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Regulation in America: A Review Article

¶ *Professor McCraw surveys the state of the art of understanding regulatory commissions in American history, evaluating the relevant literature in history, economics, political science, and law.*

With accelerating momentum over the last quarter-century, the subject of economic regulation by state and federal commissions has undergone rigorous reinterpretation. Although the process of revision is far from mature, studies in each relevant discipline – history, political science, law, and especially economics – have begun to reshape the terms of discussion and to advance alternative models of regulatory behavior. In so doing, they have questioned not only some long-held views of business-government relations, but also associated themes such as the nature and results of Progressive and New Deal reforms, the wisdom and efficacy of planned interference with market forces, and the character of the American polity itself.

Certain difficulties still block the formation of a satisfactory new synthesis. For one thing, the scope of "regulation" defies precise definition, since every economic activity is regulated in some degree.[1] Commissions of various types exist in all fifty states and throughout the federal establishment, but some have little in common with others besides the presence of "board" or "commission" in their titles. Then too, regulation properly conceived includes structurally different (commissionless) but functionally similar roles played by institutions like the Antitrust Division of the Department of Justice and the price support apparatus of the Department of Agriculture. It also includes intra-industry regulatory mechanisms such as trade associations, rate bureaus, and price leadership

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[1] Even public utility regulation raises definitional issues. See James W. McKie, "Regulation and the Free Market: The Problem of Boundaries," *Bell Journal of Economics and Management Science*, I (Spring, 1970), 6–26.

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systems. This essay will address only the commission aspects of regulation, beginning with two widely known but troublesome concepts or images: the "public interest" notion, and the recently dominant "capture" thesis. Some of the scholarship of regulation, and practically all the journalism, converges on one or the other, or on some combination of the two.

"Public Interest"

The "public interest" seems an unusually vague construct, indefinable and analytically counterproductive. Part of the problem comes from its multiple meanings and evolving redefinitions over time. In the nineteenth century, "public interest" enterprises had social overhead functions, such as banking, transportation, and several other industries later called "public utilities." Some of these enterprises combined great economic power with a propensity toward corruption, and they required regulation for the protection of potential victims. Others, notably railroads, tended toward "natural monopoly" and needed a surrogate for the lost discipline of the market. More recently, still other industries, such as broadcasting and air transport, appeared to need regulation as an escape from chaotic or destabilizing competition, which injured not only themselves, but the public as well.

American law reflected these economic premises. Beginning in the nineteenth century and culminating in the *Nebbia* decision of 1934, the law marked off certain types of enterprise as "affected with a public interest" and therefore subject to a strong application of the police power. But as society became more and more interdependent, and as consumer markets for standardized products became larger and larger, the number of industries logically "affected with a public interest" grew unmanageably large. As time passed, the "public interest" as an economic and legal notion had less and less utility, and became an unsatisfactory litmus test of why some industries in America are closely regulated, and others are not.[2]

In the political sense, insofar as it can be distinct from the legal or economic one, "public interest" has been roughly analogous to such phrases as "public good," "common good," or "general wel-

[2] On the "public interest" in American utility law, see Harry N. Scheiber, "The Road to *Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts," *Perspectives in American History*, V (1971), 327–402. *Nebbia v. New York*, 291 U.S. 502 (1934). Most textbooks of public utility economics provide a summary of the evolution of "public interest" law; an example is Part I of Paul J. Garfield and Wallace F. Lovejoy, *Public Utility Economics* (Englewood Cliffs, N.J., 1964).

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fare," expressing in the eighteenth and nineteenth centuries a conviction that the societal whole is greater than the sum of its parts, and by the mid-twentieth an intuition that consumer interests are more vital than they used to be. In political science, the notion is related to the theory of public goods, and also to pluralist thought, for which it serves as a point of departure.[3]

In a confusing amalgam of these usages, "public interest" is a thread of continuity at the heart of regulatory ideology, from its origins down to the present. The phrase "the public good," for example, appeared in the statute that created the first important regulatory tribunal, the Massachusetts Board of Railroad Commissioners, established in 1869 and dominated throughout its first decade by Charles Francis Adams, Jr. In commissions, Adams, like many others, detected "a new phase of representative government," made necessary by the unprecedented complexities of industrial technology. Commissions would take as their guide "the interest of the community," which informed regulators would harmonize with the interests of businesses. Unlike legislatures, the new agencies would sit continuously, investigating and deliberating within a universe of dispassionate expertise. Shunning turmoil, they would deal with industrial problems not as dramatic episodes, but as evolving processes calling for careful, meticulously considered responses. Statistics would replace emotions as the basis for action.[4]

For seven decades afterward, from the 1870s through the New Deal, state and federal commission regulation proliferated over railroads, gas and electric utilities, radio and television broadcasting, truck and air transport, and a few other enterprises. Although the reasons for regulation varied according to the industry involved, the notion of the "public interest" continued to dominate the rhetoric of reformers, the utterances of presidents, and the decisions of commissioners. It served as an ideological glue binding together the quasi-legislative, quasi-executive, quasi-judicial duties of regulators. In the 1930s, the doctrine reached its rhetorical zenith, a paradoxical result in view of the New Deal's frequent recognition of and assistance to private interest groups. Legislative draftsmen inserted the phrase repeatedly into the flood of regulatory law that

[3] The concept is examined at length in Glendon Schubert, *The Public Interest* (Glencoe, Ill., 1960); Richard E. Flathman, *The Public Interest: An Essay Concerning the Normative Discourse of Politics* (New York, 1966); Carl J. Friedrich, ed., *The Public Interest* (Nomos V, New York, 1962); and Virginia Held, *The Public Interest and Individual Interests* (New York, 1970).

[4] Massachusetts *Acts and Resolves*, 1869, Chapter 408, Section 4, p. 701; Charles Francis Adams, Jr., "Boston, I," *North American Review*, CVI (January, 1868), 18, 25; Adams, "Railroad Inflation," *North American Review*, CVIII (January, 1869), 158, 163–164.

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created the Federal Communications Commission, the Securities and Exchange Commission, and the Civil Aeronautics Authority (now Board). The "public interest" occurs a dozen times in the Communications Act, a dozen and a half in the Securities Exchange Act, and more than two dozen in the Civil Aeronautics Act, as a guide for regulators and as a justification for the immense discretionary powers those statutes bestowed.[5]

The New Deal also produced the outstanding theoretical elaboration of administrative regulation, written by James Macauley Landis, a draftsman of both the Securities Act and the Securities and Exchange Act. Pupil and friend of Felix Frankfurter, commissioner of the FTC and the SEC (and, later, dean of the Harvard Law School and member of the CAB), Landis was one of the brightest men of his time. In his Storrs Lectures at Yale, published in 1938 as *The Administrative Process*, he delivered the most eloquent celebration of commission regulation ever written. Recognizing the ambiguity of the "public interest," Landis nonetheless affirmed the validity and efficacy of broad administrative discretion founded on that doctrine.[6]

The "Capture" Image

Significantly, Landis devoted much of his analysis to a defense of regulation, for the idea had long since encountered critical attack. Deriving from many different sources and premises, this critique resolved into an alternative image of regulation at once more tough-minded, easily grasped, and above all more descriptive of what seemed to be going on within the regulatory agencies.

