

Introduction

Daniel Carpenter and David Moss

When markets or regulations fall short of our expectations, observers often point to regulatory capture as a culprit. At times, the supposed domination of regulation by the companies governed leads to a failure of public protection from financial crises or preventable environmental, safety, and health disasters. At others, critics worry that regulatory capture stunts competition and innovation, as one group of firms wields the regulatory power of the state as a weapon to discourage the entry or success of other firms. Recent years and events provide no exception to the existence of these claims, or their credibility. In the wake of the global financial crisis of 2008, and following public catastrophes ranging from massive oil spills to mine explosions, observers seemed to find capture everywhere.

For example, in the wake of what *New Yorker* columnist James Surowiecki called “the regulation crisis,” both left and right pounced on the reputed capture of the agencies responsible. *Forbes* columnist Daniel Kauffman maintained that “There are multiple causes of the financial crisis. But we cannot ignore the element of ‘capture’ in the systemic failures of oversight, regulation and disclosure in the financial sector.” Chicago economist Gary Becker argued that “An economically disastrous example of the capture theory is provided by the disgraceful regulation of the two mortgages housing behemoths, Fannie Mae and Freddie Mac, before and leading up to the financial crisis.” After the Deepwater Horizon explosion and Gulf Oil spill of spring 2010, conservative columnist Gerald P. O’Driscoll wrote in the *Wall Street Journal* that “Obviously,

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regulation failed. By all accounts, MMS operated as a rubber stamp for BP. It is a striking example of regulatory capture: Agencies tasked with protecting the public interest come to identify with the regulated industry and protect its interests against that of the public. The result: Government fails to protect the public.”¹

Capture is, then, quite plausibly² alleged to figure significantly in the major human and environmental crises of our time. And in the aftermath of the crises, capture has been alleged to have rendered efforts at reform significantly less effective than would have been ideal. The widespread thought that special interests capture regulation, and that neither the government nor the public can prevent this, understandably weakens public trust in government, and contributes to a sense that our political system is not able to meet the challenges it faces.

Surely, no system will be able to meet every challenge it can encounter, and even effective political solutions will often-- perhaps always-- be less than ideal. But, just as surely, our political system has met great challenges in the past, and meets some contemporary challenges far more effectively than others. So, despite the oft-expressed skepticism about the capabilities of government and the great damage that economic and environmental disasters have already inflicted, the hope that capture can be prevented, and that regulation can stabilize economic and environmental systems in ways that better protect the public interest seems warranted. But what

¹ James Surowiecki, “The Regulation Crisis,” *New Yorker*, June 14, 2010; Kauffman, “Corruption and the Global Financial Crisis,” *Forbes*, January 27, 2009; Becker at <http://www.becker-posner-blog.com/2011/06/capture-of-regulators-by-fannie-mae-and-freddie-mac-becker.html> (accessed July 21, 2011); Gerald P. O’Driscoll, Jr., “The Gulf Spill, the Financial Crisis and Government Failure,” *Wall Street Journal*, June 12, 2010.

² As will be discussed below, plausibility, however, lies quite a distance from proof.

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can we do about it? If we know that capture is not always and everywhere a bar to effective regulation, how can we translate that truism into preventing capture before it occurs, while detecting and eliminating (or at least mitigating) it where it's found?

This volume is a large first step toward answering these questions.

This volume brings together a set of authors who carefully examine contemporary regulation to gain clearer understanding of what regulatory capture is, where and to what extent it occurs, what prevents it from occurring elsewhere, and finally, to distill lessons for policy makers and the public for how capture can be prevented, and the public interest protected. Such a comprehensive approach – one that combines theoretical insight and critique, empirical tests, economic and political fundamentals, historical and legal understanding, and focuses on mechanisms, the scope of the problem and, critically, upon potential solutions – is badly needed. Public and professional cries of regulatory capture have been met with near silence from the academy.³ A surfeit of claims has been neither demonstrated nor disproved. Although highly abstract models and theoretical case studies of capture in specific agencies or policies abound, no general volume on regulatory capture has been produced in three decades, since the 1981

³ As Rhode Island Senator Sheldon Whitehouse remarked on the Senate floor in June 2011, “regulatory capture isn’t getting the attention it deserves.” *Congressional Record – Senate*, July 7, 2011, S4453.

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publication of political scientist Paul Quirk's *Industry Influence in Regulatory Agencies*.⁴

Our main findings in this volume are that capture is simultaneously misdiagnosed, and mistreated. *Misdiagnosed*: our studies provide evidence from historical, statistical, legal and mathematical analyses that regulatory capture is poorly studied in the academy and poorly reasoned about in the public realm. All too often, scholars and pundits alike leap from an event (however embarrassing) to make large-scale inferences about an agency's entire culture. Or (more common among scholars) they find a partial correlation between variables in a statistical analysis, one that might suggest political influence but might not, and adopt capture as the immediate or obvious explanation without digging thoroughly into alternative mechanisms. And, at the same time as regulation is too casually judged to be capture, deregulation and regulatory inaction are casually overlooked as potential vehicles of capture. *Mistreated*: there is far too much fatalism – some of it strategic, no doubt – about the possibility of ameliorating capture or even preventing it.

⁴ There have, of course, been numerous synthetic publications and new treatments on regulation, most notably Ian Ayres and John Braithwaite's *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, 1992); Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Chicago: University of Chicago Press, 1990). More recent treatments include David Moss, *When All Else Fails: Government as the Ultimate Risk Manager* (Cambridge; Harvard University Press, 2005); W. Kip Viscusi, John M. Vernon and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* (Cambridge, MIT Press, 2005); Edward Balleisen and David Moss, eds., *Government and Markets: Toward a New Theory of Regulation*; Steven Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton, 2008); Marc Eisner, *Regulatory Politics in Transition* (Baltimore: Johns Hopkins University Press, 2000).

