Readings
of particular interest

Why Ideology Counts

"The Politics and Economics of Senate Voting on Coal Strip Mining Policy" (Harvard Energy and Environmental Policy Center, Discussion Paper E-82-10, October 1982), and "Further Evidence on Capture and Ideology in the Economic Theory of Politics" (Harvard Institute of Economic Research, Discussion Paper 979, April 1983), by Joseph P. Kalt and Mark A. Zupan.

What is sometimes called the "economic theory of politics" postulates that regulators and legislators sell their "outputs" to constituents in a "market" for political support. Some theorists even suggest that there is "perfect competition" in the market for representation, so that the legislator that fails to sell to the highest bidding constituent group will inevitably be outbid for reelection. Of course, the economic theory acknowledges that voters may themselves act on ideological as well as economic motives, but it leaves little room for the traditional assumption that legislators often vote to advance their own views of the public interest even when it does not further their political well-being to do so.

According to Joseph Kalt of Harvard University and Mark Zupan of MIT, a number of recent studies cast doubt on the pure "economic theory" and reemphasize the importance of publicly interested or ideological motivations in explaining government actions. These studies find that a variable called "legislator ideology," typically based on the ratings of such groups as the liberal Americans for Democratic Action and the conservative Americans for Constitutional Action, is important in explaining why legislators vote the way they do. Conversely, variables representing the interests of home-state voters do not adequately explain legislative choices. In these papers, Kalt and Zupan examine U.S. Senate votes on strip-mining issues and find more evidence for this case.

They conducted a statistical analysis of Senate votes on the Surface Mining Control and Reclamation Act, which Congress passed in different versions in 1974, 1975, and 1977 (the first two versions were vetoed by President Ford, the third was signed by President Carter). They found that the voting patterns could not be adequately explained by the presence or absence in each senator's home state of such groups as surface and underground coal producers, environmentalists, and users of coal and environmental amenities. Some of these interest groups might have been better organized and more concentrated than others, but adjusting the analysis to cover this possibility did not help much. The predictive ability of their model improved significantly, however, when they added an "ideology" variable based on the ratings of the League of Conservation Voters (LCV).

Of course, the ideology variable might serve as a proxy for otherwise unidentified constituent interests on issues pitting preservation against economic growth. To avoid this possibility, the authors devised what they hoped was a purer measure of ideology, based on roll-call votes on social and ethical issues such as the death penalty, sex education, the immigration of communists, and the neutron bomb. The idea is that such issues do not generally mobilize economic interest lobbies, so that senators are more likely to vote ideologically on them. The authors found that the social/ethical ratings predicted the senators' strip-mining votes just about as well as the LCV ratings, which implies that the two kinds of ratings are both measuring the same sort of ideology.

There is another simple way to test whether senators' ideological votes reflect their constituents' preferences or their own. As senators get closer to reelection, the perceived cost of contradicting voters' wishes should rise. The authors found that as election time approached, senatorial votes were less influenced by the personal ideological ratings of the senators.

Kalt and Zupan say that there are several sources of institutional slack that might allow legislators to pursue their own objectives. For instance, voters have poor incentives to be well informed; they must make all-or-nothing choices between a few candidates, each with a large bundle of positions; they cannot hold winning candidates to their promises by contract; and the "market" for legislators meets only infrequently, once every six years in the case of senators.

If senators indeed have a chance to further their personal ideological objectives, Kalt and Zupan say, the job should logically attract people with relatively intense ideological tastes. Many of the other self-interested things legislators can do, such as taking bribes and going on junkets, are subject to official or unofficial sanctions, but having voted one's "conscience" is, if anything, considered to be grounds for admiration.

The Air Controllers' Strike: Implications for Labor Law

"Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers" by Bernard D. Meltzer and Cass R. Sunstein, in *University of Chicago Law Review*, vol. 50, no. 2 (Spring 1983), pp. 731-799.

Why are strikes by air controllers, who work for the federal government, a federal crime, while equally disruptive strikes by airline pilots, who work for private companies, are protected by federal law? In this article, Professors Bernard D. Meltzer and Cass R. Sunstein of the University of Chicago Law School discuss that question, along with its broader implications for federal labor policy and the legal discretion of executive-branch officials, in light of the 1981 air traffic controllers' strike.

The current ban on strikes by public employees, including federal employees, has been attacked on the grounds that the private and public sectors are not different enough to warrant the dramatic difference in the treatment of strikes. Indeed, some critics have argued that the ban relegates public employees to "second-class citizenship" and is thus vulnerable to constitutional challenge.