Early skeptics had questioned just how independent the regulatory machinery was likely to be, or should be. For one thing, the appointment of expert, nonpartisan regulators (or even bipartisan commissions) and their removal from the normal political process seemed a step toward elitism, away from the nation's democratic traditions. For another, genuine independence might be unsustainable against presidents or governors who wished to interfere with scientific deliberation, or thwart it through the ap-

[5] A typical declaration of the principle came from Commissioner Joseph B. Eastman of the ICC, who wrote to his colleagues in 1931: "For a long time I have quarreled with the idea that in a complaint case involving freight rates this Commission is merely a jury to decide between the parties upon the basis of the particular facts which they happen to bring to our attention in that case. The Commission is much more than that; it is an expert tribunal with a definite responsibility for the railroad rate structure of the country and its proper adjustment in the general public interest." ICC Docket No. 22876, May 4, 1931, Eastman Papers, Robert Frost Library, Amherst College, Amherst, Massachusetts.

[6] Landis, *The Administrative Process* (New Haven, Conn., 1938). On the "public interest," see especially 51–52.

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pointment of cronies and hacks. Even more likely, considering what usually went on inside the lobbies of legislatures, regulated corporations could direct their potent economic influence as readily toward regulators as toward other public officials. These arguments, all related to experience as well as to deductive notions of "capture," persisted as a running debate throughout the Progressive Era. In 1925, President Calvin Coolidge symbolically crystallized the "capture" theme by appointing to the Federal Trade Commission a man (William E. Humphrey) who brought a 3–2 majority against what most old progressives conceived as the "public interest." The ensuing despair brought loud protest, together with calls for the FTC's abolition from some of its erstwhile friends.[7]

The New Deal temporarily quieted criticism of this sort. Franklin D. Roosevelt appointed aggressive regulators like Landis and William O. Douglas, and attempted to undo history by firing Humphrey. Thus, during the thirties, intellectually respectable criticism of regulation came from other sources, many of them based on theoretical objections that held it to be "a headless fourth branch of government," unresponsive to executive leadership. It was to this kind of attack, rooted more in political science than in evidence of sellout, that Landis replied when he wrote *The Administrative Process*.[8]

The "capture" idea persisted nevertheless. The New Deal's multiplication of regulatory agencies, together with its programs of assistance to specific interest groups, simply multiplied the fields available for "capture." Over the next two decades, observers noted that the CAB and FCC in particular seemed to follow doctrines that equated the "public interest" with whatever the most powerful elements of the communications and airline industries wanted. By the 1950s, scholars such as Samuel P. Huntington and Louis L. Jaffe had begun to analyze the ties between regulator and regulated, and the inherent flaws in regulatory thought. In 1955, Marver H. Bernstein published a devastating book that synthesized into a coherent whole all the diverse objections that had gathered force since the New Deal. And in 1960, James M. Landis, in a stunning turnaround, catalogued the breakdown of the regulatory system he himself had celebrated twenty-two years before.[9]

[7] G. Cullom Davis, "The Transformation of the Federal Trade Commission, 1914–1929," *Mississippi Valley Historical Review*, XLIX (December, 1962), 452 *ff*.

[8] The Humphrey episode is examined in William E. Leuchtenburg, "The Case of the Contentious Commissioner: Humphrey's Executor v. U.S.," in Harold M. Hyman and Leonard W. Levy, eds., *Freedom and Reform: Essays in Honor of Henry Steele Commager* (New York, 1967), 276–312. The focus of Landis's attention is evident in *The Administrative Process*, 4.

[9] Huntington, "The Marasmus of the ICC: The Commission, the Railroads, and the

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By that time, the attack on regulation had become a staple of the broad re-evaluation of American institutions that began in the 1950s and reached maturity in the 1960s. Liberal reform as a whole underwent a searching critique and redefinition, its viability questioned by disillusioned analysts who looked beneath society's veneers and found the results of pluralist democracy ugly and repulsive. In a context of prolonged national crisis and self-examination, the regulatory agencies remained prime targets. By the late 1960s, a common assumption held that the commissions, like so many American institutions, had sold out, that they had suffered "capture" by regulated interests, that the "public interest" had become a tragic joke.

Detailed indictments quickly followed. Portraits of uniformly abysmal performance emerged from a series of immature, predictable, but incisive exposés published by the young associates of Ralph Nader. Less sensational but equally damning studies by other journalists and scholars suggested that however flawed the work of "Nader's Raiders" might be, their conclusions had merit. By the 1970s, the "public interest" as a credible standard for interpreting regulatory behavior had few defenders. In its place reigned the "capture" thesis, which was rapidly nearing the status of a truism, a cliché of both scholarship and popular perceptions. "If nearly a century of regulatory history tells us anything," observed economist Robert Heilbroner, "it is that the rules-making agencies of government are almost invariably captured by the industries which they are established to control." [10]

Historians and Regulation

Over much of the literature of "capture," one historian exerted a uniquely powerful influence. Gabriel Kolko anticipated the crest of the thesis in each of his two books on regulation, *The Triumph of Conservatism* (1963), and *Railroads and Regulation* (1965). In Kolko's models, argued *a priori* and buttressed by impressive new

Public Interest," *Yale Law Journal*, LXI (April, 1952), 467–509; Jaffe, "The Effective Limits of the Administrative Process: A Reevaluation," *Harvard Law Review*, LXVII (May, 1954), 1105–1135; Bernstein, *Regulating Business by Independent Commission* (Princeton, N.J., 1955); Landis, *Report on Regulatory Agencies to the President-Elect* (U.S., Senate, Committee on the Judiciary, 86th Cong., 2d sess., 1960).

[10] Edward F. Cox, *et al.*, *"The Nader Report" on the Federal Trade Commission* (New York, 1969); Robert Fellmeth, *The Interstate Commerce Omission* (New York, 1970); Mark J. Green, *The Closed Enterprise System* (New York, 1972); Green, ed., *The Monopoly Makers* (New York, 1973). Examples of additional critical literature include Louis M. Kohlmeier, Jr., *The Regulators: Watchdog Agencies and the Public Interest* (New York, 1969); and Paul W. MacAvoy, ed., *The Crisis of the Regulatory Commissions* (New York, 1970). The quotation is from Heilbroner, *et al.*, *In the Name of Profit* (Garden City, N.Y., 1972), 239.

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evidence of the sort conventionally esteemed by historians, "capture" inhered in the American polity, because of the centrality of capitalist power. Thus, wrote Kolko, railroad men themselves "were the most important single advocates of federal regulation from 1877 to 1916." From the beginning, "the Interstate Commerce Commission entered into a condition of dependency on the railroads, and the railroads quickly began relying on the Commission as a means of attaining their own ends." Even more startling, what was true of the railroads applied to American business in general: "Federal economic regulation was generally designed by the regulated interest to meet its own end, and not those of the public or the commonweal." [11]

Kolko's ideas failed to convince many of his colleagues. Some historians pointed out that he ignored contrary evidence and misunderstood basic economics; others argued that he fallaciously assumed a polarity between the public interest and private interests; still others asserted that even the selective evidence he did present, though useful, did not begin to sustain his thesis, in part because he often failed to distinguish what businessmen received from what they originally wanted.[12] Still, Kolko's books asked new, challenging questions, and neither the questions nor his evidence could be dismissed easily. Consequently, they became staples of graduate seminars and professional convention sessions. Activists enlisting in the causes of the 1960s found Kolko's the most usable of pasts. More important, his work influenced scholars in disciplines other than history. Here the attraction seemed to be neither the strength of evidence nor the conclusiveness of argument, but the distinctly theoretical approach. At bottom, Kolko's analysis was a straightforward deductive system, very like the deductive models of economists and sociologists. The Kolko model argued not only that "capture" inhered in the system from the outset, but also that the American political economy made the design and subsequent behavior of commissions inevitable, and therefore predictable. Such a theory had immense appeal, the more so because it seemed a uniquely clear explanation of contemporary experience. Nor was the appeal confined to Kolko's ideological allies on the Left. His insistence that competition in the American economy was increasing

[11] Kolko, *Railroads and Regulation 1877–1916* (Princeton, N.J., 1965), 3, 233; Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900–1916* (New York, 1963), 59.