The closest theoretical accounts in mathematical modeling occur in sections of Jean-Jacques Laffont and Jean Tirole's *A Theory of Incentives in Procurement and Regulation* (Cambridge; MIT Press, 1992), and in Gene Grossman and Elhanan Helpman's *Special Interest Politics* (Cambridge: MIT Press, 2003). Yet these books do not offer specific or general empirical tests of the theory, and the models have limited applicability to the kinds of regulatory capture that are most important for public policy discussions. We offer further critiques below.

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Recent events provide an example. Financial regulators missed investment fraud and toxic loans at the very time their staff was shuttling back and forth between Washington and Wall Street; energy regulators ignored the risk of a catastrophic mine exposition and oil spill just as their inspectors and officials were cavorting with industry managers; a telecommunications regulator made a series of industry-friendly decisions, and just over a year later a prominent commissioner who was a pivotal vote in these decisions departed the agency to take a high-status vice-presidential position with a regulated company. With all of these emblematic and vivid events, capture certainly seems plausible.

Plausibility, however, lies quite a distance from proof. Claims of capture proliferate so broadly that they are rarely tested or examined closely. And even where they are well supported, claims of capture are often extended far beyond the available evidence to cast doubt on the validity of the entire regulatory structure itself. Some capture exists, or significant capture prevails, these claims go, and as a result the regulatory policy or agency in question needs to be not merely reformed but abandoned. And all too often, observers of regulation are quicker to yelp about capture than to think hard about how it might be prevented or mitigated. Analyses stop at diagnosis without venturing to the matter of cure. To extend the therapeutic metaphor a bit further, the patient is sick, and the all-too-common response is to let it wither and die.

This fatalism is seen in the center, the left and the right of political discourse. As recent polling suggests, “This fatalism has over time deeply influenced not just scholars and inside-the-beltway cynics, but the broad mass of the American electorate. Public trust in the Federal government has slid ever lower over the last forty years and as of this writing, stands at under

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20%.”⁵ It is hard to fathom how a democracy can solve social problems through governance in the presence of such widespread suspicion of government. But recent events underscore the uncontroversial truth that some significant government regulation is needed for both democracy and the market economy to endure. Those who are suspicious of democracy and/or the market economy from both the left and the right will perhaps be untroubled by this.⁶ For the rest of us, who broadly believe in democracy and a market economy, the need for clear understanding of capture and techniques to prevent it could hardly be more urgent or obvious: Where capture exists, it needs to be discovered and prevented. Where capture is an illusion, we need to expose it, both to enable us to improve whatever problems do exist in our governance regimes, and to give the public an accurate understanding of what their government is actually doing, for good and ill, and what it can reasonably be expected to be able to achieve.

Evidence -- of what government has done successfully, what it has failed at, and of how success and failure occur -- is sorely needed to inform important political debates about governance that has become predictable and unhelpful as it has continued on in the absence of fact-checks capable of confounding assumptions on all sides⁷ Indeed, the staleness of our debates may not only

⁵ <http://people-press.org/2010/04/18/public-trust-in-government-1958-2010/>

⁶ Marxists claim that regulatory state is no sure cure for ills of capitalism, and William Novak makes clear in this volume, it was a Marxist scholar (the historian Gabriel Kolko) who arguably launched the subdiscipline of capture studies. [Add citation to right wing anti-democracy critique of regulation.]

⁷ The general parameters of these debates are of course familiar: Libertarians claim that capture undercuts even well-intentioned and designed regulations, undermining the rationale for them. See, e.g. Cato Institute senior fellow Gerald Driscoll’s Wall Street Journal Op Ed of June 12, 2010, *The Gulf Spill, the Financial Crisis, and Government Failure*, “Regulatory practice represents islands of central planning in otherwise decentralized market economies. If we add

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reflect the growing despair about the prospects of good government, but also be a contributor to it.

Against this fatalism, we aspire to improve our understanding of capture, making it more rigorous, more thorough, and more practically useful to those who want to prevent capture. Capture is real and a genuine threat to regulation, we recognize, but regulation to protect and advance the public interest is both possible, and in some circumstances, necessary to stave off catastrophe. Furthermore, there are uncontroversial instances of uncaptured regulation, and sometimes widespread claims of capture do not withstand careful scrutiny of the evidence.⁸ Moreover, there are plausible solutions that need consideration and scholarly analysis. Where these solutions are workable, they promise to go a long way toward preventing capture. And in situations where capture proves impossible to completely prevent, meaning that any regulation in the sphere will be at least marginally compromised in its ability to achieve the aimed for social goods, mitigation strategies may nonetheless ensure that on net, the regulation is useful. In short, we believe that better study of regulation can show us how to prevent capture, and make regulatory governance a more useful tool for accomplishing public ends.

back in the problem of regulatory capture, then we get industries coddled and protected by government. When business and politics become intertwined we move from market economies to crony capitalism.” Available at http://www.cato.org/pub_display.php?pub_id=11892 (last checked 9/25/11) Simple laws should prevail, in this account, not complex regulations. Progressive, social democrats and Anglo-American liberals will argue that regulations should be stronger and continually strengthened, since capturing forces will always operate to dilute them. Or, to consider the opposite, there may be a loss of faith in the possibility of governance institutions that aim at a public interest; capture may lead those on the left to occupy an anti-state position at those very times when the state is a potentially powerful mechanism for changing things for the better. Alternatively, capture may leave those on the left in the position of being apologists for a corrupt regulatory regime because they despair at the possibility of it being improved.

⁸ See especially my “Detecting and Measuring Capture,” and the Moss and Lackow chapter on federal communications regulation.

