

Jerry Ellig on Dynamic Competition and Rational Regulation

Selected Articles and Commentary

Edited by
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Contents

Foreword	ix
<i>Bruce Yandle</i>	
About Jerry Ellig	xiii
About the Contributors	xv
Introduction	xvii
<i>Susan E. Dudley and Patrick A. McLaughlin</i>	
Part I: Improving Regulatory Process	
Comprehensive Regulatory Impact Analysis: The Cornerstone of Regulatory Reform	2
Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis	12
<i>Jerry Ellig and Rosemarie Fike</i>	
Systematic Study Shows Improvement in SEC Economic Analysis	50
Comprehensive Regulatory Reform	54
<i>Patrick A. McLaughlin, Jerry Ellig, and Michael Wilt</i>	
Ten Principles for Better Regulation	76
Why and How Independent Agencies Should Conduct Regulatory Impact Analysis	92
Economic Analysis of Tax Regulations: An Assessment of the First Year	126
COMMENTARY Zombie Regulations Emerge at Midnight	136
<i>Sherzod Abdulkadirov and Jerry Ellig</i>	
COMMENTARY Improved Economic Analysis Should Be Lasting Part of Pai's FCC Legacy	139
<i>Babette Boliek, Jerry Ellig, and Jeff Prince</i>	
Part II: Lessons from Regulatory Reform	
Endogenous Change and the Economic Theory of Regulation	144

Electric Restructuring and Consumer Interests: Lessons from Other Industries	156
<i>Robert W. Crandall and Jerry Ellig</i>	
Railroad Deregulation and Consumer Welfare	162
The Future of Regulation	191
Epistemic Lessons from Economic Regulatory Reform	205
Trucking and Rail Regulatory Reforms Provide a Model for Bipartisan Cooperation	213
COMMENTARY The Misguided Antitrust Attack on Big Tech	217
<i>Phil Gramm and Jerry Ellig</i>	
Part III: Competition and Regulation	
A Taxonomy of Dynamic Competition Theories	222
<i>Jerry Ellig and Daniel Lin</i>	
Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia	252
<i>Alan E. Wiseman and Jerry Ellig</i>	
State Funeral Regulations: Inside the Black Box	284
COMMENTARY Wine Wars: Uncorking E-commerce?	312
<i>Asheesh Agarwal, Jerry Ellig, and Todd Zywicki</i>	
COMMENTARY Pine Box Politics	317
COMMENTARY Selling Santee Cooper: Competition Should Be Part of the Plan	321
Part IV: Regulating Network Industries	
The Regulatory Determinants of Railroad Safety	326
<i>Jerry Ellig and Patrick A. McLaughlin</i>	
A Concise Explanation of the FCC's Economic Analysis on Net Neutrality	358
COMMENTARY The Incredible Ticket Machine: Economic Progress Depends on Entrepreneurial Discovery	362
COMMENTARY Internet Regulation at the FCC: No Longer an "Economics-Free" Zone	370

Part V: Judicial Oversight of the Regulatory Process

	Improving Regulatory Impact Analysis: The Role of Congress and Courts	374
	<i>Reeve T. Bull and Jerry Ellig</i>	
	Statutory Clarity and Judicial Review of Regulatory Impact Analysis	382
	<i>Reeve T. Bull and Jerry Ellig</i>	
COMMENTARY	Courts Have a Role to Play Reining in Federal Agencies	386
	<i>Jerry Ellig and Reeve T. Bull</i>	
COMMENTARY	Here's How Federal Agencies Can Write More Effective Regulations—and Win Regulatory Battles in Court	389
	<i>Jerry Ellig and Catherine Konieczny</i>	
	Index	393



Foreword
A Man to Remember!

Bruce Yandle

Jerry Ellig was a wonderful human being. He was also an outstanding economist. He loved being alive. He loved to smile. He loved family and friends. And he was glad to teach and glad to learn.

I first met Jerry around 1997 when he and I were participating in an early Mercatus Center conference. First impressions matter, of course. And his smile, warm handshake, and easygoing manner got to me.

Jerry was one of those rare individuals who comes equipped with a double-barreled brain; both hemispheres fired powerfully. Yes, he could do economic analysis with the best of them; and yes, he could paint beautiful word pictures, stand as a role-playing actor to communicate the subtleties of regulatory issues (you should have seen him as the preacher in a *Bootlegger/Baptist* lecture); and, drawing on a vast knowledge of history and literature, which he obviously loved, quietly correct an error in fact or interpretation made unwittingly by another scholar. Over the years, I observed all of this. In fact, I was one who received a prompt, low-key correction from Jerry. I note that he welcomed the same treatment.