[12] A collection of Kolko criticism appears in Otis L. Graham, Jr., ed., *From Roosevelt to Roosevelt: American Politics and Diplomacy, 1901–1941* (New York, 1971), 70–109; see also Robert U. Harbeson, "*Railroads and Regulation, 1877–1916*, Conspiracy or Public Interest?" *Journal of Economic History*, XXVII (June, 1967), 230–242.

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at the turn of the twentieth century, and his implicit ideal of a decentralized society attracted admiration from many quarters, notably the "Chicago school" of free market economists.[13]

As "capture" became first an alternative to "public interest," then a cliché in its own right, questions arose about *its* validity. How could the Interstate Commerce Commission be simultaneously the captive of railroad, truck, and barge transporters, when these industries had overlapping markets and were partial competitors? In what sense was the Federal Power Commission the captive of the natural gas industry, whose field prices it regulated so stringently that production brought inadequate returns, leading to what critics called "regulation-induced shortages"?[14] How well did the "capture" thesis fit those few points of regulatory history where scholars had made detailed investigations?

Most of the existing histories pertain to railroad regulation alone, probably because it offers the richest source materials and the longest perspective for evaluation. In consequence, however, the aggregate portrait of regulation by historians is very narrow. Of eight book-length studies to appear since Lee Benson's pioneering *Merchants, Farmers, and Railroads*, all except three have concerned railroad regulation.

Benson's thesis, that "New York merchants constituted the single most important group behind the passage of the Interstate Commerce Act," seems in retrospect less convincing and less significant than the other points he established in arguing it. His vast body of evidence demonstrated that the movement for national railroad regulation was a many-faceted phenomenon that embraced agricultural, mercantile, and eventually railroad interests themselves. On this last point, a pivotal one for "capture," Benson found the railroad men belated supporters who joined the movement because "it would have been fairly dangerous to attempt to cap it tight." As for the "public interest," Benson portrayed the struggle as hardly "a victory by the 'people' over the 'corporations,' " but instead a fight over who would receive what proportion of the new wealth generated by the economic explosion of the period. Fundamentally,

[13] Membership in the "Chicago school" is not a hard and fast category, but one important member is George J. Stigler (see note 33 below). Other Chicago-associated scholars apparently influenced by Kolko include Thomas G. Moore, *Freight Transportation Regulation: Surface Freight and the Interstate Commerce Commission* (Washington, D.C., 1972); and George W. Hilton, "The Consistency of the Interstate Commerce Act," *Journal of Law and Economics*, IX (October, 1966), 87 *ff.*

[14] This point is discussed briefly in James Q. Wilson, "The Dead Hand of Regulation," *The Public Interest*, XXV (Fall, 1971), 46–49; on the FPC, see Paul W. MacAvoy, "The Regulation-Induced Shortage of Natural Gas," *Journal of Law and Economics*, XIV (April, 1971), 167–199.

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the origin of the ICC was a story of warring interest groups, no one of which represented the entire public or felt motivated by an ideology of the general welfare. Instead, economic men fought each other over the division of industrial spoils. Without regulation, the railroad magnates had the power to keep a disproportionate share for themselves, even during periods of instability within the industry. Benson's behavioral methodology, informed by pluralist theory from political science, cut through the rhetoric of the period, and in the process demonstrated the inadequacy of both "public interest" and "capture" as models of the origins of national railroad regulation.[15]

Studies by Gerald D. Nash, Edward A. Purcell, Jr., and K. Austin Kerr confirmed the pluralist implications of Benson's book, though Nash differed in his nomination of the leading interest group (Pennsylvania oil men in place of Benson's New York merchants), and Purcell argued that the very process of suggesting one leading proponent disguised the national consensus basic to the ICC's creation. Kerr carried the model of group interaction into the period of World War I, showing how external conditions favored first one interest, then the other, and especially how the growing potency of railway brotherhoods injected a third major force into the old dualism of carriers versus shippers.[16]

These same points emerged in Albro Martin's *Enterprise Denied.* Yet Martin consistently viewed the struggle from the perspective of railroad executives, and took rhetoric and ideology much more seriously. Evaluating congressional and ICC action between 1897 and 1917, Martin contended that railroad entrepreneurship was stunted by "archaic progressivism." He thus portrayed the era as a starving time for railroads, accompanied by a rise in the political fortunes of shippers, with whose cause midwestern legislators identified "reform." Though the book suffered from an untenable conclusion,[17] Martin exhibited an unusually sure sense of the ways in

[15] Benson, *Merchants, Farmers, and Railroads: Railroad Regulation and New York Politics, 1850–1887* (Cambridge, Mass., 1955), 212, 245. An earlier work that included substantial analysis of nineteenth century state commissions in one area was Edward Chase Kirkland, *Men Cities and Transportation: A Study in New England History, 1820–1900* (2 vols., Cambridge, Mass., 1948). Benson's conclusion that railroad men supported regulation somewhat reluctantly was consistent with an earlier report by Thomas C. Cochran, in *Railroad Leaders 1845–1890: The Business Mind in Action* (Cambridge, Mass., 1953), 189–199.

[16] Nash, "Origins of the Interstate Commerce Act of 1887," *Pennsylvania History*, XXIV (July, 1957), 181–190; Purcell, "Ideas and Interests: Businessmen and the Interstate Commerce Act," *Journal of American History*, LIV (December, 1967), 561–578; Kerr, *American Railroad Politics, 1914–1920* (Pittsburgh, 1968).

[17] Martin, *Enterprise Denied: Origins of the Decline of American Railroads, 1897–1917* (New York, 1971). Martin concluded that the ICC's regulatory action in the decade following passage of the Hepburn Act (1906) induced a capital starvation that precipitated the secular decline of American railroads. The fallacy here was Martin's insufficient

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which businessmen made decisions. In effect, the book, together with a later article by Martin that clarified the controversy over pooling, totally inverted the thesis of Kolko's *Railroads and Regulation.* Whatever "capture" had occurred was the railroads by the ICC. Wherever Kolko had found "political capitalism" operating to the benefit of the industry, Martin discovered "archaic progressivism" undermining it. Where Kolko's implicit premise appeared to be the illegitimacy of the American polity, Martin's seemed to be the nonsense of regulatory meddling with a market system.[18]

Two state studies provided additional insight into early railroad politics, in its midwestern setting. These were George H. Miller's *Railroads and the Granger Laws* and Stanley P. Caine's *The Myth of a Progressive Reform.*[19] Miller's book, a model of careful scholarship, argued that although the so-called "Granger" legislation of the four upper-midwestern states in the 1870s may have had the support of farmers (some of whom were more or less "radical"), the laws derived more directly from the region's shippers. "When set against the background of previous rate law and policy," observed Miller, "the laws appear far less radical and in no sense agrarian."[20] In the Middle West, the railroad problem meant discriminatory rates, not general rate levels. It meant interstate and intercity rivalry as much as carriers versus shippers. The dilemma pressed hard: if regulation were too stringent, railroads might refuse to extend their services, or stop them altogether, cutting the umbilical lifelines of towns serving as trans-shipment points for agricultural commodities. Within such a context of total dependence, the "public interest" had a sharper, more self-evident substantive meaning than it had for other regions and other industries. As for "capture," it was irrelevant to regulatory experience in the Granger states. The railroads fought commission regulation with every tool they possessed. When this effort failed, they often ignored the new laws, and when that policy proved unsatisfactory they turned to the courts for relief. Thus Miller's book again confirmed the group-struggle pattern of regulation. It also provided a valuable institutional approach to a question too little explored by historians – the transitions and continuities in nineteenth-century

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emphasis on a much stronger factor in the railroads' eclipse – the onset of severe intermodal competition, both for freight, from trucks, and for passengers, from interurban electrics, automobiles, and airlines.