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Beyond providing a needed critique of status quo academic understanding of capture, the volume offers some important positive contributions. These include several novel concepts and distinctions for understanding capture. We differentiate between *strong capture* and *weak capture*, arguing that just because capture exists does not mean that the policy or agency involved should be dispensed with. We also argue that not all capture generates new regulatory barriers to entry. Indeed, *capture often leads to a form of deregulation*, and when it does, the reduction in regulation that is accomplished can, in principle, be *more* anti-competitive in intent and effect than the regulation it replaced. A form of capture we call *corrosive capture* can achieve a form of deregulation even in the absence of public support or a strong welfare rationale for that move. Finally, several authors in this volume examine the possibility that not all capture is pecuniary or interest-based, but may have deep cognitive and social roots. Kwak introduces the concept of cultural capture and applies it to recent developments in financial regulation.

The collection of efforts here also offers methodological fruit for future scholars and analysts of regulation. Both theoretically and empirically, both in general and for specific cases, we address weaknesses in commonly used tools – historical, statistical and legal – for detecting and measuring capture.

The problems with contemporary capture scholarship boil down to the link between theory and evidence. As the regulatory crisis of 2008-2010 unfolded, we began to notice some common features of the dozens (if not hundreds) of claims being made about captured regulatory agencies. The claims had the benefit of seeming to fit neatly with the unfolding story, yet a disturbing commonality among them was a lack of solid evidence. It could appear, and often did appear, that regulatory agencies were being steered (consciously or not) by the very entities they were supposed

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to govern. Yet in most cases there was little or no direct evidence linking the process or events of capture to the regulatory failures that everyone decried. And most of the capture that seemed to have occurred was not of the anti-competitive, entry barriers sort that theorists like Samuel Huntington, Marver Bernstein, George Stigler and Alfred Kahn had worried about in the late twentieth century.

The claims reminded us of claims that had been made in previous decades about capture. On the basis of observing a single industry-friendly decision, law or exchange, scholars would quickly jump to capture as the obvious explanation. The ease with which they did so gestured less to the empirical support they had, and more to a period of overwhelming cultural distrust of government and to embedded cynicism (indeed functionalism) in the social sciences at the time.⁹ In recent decades social scientists may have been predisposed to inferring capture more readily than is warranted. This can be seen in the selective approach commonly brought to the use of both historical and statistical data.

Some of the initial claims of capture came from scholars who were reviewing the early history of government regulation. In 1892, Richard Olney, a prominent corporate attorney and soon-to-be Attorney General, advised George Perkins, a railroad president, against seeking the repeal of the Interstate Commerce Act, noting that

⁹ For a mathematical model that examines and debunks some of these older claims, consult Daniel Carpenter, “Protection without Capture: Product Approval by a politically Responsive, Learning Regulator,” *American Political Science Review* 98 (4) (November 2004). By functionalism we mean the kind of “actor-centered functionalism” described in Paul Pierson, whereby analysts observe the way an institution functions and then make the inference that strategic actors must have designed the institution to function in exactly this way (*Politics in Time: History, Institutions and Social Analysis* (Princeton: Princeton University Press, 2004), 14, 104-127).

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The [Interstate Commerce] Commission, as its functions have now been limited by the courts, is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a Commission gets to be, the more inclined it will be found to take the business and railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests.... The part of wisdom is not to destroy the Commission, but to utilize it.

Olney's remark has been repeatedly quoted and cited as evidence that even the earliest national regulatory agencies in the United States were captured. Its language inspired the work of Bernstein and Huntington, and it was rehearsed on the floor of the United States Senate.¹⁰ While certainly powerful, it is critical to understand that Olney's letter provides no direct evidence that the Commission did in fact "take the business and railroad view of things," but that one potentially interested observer predicted that it would take such a view, and that the ICC could be harnessed by the railroads. We believe that more evidence is needed to make an accurate diagnosis of capture, and – crucially – that the evidence is largely available and accessible to those willing to sift through it. Well before Stigler penned his famous essay "The Theory of Economic Regulation," another economist later identified with the Chicago school, Ronald Coase, surveyed the early history of federal broadcast regulation and suggested it had been poorly designed and conceived. Although

¹⁰ Richard Olney to Charles E. Perkins, December 28, 1892, quoted in Bernstein, *Regulating Business by Independent Commission*, 265. For an early citation to this remark, consult Matthew Josephson, *The Politicos* (New York: Harcourt, Brace, 1938), 526. For a review of the intellectual history of the uses to which Olney's letter has been put, among other claims, see Eduardo Federico Canedo, *The Rise of the Deregulation Movement in Modern America, 1957-1980* (Ph.D. Dissertation, Columbia University, 2008). Olney's letter constituted a core reference and piece of evidence for some of the founding scholars of capture theory, including Bernstein (as above) and Huntington.

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Coase's seminal paper on the FCC did not claim that broadcast regulation had been captured, his analysis appears to have set the stage for many of his followers to diagnose capture rather too easily, in some cases after only a quick look at the historical evidence.¹¹

These older claims about capture have been succeeded by scholarly arguments that make vast inferences from statistical associations. Having claimed to show by statistical association that the relative wage and profit effects of labor safety and environmental regulation fell more heavily upon small firms and industries in Southern states, economists Ann Bartel and Lacy Glenn Thomas proclaimed support for "predation by regulation": "We have shown that regulation has become a predatory device that indeed is utilized to enhance the wealth of predators and to reduce the wealth of rivals."¹² Thomas later claimed a similar effect for the profit-reducing effects of food and drug

¹¹ Ronald Coase, "The Federal Communications Commission," *Journal of Law and Economics*, Vol. 2 (Oct., 1959), pp. 1-40. On later claims that broadcast regulation was captured from beginning, see especially Thomas W. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," *Journal of Law & Economics*, Vol. 33 (1990), 133-175; and Hazlett, "Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?," *Journal of Law and Economics*, Vol. 41, No. 2 (October 1998), 529-576. For an evaluation of the evidence relating to the alleged capture of early broadcast regulation, see the chapter "Capturing History" by Moss and Lackow in this volume.