I recall the time Jerry quietly and quickly came to my rescue when in the early months of the Trump administration I made reference in a short op-ed to a remark the president made in his inaugural speech. He mentioned the “Forgotten Man,” a mythical citizen described in the William Graham Sumner classic essay by that title. Mr. Trump implied that those he referred to were caught in the backwash of deindustrialization and had not been fairly treated by previous administrations, and that the forgotten man would be forgotten no more.

But Sumner’s forgotten man had not been a victim of international trade, immigrant competition, or deindustrialization. His man plodded along

silently, did not engage in politics, but always paid his taxes. He was politically silent and therefore forgotten. And in my op-ed I had not corrected Mr. Trump's faulty interpretation of Sumner's forgotten character. As soon as my op-ed saw the light of day, I received an email from Jerry, calling attention to the correct interpretation, giving me time to make a small revision to my piece. How many times have you or I, after seeing a glitch in someone's work, taken the time to send a short note offering a correction? Jerry was that kind of guy.

While Jerry was deeply engaged in his work on regulation—I think he lived and breathed it—he still left plenty of room for family and friends. A few years ago, Jerry and his wife, Sandy, made the decision to leave the DC area and move to rural South Carolina, where Jerry continued his work remotely with regular trips back to Mercatus and later to the George Washington University Regulatory Studies Center. Living in small town South Carolina gave Jerry's daughter, Katherine, the opportunity to be smitten by agriculture, horses, and chickens. She became an active member of 4-H. Interestingly enough, Jerry followed her lead and became the advisor to the local 4-H club. The man had immense bandwidth.

Anyone examining Jerry's professional life by way of positions held, papers written, articles published, and testimony given will at first be overwhelmed by the volume and depth of his activities, and then be amazed at his tight focus on political economy and improving regulatory policies and procedures. A longer glance in this direction also reveals a scholar whose thoughts and findings helped others in their search for understanding. The pattern of citations to Jerry's work follows that of his professional work and activities. There are not one or two "home-run" articles with hundreds of citations, but scores of articles with scores of citations.

I want to point out that economists are sometimes accused of having a peculiar kind of disease that causes them to be arrogant about their self-perceived unusual abilities, cynical about how the world works, and not very interested in engaging in conversation (and certainly not co-authorship!) with others who must bear up under the handicap of not being trained in economics. In many cases, the disease is most evident in situations involving students, especially graduate students. Perhaps readers of this collection of papers may have encountered what I am referring to here and may themselves have a favorite story or two to tell.

If indeed it is the case that economists more frequently than other professionals suffer from the disease of cynicism, wouldn't it be wonderful if God in his wisdom would occasionally provide an economist with opposite traits, someone who is soft spoken, even humble when approaching a new

problem? Wouldn't it be wonderful if occasionally we would encounter an economist who is a deep believer in the power of his or her discipline to crack open social problems and shed light on them, who yet communicates a sense of being privileged to have the opportunity to be a part of the academy and, to top it all off, who shows respect for others, no matter their station in life.

Whether from an act of God or from a case of sheer good fortune, we had in Jerry Ellig just such a person. Those of us who knew him have something special to celebrate.

About Jerry Ellig

Bridge Builder

In his academic research, Jerry Ellig (1962–2021) focused on regulatory impact analysis, regulation of network industries, and performance management in government. But to ensure his work would make a difference in people’s lives, he never forgot the need for a “bridge” connecting the academy and the policy world. It was one he traversed, back and forth, throughout his career.

An assistant professor of economics at George Mason University between 1989 and 1995, Ellig went on to serve as a senior economist for the Joint Economic Committee of the US Congress (1995–96) before returning to Mason to join the university’s Mercatus Center as a senior research fellow. Between 2001 and 2003 Ellig was deputy director and acting director of the Office of Policy and Planning at the Federal Trade Commission, after which he again returned to Mercatus and to a position as adjunct professor in Mason’s School of Law (2005–08). In 2017 Ellig became chief economist at the Federal Communications Commission and a year later joined the George Washington University Regulatory Studies Center as a research professor.

But when he was on one side of the “bridge,” Ellig remained in frequent contact with the other. These efforts included testifying on Capitol Hill, where he would provide members of Congress with what one Mercatus colleague called “insights on the role of economic analysis in regulatory decision-making they weren’t going to get from anyone else that day.” Ever amiable, courteous, and humble, he would deliver his remarks with a smile on his face, cowboy boots on his feet, and one of his trademark Jimmy Buffett Parrothead ties around his neck—a sartorial nod to the Hawaiian shirts he loved to wear on less formal occasions, like when visiting a favorite tiki bar.