The authors examine two possible reasons for the disparity. The first is that the services public employees provide are more essential. The injuries that could result from a suspension of national defense and relief to the indigent, to take two obvious examples, might put undue pressure on "management" to capitulate.

The second reason is that market forces may tend, with some exceptions, to provide a much more direct check on labor demands in the private sector than in the public sector. In the private sector, wage hikes will lead to higher prices and thus lower production and employment. That prospect can often temper wage demands and encourage other bargaining concessions. In the public sector, there is no such direct and sharply focused constraint. Consumers do not pay directly for many important services, and although citizens might protect their interests by careful voting, their stake is typically a diffuse one compared with that of the public employees. Accordingly, the ban on public employee strikes may be understood as a response to the fear that a well-organized interest group will acquire disproportionate power over public finances, thereby undercutting the institutions of representative democracy. While these distinctions are not without their difficulties, they supply a substantial justification for the prevailing federal policy, Meltzer and Sunstein argue. The statutory ban on federal employee strikes, they say, should survive constitutional attack.

Having sketched out the legal setting, the authors proceed to analyze the circumstances of the 1981 strike. Before the strike, they say, PATCO engaged in two apparently contradictory strategies. On the one hand, it repeatedly reassured members of Congress, among others, that it would respect the law banning strikes. On the other hand, despite these reassurances, there is evidence suggesting that PATCO leaders were actively building up rank-and-file support for the strike, to the point of "strike fever."

There was some genuine dissatisfaction with salaries and working conditions. The inadequacies of the latter had been described by various task forces. The most recent and thoroughly documented report, issued in 1982, noted the distinctive "concentration and intensity" of the demands made on air controllers and charged that management had proved highly insensitive to employees' complaints. Of course,

Mac, *Daily Mail* Rothco

"Now hear this . . . The big red one with the yellow stripes is the last one I bring down—I got my own job to do."

Congress did not intend dissatisfaction, even if warranted, to justify an unlawful strike. Nevertheless, PATCO may have expected a strike to resolve the dissatisfaction quickly, because of the devastating effects of bringing air transportation to a halt. (See also "Close Encounters in the Skies," by Michael E. Staten and John R. Umbeck, *Regulation,* March/April 1983.)

The authors conclude that PATCO's decision to walk out, so ill-conceived in retrospect, resulted from several misunderstandings (and a few other factors as well). First, candidate Reagan had given PATCO leaders assurances before the election that the air controllers' grievances would be remedied if he won the election. In a highly publicized letter, Governor Reagan referred to the deplorable state of the nation's air traffic control system, noting that he had been informed that there were "too few people working unreasonable hours with obsolete equipment," a situation that had placed the nation's air travelers in "unwarranted danger."

A second possible factor in PATCO's miscalculation was that earlier administrations had not responded to past violations even with extensive legal sanctions, let alone massive firings and replacements. PATCO apparently expected this leniency to continue, despite a cluster of signals that it would not. The government had publicized its extensive plans to counter a strike. The air control system was considered overstaffed. The national mood, as formed in the aftermath of the Iranian hostage situation and reflected in the new administration, was

unsympathetic to violations of laws and anti-strike oaths. Courts had also called on the Department of Justice to enforce the laws against strikes.

The article also argues that the department's decision to prosecute the leaders of the strike was not an unconstitutional attempt to penalize the exercise of free speech rights. Although the current law bans selective prosecution, it does not ban giving priority to the prosecution of those who not only commit a crime but counsel others to commit it as well. Finally, the authors find that there is no legal obstacle to rehiring the strikers but that the President was legally required to discharge those found to have been strikers.

The authors conclude that the corollary of an anti-strike policy should be responsive employee management. The claims that federal workers suffer "second-class citizenship," according to Meltzer and Sunstein, may be answered at least in part by expanding worker participation, taking seriously the recommendations of task forces appointed to study labor unrest, and enlisting the talents of employees in solving problems of the workplace. It is of course by no means clear that such measures would have succeeded in preventing the PATCO strike—although they might help to reduce the likelihood of similar strikes in the future—but they would serve some of the same policy objectives that the legalization of the strike weapon serves in the private sector.

Another Look at Landing Slots and Airline Competition

Airport Access Problems: Lessons Learned from Slot Regulation by the FAA: An Economic Policy Analysis by Donald Koran and Jonathan D. Ogur (Washington, D.C.: Federal Trade Commission, May 1983), 73 pp.