¹² In a revealing rhetorical defense of these conclusions, Bartel and Thomas argued (without evidence) that their statistical associations were due directly to congressional calculations of the time. "We recognize that public interest theorists will object to our characterization of OSHA and EPA as predatory. From the viewpoint of these scholars, regulations inevitably have heterogeneous effects, and indirect effects are entirely innocent by-products of the public pursuit of work-place safety and environmental quality. We explicitly reject any such defense of OSHA and EPA behavior. ... [W]e ... find ample evidence of OSHA and EPA actions that unnecessarily exacerbate or even artificially create indirect effects for political purposes (what we call enforcement asymmetries). Furthermore, despite mounting evidence of the inefficiency of OSHA and EPA, Congress has continued to be uninterested in adequate monitoring of

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regulations. Similarly, in examining the stability of the cotton dust standards implemented by the Occupational Safety and Health Administration (OSHA), economist W. Kip Viscusi wrote in 1992 that “now that the large firms in the industry are in compliance, they no longer advocate changes in the regulation. Presumably, the reason is that the capital costs of achieving compliance represent a barrier to the entry of newcomers into the industry. This is simply one more illustration of the familiar point that surviving firms often have a strong vested interest in the continuation of a regulatory system.” The stability of any law or regulation, and the lack of opposition to these policies, could be due to inertia, to the institutions in American politics (filibuster, bicameralism, presidential veto, the Administrative Procedures Act) that make policy change difficult, or to broad public support for the regulations, yet Viscusi—like many other scholars who invoke capture—points simply, and without evidence, to capture and rent-seeking.¹³

In thinking this way, economists, legal scholars and political scientists have been following the lead of George Stigler, who argued in his classic essay “The Theory of Economic Regulation” that statistical analyses of the operation and effect of regulation should be used to make inferences about the original purposes of its design.

regulatory effect, much less in regulatory reform. All this suggests that indirect effects are far more than innocent by-products—indeed, they may well be the primary political concern.” Ann P. Bartel and Lacy Glenn Thomas, “Predation through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency,” *Journal of Law and Economics* 30 (2) (October 1987) 239-64.

¹³ Viscusi, W. Kip. 1992. *Fatal Tradeoffs* (New York: Oxford University Press), 177. Viscusi regards it as “presumable,” in this argument, that the OSHA standard’s stability is due to its heterogeneous effects, as opposed to the institutional stability that is commonly identified by political scientists and sociologists.

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The theory [of economic regulation] tells us to look, as precisely and carefully as we can, at who gains and who loses, and how much, when we seek to explain a regulatory policy.... It is of course true that the theory would be contradicted if, for a given regulatory policy, we found the group with larger benefits and lower costs of political action being dominated by another group with lesser benefits and higher cost of political action.... The first purpose of the empirical studies is to identify the purpose of the legislation! The announced goals of a policy are sometimes unrelated or perversely related to its actual effects, and *the truly intended effects should be deduced from the actual effects*.

As we suggest in our chapter “Detecting and Measuring Capture,” Stigler’s rather casual standard of causal inference has been uncritically embraced by a subsequent generation of economists. With little circumspection on the limits of drawing broad theoretical conclusions from observational data analysis, scholars have repeatedly proclaimed empirical triumphs for capture theory after data analysis of select cases or highly aggregated cross-national datasets. Djankov et al “The Regulation of Entry” examines cross-country correlations between an artificially constructed index of entry barriers and indicators of democracy. Finding that their index correlates negatively with measures of democracy and positively with measures of corruption, the authors proclaim support for the Stiglerian view, without consulting alternative explanations. Despite these weaknesses, the Djankov and colleagues study has been influential in World Bank policymaking and in foreign and economic policy toward developing countries.¹⁴

Perhaps the deepest problem with this type of research is not its tendency to overstate the evidence for capture, but its lack of nuance in describing how and to what degree capture works in particular settings. As scholars in law, political science, economics and other areas of policy have

¹⁴ George J. Stigler, “The Theory of Economic Regulation,” in Stigler, *The Citizen and the State* (Chicago: University of Chicago Press, 1975), 140. Djankov, et al, “The Regulation of Entry,” *Quarterly Journal of Economics* (2002).

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noted, capture (even where it can be shown to exist) often prevails in a matter of degrees, in some agencies or regulations more visibly and robustly, in others less so.¹⁵ The regulatory world is one lit by shades of grey. Yet scholarship does not typically discriminate among these shades in ways that enable informed advice on the marginal value of any regulatory (or deregulatory) policy options. Existing treatments of regulatory capture give us no sense of the sources or patterns of variation in capture, and they fail to instruct readers as to how, given this variation, capture ought to be prevented or minimized.¹⁶

The Political and Social Fallout of Capture (Mis)Diagnoses

Whether right or wrong, capture diagnoses are also relevant because the claims shape politics. If capture is hard to prove or to understand for academics, it is even more so for voters. Current levels of trust in government are at historically low levels,¹⁷ and one of the reasons that citizens distrust many functions of government (at the same time that they distrust big businesses

¹⁵ Breyer, *Regulation and Its Reform* (Cambridge, Massachusetts: Harvard University Press, 1982).

¹⁶ In this volume, we attempt to highlight this issue through the introduction of a distinction between “strong” and “weak” capture. See especially Chapter 2.