Many of those insights for policymakers—on everything from electricity restructuring, railroad safety, and big tech to wine sales and funerals and

caskets—are included in this memorial collection. In all, Ellig produced 61 testimonies, public interest comments, and government publications.

A prolific writer, he also authored or coauthored 26 working papers; 44 monographs, reports, or pamphlets; 16 chapters in edited volumes; and 4 books. The latter include *Government Performance and Results: An Evaluation of GPRA's First Decade* (Routledge, 2012, with Maurice P. McTigue and Henry Wray) and *Dynamic Competition and Public Policy: Technology, Innovation, and Antitrust Issues* (Cambridge, 2001).

Ellig published nearly 90 papers in scholarly outlets such as the *Journal of Benefit-Cost Analysis*; *Journal of Regulatory Economics, Regulation and Governance*; *Public Choice*; *Journal of Empirical Legal Studies*; *Managerial and Decision Economics*; *The Journal of Politics*; *The Antitrust Bulletin*; *Administrative Law Review*; *Business and Politics*; *Federal Communications Law Journal*; and *Texas Review of Law & Politics*. Many were written in collaboration with junior colleagues or graduate students he was mentoring. And in keeping with his “bridging” efforts, he wrote nearly as many commentary pieces and op-eds for the *Wall Street Journal*, *New York Times*, *Washington Post*, *Barron's*, *U.S. News & World Report*, and other popular media outlets.

A graduate of St. Xavier High School in Cincinnati, Ohio, Ellig received his BA in economics from the city's Xavier University and his MA and PhD in economics from George Mason University. His dissertation addressed “Law, Economics, and Organized Baseball: An Analysis of a Cooperative Venture,” which the devoted fan of the Big Red Machine dubbed “Fastballs, Curveballs, and the Market Process.”

Before Ellig's sudden death in January 2021, he lived with his wife of 28 years, Sandy Chiong, on a farm in South Carolina. For many years, he was a resident of northern Virginia, where he and Sandy raised their daughter, Katherine.

About the Contributors

VOLUME EDITORS

Susan E. Dudley is director of the George Washington University Regulatory Studies Center and distinguished professor of practice in GW's Trachtenberg School of Public Policy and Public Administration. She is a senior fellow with the Administrative Conference of the United States, a past president of the Society for Benefit Cost Analysis, a National Academy of Public Administration fellow, and chair of the Federalist Society's Regulatory Transparency Project regulatory process working group. Her research is widely published in academic journals and the popular media.

Before founding the GW Regulatory Studies Center, she served as the presidentially appointed Administrator of the Office of Information and Regulatory Affairs from 2007 to 2009, directed the Regulatory Studies Program at the Mercatus Center, and taught courses on regulation at the George Mason University School of Law.

She first met Jerry in 1998, when she joined the Mercatus Center at George Mason University.

Patrick A. McLaughlin is the Director of Policy Analytics and a Senior Research Fellow at the Mercatus Center at George Mason University. His research focuses primarily on regulations and the regulatory process. His research and op-eds have been featured in a wide range of media outlets including *The Economist*, C-SPAN, WSJ, *Politico*, and *The Hill*.

McLaughlin created and leads the RegData and QuantGov projects, deploying machine learning and other tools of data science to quantify governance indicators found in federal and state regulations and other policy documents. The resulting database is freely available at QuantGov.org.

Before joining Mercatus, McLaughlin served as a Senior Economist at the Federal Railroad Administration in the United States Department of Transportation and as a Visiting Scholar at the Regulatory Studies Center at George Washington University. He holds a Ph.D. in economics from Clemson University.

Patrick first met Jerry in 2008, when Patrick interviewed for a position at Mercatus. Jerry was a big reason that Patrick accepted Mercatus's offer.

FOREWORD

Bruce Yandle is a distinguished adjunct fellow at the Mercatus Center at George Mason University and dean emeritus of the Clemson College of Business and Behavioral Sciences. His most recent book is *Bootleggers and Baptists: How Economic Forces and Moral Persuasion Interact to Shape Regulatory Politics*, coauthored with economist Adam Smith.