[18] Martin, *Enterprise Denied, passim*; Martin, "The Troubled Subject of Railroad Regulation in the Gilded Age – A Reappraisal," *Journal of American History,* LXI (September, 1974), 339–371.

[19] Miller, *Railroads and the Granger Laws* (Madison, Wis., 1971); Caine, *The Myth of a Progressive Reform: Railroad Regulation in Wisconsin 1903–1910* (Madison, Wis., 1970).

[20] Miller, *Railroads and the Granger Laws,* ix.

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state economic policies from optimistic promotion to disillusioned regulation.[21]

In Stanley P. Caine's monograph on Wisconsin, the principal actor was Robert M. La Follette, who, as the state's governor from 1901 to 1906, attempted to add railroad regulation to his list of essential programs. As La Follette himself told the story in his autobiography, he managed to secure a genuinely progressive commission, which inaugurated an era of regulation in the "public interest." Several historians accepted this version uncritically, but Caine did not. Instead, he argued that the alleged victory over corporate interests was an illusion; that the new law did not give the commission clear power to initiate rates, but made it a judicial institution of appeal from the decisions of railroad corporations. The new tribunal quickly assumed an accommodating posture, and the railroad men who had fought its creation grew to admire it. To Caine, this sequence indicated "a betrayal of reform ideals." The very title of his book, *The Myth of a Progressive Reform*, implied a normative judgement that the "public interest" had not been served.[22]

Although most regulatory histories pertained to railroads, three studies addressed other aspects of the subject. The best known of the three, Kolko's *The Triumph of Conservatism*, argues the same thesis as his *Railroads and Regulation*, substituting business in general for the railroads' role. The other two examine the early careers of the Federal Trade Commission and the Securities and Exchange Commission. The first to appear was G. Cullom Davis's article, "The Transformation of the Federal Trade Commission, 1914–1929." Davis found in the FTC the same sort of inconsistency within one agency that scholars of railroad regulation had collectively discovered among different railroad commissions. As the FTC struggled with its vague mandate during the Progressive Era, World War I, and the prosperity of the twenties, "unfair methods of competition in commerce" successively acquired different mean-

[21] The litigation over the Granger laws produced one of the landmark cases in public utility law, *Munn v. Illinois* [94 U.S. 113 (1877)], in which the opinion of Chief Justice Morrison R. Waite explicitly relied on the "public interest" doctrine in affirming the power of states to regulate enterprises that "stand in the very 'gateway of commerce' and take toll from all who pass." Miller's book provided an insightful new perspective on this decision, tying it to earlier state policies, as did Harry N. Scheiber in the article cited in note 2 above.

[22] Caine, *The Myth of a Progressive Reform*, especially Chapter 10. Caine's analysis was strongest in clarifying the motives of La Follette and other principals, the legislative trade-offs that usually characterize regulatory statute-making, and the policies of the new commission itself. Nowhere, however, did he show that rates in Wisconsin were too high, or that a substantial general decrease would have benefited the shippers or the public without unduly injuring the corporations. Instead he seemed to take this difficult question for granted.

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ings for different groups. By the close of the commission's first decade, its early enemies had become champions, its early advocates new opponents. In Davis's scheme, the "public interest" alternated with "capture" depending on the identity of the commissioners, which in turn varied with the incumbent of the White House and ultimately with the mood of the nation. In effect, Davis found the commission, like Mr. Dooley's Supreme Court, following the election returns. The high court itself added to the FTC's woes by confining its discretionary powers to the narrowest of functions.[23]

Michael E. Parrish's fine study, *Securities Regulation and the New Deal*, emphasized the intelligence and professionalism of the architects and early members of the Securities and Exchange Commission, but also noted the effects of concentrated industry pressure, both on the shape of the legislation and on the policies of the SEC. Even during a national economic depression, when businessmen in general and securities dealers in particular were in extremely low repute, industry input could still have powerful impact. The SEC confronted entrenched economic arrangements that antedated the New Deal, and that were likely to be upset by an overturning of the exchange apparatus, with devastating effects not only on the guilty few but also on innocent multitudes of investors. The SEC negotiated a fine line between merely symbolic action on the one hand and overkill on the other, a policy that represented neither a rout of the villains nor a surrender to them, but "half a loaf." Considering the complex situation, this was a substantial achievement. It minimized the effects of private corruption on the national economy, and "held the possibility of more orderly, enduring economic growth in the future." [24] Parrish detailed the financial community's utter hostility toward regulation, its near-willingness to hold national recovery hostage to its determination to avert reform. During the post-enactment period, the mutual reliance between industry and commission for information, the shifts back and forth of important personnel, were characteristics consistent with the possibility of "capture," but not in themselves conclusive evidence.

Taken as a whole, historical writing offers few clear patterns of regulatory behavior, except that it demonstrates the inadequacy of either "capture," the "public interest," or the two in tandem as satisfactory models. Most historians have emphasized the political

[23] Davis, "The Transformation of the Federal Trade Commission, 1914–1929," *Mississippi Valley Historical Review*, XLIX (December, 1962), 437–455.

[24] Parrish, *Securities Regulation and the New Deal* (New Haven, Conn., 1970), 219, 232. This book covered much of the same ground as Ralph F. De Bedts, *The New Deal's SEC: The Formative Years* (New York, 1964), but was better researched and more analytical.

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aspects of regulation, with the one common conclusion that regulatory politics involved an intricate, complex struggle among intensely competitive interest groups, each using the machinery of the state whenever it could, to serve particularistic goals largely unrelated to "public interest" ideology except in the tactical sense.

Economists and Regulation

A continuing problem for both scholars and reformers has been the elusiveness of hard evidence concerning regulation's actual effects. Unlike their corporate counterparts, commissions issue no profit and loss statements telling in an instant whether the quarter or year has been good or bad. No regulatory agency lists its common stock on traders' exchanges, where a rise or fall might indicate success or failure. Nor do most commissioners, like elective politicians, face voters at regular intervals for endorsement or rejection. Consequently, the new attention that economists gave to regulation in the 1960s and 1970s had prodigious significance. In these studies, a "bottom line" appeared, purporting to provide quantitative assessments of regulation's impact.

Economists had long been interested in the subject. Institutional economics supplied some of the intellectual foundations of the commission movement, and prominent scholars like John R. Commons, William Z. Ripley, Balthasar H. Meyer, and Rexford G. Tugwell sometimes wrote regulatory laws, served on commissions or commission staffs, and made regulation an academic subdiscipline. By the 1930s, however, institutionalism had begun to wane, and the subsequent triumph of Keynesianism and macroeconomics inevitably made regulation a less exciting topic, prosaic in comparison with the glamour of fiscal policy, growth economics, and "fine tuning."

