honesty, that I have been continually impressed by the alertness, energy, and dedication of public interest advocates in Washington. At the same time, I have frequently noticed—and lamented—short-sightedness, fecklessness, and confusion among the political appointees of Republican administrations over the past fifteen years. I do not have any great confidence in the supposed expertise of career bureaucrats, either.

But I believe that the argument of this book does not rest on partisan or personal sympathies. Whether one has more sympathy for private advocacy groups than I do or less respect for executive officials than I do, the fact remains that executive officials are responsible for policy and private advocacy groups are not. This fact may seem a mere formal characterization, but it is true and important nonetheless. Advocacy groups cannot be held responsible for their preferences. Officials are supposed to be responsible for their decisions. That is the heart of the matter. Debate over administrative decisions is both inevitable and essential: officials ought to be criticized for poor performance. But they ought to be criticized *for their performance.* It does not advance public policy to channel criticism and debate into legalistic criteria of proper performance. That is what happens, however, when we pretend that "the law" means that responsible officials owe some particular policy to the advocacy groups best situated to claim it.

My argument is not an appeal for unconditional trust in executive policy decisions. If wider acceptance of the constitutional argument advanced in this book were at all likely to have that result, I would have serious misgivings about the argument. But I do not accept the notion that policy debate must be forever vain and vacuous if it cannot grasp hold of fixed legal criteria, for this is a notion that would make one despair altogether of republican government. It seems to me, however, that this is far from what goes on in public policy. The problem is not that contending advocates are forced, in desperation, to

cling to the restraining cords of law. The problem is more often a logjam of contending interests and constituencies, fearful of almost any creative or independent initiative on the part of federal agencies. It seems plain to me that we will continue to suffer confused and frustrating policy outcomes if we cannot accept some scope for independent action by executive officials, and that is not likely to happen while contending interests are encouraged to view even the details of policy as legally entailed and precommitted.

I have some hope that this is an argument that can receive more of a hearing in the 1990s than it did in the 1980s. Certainly, the dream of the 1960s and 70s that activist courts can be the agents of social progress has worn very thin. In the past decade, courts have acted as brakes on policy reconsideration, and even most of those who have sought to reach for these brakes seem to understand that there is a long-term cost to administrative paralysis. Critics of the Reagan administration may have hoped to delay change or reconsideration until the onset of a new administration. With the onset of a new Republican administration, even such critics may begin to wonder whether it is worthwhile to allow constituency groups to veto new policies into the indefinite future. Most people may not care very much whether regulatory agencies are performing well. Some of those who most often resort to the courts to control or direct regulatory policy care very much, however, and they may for just this reason be willing to reconsider their earlier views. The argument will not be settled soon or all at once. But it is worthwhile to return to the fundamentals if we want to break out of the legalistic compulsions of the recent past.

Whatever its merits, this book owes much to those who have helped, encouraged, and prodded me over the years. My interest in administrative law was initially stimulated by the late Herbert Storing, long-time professor of political science at the University of Chicago. My initial interest was then further encouraged by another Chicagoan, Antonin Scalia, who was editor-in-chief of the journal *Regulation* during the late 1970s, when I served there as an assistant editor. I have also incurred considerable intellectual debt to members of the Harvard faculty, most particularly to Professor James Q. Wilson for many years of patience and good sense and to Professor Harvey C. Mansfield, Jr., for periodically luring me into the dizzying realm of political thought beyond conventional good sense. At Cornell, I owe most to Professor Werner Dannhauser, for his encouragement and example, in keeping his eyes upward and his feet on the ground. I must also express appreciation to many other colleagues at Cornell for contributing to a tolerant and stimulating scholarly environment, despite the many differences among us.

For helpful comments on the final draft of this book, I would like to thank

Louis Fisher of the Congressional Research Service, Robert Katzmann of the Brookings Institution, Thomas Christina of the Department of Justice, Terence Pell of the Department of Education, and Michael S. Greve of the Washington Legal Foundation. I have also benefited much over the years from talks about the general subject of this book with William Kristol and Fred Baumann, who understand that sustained argument is a high form of friendship.

Finally, I must express my appreciation to my parents, my wife, and my children. They have all been immensely patient (or just sufficiently impatient) in waiting for this book to be completed, and they have all been constant reminders to me that legal formulas never reach the fundamental things.

Ithaca, New York
January 1989

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PART I

INTRODUCTION

1

The Politics of Interest Group Legalism

SCARCELY a decade elapsed between the assassination of President Kennedy and the forced resignation of President Nixon, but that decade—now regarded in cultural chronology as "the sixties"—transformed the landscape of American public life. It was an era of extreme moral passion and defiant political gestures, an era of great expansion in governmental undertakings and sharp decline in public respect for government. Many of the new concerns that first rose to prominence in that era, such as civil rights and the environment and consumer protection, have retained a permanent place in the framework of public policy. Many of the institutional transformations of that era have also endured through the 1980s. This book is about one of them: the extension of judicial controls over federal regulatory operations.