Introduction

Dynamic Competition, Rational Regulation, and Jerry Ellig

Susan E. Dudley and Patrick A. McLaughlin

We've been lucky to call Jerry Ellig a friend and colleague at the George Washington University Regulatory Studies Center and the Mercatus Center at George Mason University. His untimely death cut short a productive and generous career, and we hope this collection provides a glimpse of his creative mind and sense of humor to those who didn't have the good fortune of knowing him.

Jerry was a prolific writer, and this book captures only a fraction of his scholarship and popular writing. We hope the selected items reflect some of what made him such an impressive scholar and collaborator. Whereas Jerry was brilliant at applying economic concepts and empirical analysis to improve public policy through academic publishing, he was never content simply to write for other academics. He enjoyed not only studying but also finding solutions to real-world problems in government and academia. And because Jerry was a great communicator, he was able to take his academic work and translate it for different audiences, through congressional testimony, seminars, op-eds, short presentations, and classroom teaching. He was also a generous mentor, supporting and collaborating with graduate students and colleagues to publish prolifically in peer-reviewed economics, public administration, and political science journals, as well as law reviews and more popular publications.

This book is divided into five parts, each reflecting an area where Jerry made significant contributions to the public policy, law, and economics literature. For each, in addition to scholarly writing, we have tried to include shorter pieces that communicated his research insights through more popular media. Because he was such a prolific writer, these selections only touch the surface of his scholarship. A full bibliography of Jerry's work can be found on the GW Regulatory Studies Center's and Mercatus Center's websites.

Jerry published 4 books, 16 book chapters, 87 journal articles, and numerous op-eds, essays, and commentary. The breadth, depth, and sheer fecundity of his scholarship presented us with several difficult choices when assembling this book. Many excellent papers were not included, although we tried to at least include an op-ed or congressional testimony that contained some of the essential ideas of the papers that we had to omit from the volume. For example, Jerry wrote a report for the Administrative Conference of the United States (ACUS) titled “Agency Economists,” which discusses how the structure of a regulatory agency can affect the quality of economic analysis of regulations and the odds that economic analysis will be used in decision-making. Jerry’s expertise in this wasn’t merely academic. He helped stand up the Office of Economics and Analytics at the Federal Communications Commission (FCC) in 2018 and made sure that the new office was structured in a way that incorporated the best practices that he wrote about in that ACUS report. Although we were not able to include the ACUS report in this collection, we did include one of Jerry’s op-eds about the new office at the FCC (“Improved Economic Analysis Should Be Lasting Part of Pai’s FCC Legacy”), which summarizes many of the points made in Jerry’s ACUS report.

The first part of this book includes papers and commentary on the topic of regulatory process. It’s fitting for this to be the first of the five parts, because regulatory process reform permeated almost all of Jerry’s work. And understandably so: process and regulations go together like longboards and tiki drinks—that is, they’ve been linked from the beginning and appreciated as complements by those who dig deep into the subject. In the United States, key aspects of the regulatory process were defined in the Administrative Procedure Act of 1946, and it has not substantially changed since then.

But that’s not for a lack of trying. A significant portion of the ink that has been spilled at the intersection of administrative law and economics has focused on potential reforms to the regulatory process. Jerry was no exception. We doubt that any of the regulatory studies that Jerry wrote, co-wrote, or even commented on lacked some lesson about the potential for improving the regulatory process.

Where Jerry was exceptional, however, was in his commitment to large-scale, multiyear research projects that could help inform regulatory process reform with novel empirics and insights. The Regulatory Report Card, for example, was initiated in 2008 and ran through 2013. It involved training and managing scores of students and at least nine other scholars (including one of us [Patrick McLaughlin], John Morrall, Richard Williams, Sean Mulholland, Todd Nesbit, Feler Bose, James Broughel, Anthony Dnes, and Michael

Marlow). As Jerry wrote in a 2016 working paper, “Better analysis is an input into better regulation.” The Regulatory Report Card project and its outputs, like much of Jerry’s work, focused on how economic analysis of regulations could be better performed and used in regulatory decision-making. The scale and scope of the project makes it continue to stand above all other attempts to assess the quality and use of economic analysis in the regulatory process. While Jerry’s work has undoubtedly led to some improvements in the quality of analysis—that is, in how specific regulatory agencies perform economic analysis of regulations—his words on the actual use of economic analysis by policymakers themselves seem, unfortunately, timeless:

Under the current regulatory process, ignoring analysis is any administration’s prerogative. Some argue that this is perfectly proper in a democratic society, but such ignorance has real consequences for real people. When administrations skimp on regulatory analysis, they issue regulations without knowing whether a significant problem exists, the root cause of the problem, alternative solutions that address the root cause, the effectiveness of each alternative in solving the problem, the benefits to society of each alternative, and the cost to society of each alternative. Citizens should question whether ignorance of these factors is acceptable for regulations that affect hundreds of millions of Americans and impose hundreds of millions of dollars in costs. (Jerry Ellig, “Evaluating the Quality and Use of Regulatory Impact Analysis: The Mercatus Center’s Regulatory Report Card, 2008–2013,” Mercatus Working Paper, 2016, 85)

The second part, “Lessons from Regulatory Reform,” highlights both the empirical nature of Jerry’s work as well as the humility that Jerry always exhibited. Jerry was unafraid to give others credit or to learn from the experiences (and data) of the reforms of yesteryears. For example, the 1970s and 1980s witnessed an extraordinary phenomenon. Bipartisan efforts across all branches of government led to a wave of economic deregulation in industries that had previously been characterized by federal price controls, quality standards, and restrictions on entry and exit. This economic deregulation was fueled by theoretical and empirical academic research showing that regulations tended to benefit incumbent companies, at the expense of consumers and innovators;

economic deregulation was then championed by policy entrepreneurs in think tanks and government who were able to translate those ideas into action.

Jerry was too young to contribute to this remarkable deregulation movement, but he was most certainly influenced by it, and during his career, he embodied the roles of both the academic and the policy entrepreneur. One area where his contributions have been most significant is in documenting, retrospectively, the long-term effects of the economic deregulation of the 1970s and 1980s. This part of the book reproduces a few of his most influential articles that quantify the extent to which the dynamic competition unleashed by deregulation increased innovation, lowered prices, and enhanced consumer welfare and that draw epistemic lessons from that experience. At the time of this writing, those lessons of reform are being forgotten by actors across the political spectrum, so his insights are particularly valuable.

Part three contains several pieces from an earlier stage in Jerry's career, when he was focused on competition and regulation. The first selection, "A Taxonomy of Dynamic Competition Theories" with Daniel Lin, is an accessible yet deeply insightful examination of the nature of competition, and the policy implications of different theories; it should be required reading for all regulators. In the early 2000s, he took a leave from George Mason University to work in the policy office at the Federal Trade Commission, eventually becoming the head of the office. From that perch, he and his team intervened in state policy issues, discouraging unnecessary licensing requirements and encouraging greater competition that would benefit consumers, workers, and businesses. For example, they showed empirically that state laws that only allowed funeral homes to sell caskets dramatically increased the costs of funerals by preventing bereaved parties from purchasing caskets online. His work on internet wine sales (with Alan Wiseman) helped pave the way for consumers being able to purchase wine online and was cited in a Supreme Court case on the topic.

In part four, we have included a few papers that focus on "network industries" such as telecommunication, rail transportation, and passenger aviation. In some ways, this is the section of the book with which many traditional, academic economists will be most comfortable. Regulation for a large segment of economists means antitrust regulation—the narrow set of rules that ostensibly limit monopoly power in the name of competition. Of course, regulation went far beyond mere economic regulation of network industries and into social regulation many decades ago, but regulations applied to network industries remain an important aspect of both the state of regulations in the United States and in the body of Jerry's scholarship.

Part five contains some of the research from the final years of Jerry's career, when he began empirically exploring whether judicial review of regulatory impact analyses could have a positive effect on their quality and use. Collaborating with attorney Reeve Bull, he conducted empirical analysis that showed that reviewing courts were quite capable of evaluating the quality of agencies' regulatory justifications and that judicial review improved future analysis conducted by agencies. Their research also showed that agencies conduct better analysis, and that courts more effectively review that analysis, when Congress provides clear statutory direction concerning how agencies are to account for the economic effects of their regulations.

Whereas we believe that we captured the essence of most of the major thrusts of Jerry's writings, we also recognize that there is more than a single book can include. Our hope is that the volume will at least convey to the reader an appreciation of the methodical, rational approach that Jerry applied to various areas of regulatory economics and public policy and provide a road map to learning more about any of the topics.

This book attempts to highlight some of Jerry's scholarship, but it can't capture what were perhaps his most outstanding qualities—his personal humility and good-natured approach to work and life. Never one to indulge in gossip or negativity, he endeared himself to people, even those who disagreed with him, because he was genuinely good and kind, unpretentious and honest, open-minded and laugh-out-loud funny. Everyone who worked with him will miss not only his intelligence and productivity but also his affability, Hawaiian shirts, trademark parrot tie, and wit.