The studies emerging in the 1960s and 1970s grew less out of the old institutional tradition than from the intellectual revival of price theory, whose methods in themselves raised questions about the pricing functions exercised by state utility commissions and by Federal agencies such as the ICC, CAB, and Federal Power Commission. Adding a measure of ideology to the cold logic of price theory was the related work of scholars associated with the "Chicago school," whose near-worship of the market as allocator of resources led to a distaste for that very interference with market forces that lay at the heart of the commission movement. Irrespective of premises Left or Right, the explicit test for most

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economists was the performance of an industry under regulation. The collective conclusion, much more decisive than those of the empirically-oriented historians, held that regulation was an expensive failure. In a harsh summary verdict, one influential economist wrote in 1963: "What the regulatory commissions are trying to do is difficult to discover; what effect these commissions actually have is, to a large extent, unknown; when it can be discovered, it is often absurd." [25]

The ICC, the oldest Federal commission, which had weathered innumerable storms and had by the 1930s attained a uniquely high reputation, was now found guilty of enormously costly errors. Its policies of minimum rate regulation, its reluctance to allow market forces to select optimal modes for particular freights, its custodial preservation of obsolete services, were ill serving the industries concerned and making a mockery of the "public interest." By the 1970s, "the immediate cost to the economy of such regulation-induced inefficiencies in surface freight transport is estimated at $4 billion to $10 billion a year." [26]

For airline regulation, the same dismal picture emerged. The Civil Aeronautics Board had prevented since its creation during the New Deal the entry of a single new trunk line carrier into the business. It had facilitated the rise of fares to unnecessarily high levels, preventing normal price competition and indirectly promoting useless and expensive types of competition, such as excessive flights, elaborate decors, massive media advertising, and extravagant inflight services. For the one important city-pair market not subject to CAB regulation, the intrastate Los Angeles-San Francisco route, normal business competition had cut the going rate nearly in half, suggesting what deregulation might accomplish elsewhere. In

[25] Ronald H. Coase, "Comment," *American Economic Review*, LIV (May, 1964), 194. The rapid rise of interest in regulation among economists may be traced through two relatively new journals, both devoted largely to regulatory topics: the *Journal of Law and Economics*, and the *Bell Journal of Economics and Management Science*. A third indication is the large project begun in the late 1960s by the Brookings Institution, which resulted in a number of books on regulation, many of which are cited below.

[26] The quotation is from John R. Meyer and Alexander L. Morton, "A Better Way to Run the Railroads," *Harvard Business Review*, LII (July–August, 1974), 143, citing an unpublished paper by Thomas G. Moore. Moore's views are elaborated also in a book that conveniently surveys the literature of its subject: *Freight Transportation Regulation: Surface Freight and the Interstate Commerce Commission* (Washington, D.C., 1972). Important studies include John R. Meyer, Merton J. Peck, John Stenason, and Charles Zwick, *The Economics of Competition in the Transportation Industries* (Cambridge, Mass., 1959); Ann F. Friedlaender, *The Dilemma of Freight Transport Regulation* (Washington, D.C., 1969); George Wilson, *Essays on Some Unsettled Questions in the Economics of Transportation* (Bloomington, Ind., 1962); Wilson, "The Effect of Rate Regulation on Resource Allocation in Transportation," *American Economic Review*, LIV (May, 1964), 160–171; and Richard N. Farmer, "The Case for Unregulated Truck Transportation," *Journal of Farm Economics*, XLVI (May, 1964), 398–409. An interesting attempt to apply theory to early railroad experience is Paul W. MacAvoy, *The Economic Effects of Regulation: The Trunk-Line Railroad Cartels and the Interstate Commerce Commission Before 1900* (Cambridge, Mass., 1965).

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focusing its policies on other priorities, such as the promotion of new, technologically advanced aircraft, the subsidized extension of air service to small towns, and an apparent determination to maximize the size of the industry, the CAB had lost sight of the overall consumer interest.[27]

Price regulation of the natural gas industry by the Federal Power Commission brought similar inefficiencies, according to the leading student of this question.[28] In the first place, gas field production bore little resemblance to "natural monopoly," being instead diversified among numbers of relatively small producers. Regulation therefore lacked the logical foundation that supported early railroad commissions. Then too, the policies of the FPC tended to freeze prices during periods of sustained inflation, discouraging a proper market level of production, retarding the development of the industry, and diverting users to less economical sources of energy. By the 1970s, the policy had injured the entire economy, as the energy problem became acute and one important fuel source lay poorly developed because of regulatory constraint.

Within the states, public utility commissions seemed to pursue unwise policies toward the electric power industry. One influential hypothesis held that regulation had no serious effect at all.[29] In an equally challenging argument, two scholars theorized that utilities tend to overcapitalize, and consequently to operate at outputs other than the optimal. This excessive-capitalization theory encouraged a host of spinoff studies, and gave its originators a type of immortality by incorporating their names into the phenomenon they described: "the Averch-Johnson effect." Still other scholars discovered additional errors common to state utility commissions.[30]

[27] Richard E. Caves, *Air Transport and Its Regulators — An Industry Study* (Cambridge, Mass., 1962); William A. Jordan, *Airline Regulation in America: Effects and Imperfections* (Baltimore, 1970); George C. Eads, *The Local Service Air Line Experiment* (Washington, D.C., 1972); Theodore Keeler, "Airline Regulation and Market Performance," *Bell Journal of Economics and Management Science*, III (Autumn, 1972), 399–424; George W. Douglas and James C. Miller III, *Economic Regulation of Domestic Air Transport: Theory and Policy* (Washington, D.C., 1974).

[28] Paul W. MacAvoy, *Price Formation in Natural Gas Fields* (New Haven, Conn., 1962); MacAvoy, "The Effectiveness of the Federal Power Commission," *Bell Journal of Economics and Management Science*, I (Autumn, 1970), 271–303; MacAvoy, "The Regulation-Induced Shortage of Natural Gas," *Journal of Law and Economics*, XIV (April, 1971), 167–199.

[29] George J. Stigler and Claire Friedland, "What Can Regulators Regulate? The Case of Electricity," *Journal of Law and Economics*, V (October, 1962), 1–16; see also Harold Demsetz, "Why Regulate Utilities?" *Journal of Law and Economics*, XI (April, 1968), 55–65. An enlightening discussion of the evolution of utility pricing theories is R. H. Coase, "The Theory of Public Utility Pricing and Its Application," *Bell Journal of Economics and Management Science*, I (Spring, 1970), 113–128. Elaborations of this theme may be found in any of several standard textbooks on public utility economics, one of the best of which is Alfred E. Kahn, *The Economics of Regulation* (2 vols., New York, 1970, 1971).

