Umpires at Bat: Setting Food Standards by Government Regulation

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Samuel P. Hays has urged historians to study the administration of regulatory legislation. He doubts the accuracy of the assumption, commonly made, that a body of experts impartially enforces regulation in the public interest [7, pp. 124-126]. The following study of the enforcement of the Pure Food and Drugs Act was undertaken with the advice of Hays firmly in mind, and it amply supports his doubts.

We should not be surprised that Hays's conjecture about administrating regulation landed so close to the mark in the case under study. The passage of the Pure Food and Drugs Act produced powerful interest groups. Rarely would we expect such groups to fold their tents and slip away after legislation is passed. They will push to influence administration of the law for the same reason that they pushed to influence its passage--it serves their interests to do so.

The Pure Food and Drugs Act, signed by President Roosevelt on June 30th, 1906 left large issues, which had stalled the bill in Congress for several years, unresolved. Congress deliberately evaded the controversies that the chief chemist of the Department of Agriculture and the architect of the pure food law, Harvey Washington Wiley, had created by taking sides in commercial disputes. Congress's evasiveness meant that these issues would have to be resolved administratively, through the enforcement of the Act. This is precisely what happened to one of the most important of the unresolved issues: How would food standards be determined?

Food Standards

The authority of the Secretary of Agriculture to set standards was dropped from the Agriculture Appropriation Bill for fiscal year 1906-1907.

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However, the appropriation bill did include a clause which authorized the Secretary "...in collaboration with the Association of Official Agriculture Chemists, and other such experts as he may deem necessary, to ascertain the purity of food products and determine what are regarded as adulterations therein." Wiley believed that the wording permitted further investigations into food standards, even if it did not allow the Secretary to officially set them [19; 29; 21, p. 18].

Wiley appeared before the Agriculture Committee to request that the authority of the Secretary of Agriculture to set food standards be restored. The Chairman of the Committee, James Wadsworth, told Wiley that, "There was a great deal of discussion on that [i.e., food standards], and there was a good deal in the conference, and I think that the conference was unanimous in wanting to strike them out." [25, p. 254]

Wiley insisted that he needed the authority to set standards, because without them he would not be able to enforce the pure food law. He testified:

> Suppose you take this out of the bill. Then our only avenue to publicity would be a court trial under the food law. We want to avoid the court trial publicity, as far as possible. . . . I think there is greater reason for this remaining just as it is now than there was before the pure-food law passed. The food law provides for no investigation or publication" [25, p. 260].

Wiley was asking for authority to set standards without going through the courts. His independent exercise of authority is precisely what had created opposition to Wiley as the administrator of the food law. His rhetoric and rulings had alienated many politicians, food officials, and businessmen. His propensity to enshrine his opinions as law underlay Congress's refusal to grant him authority to set standards.

The hearing in which Wiley asked for greater authority demonstrated the danger of granting it to him. Near the end of Wiley's testimony Congressman Cromer of Indiana, speaking to Wiley, remarked, "You have not elaborated on the question of whiskies yet this morning." The mere mention of whiskey sent Wiley into a harangue in which he said:

> Blended is not the antithesis of straight. "Crooked" is the term you mean. If one is straight, the other is crooked. Crooked whiskey is not whiskey at all, but is made of neutral spirits, flavored and colored. It is an imitation. It has none of those aromatic and flavoring congeneric products which are volatile at the ordinary temperature of distillation. I think that pure spirits is a poison, pure and simple. It coagulates the protoplasm in the cells.
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> The Chairman: You mean pure spirits?
>
> Dr. Wiley: Yes; alcohol. As long as any man can keep his cells limpid and keep his protoplasm limpid he will never grow old.

> Alcohol absolutely coagulates protoplasm the moment it touches it, but alcohol that is in whiskey or brandy or rum is so mingled by nature's operations that it is in an entirely different proposition" [25, pp. 278-79].

Wiley's outburst bordered on idiocy. Whatever the palatable virtues of straight whiskey, it is hardly natural; nature does not produce whiskey stills. Nor is straight whiskey more wholesome and healthful than rectified. The health effects, good and bad, are virtually identical. To ascribe longevity to limpid cells, and to accuse rectified whiskey of poisoning people by coagulating the protoplasm, demonstrates a capacity for fantasy that is wholly out of place in a scientist and an impartial administrator of the law. Wiley uttered such fantastic statements before a Congressional Committee, for the public record and for the press who would report his statements, during a period that he was in league with straight whiskey makers to discredit their rivals' product [9, pp. 286-309].