¹⁷ General studies include Garry Wills, *A Necessary Evil: A History of Americans’ Distrust of Government* (1999); Marc Hetherington, *Why Trust Matters: Declining Political Trust and the Demise of American Liberalism* (Princeton: Princeton University Press, 2005); Joseph S. Nye Jr., Philip D. Zelikow and David C. King, *Why People Don’t Trust Government* (Cambridge, Mass.: Harvard University Press, 1997). For a recent poll, see <http://pewresearch.org/pubs/1569/trust-in-government-distrust-discontent-anger-partisan-rancor> [accessed July 21, 2011].

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and concentrations of corporate power), is that they perceive government and business as mutually compromised, or “in bed” with one another. While these perceptions are justified to some extent, they are almost certainly truer in some circumstances than others; the important point is that the reputation of a captured government, like the reputation of governments in general, creates realities that are far removed from the truth of those reputations.¹⁸ Unless the claims and images embedded in these reputations are critically examined and fact is separated from fiction, false reputations can inflict unwarranted damage on both government and business, while creating harmful dynamics in modern democratic societies.

The problem with this decline in market confidence lies in two features of modern democratic republics. First, capitalism and regulation are historically and politically inseparable,¹⁹ such that alternatives to regulation, such as *laissez-faire* or soft social norms, are by themselves untenable for most societies. Alternatives to regulation often fail, in particular, because they are unable to enforce constraints on destructive or dangerous behavior. And where there is not regulation, especially regulation enabled and governed by a democratic republic, there are many ways for powerful interests to dominate the marketplace to the detriment of the wider society. There are, to be sure, theoretical calls for industry self-regulation and considerable deregulation has occurred in the United States. Except perhaps among the most extreme of visions and predictions,

¹⁸ Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton: Princeton University Press, 2010), Chapter 12.

¹⁹ William Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1999); Oscar and Mary Flug Handlin, *Commonwealth, A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (Cambridge: Harvard University Press, 1959).

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however, the existence of and need for regulatory frameworks for a range of industries has not been in doubt in recent years. Second, repeated polling of Americans suggests that, at least in the United States, Americans do not wish for the absence of regulation. Recent polling indicates that when specific questions about existing regulations and regulatory agencies are asked of Americans, the survey responses collected suggest a broad belief in the importance of regulating key sectors:

The strongest support for stricter regulation relates to food safety (73%), executive pay and bonuses (70%), the safety of pharmaceuticals (70%), banks and financial services (69%), air and water pollution (68%), consumer product safety (67%), and environmental safety (66%). Majorities also support more strict regulation of advertising claims (65%), big business (64%), and health and safety in the workplace (54%).

Interestingly, these basic preferences seem to hold even among groups of voters often assumed to be economically libertarian:

...[M]ajorities even of Tea Party “members” favor stricter regulation of food safety (61%), executive pay and bonuses (52%), pharmaceutical safety (59%), consumer product safety (54%), and advertising claims (61%).²⁰

As we will see, treatments of capture within the academic literature not only frequently overstate the problem (e.g., seeing strong capture where the facts, at most, indicate weak), but also tend to be asymmetric in the types of capture that are imagined or reported. It is quite common for academics to over-diagnose regulatory capture when it comes to concrete action taken by legislatures or agencies, yet it is much less common (until very recently) for academics to focus on

²⁰ For the recent poll from Harris Interactive, see “Do We Want More or Less Regulation of Business? It All Depends on What Is Being Regulated” The Harris Poll #76, June 10, 2010; <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/407/Default.aspx> (accessed July 23, 2011).

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capture as relevant to regulatory inaction (a mechanism we call “corrosive capture” below). This asymmetry may again bear consequences for our politics, as it can be expected to shift reformist attention in ways that probably do not neatly track the contours of the problem to be solved.

Problems with Capture: Theory and Concepts

We believe that the main problems with capture arguments in academic and policy realms boil down to the tenuous link between theory and observation. Capture is inferred on the basis of observations of undesired regulatory outcomes, even though those outcomes might be caused by a number of things besides capture. Regulators may sometimes implement bad policies with good intentions – just as any of us make mistakes. They may sometimes act corruptly for their own gain, outside of any special influence by a regulated party. Scholars of regulation often infer capture whenever there is partial reliance of the regulator upon incumbent firms (which can happen for lots of reasons unrelated to capture). By asserting capture every time regulation seems to fail us, we might be obscuring what’s actually going wrong (if something is in fact going wrong) and thereby obscuring potentially useful improvements.

It cannot be adequate scholarly practice to infer from a net negative regulatory outcome (from the public’s perspective) that regulatory capture must have caused or contributed to it. Undoubtedly the recent financial crisis represents a vast, worldwide loss of wealth, savings and economic security for billions of humans. Yet the severity of the crisis cannot, in and of itself, serve as proof for the capture of regulatory agencies. There was vast deregulation of the financial sector in the years leading up to the crisis, to be sure, yet it is also the case that conservative political leadership in a number of countries – leadership that was repeatedly elected from 1980 through

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2004 in the legislative and executive branches of the U.S. government – passed legislation to effect this deregulation.²¹ Just as deregulation does not always mean capture, so too is regulatory failure distinct from capture. Some net negative regulatory outcomes can occur because of regulators’ incompetence, inefficiency, or randomness. Yet these explanations seem to have taken a back seat to capture as mechanisms accounting for regulatory failure.

There are, moreover, many crucial differences between corruption and capture. While some capture may imply corruption, and some corruption works through the capture of an agency, the two are usually quite differentiable. Much corruption involves the trading of public goods and values for private benefits, such as bribery and vote-buying, the exacting of hidden fees or tolls upon citizens or private businesses, the distribution of jobs and monies to cronies, and other illicit acts. Much of this activity is illegal in the societies where it occurs. Many scholars and reformers have identified civil service reform (the introduction and enforcement of merit-based criteria in government hiring) as an important tool for combating capture. Capture, by contrast, often involves behavior that is technically legal. Indeed, capture through legal means may be the most typical form of capture, at least in the United States and other countries with strong rule of law. This is suggested by the fact that the pre-eminent examples of captured agencies and regulations in the

²¹ And no sector of society seemed as enamored with the deregulatory vision as much as academia itself, especially economists but also many lawyers and legal scholars, political scientists and other policy participants. Perhaps, as Luigi Zingales suggests in our volume, it is economists themselves who have been captured. Yet if so, that fact is quite different from a world in which the public and academia support regulation and yet agencies deregulate according to the wishes of industry.