[30] Harvey Averch and L. L. Johnson, "Behavior of the Firm Under Regulatory Constraint," *American Economic Review*, LII (December, 1962), 1053–1069; discussions of

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Economists tended to be less critical of those commissions with few or no pricing powers, but they hardly ignored them altogether. Scattered throughout the literature were indictments of the Federal Communications Commission, the Securities and Exchange Commission, state insurance commissions, and others. Sometimes regulation itself was held to inhibit technological innovation, a grievous charge to lay at the door of a uniquely American institution.[31]

The distinctive contributions of the economists were their theoretically-based methodology, their quantification of regulatory inefficiencies, and their ability to predict probable effects of hypothetical changes in commission policy. Partly because their inquiries were typically less holistic than those of the historians, they were better able to keep a rigorous focus, and to specify precisely what it was they were trying to show. On the other hand, they paid less attention to historical sequence and factual detail. Seldom did they attempt the kind of combined cultural and economic analysis so fruitful in the work of historians such as Ellis W. Hawley and Richard Hofstadter.[32]

A few economists did theorize about the entire regulatory process. One ambitious statement came from George J. Stigler, a leading member of the "Chicago school," who propounded a rudimentary model of regulation from its origins, through enactment, and into operation. Unhappy with assumptions that the "public interest" emerged automatically from regulation, Stigler showed equal impatience with the "capture" thesis: "This criticism seems to me exactly as appropriate as a criticism of the Great Atlantic and Pacific Tea Company for selling groceries, or as a criticism of a politician for currying popular support." In some respects, Stigler's was the Kolko model updated. Whatever "capture" had occurred was not so much of the commissions as it was of prior political

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the "A–J effect" are summarized in William J. Baumol and Alvin K. Klevorick, "Input Choices and Rate-of-Return Regulation: An Overview of the Discussion," *Bell Journal of Economics and Management Science*, I (Autumn, 1970), 162–190.

[31] The following are examples of recent scholarship on these topics: on the FCC, Roger G. Noll, Merton J. Peck, and John J. McGowan, *Economic Aspects of Television Regulation* (Washington, D.C., 1973); R. H. Coase, "The Federal Communications Commission," *Journal of Law and Economics*, II (October, 1959), 1–40; on technological aspects, William M. Capron, ed., *Technological Change in Regulated Industries* (Washington, D.C., 1971); on one aspect of SEC regulation, Jeffrey F. Jaffe, "The Effect of Regulation Changes on Insider Trading," *Bell Journal of Economics and Management Science*, V (Spring, 1974), 93–121; on state insurance commissions, Paul L. Joskow, "Cartels, Competition and Regulation in the Property-Liability Insurance Industry," *Bell Journal of Economics and Management Science*, IV (Autumn, 1973), 375–427.

[33] Many of the institutionalists did approach problems in this way, as have a few more recent economists such as J. K. Galbraith. For the historians, see, in particular, Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton, N.J., 1966); and Hofstadter, "What Happened to the Antitrust Movement? Notes on the Evolution of an American Creed," in Earl F. Cheit, ed., *The Business Establishment* (New York, 1964), 113–151.

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power, which expressed itself through the creation of a regulatory mechanism. The new apparatus did not necessarily take the form of a commission, but could be an import quota system or tariff schedule. The virtue of Stigler's argument was its recognition that the regulatory process goes beyond purely economic phenomena, that "the problem of regulation is the problem of discovering when and why an industry (or other group of like-minded people) is able to use the state for its purposes, or is singled out by the state to be used for alien purposes." [33]

Regulation in the Literature of Political Science and Law

An appropriate source of answers to Stigler's question would appear to be political science and law. As was the case in economics, the contributions from scholars in each of these two disciplines outnumbered those of historians, a logical circumstance considering that regulation is barely a century old, that it remains controversial, and that the commissions' embrace of legislative, executive, and judicial roles within a single institution raised theoretical and practical issues of keen interest to lawyers and students of government.

Although the characteristic approaches of the two disciplines were not identical, each one emphasized matters of procedure, responsibility, and equity. Where the distinctive method of historians was empirical, and of economists a theory-oriented testing of market efficiency, that of political scientists and lawyers centered on due process, legitimacy, and reform. The resulting scholarship fell into two broad categories. The first included a number of quasi-histories, written within a generation of the establishment of particular commissions and directed toward prescriptions for improvement as well as toward analysis. A second category focused on elaborations or critiques of interest group politics in America, and included books addressing the questions of "public interest" and "capture." This second category fitted into the pluralist versus anti-pluralist debate within both political science and law.

Three books on the Federal Trade Commission typified the first group, the prescriptive quasi-histories. In *The Federal Trade Com-*

[33] Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science*, II (Spring, 1971), 3–21. See also Stigler, "The Process of Economic Regulation," *The Antitrust Bulletin*, XVII (Spring, 1972), 207–235. A few other economists have attempted interdisciplinary approaches. See, for example, Roger G. Noll, "The Behavior of Regulatory Agencies," *Review of Social Economy*, XXIX (March, 1971), 15–19; and Paul L. Joskow, "Pricing Decisions of Regulated Firms: A Behavioral Approach," *Bell Journal of Economics and Management Science*, IV (Spring, 1973), 118–140.

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mission: A Study in Administrative Law and Procedure,[34] Gerard C. Henderson, a practicing lawyer, found the early FTC insufficiently judicial in its proceedings, sometimes guilty of unfairness, and ready to dissipate its energies in cases involving no broad public concern. Some of the same suggestions appeared in another study of the FTC, published in 1932 by Thomas C. Blaisdell.[35] Anticipating much New Deal scholarship, Blaisdell found the commission's performance during the 1920s clearly unsatisfactory. The vague FTC Act implicitly identified competition *as* the "public interest," on the apparent assumption that competition in all cases promoted socially desirable results. Such a premise Blaisdell found controverted by American economic history. "Means were confused with ends," he wrote, in a comment significant not only for the FTC, but for other aspects of regulatory experience. Blaisdell contrasted the Federal Trade Commission's woes with the more successful record of the ICC, whose problems with the courts were resolved only through repeated action by Congress.[36] In still a third book on the FTC, former commissioner Nelson B. Gaskill identified some of the same problems, suggested a few new remedies, and like both Henderson and Blaisdell advanced the hope that intelligent trade regulation on a broad scale could be achieved, despite the FTC's manifest failures. The overriding need, wrote Gaskill, was a clear enunciation of policy, by both Congress and the commission.[37]

In 1962, Henry J. Friendly updated these views, in a brief but important book entitled *The Federal Administrative Agencies: The Need for Better Definition of Standards*. Ending with a prescriptive chapter typical of regulatory scholarship, Friendly sought salvation through the creation of "a body of substantive law." Delineating the ways in which procedural delay denied justice, Friendly showed how due process carried to extremes could actually thwart the "public interest." Even so, he rejected the remedy of heavy reliance on presidential control over commissions recommended in the Landis report of 1960, and also in the extensive work of Emmette S. Redford, a leading figure among scholars of regulation within political

[34] New Haven, Conn., 1924.

[35] Blaisdell, *The Federal Trade Commission: An Experiment in the Control of Business* (New York, 1932).

[36] *Ibid.*, 293, 307. The comparison was made central in Carl McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission 1920–1930* (Cambridge, Mass., 1933). Also on the important subject of judicial review of regulation, see Louis L. Jaffe, *Judicial Control of Administrative Action* (Boston, 1965); and Martin M. Shapiro, *The Supreme Court and Administrative Agencies* (New York, 1968).

[37] Gaskill, *The Regulation of Competition* (New York, 1936). This book examined not only the FTC, but also the recently expired National Recovery Administration. It was a broadside more than a scholarly work.