One unexpected consequence of the 1981 air controllers' strike was the re-regulation of airline routing decisions, three years after they had been officially deregulated. To lighten the burden on the air-traffic control system, the Federal Aviation Administration decided to limit the number of landing "slots" available at each of twenty-two major airports during peak travel times. It had used this rationing method since the late 1960s at four crowded airports in New York, Chicago, and Washington. (For more details, see "Airline Competition and the Slot Market," *Regulation*, September/October 1982.)

Economists have frequently suggested that the FAA should allow more play to market forces in allocating slots, and in particular should let airlines sell their slots to each other in an "aftermarket." Aside from a brief experiment in 1982, however, the agency has always ignored these suggestions. This staff report of the Federal Trade Commission's Bureau of Economics concludes that the FAA's refusal may be costing air passengers tens of millions of dollars a year.

Before airline deregulation the slot-rationing system created less distortion, the authors say, because entry was already largely frozen by Civil Aeronautics Board regulations. Once Congress freed the airlines to realign their route structures, however, and once the controllers' strike led the FAA to extend slot rationing to many more airports, contradictions became apparent. It showed, for example, that the "use it or lose it" basis on which airlines held slots distorted their incentives. For example, Air Florida kept flying planes to Burlington, Vermont, over the summer so that it could preserve its slots for use during the busy winter months.

In May 1982, the FAA responded to its critics by allowing airlines to barter slots with each other. That left a serious problem: while existing carriers could rationalize some of their operations, new entrants had no slots to barter with. In mid-1982 the agency let airlines sell slots to each other in a six-week experiment. During that time there were more than 190 slot sales at prices ranging from $12,000 to $500,000 each, with more convenient landing times commanding the higher prices. (Not all sales were for cash. Empire, a commuter line, gave American three slots at O'Hare in exchange for $1.5 million worth of computer reservation services and a slot at Kennedy.) Slot buying also enabled some fledgling airlines to keep flying even after losing key slots to FAA cutbacks. People Express survived by buying a dozen slots at Newark for $200,000 from two other carriers.

Some defenders of slot-rationing had predicted that airlines would simply pass the cost

of slot purchases on to customers in higher fares. The authors, however, found neither theoretical nor empirical support for that concern. They argue that fares will reflect the scarcity of landing opportunities whether or not trading is allowed. In fact, fares are already 20 percent higher on average at airports with a slot system than they are at unrestricted airports. Because slot selling would not increase that scarcity—but merely transfer so-called economic rent—fares should not rise on average and might even fall as unnecessary costs were cut.

The authors say the prohibition on slot sales creates three kinds of unnecessary costs, two of which they estimated using data from the St. Louis airport. First, the rule keeps slots from being transferred from lower-valued to higher-valued flights. The FAA's 27 percent cutback in landing slots at St. Louis led to a loss of flights that passengers had valued at around $15.9 million per year. With slot sales, the authors estimate, a different collection of flights would have been lost at a perceived cost to passengers of about $12.2 million. "The difference, approximately $3.7 million per year, represents the extra loss at St. Louis because non-market allocation gave slots to relatively low-valued flights," they say.

Second, the rule reduces competition by creating barriers to entry by new airlines, especially those entering a market for the first time. The actions of the carrier committee at Washington National provide evidence of this anticompetitive bias:

> At the last meeting the dispute was so intense that nine airlines voted against a proposal that would have given each of them exactly the number of flights they wanted. They did so, they said, to keep New York Air and USAir from increasing the number of their flights. [*Washington Post*, November 8, 1972]

Using a model of airline demand, Koran and Ogur calculate that full monopoly pricing would keep fares 48 percent above cost. Assuming that the rule blocks entry only in part, leading to a 10 percent premium over cost, passengers at the St. Louis airport would lose $3 million a year.

Third, the rule may lead to an incorrect amount of investment in airport and air-traffic control capacity. For example, "without meaningful prices to discourage peak period use, expensive new facilities may be required prematurely." Slot sales might also give planners useful information on where and when to invest in airport and air-traffic control improvements, and would help shift traffic to less-congested airports—such as Newark (instead of the New York airports), Dulles (instead of Washington National), and Midway (instead of Chicago O'Hare). Many of the new discount airlines are already basing their operations at these (usually) less costly second-string facilities.

Koran and Ogur do not provide estimates for the magnitude of the third category of losses. The first two categories add up to around $7 million for the St. Louis area—which, extrapolated to a nationwide market, implies passenger losses of tens of millions of dollars a year.

The slot system is being phased out except at Washington National, but the authors say that local controls on noise and ground congestion continue to limit entry. They suggest that a market approach would reduce the costs that these remaining controls impose on the traveling public.

Conformity and Dissent in the Public Classroom

Compelling Belief: The Culture of American Schooling by Stephen Arons (McGraw-Hill, 1983), 228 pp.