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United States have arisen decades after civil service reform.²²

Nor does the apparent influence of incumbent firms upon a regulator provide rigorous evidence of capture. Even if influence can be shown – and many of the essays in this volume demonstrate that doing so is far from easy – a diagnosis of capture is unwarranted, given this evidence alone, because regulators and incumbent firms must often cooperate (by necessity, for efficiency and quite commonly by legal mandate). Such cooperation may provide avenues for influence, but capture must involve influence of a special sort (a re-direction of regulation away from the public interest, as we suggest below). Separable from this point, incumbent firms often serve as the best or only source of information (on the content of products, on costs, and on safety and risk and their measurement) for regulators.

²² Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (New York: Cambridge University Press, 1999); Robert E. Klitgaard, *Controlling Corruption* (Berkeley: University of California Press, 1999); Pranab Bardhan, ‘Corruption and Development: A Review of Issues,’ *Review of Economic Literature*, XXXV (September 1997) 1320-1346. For a canonical example in the realm of American economic and political history, consult Richard White, ‘Information, Markets, and Corruption: Transcontinental Railroads in the Gilded Age,’ *The Journal of American History* (2003) 90(1): 19-43; White, *Railroaded: The Transcontinentals and the Making of Modern America* (W. W. Norton, 2011). More recently, consider Laurence Lessig’s notion of ‘institutional corruption,’ which is closer to our understanding of capture though still quite different; ‘Democracy After Citizens’ United,’ *Boston Review* (September/October 2010). On the timing of civil service reform, the main federal statute is the Pendleton Act of 1882; there was enforcement of this act only later in the nineteenth-century and in the Progressive Era through presidential ‘covering in’ of federal jobs under the competitive civil service system (Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982), Chapters 3 and 6). Yet the extension of civil service reform was largely completed by the time that most of the major regulatory agencies of American government were created or received their main enabling acts. And those early regulatory agencies created in the Progressive Era, such as the Interstate Commerce Commission, Federal Trade Commission, Food and Drug Administration, and Federal Reserve, were created as non-patronage organizations.

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The New Approach

Defining Capture: Weak versus Strong, Corrosive versus Anti-Competitive

Many of capture theory's problems boil down to the lack of a clear definition for the central concept. Capture is often equated with corruption, influence, and regulatory failure. Yet it is also associated with distributive politics, even though the two are quite distinct. For instance, there is considerable pressure for redistribution in politics – from the poor to the rich, from the rich to the poor, from one class of producers to another, or from one geographic section or locality to another. Regulatory capture may end up redistributing, but the political coalitions that emerge for redistribution are likely to be radically different from those that emerge for regulation or for deregulation.

Given the manifold problems in bringing conceptual structure to “capture,” we begin our effort by offering a broad and flexible definition. As with any definition or model, numerous amendments must be (and will be) made in order to apply the term as we understand it to mean:

Regulatory Capture is the result or process by which regulation (in law or application) is, at least partially, by intent and action of the industry regulated, consistently or repeatedly directed away from the public interest and towards the interests of the regulated industry.

Our definition rests upon some critical concepts that compose the idea. To begin with, capture

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moves regulation away from the service of one goal (public interest) and toward another (industry interest).²³ Hence understanding capture requires an understanding of these two concepts or variables and when they diverge. Measuring the “public interest” is a thorny problem as old as democracy itself. Some would maintain that the repeated actions of democratic citizen majorities (or repeatedly elected majorities of representatives of those citizens) constitute the most legitimate measure of the public interest.²⁴ Others would argue that calculations of welfare economics should serve as the measure. We do not choose among these alternatives, but we note that, in lieu of an ability to directly perceive and measure the public interest, we must build *defeasible models*²⁵ of the public interest for purposes of assessing by our best lights whether a particular regulation, or application thereof, is captured.

²³ These and other features of our definition cohere with general models of capture and industry influence in regulation, for instance Quirk’s *Industry Influence in Federal Regulatory Agencies*, Stigler’s foundational notion that “regulation is acquired by the industry and designed and operated primarily for its benefit,” and Laffont and Tirole’s model of producer protection in a multi-player political economy game (*A Theory of Incentives in Procurement and Regulation*, Chapter 11, and esp. Proposition 11.1 and 11.2 and surrounding discussion, pp. 485-493).

²⁴ Such an idea of repeated democratic expressions of the interest of the whole, as opposed to (a) near-term or short-run expressions of interest or (b) special interests, animates the idea of the public good in James Madison’s *Federalist* #51, where the celebrated concept of “faction” is defined as in opposition to the ‘permanent and aggregate interests of the community’: “By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”

²⁵ By *defeasible* we mean to stress two different but complementary features of accounts of the public interest: First, they must be capable of being shown to be false (tautologous or vacuous definitions are unacceptable). Second, we recognize that there is no certainty in making a value claim about the common good -- interesting claims will be contestable, and can be shown to be mistaken through persuasive argument. What matters is that an account of what is in the public interest be offered, and defended so readers and future researchers can engage appropriately with the argument.