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science.[38] Displaying a faith in regulation consistent with the book's dedication to Felix Frankfurter, a pioneer of legal scholarship and teaching in the field, Friendly concluded with an affirmation: "The administrative agencies have become a vital part of the structure of American government. Nothing is accomplished by merely negative criticism or by petulant proposals to abolish them." [39]

Such feelings echoed the tradition of reform-oriented scholarship emblematic of the 1930s. In that decade I. Leo Sharfman completed his huge study, *The Interstate Commerce Commission*,[40] which comprises five thick books and remains the most exhaustive analysis of a commission yet written. Its conclusions tended to confirm the ICC's high reputation of the time. Also in the thirties, E. Pendleton Herring published a thoughtful analysis of several agencies, and a short prosopographical study of the careers of federal commissioners.[41] At the close of this productive decade of scholarship, Robert E. Cushman completed the broadest of the prescriptive quasi-histories, *The Independent Regulatory Commissions*, a massive study that grew out of Cushman's work on Franklin D. Roosevelt's Committee on Administrative Management.[42] Packed with suggestions for improvement, Cushman's book also contained a cross-national analysis of the American and British experiences in regulating business – a useful methodology mostly neglected since.

A landmark of regulation in the scholarship of political science was Marver H. Bernstein's book of 1955, *Regulating Business by Independent Commission*.[43] In a survey of the entire field, Bernstein

[38] Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (Cambridge, Mass., 1962). Friendly was a Federal judge at the time. His book, heavily footnoted, provided a convenient guide to the legal literature on administrative procedure, a topic I have only touched on in this discussion. Representative of the voluminous publications of Emmette S. Redford are *Administration of National Economic Control* (New York, 1952); *American Government and the Economy* (New York, 1965), and *The Regulatory Process: With Illustrations from Commercial Aviation* (Austin, Texas, 1969).

[39] Friendly, *The Federal Administrative Agencies*, 175; one example of the influence of Friendly's views may be found in William L. Cary (a former chairman of the SEC), *Politics and the Regulatory Agencies* (New York, 1967).

[40] Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure* (4 vols. in 5, New York, 1931–1937). Sharfman was an economist, not a lawyer or political scientist. I have included his work in this section because it more closely resembles the work of the 1930s political scientists than that of recent economists.

[41] Herring, *Public Administration and the Public Interest* (New York, 1936); Herring, *Federal Commissioners: A Study of Their Careers and Qualifications* (Cambridge, Mass., 1936).

[42] Cushman, *The Independent Regulatory Commissions* (New York, 1941). The Committee, known popularly as the "Brownlow Committee," after its Chairman, Louis Brownlow, was one of a long series of *ad hoc* groups studying regulation and organization in the Federal establishment. Subsequent studies produced the Hoover Commission Report (numbers 1 and 2), the Landis Report, and the Ash Council Report.

[43] Princeton, N.J., 1955. In the mid-1950s, there was nothing like a consensus on regulation within political science. Bernstein's views may be contrasted with those of Redford, *Administration of National Economic Control* (note 38 above), and of Robert E. Lane, *The Regulation of Businessmen* (New Haven, Conn., 1954). See also the uncritical

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weighed arguments for and against regulation and came down heavily on the negative side. Generalizing freely, the author propounded a "life cycle" theory, which held that commissions typically pass through successive phases, beginning with exuberant prosecution of mandate but ending with ossification and debility. In the area of documentation, the book left something to be desired, but Bernstein's arguments seemed so thoughtful, reasonable, and self-assured that they practically set the terms for the critical attack that followed in the 1960s.

This attack, as noted above, came largely from economists and from reformers like "Nader's Raiders," who made heavy use of the economic literature and of the theories and arguments summarized by Bernstein. In political science, the analysis tended to become much broader, and to address issues of which regulation formed only a part. Especially noteworthy was the work of the critics of pluralism. Dismayed by the results of "broker-state" government in the New Deal pattern, unpersuaded by celebratory assurances from 1950s writers that countervailing pressures from diverse interest groups yielded a genuine "public interest," these scholars detailed the distance between the aims of Progressive and New Deal reformers on the one hand, and the contemporary reality of American life on the other.

Three books both exemplified and influenced the anti-pluralist persuasion: Henry S. Kariel's *The Decline of American Pluralism*, Grant McConnell's *Private Power and American Democracy*, and Theodore J. Lowi's *The End of Liberalism*.[44] The three differed in many particulars but held unanimously that pluralist theory disguised the exploitation of public authority by private groups for private purposes. The "public interest," far from emerging automatically from the inter-group struggle, was simply lost in the shuffle. Regulated industries were the clients of their commissions. The American Farm Bureau Federation, in alliance with other powerful groups, dictated policy to the Department of Agriculture. Big Labor won big gains for itself, but often ignored the rest of society. Meanwhile, the "public interest" led nobody's list of priorities.

"Capture," in other words, applied not just to commissions but to the entire American polity. The system had degenerated from an original dream of constitutional democracy and the general

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quasi-history by James E. Anderson, *The Emergence of the Modern Regulatory State* (Washington, D.C., 1962).

[44] In the order listed: Stanford, Cal., 1961; New York, 1966; and New York, 1969.

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welfare to a hopelessly fragmented mélange of small, autonomous constituencies sensitive only to self-interest The tragedy was that the government had lent its authority to these constituencies, piece by sovereign piece, and that the pluralist postulate of universal access to power had encountered the incontrovertible fact that such access depended on systematic, articulate, well-funded organization. Some groups could not meet these tests. Unorganized or, as in the case of the poor, unorganizable, they stayed out in the cold, away from the American banquet.[45]

The anti-pluralist indictment inspired a variety of responses, some of them holding that the legal order in the United States had always provided mechanisms to protect the weak and unorganized. As one scholar put it in 1972, "probably never before in our history has legal policy been so supportive of the rights of individuals and groups affected by administrative action to be heard and to influence the action taken." To some writers, the advent of public interest law – an institutional adaptation to some of the problems identified by the anti-pluralists – represented a hopeful sign that the existing system might yet work, given adequate funding for public interest lawyers.[46] Some of the most promising studies by legal scholars, such as those of Richard A. Posner, attempted to combine economic theory with jurisprudence, in order to establish first principles of regulation, whether of the commission variety or of the older market-common-law type.[47]

An Assessment

The collective findings in history, economics, political science, and law have been sufficient to establish a few broad conclusions:

1. Neither "public interest" nor "capture," nor the two in combination adequately characterize the American experience with regulation over the last century. Sometimes regulation materialized

[45] The solutions offered by the anti-pluralists varied, and in each book, the diagnosis seemed superior to the prescription. Lowi proposed a return to basic constitutional principles and the promotion of "juridicial democracy." McConnell suggested the strengthening of mechanisms that permitted the entire people to act as one. Invigoration of broad constituencies would limit the scope of "capture," promote citizen participation, and give substantive content to the "public interest."

[46] Carl A. Auerbach, "Pluralism and the Administrative Process," *The Annals*, CD (March, 1972), 1. On public interest lawyers, see Simon Lazarus, *The Genteel Populists* (New York, 1974), Chapter 10; Joseph C. Goulden, *The Superlawyers* (New York, 1972), Chapter 10; and Richard C. Leone, "Public Interest Advocacy and the Regulatory Process," *The Annals*, CD (March, 1972), 46–58.

[47] Posner, "Natural Monopoly and Its Regulation," *Stanford Law Review*, XXI (February, 1969), 548–643; Posner, "Taxation by Regulation," *Bell Journal of Economics and Management Science*, II (Spring, 1971), 22–50; Posner, *Economic Analysis of Law* (New York, 1973); Posner, "Theories of Economic Regulation," *Bell Journal of Economics and Management Science*, V (Autumn, 1974), 335–358.

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with the support or even initiative of the industry involved (as with broadcasting), sometimes with the reluctant assent (as with the ICC), and sometimes against the rigid opposition (as with the Granger commissions and the SEC). Commissions often came into existence with broad popular support, sometimes amid obvious public apathy, but never in the face of mass-based, articulate opposition.