The current debate on school reform focuses mostly on how to improve the "quality" of education, neutrally defined. But the educational marketplace is one part of the marketplace of ideas, and its domination by government should be seen as a threat to intellectual liberty. Thus argues Stephen Arons, a professor of legal studies at the University of Massachusetts at Amherst, in this survey of the legal issues involved in conflicts between school officials and families.

The author begins with the issue of library and curriculum selection in public schools. These disputes are usually cast as battles between "censorship" and "academic freedom." On the one side are parents and political activists who object variously to profanity, evo-

lutionary theory, racism, and sexism in school books. On the other are teachers and librarians who want to keep as much authority to select books as possible. (Local school boards are often accused of censorship if they side with the parents against the teachers.)

"It is hard to know which group should be called 'censors' in such a school war," Arons writes, since the "censors do nothing fundamentally different from what is done by the 'selectors.'" Both groups want "to show that their values and world view should become the official reality ordained by law." No matter who wins, one set of families is sure to dislike the values their children are taught.

It could be said that those who want more inclusiveness—longer optional reading lists, more books on library shelves—are less properly labeled "censors" than those who want to exclude books. But there are practical limits to this distinction. Funding and shelf space for school libraries are painfully limited, and there is no point teaching children in groups if they all study from different texts.

Sometimes it is proposed to defuse curriculum disputes by selecting textbooks on neutral educational merits: whether they are teachable, interesting to students, appropriate to the age group, and so forth. The "problem with this approach to censorship," the author says, "is that it ignores the legitimate interests of the contending parties." If parents genuinely believe that a text inculcates bad values in their children, they are right to object to it no matter how well it develops skills. Some textbooks try to strike a balance between contending views, but "compromise does not accomplish the goals the combatants have in mind. . . . In many instances compromise is structurally impossible. If the board is choosing one reading textbook for grade two, that book shows girls and women either in domestic roles only or in all work roles."

The Supreme Court addressed these issues in its 1982 *Island Trees* decision, but with seven contradictory opinions that resolved few questions. Arons says the Court has still not confronted the root cause of the problem, which is the lack of family choice in schooling. Bound by compulsory attendance laws and unable to afford private school, most parents can influence their children's education only by raising a political ruckus. The result is that schooling becomes a source not of community cohesion, as is usually hoped, but of needless divisiveness.

Families that pull their children out of public schools do not escape the legal pressure for conformity. The few who try to teach their children at home face tremendous legal obstacles, even if they are themselves well educated and seemingly suitable teacher material. Some states prosecute home schoolers under criminal law and threaten to seize their children and place them in foster homes. Other states require parents to qualify for teaching licenses or to use state-approved curriculum plans and textbooks (often the same textbooks used in public school). Just to apply for the right to teach at home, most parents must petition the local school administrator in a prolonged personal interview, explaining in detail why they want to avoid the public schools. This challenge to official expertise is annoying enough to its target, Arons says, that it is "surprisingly prevalent" for school systems to press legal charges against parents even though it would be easy to let them go quietly.

Private schooling is a much less radical option than home schooling and even enjoys some recognized constitutional protection. The Supreme Court held in the 1925 case of *Pierce* v. *Society of Sisters* that the Constitution did not permit Oregon to ban all private schools, since "the child is not the mere creature of the state." Although they cannot ban private schools outright, states remain free to hold them to stringent standards on curriculum and many other matters. [EDITORS' NOTE: *In Nebraska, seven parents were recently jailed for sending their children to a church school that refused to comply with such regulations on principle.*]

The famous Supreme Court case of *Wisconsin* v. *Yoder* (1972) established that Amish families could escape compulsory attendance laws. But the Court made clear that it was restricting the new freedoms to well-established religious sects, rather than ordinary secular families. Likewise, private schools run by religious sects have fared better in court challenges to regulatory authority than have nonsectarian schools. Ironically, Arons maintains, the law is most inclined to protect the right of dissent in schooling if the dissenting subculture is itself gloomily rigid and authoritarian and is therefore "safe and unlikely to proliferate."

The author concludes by arguing that the Constitution forbids the state to interfere with the free development, as well as expression, of dissenting views. "Wherever beliefs, world views, values or ideologies are at stake, the Constitution must be read to impose the same government neutrality as is brought into play with regard to religion." That would require a "separation of school and state," the first step of which would be for government at all levels to stop regulating private school content except under the most compelling of circumstances.

Yale Launches a New Journal

Yale Journal on Regulation, vol. 1, no. 1 (1983), Bruce Judson, managing editor, 110 pp.