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Intent is necessary to capture as we define the concept. Causal and intentional action of industry is necessary because this rules out alternative mechanisms, for example, bureaucratic drift. It is possible for an industry's interest to be served through regulation, at the expense of the public interest, if regulators simply diverge in their views (through ideological appointments, for instance). Under our definition, the fact that industry is served well by the regulation is deeply insufficient for a judgment of capture. The fact that industry is differentially served well is insufficient, because it could be alternately explained by drift, coincidence, or as a byproduct of uncaptured regulatory intent. We recognize that the high evidentiary bar associated with the necessity of intent to our definition may lead us to under-diagnose capture, yet we believe that this fact testifies to the robust empirical standards that are needed for scholarly analysis to move beyond journalistic descriptions of regulation.

Evidence. Our definition results in a set of standards for making statements about whether, or how much, capture has occurred in the case of a given regulation or a given agency. We offer a more detailed analysis of these empirical standards for detection and measurement (or what we more casually call “diagnosis”) in the second chapter of this volume. Yet three general empirical standards follow straightforwardly from our definition. In order to claim capture, an argument ought to

- provide a defeasible model of the public interest;
- show action and intent by the industry (special interest);
- show policy shift away from public interest toward special interest, as a result of the intentional action of the industry.

If an argument that capture has occurred lacks one of these necessary components, then

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scholars making claims must exhibit considerable circumspection about what has been shown. Showing all three is, we believe, the gold standard for a capture diagnosis. The second clause of the third standard – policy shifts as a result of intended action – is critical. A diagnosis of capture often requires a causal demonstration of some sort. To be sure, when examining the writing of a rule, the passage of new legislation, or enforcement of policy, causal inference of the sort achieved in a randomized experiment in biology, medicine or psychology is often impossible. Yet this impossibility does not relinquish the responsibility for scholars to examine their claims carefully, to distinguish between statistical association and cause, and to hedge whatever cause-and-effect claims they advance. Over the long run, care on the part of scholars is likely necessary for improving the accuracy of the practical judgments – which will almost always need to be made on the basis of inconclusive data—by citizens and policymakers.

Mechanisms of Capture. There are a range of different empirical and theoretical conditions under which capture of regulation prevails. We aim to provide greater clarity on the mechanisms already under consideration, as well as to introduce new or understudied mechanisms to serious study. In political science, economics and law, there are models of implicit bribes or rent-seeking (Laffont and Tirole; Grossman and Helpman). There are models by which a regulator might be inclined to pursue the public interest but is scared off from doing so by industry threats of political or legal retaliation (see Gordon and Hafer); this is, strictly speaking, something different from an implicit bribe. There are arguments about the cultural or social influence of repeated interaction with the regulated industry (as in Johnson and Kwak, *13 Bankers*), such that the regulator begins to think like the regulated and cannot imagine another way of approaching its problems. In the case of cultural or social capture, the legislator or agency may not be fully conscious or aware of the extent

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to which its behavior has been captured. So what is important about our conception of capture, including its strong and weak variants, is that it is not model-dependent or mechanism-dependent. Our definition is robust, in the sense that it can accommodate all the various models and mechanisms described above. There are, for instance, no preferences stated in the models, though the definitions could easily be stated in terms of preferences as a special case.

Regulatory Capture by Design: The Legislative Mechanism. A principal mechanism by which regulation can come to serve the industry's interest rather than the public's interest is for the industry to acquire regulation in statute. The historical and statistical annals of legislative studies are filled with evidence for how business interests and other special interests (including labor unions) use their resources -- voting blocs, campaign contributions, volunteer labor, networks, information, perhaps the (implicit or explicit) promise of future employment, and other tools -- to induce politicians to bend. Stigler's classic examples of regulatory capture -- state trucking weight limits and occupation licensing -- were, on the whole, regulations passed by legislatures, and less the result of state agency decisions based upon statutory delegation from governors and state legislators. In some cases the outcomes of policy can be hardwired into statute, the most obvious case being entitlements. Even in those cases where outcomes depend upon agency decisions, it is plausible to argue that once a statute has been tilted in favor of the industry's interest, it will be incredibly difficult for other forces to direct the agency's administration of a statute toward the public interest.²⁶

²⁶ Richard Hall and Alan Deardorff, "Lobbying as Legislative Subsidy," *American Political Science Review* (2005); James M. Snyder, Jr., Vote-Buying; Richard Hall and Frank Wayman, "Buying Time: Organized Interests and the Mobilization of Bias in Congressional Committees," *American Political Science Review* (1986). On the idea that various procedures in an agency's

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Regulatory Capture by Administrative Influence. The original concerns of capture scholars, ranging from Gabriel Kolko to Sam Huntington and Marver Bernstein, concerned not regulatory capture by legislation, but instead the capture of administrative agencies. Following Bernstein, consider Olney's letter to Hanna. It counsels the (railroad-friendly) reader not to worry about the ICC because the Commission will eventually depart from its moorings in consumer protection and public interest and come to see the railroad's point of view. (There is a powerful gesture in this letter, written over 120 years ago, to the concept of "cultural capture" as James Kwak defines it in this volume). Once the administrative agency does adopt the industry's way of viewing things, then most or all of the threat posed by the regulatory legislation will dissipate. Furthermore, because a regulatory organ exists, an important bulwark of legitimating will occur for the industry, which can always turn to its critics and point to the existence of a regulatory agency as a means by which the public is protected.

Strong versus Weak Capture

Arguments stipulating capture often go well beyond claims about the mechanics of political economy. They move quickly from "is" to "ought," and they are especially likely to recommend deregulation. This move – from the postulated fact of capture to strong arguments for the

statute and in restrictions on rulemaking allow congressional majorities to "hardwire" administrative outcomes at the stage of rulemaking, see Mathew McCubbins, Roger Noll and Barry Weingast (writing under the collective McNollgast), "Administrative Procedures as Instruments of Political Control," *Virginia Law Review*. For another argument that statutes are strategically constructed so as to hardwire administrative outcomes, see John Huber and Charles Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (New York: Cambridge University Press, 2002).