2. Once established, commissions did respond readily to pressures from organized interest groups. Such groups included not only the regulated industry, but also that industry's market elements (shippers, for example, in the case of the ICC), and occasionally the industry's labor force. Whenever actual "capture" by one of these elements did occur, it followed patterns not peculiar to commissions but common to a whole range of bureaucratic interdependency between government agencies and organized interest groups, whether in labor, agriculture, defense, or other private interests able to use the power of the state for their own benefit.

3. Regulation in America has been a multi-functional pursuit, a circumstance that has offered scholars a choice, when they generalize about the regulatory process as a whole, between extreme caution on the one hand, and extreme likelihood of error on the other. Regulation is best understood as an institution capable of serving diverse, even contradictory ends, some economic, some political, some cultural. Regulatory experience over the last century suggests several major ends or functions:

a. the function of disclosure and publicity
b. the function of cartelization
c. the function of containing monopoly or oligopoly
d. the function of economic harmony among industries
e. the function of promotion or advocacy
f. the function of legitimizing parts of the capitalist order
g. the function of consumer protection.

Obviously, such a list could be longer, or differently stated. The functions could overlap, as in early railroad regulation, when efforts to control rates through disclosure and publicity aimed at stabilization and economic harmony. More often than not, regulatory functions among different commissions, and sometimes even within the same agency, could conflict. The Civil Aeronautics Board, to take one example, has not succeeded in its efforts to promote orderly airline development and technologically advanced aircraft, while simultaneously trying to stabilize rates at levels attractive to travel-

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lers with modest incomes. In the broader sense, items (b) and (c) above proceed from conflicting premises concerning the efficacy of competition, reflecting not only different market imperatives of different industries, but also ideological splits within American society. The perennial conflict over competition underlies a large proportion of the controversy over regulation, including both the "public interest" and "capture" images of it.

Despite the danger of internal inconsistency, regulators have identified whichever function they wished to emphasize at the moment with the "public interest." They could hardly have done otherwise. Almost nobody ever declares his hostility to the "public interest." Yet such rhetoric could go beyond either symbol or cant. It could often signify an intelligent conviction that a particular policy would yield broad societal benefits. For scholars, the notion has little use as a static entity, but it may offer a helpful signal at those points where it visibly changes. Industries or societies in different stages of development need different things. The same industry or society, moving from one phase to another, fulfills or forgets old needs and acquires new ones. The "public interest," therefore, however defined, cannot remain static, even within the mind of an individual. Time makes it dynamic; and historians specialize in change over time.

They have less experience, however, in other aspects of regulation equally essential to understanding: the structures, markets, and competitive characteristics of the industries involved. As the histories of railroad regulation suggest, a firm grasp of the "railroad problem" and the distinctive features of the industry – its high ratio of fixed to variable costs, its powerful tendency toward huge integrated systems – are indispensable to the study of attempts at its public control. If, as seems likely, the inherent nature of an industry is the most important single context in which regulators must operate, then the range of policies open to them has been narrower than many observers have hitherto believed.[48]

These problems indicate once more that regulation is so broad a

[48] The logical starting place here is the work of Alfred D. Chandler, Jr., though it customarily deals less with regulated enterprises than with manufacturing. See, in particular, *Strategy and Structure: Chapters in the History of the Industrial Enterprise* (Cambridge, Mass., 1962); "The Structure of American Industry in the Twentieth Century: A Historical Overview," *Business History Review*, XLIII (Autumn, 1969), 255–298; and Chandler, ed. and comp., *The Railroads: The Nation's First Big Business* (New York, 1965). See also Alfred S. Eichner, *The Emergence of Oligopoly: Sugar Refining as a Case Study* (Baltimore, Md., 1969). A superior analysis of both the evolution of big business and of its historiography is Glenn Porter, *The Rise of Big Business 1860–1910* (New York, 1973), which emphasizes the capital-intensive nature of modern enterprise. A strong statement of the relationship between production process and industry structure appears in Robert T. Averitt, *The Dual Economy: The Dynamics of American Industry Structure* (New York, 1968), Chapter 3.

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topic that its proper study compels the use of methods from many disciplines. Besides those discussed here – history, economics, political science, and law – another promising perspective might come from organizational theory.[49] Despite the vast literature on regulation, scholars still have only a vague idea of what went on inside the commissions, in the interplay of contending sub-groups, the relationships among commissioners and career staff members, and especially the connections between regulatory policy and perceived bureaucratic imperatives. Like other organizations, commissions seldom followed paths that would diminish their own importance, but instead promoted policies that would insure their institutional survival and growth. The inconsistent patterns of regulatory behavior over the last hundred years may mean not only that regulation is a multi-functional undertaking, and that different industry structures governed regulators' options, but also that commissions' highest loyalties sometimes went neither to the "public interest" nor to the regulated industry, but to regulation itself. Regulation was their business, and they did not intend to close up shop.[50] In promoting regulation as a value in itself, they generated an independent social force whose cumulative influence over time may have been substantial, but which remains mostly unexplored by scholars.

Multiple approaches are therefore essential for the realization of the major dividend available from the study of regulation: the illumination of that shadowy zone where public and private endeavors met and merged, where regulator and regulated experienced a confusion of identity and assumed each others' roles. Seldom in American history did the goals of private groups form a perfect identity with those of the rest of society, but seldom a perfect antithesis, either. Instead, sets of goals overlapped, now finely, now amply. Within the zones of overlap, private groups plausibly claimed service to society, and "capture" coexisted in fleeting calm with "public interest." Fleeting, because each zone suffered a double indeterminacy: who made the decisions, the public official or the businessman? And what were the precise

[49] Discussions of historians' application of organizational theory include Louis Galambos, "The Emerging Organizational Synthesis in Modern American History," *Business History Review*, XLIV (Autumn, 1970), 279–290; James H. Soltow, "American Institutional Studies: Present Knowledge and Past Trends," *Journal of Economic History*, XXXI (March, 1971), 87–105; and Robert D. Cuff, "American Historians and the 'Organizational Factor,'" *Canadian Review of American Studies*, IV (Spring, 1973), 19–31. Cuff's own *The War Industries Board* (Baltimore, 1973), is in many respects a model organizational study.

[50] An early suggestion of "regulation-mindedness" appears in Louis L. Jaffe, "The Effective Limits of the Administrative Process: A Reevaluation," *Harvard Law Review*, LXVII (May, 1954), 1113.

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boundaries of the zone? Constantly shifting from internal and external pressures, the zones formed arenas whose only permanent qualities were confusion, controversy, and uncertainty. Did a given action by a businessman or regulator denote the presence of "public interest," or of "capture"? Did it deserve congratulation, or condemnation? Prize, or prosecution?

The theme is ancient, of course, a continuous thread of American history back at least to the time of Hamilton. Writing twenty years ago, Robert A. Lively described "the incorrigible willingness of American public officials to seek the public good through private negotiations," and offered as a leading exhibit the early corporate enterprises promoted by the states.[51] In this sense, "capture" and "public interest" derived from a single source, and have been intertwined ever since. The gradual obsolescence of the public purpose corporation, and the concurrent rise of modern industrial capitalism, set a context hospitable to the evolution of a regulatory system with as many private purposes as public, as many promotional functions as restrictive, and as much continuity with a recent past as divergence in a new age.

[51] Lively, "The American System: A Review Article," *Business History Review*, XXIX (March, 1955), 93.

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