Prior to the mid-1960s, federal regulation was largely preoccupied with stabilizing particular industries or particular economic transactions, and judicial review of regulatory decisions was almost entirely limited to suits by regulated firms. But the dominant political atmosphere of the sixties—spurred by the civil rights movement, then by the antiwar movement, then by the environmental and consumer movements—was contemptuous of interest group politics and suspicious of "bureaucracy." New programs were celebrated for serving the disenfranchised, the "quality of life," or some higher communal concern.[1] The "new politics" of that era encouraged a new approach to judicial controls on regulation, allowing the beneficiaries of regulation to sue agencies to demand more extensive or more rigorous con-

trols. And dozens of so-called "public interest" groups sprang up to exploit these new opportunities.

As the passions of the sixties subsided, the new politics began to settle into more traditional patterns. Successive elections brought moderate or conservative presidents, and in Congress, too, after the early 1970s, the prevailing mood turned more cautious about major regulatory initiatives. Advocates for the environment or consumers or civil rights no longer seemed to speak for vast national movements, transcending ordinary politics, but seemed instead to operate as one more set of Washington interest groups. But the pattern of judicial controls developed in the heady days of the sixties remained in place. And it has remained a continuing source of leverage to advocates of greater regulation, allowing them to resist—often with much success—the new policy directions sought by the Reagan administration during the 1980s.

The new system in administrative law has become entrenched because it serves not merely self-styled "public interest" organizations, but trade unions, business trade associations, and other interests with a stake in extending regulatory controls over others in particular policy contexts. Not even the advent of Reagan appointees to the federal bench has made much of a change in the new administrative law. So in 1985, for example, more than one-third of the suits against government regulatory decisions heard by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Court of Appeals)—the leading court in the country for major regulatory challenges—were brought by litigants seeking to extend or intensify regulatory controls on third parties. In 1987 this proportion was even higher.[2] In the eighties, this system is less often defended with the sixties rhetoric of safeguarding the "public interest" or assuring legal protection for "underrepresented interests." Rather, it is more commonly defended—at least by judges and law professors—as the price we must pay to maintain the rule of law or to retain a constitutional scheme of checks and balances.[3]

This book is an argument for finally abandoning this legal legacy of the fevered 1960s. It argues that the current pattern in administrative law is *not* the price we pay for constitutional government and the rule of law. It is the price we pay for distorting constitutional government and the rule of law to accommodate the claims of interest groups. By the same token, this book argues that the current pattern in administrative law is *not* a check on interest group politics. It is an extension of interest group politics, under legalistic guises. In a number of regulatory fields the system has, in fact, yielded the usual negative consequences associated with interest group politics: deflecting policy toward narrow aims and interests, paralyzing policy initiative, fostering contradictory or confused overall policy patterns.

Pious talk about "law" does nothing to change the underlying reality. Those

who challenge regulatory decisions always have an interest in the outcome. They do not bring lawsuits because of abstract reverence for law. If they are not asserting their own rights, in the manner of regulated firms in conventional lawsuits, legal challengers must be understood as asserting the particular interests of the particular group to which they belong—or, in other words, simply practicing interest group politics in a new forum. It is quite irrelevant whether environmental or consumer advocates or other "public interest" organizations conceive their advocacy as benefiting the entire public. There is no a priori reason to assume that the public shares their view of what constitutes a "benefit" or that the public wants as much of such benefits—with all of their associated costs—as do these advocacy groups. Labor, business, and other advocacy groups may also be convinced that in gaining what they seek they will benefit the general public, and these other interests also obtain considerable leverage under the "new administrative law." But it is surely safer to view all litigating groups as advancing their own interests and their own policy aims than to assume that they are truly disinterested or truly qualified advocates for the actual benefit of the entire public.

The current system in administrative law can hardly be defended, moreover, with the claim that judges will prevent advocacy groups from obtaining any more than their due under the law. To conceive the role of the courts in this light is, after all, to concede the most disputable premise of the undertaking—that public law can in fact be conceived as making particular commitments to particular groups. Neither is it any more persuasive to emphasize the public stake in legality rather than the particular interests of the groups who invoke it. This formula implies that the public has more of a stake in legality than in sound policy—which is, to say the least, a rather curious notion of the public interest, one much more likely to appeal to a public interest lawyer than to the ordinary citizen, left to cope with the consequences of such aimless "legality." Even most defenders of contemporary administrative law do not seem entirely serious in appealing to legality, for this appeal is usually coupled—at least in legal literature—with the disclaimer that the law should not be interpreted in overly rigid ways.[4] Thus the most sophisticated arguments suppose that the modern judge can skillfully find his way to just the right policy balance, rejecting excessive interest claims on the one side and avoiding overly rigid legal constructions on the other.

But with all of the interests and advocates who lobby the agencies now enabled to petition the courts, why suppose that the judges will make better decisions about which ones to heed? Some commentators have argued that judges will make better policy decisions because they are politically independent and removed from bureaucratic routine.[5] But such arguments—celebrating the unaccountable, dilettante judge over the full-time, responsible offi-