The *Yale Journal on Regulation* is a new journal published twice a year with the support of the Yale Law School. The first issue contains four articles.

• In the lead article, "Winning by Losing," Paul MacAvoy and Kenneth Robinson argue that AT&T's antitrust settlement allowed it to do what the regulators would never have let it do on its own: get rid of its low-profit local exchanges, while keeping its more profitable and faster growing long-distance and manufacturing divisions. MacAvoy, formerly of the Yale economics faculty, is now dean of the University of Rochester Graduate School of Management; Robinson is a policy adviser at the Department of Commerce.

AT&T "won by losing" the legal process, the authors assert, and the public may have lost by winning. After divestiture, they say, AT&T will have significant cost advantages over its competitors in the long-distance and equipment markets. This will enable it either to drive the competitors out of business, or to reap monopoly profits while confining smaller firms to a tenuous existence on the fringe of the market. Regulators may try to keep the smaller long-distance companies alive by holding down the fees they pay for access to local networks, but that would help drive up local rates.

MacAvoy and Robinson believe that instead of accepting the divestiture agreement, Judge Harold Greene should have reached the merits of the government's antitrust case against AT&T. They find that case was weak. The predatory pricing charge relied on the claim that AT&T was "pricing without regard to cost," a standard that is without legal precedent and that is a most peculiar one "to apply in an industry that is required by regulation to deviate from cost-based pricing." And AT&T's refusals to interconnect with competitors, they assert, were consistent with the regulatory policies of the Federal Communications Commission, which has sought to limit "cream-skimming" entry. In fact, "most of the allegations against AT&T involved actions that were the inevitable consequences of regulation."

The real problem with the settlement, they suggest, was that the parties never had to confront openly the basic conflict between antitrust and regulation. "The decree creates only the impression that antitrust laws have overturned the entire field of regulation." Yet there are no countervailing practical benefits, the authors assert: "the AT&T settlement and decree seem likely to achieve neither sound antitrust nor traditional regulatory policy objectives."

• The law's growing reliance on economic analysis will complicate the nature of judicial review, according to Judge Patricia Wald of the U.S. Court of Appeals for the D.C. Circuit, in "Judicial Review of Economic Analyses." Various practical factors tend to prevent courts from giving adequate review to the economic models and theories agencies adopt, and there is a multiplicity of rules governing the amount of deference courts should accord to the agencies in such cases. Courts must also decide how to balance economic with noneconomic considerations. Judge Wald offers practical suggestions for judges who must review agency economic analyses, and by implication, for litigants who must appear before judges in cases relying on such analyses.

• In "Regulation and Federalism," Boyden Gray, counsel to the Vice President, describes how the Reagan administration is reconciling the sometimes conflicting goals of decentralization (the "New Federalism") and regulatory relief. Gray sets forth a framework for deciding whether to override what he says should be a rebuttable presumption in favor of state and local operation of regulatory programs. There are four situations, he says, that may justify

federal preemption: when state regulation burdens interstate commerce, when the federal government finds it easier than the states to take the political heat for a regulation, when states or regions engage in destructive competition with each other through the regulatory process, and when the federal government has scientific or technological expertise that it would be wasteful for the states to duplicate. Gray examines how these concerns helped shape the Reagan administration's positions on national product liability legislation, coal slurry pipelines, chemical labeling, reform of the Clean Air Act, and highway safety legislation.

- Economists Robert Hahn and Roger Noll describe some unexpected interactions between proposals for a market in pollution rights and existing regulatory schemes. Their article, "Barriers to Implementing Tradable Air Pollution Permits: Problems of Regulatory Interactions," argues that current regulations grant existing stationary-source polluters what is in effect a property right to emit certain volumes of pollutants. Some proposals to introduce tradable pollution permits threaten this form of "wealth," which is why polluters sometimes resist their implementation. Noll and Hahn suggest a way to implement emissions trading that will not jeopardize these interests and hence that should forestall the opposition of existing polluters.

One way firms could meet emissions standards is by burning natural gas instead of "dirtier" fuels. But federal regulation has made the future price and availability of natural gas highly uncertain, the authors say, and as a result the current standard-setting system does not require its use in most cases. Under a system of tradable permits, on the other hand, regulators could assume that one polluter or another could obtain gas supplies, and lower the overall emissions ceiling—which would provide an additional reason for firms to resist such a system. Hahn and Noll then show how a tradable permit system can be designed to avoid this problem. Finally, they argue that the methods now in use for setting utility rates discourage electric utilities from trading emission permits by confiscating any profits that arise from their doing so. There are alternative ratemaking methods, however, that would remove these disincentives.

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