Wiley turned to the National Association of State Food and Dairy Officials, which temporarily had changed its name to the INTERSTATE Food Commission, for a solution. A dissident group of these officials, during the debate over the bill, had objected to the standards set by the Association of Official Agricultural Chemists. Their objections had contributed to Congressional withdrawal of Wiley's standard setting authority. Wiley needed to defeat this dissident group in order to gain control of the organization's standards committee. If he could do this, Wiley could use the organization as an authority to set food standards.

To accomplish this, Wiley chose as his site the INTERSTATE Food Commission's annual convention, which convened in Hartford, Connecticut on July 17th, 1906. Wiley created a joint food standards committee, which was composed of members of the Agricultural Chemists and government officials. The joint committee was made up entirely of Wiley's friends and supporters.[2]

The *American Food Journal*, in a burning editorial, denounced the meeting of food officials and its dominance by Wiley. Saying that the meeting ". . . was absolutely servile to the will of its master," the *Journal* saw immediately the significance of the meeting: ". . .Dr. Wiley needs all the prestige he can get from the National Association of State Dairy and Food Departments to pull his Standard Committee out of the ditch into which it was tumbled by Congress." [22, p. 16]

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[2]The committee was made up of William Frear of Pennsylvania, (Chairman), E. J. Jenkins of Connecticut, M. A. Scovell of Kentucky, Richard Fischer of Wisconsin, H. E. Barnard of Indiana, Elton Fulmer of Washington, H. A. Weber of Ohio, and Wiley. This was a carefully selected pro-Wiley group.

The Board of Food and Drug Inspection

Wiley also encountered opposition to his authority closer to home. Wilson and Roosevelt believed that Wiley had appropriated too much authority to his Bureau. They moved to constrain him. In April of 1907 Secretary Wilson informed Wiley that a Board of Food and Drug Inspection would be established. The Board, not Wiley, would recommend action to the Secretary. By appointing men independent of Wiley's influence to the Board, Wilson and Roosevelt hoped to keep him from running too far afield [32; 31, p. 157; 6].[3]

The Board consisted of three men--Wiley, George McCabe, solicitor for the Department of Agriculture, and Frederick L. Dunlap, a chemist recruited from the University of Michigan. Dunlap was appointed after President Roosevelt requested candidates for the position from a number of University presidents.

Roosevelt was eager to establish the Board. When Dunlap set back his arrival date in Washington, because of duties at the University, Roosevelt wrote personally to President Angell of Michigan. He asked that Dunlap be released immediately from his duties because of an urgent need in Washington [1, p. 204; 24, p. 20; 5].

Even though Wiley would serve as chairman, Wilson and Roosevelt believed that the board would dampen Wiley's excesses. Both men were receiving many complaints that Wiley was using the food law to impose his personal and peculiar opinions on the food industry. A more balanced and reasoned enforcement mechanism would reduce this source of complaints. Wiley soon proved, however, that he could either circumvent the board, or bring sufficient public pressure to force his will upon it.

Wiley's Abuse of the Guarantee Clause

One of the main concerns of State food officials was the guarantee clause. Congress had intended the provision to protect retailers from prosecution if they unwittingly sold products that failed to meet the requirements of the law. To avoid prosecution, retailers needed only to present a guarantee from the wholesaler, jobber, or manufacturer, who then would be held responsible for any violation of the law.

Administrative regulations, including food inspection decision 40, permitted retail firms to file a general guarantee with the Bureau of Chemistry. Once filed, the firm could display the guarantee on their label. It would read, "Guaranteed by the Food and Drug Act of 1906, guarantee number _____," with the number being issued by the Bureau of Chemistry. This display of the guarantee on the label went beyond the meaning of the

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[3]Wiley would later claim that Wilson arrived with Dunlap sometime in February 1907 and announced that Dunlap was to be his associate, but Dunlap did not accept the job until April. Wiley must have been confused about the sequence of events.

law; it gave the impression that the government guaranteed the purity of the product to the consumer [26, 15].

As consumers began to use guarantees as a guide, firms found them commercially valuable. This tended to favor goods that were shipped in interstate commerce over local products. Interstate shipments were subject to the Pure Food Act and thus could use the guarantee on their label; local shipments could not. It also favored domestic goods over imports, because foreign manufacturers could not be granted a guarantee [23].

The commercial effects could have been avoided by allowing companies to place only the guarantee number on their label. A simple number would not have created the impression that guarantee was to the consumer, rather than to the retailer. Wiley was reluctant to make the change. Issuing guarantees increased the power of the Bureau of Chemistry, who could refuse to grant them.[4]

Its usefulness to Wiley was demonstrated in food inspection decision #76 on "Dyes, Chemicals, and Preservatives in Foods." In this decision, the right to use the guarantee statement on products containing benzoate of soda, benzoic acid, or sulphur dioxide was denied, even though the use of these additives was perfectly legal.

McCabe objected to the discriminatory use of the guarantee. Wiley replied that ". . .it is unfair to the consumer to allow a statement to be made on the label that the food is guaranteed under the food and drugs act, for the consumer may interpret this statement as a guaranty that the food is pure" [17].

Wiley was of course correct, but he should have applied his reasoning consistently. By permitting the use of the guarantee to some while denying it to others, Wiley selectively misled consumers. Moreover, he granted a competitive edge to firms that could use the guarantee. One of these firms was H. J. Heinz. Since the company did not use benzoate of soda as a preservative in its ketchup, it could use the guarantee. Firms that used the preservative could not use the guarantee. Yet there was no presumption or evidence that Heinz's ketchup was any purer or healthier than other ketchup [3, pp. 178-80].

One the most blatant abusers of the guarantee clause was Sunny Brook, a distiller of straight whiskey. They launched an advertising campaign that claimed that their product had the official approval of government inspectors. Advertisements and billboards showed Sunny Brook with an official looking document called the "National Pure Food Law." The wording proclaimed Sunny Brook was "The Pure Food Whiskey." Other advertisements showed a man in an official looking uniform with "U.S." displayed on the lapels and "Inspector" on the cap. He held bottles of Sunny Brook, or else signed the label which said, "Ok, U.S. Pure Food Inspectors." The label on the bottle read "Sunny Brook Whiskey, Bottled in Bond, Age and Purity--Proof and Measure Guaranteed by U.S. Government."

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[4]A number of minor adjustments were made in the guarantee clause. See [16].

Sunny Brook's advertising campaign abused the guarantee clause. It was, in fact, false advertising. Government inspectors did not examine the purity of the whiskey. No official of the government could vouch for its authenticity or quality. Yet Wiley took no action against Sunny Brook until James Wilson wrote to the firm, telling it to withdraw its ads. Only after the distiller gave the Secretary an ambiguous reply did Wiley respond. He wrote Sunny Brook a a letter explaining what was wrong with their label and advertisements. Sunny Brook then offered to correct the problem. Sunny Brook was neither charged nor threatened with prosecution for mislabelling [33, 30]. Wiley showed a very different attitude towards other business firms. He threatened to prosecute Coca-Cola because their label read "Guaranteed under the Pure Food and Drugs Law" instead of "Guaranteed under the Food and Drugs Act."

The National Association of State Food Officials passed a resolution objecting to the way that firms used the guarantee clause. Wiley ignored the resolution, and firms continued to use the clause in their advertising and on their labels until two years after Wiley's resignation in 1912 [18].

The abuse of the guarantee clause was only one of the ways that the law could be used to discriminate against particular firms. Wiley, through persuasion and clever maneuvering, was able to use the law to benefit and to damage commercial reputations. The industries in which he used his discriminatory power erupted into regulatory warfare. Around these industries swirled what James Harvey Young has called "the big, bombastic issues." Benzoate of soda, whiskey, sugar, dried fruit, and Coca-Cola are the industries that comprise the bombastic issues.

These issues took up the majority of Wiley's time and received an enormous amount of press coverage. The controversies embroiled Presidents Roosevelt and Taft, Secretary Wilson, and prominent members of the scientific community. Despite the high stakes and the intensity of the controversy, the majority of the American food industry would not be involved. By the Bureau of Chemistry's own estimations most food producers were in compliance with the law, even in the first year it was passed. For most food manufacturers, compliance required little more than minor changes to their labels. Even the three acrimonious members of the Food Inspection Board agreed on the vast majority of cases that came before it. Violations usually involved minor products that were marginal to the American diet. Drugs, however, were a different story.

Drugs

During his struggle to secure passage of a pure food law, Wiley showed little regard for the regulation of drugs. At times, before publicity made it impossible to do so, he was willing to drop drugs from the law altogether. When the law did pass, its provisions towards drugs were weak.

The law required that the names and quantities of specific drugs be listed on the label. The drugs included alcohol, morphine, opium, cocaine, heroine, alpha or beta eucaine, chloroform, cannabis indicia, chloral hydrate, and acetanilide. The law also prohibited false names and false places of

manufacture, and it declared the United States Pharmacopeia or the National Formulary to be the official document determining the standards and definitions of drugs. If a drug differed from these standards it had to be plainly stated on the package. Altogether, the drug provisions placed few restrictions on patent medicines. Some labels were changed and some claims toned down, but the same products were available after the passage of the law as were available before.

Wiley was no more vigorous about pursuing prosecutions under the law than he had been in seeking stronger legislation against drugs before the law was passed. Of the first one thousand cases under the food and drugs act, only one hundred and thirty five were against drugs. This has been explained as resulting from Wiley's far greater concern with food, which he considered more dangerous than drugs [36, p. 41].

At the least Wiley's judgment was poor; at the worst he was guilty of malfeasance in carrying out his duties. He devoted large amounts of resources to the definition of whiskey, an issue that made no difference to the health of the consumer. He devoted tremendous energy to prevent glucose makers from using the name corn syrup. Again, no important issue of health or nutrition depended on the outcome.

The small staff that Wiley did assign to drugs devoted much of its time to the prosecution of Coca Cola. Wiley claimed that Coke was mislabeled because it did not contain cocaine. He also claimed it harmed health because it contained caffeine. At the same time, he thought caffeine consumed in tea or coffee was perfectly all right. The chemists assigned to drugs also worked on the revision of the Pharmacopeia, an activity which was not part of the official duties of the bureau. By the provisions of the law, which were intended to protect public health, Wiley misallocated resources.[5]

Conclusions

The preceding study supports Hays's doubt that regulation is impartially implemented in the public interest. The administration of the Pure Food and Drugs Act displayed the same commercial favoritism, the same bureaucratic in-fighting, the same arbitrariness and whimsy and self-righteous beating of chests that characterized the passage of the Act. Health and nutrition and honesty, which were supposed to be the main ingredients of the Pure Food Act, figured prominently in writing the recipe but barely made it into the main dish [35, passim; 37, pp. 165-168; 4, pp. 286-309; 38, pp. 167-181].

The main events of the struggle over standards fit the economic theory of regulation rather well, so long as we interpret this theory broadly. Originally, economic theory treated the regulated industry as a homogeneous interest group. The industry constituted a cartel whose members could benefit

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[5]Wiley was a member of the revision committee and actively used his bureau's resources to assist in the revision until, under the urging of Solicitor McCabe, Secretary Wilson prohibited future use of the bureau's resources in this pursuit.

from restricting competition and raising price. The assumption of a homogeneous industry, while sufficient to motivate regulation, is by no means necessary. Regulation can bestow benefits on particular firms at the expense of other firms within the same industry. The firms who benefit have an economic incentive to seek regulation; those who suffer have an incentive to resist it [27, pp. 50-55; 34, pp. 403-442; 2, pp. 39-47; 8, pp. 229-37].

To be useful in interpreting the history of regulation, economic theory must be broadened even further. The impetus for regulatory reform does not always come from within the industry. Politicians and bureaucrats exert their own independent influence on regulation. They do so, however, only when they find it advantageous. Politicians rarely advocate regulation that will bring them defeat at the polls. Regulators rarely administer laws in ways that will diminish their power. Because public agents pursue their own interests, their actions can be encompassed in an economic theory of regulation. It is in this sense that the struggle over food standards conforms to economic theory.[6]

Wiley's attempts to make state food officials more dependent on funding from his bureau were obviously intended to increase his influence and power. So were his attempts to restore to the Department of Agriculture the authority to set food standards. When those efforts failed, Wiley pursued the same ends by placing the power to set standards in the hands of a State Food Commission that he controlled.

These actions benefited Wiley not only by increasing his administrative domain, but also by economically rewarding the firms who supported him and by punishing the firms who opposed him. His selective enforcement of the guaranty clause benefitted him in the same way; it rewarded a member of his straight whiskey coalition and punished Coca-Cola, which opposed his administration of the law. Wiley's refusal to vigorously enforce the labelling requirements for patented drugs may be interpreted the same way. Patent medicine makers did not oppose Wiley as long as he left them alone; had he vigorously prosecuted them, he would have created another powerful enemy, which he could ill afford.

The actions of Wiley's superiors also fit more or less neatly into the economic theory of regulation. By setting up a board to administer the food law, Secretary Wilson and President Roosevelt tried to curb Wiley's favoritisms without confronting him directly. Had either man dismissed Wiley, he would have had to endure a storm of criticism from the press. Neither was willing to suffer the political unpopularity of such a decision, even though the public interest would have been better served by appointing a more impartial administrator.

The public interest was not entirely neglected in this episode. Some patent medicines did modify their claims; more firms began to list ingredients on their labels. To the extent that these actions benefited the consuming public, some general good did come out of government regulation of food standards. Overall, however, the effects were modest and even these modest improvements in public interest were a by-product of regulation. The driving

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[6]For surveys of regulation theory see [11, pp. 159-83; 10, ch. 2; 14, pp. 59-75].

force of the regulatory process was self-interest in its commercial, bureaucratic, and political manifestations.

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