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dismantling or avoidance of regulation – was a central stratagem of Stigler in his volume *The Citizen and the State*, and many specialists have since followed it. This is especially true of studies—such as the article “The Regulation of Entry” by former World Bank economist Simeon Djankov and colleagues -- that posit two possible states of the world: “good” public interest regulation versus “bad” captured regulation. If the empirical evidence appears to support the existence of the bad regulatory world, then the clear conclusion from such an analysis is to rid the world of regulation. Djankov’s “Regulation of Entry” article provides an especially revealing example of the existence and grand scale of these moves from analysis to advocacy. In the years following publication of “The Regulation of Entry,” Djankov and his World Bank colleagues established a highly structured, Bank-funded deregulatory initiative that recommended and tracked reforms worldwide with the intent of easing barriers to the creation or launch of a new business.²⁷

Politics rarely if ever reflects such simple binary realities. A central claim of this volume is that, to the extent capture exists, it prevails by degrees rather than by its presence or absence. A critical corollary of this argument is that the existence of capture need not translate into a rationale for wholesale deregulation. While a certain degree of capture (what we call “strong capture”) can vitiate the purposes and rationale for regulation, much capture is of the weaker form, such that its

²⁷ Simeon Djankov, Rafael La Porta, Florencio Lopes-de-Silanes, and Andrei Shleifer, “The Regulation of Entry,” *Quarterly Journal of Economics*, 117 (1) (February 2002) 1-37. More generally, see Shleifer and Robert Vishny, *The Grabbing Hand: Government Pathologies and Their Cures* (Cambridge: Harvard University Press, 1999). The World Bank’s Doing Business Project launched in 2002, the year of the Djankov et al publication, and in addition to running deregulation seminars for policymakers in developing and industrialized countries, also provides individualized national tracking of deregulatory reforms and even simulators for policymakers to examine the possible effects of deregulation (see <http://www.doingbusiness.org> (accessed July 28, 2011)).

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existence can and does coincide with healthy regulatory functioning. This is not to deny that, where weaker capture might exist, it would better for the polity and the economy to reduce its severity. Yet reducing the severity of capture – or, to invoke the title of our volume, prevent capture – is a far cry from responding to the threat of capture by deregulating.

Strong capture violates public interest to the extent that the public would be better served by nonregulation of the activity in question. If capture prevails to the extent that anticompetitive institutions interfere with the healthy functioning of market competition, or if the purported safety or public benefits of regulation are entirely erased by capture, then the regulation in question becomes a net negative. This is the kind of capture that Stigler and his disciples saw (and still see) everywhere in economies that are advanced and industrialized as well as developing. In Stigler's writings the existence of even a small or moderate amount of capture is enough to reject the public interest theory of regulation in its entirety. This rejection of public interest theory not only means factually that democracy is not working as advertised, but also means that the proper policy response is to weaken or altogether dismantle regulation. It is of course possible that reform of strongly captured regulation would be better than non-regulation, yet for purposes of a definition we assume that there might exist a form of capture so robust and incorrigible that it cannot be reformed and hence the resulting regulation must, in theory, be abandoned.

Weak Capture occurs when special interest influence results in a reduction of regulation's attainment of the public interest (relative to the counterfactual situation in which little or no special interest influence is exerted upon regulation), but the public interest is still being served by

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regulation, relative to the baseline of no regulation.²⁸ In other words, weak capture prevails when the public interest is less well served than it could be (or would be) but for the capture, but the public interest remains better served by the captured regulation than it would have been without the captured regulation at all.²⁹

Our priors in this volume are that some amount of weak capture may be, and probably is, fairly ubiquitous. If so, then two important qualifications are in order. First, the existence and degree of weak capture remain difficult to prove. Second, if the capture around us is weak capture, then the policy prescriptions of Stigler and his disciplines are quite mistaken, not just empirically, but also analytically.

Pro-Regulatory versus Deregulatory Capture

Special interests and regulated industries can shape policies in different ways, and they can push policies in several directions. The Stiglerian account of capture predicts that *captured regulation will be stronger* in the sense of more rigid and less permeable entry barriers to the market. If the industry is using regulation to form a cartel and restrict supply and/or entry, then captured regulation will be more effective for these aims to the extent that it is *more effective* in

²⁸ By the baseline of no regulation, we mean nonexistence of the captured regulation/regulatory regime. So given an accurate diagnosis of weak capture, the proper comparison is between the weakly captured regulation as it is (“warts and all”) and a state of deregulation.

²⁹ Our weak capture/strong capture distinction is meant to differentiate between (a) regulation influenced to a slight degree away from the regulator’s best guess at the public interest and (b) regulation that is largely or wholly in the service of the special interest. As we have constructed the distinction here, it is possible for regulation to be motivated wholly by service to the industry’s interests and still be weakly capture, because we have distinguished strong from weak capture based on the degree to which the public interest is not served (partially - weak, wholly not served - strong) instead of the degree to which the regulator acts in the interest of industry.

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terms of achieving its stated aims, that is, to the extent that the entry barriers are strong. If physicians seek to limit the supply of their services and thereby raise their pay, then licensing needs to present higher hurdles to qualification and entry for prospective doctors.

Corrosive capture, on the other hand, occurs if clearly organized firms push the regulatory process in a “weaker” direction, not with the aim of reducing entry, but with the aim of reducing costly rules and enforcement actions that reduce firm profits. This is a form of deregulation, of course, but it is quite plausible that deregulation through electorally sanctioned mechanisms would not present as much of a policy problem as deregulation initiated by a captured regulator. The corrosion of regulation occurs not with the express sanction of voters in repeated elections, but in the weakening of regulatory independence – and the fidelity of regulators to their statutory obligations – through various forms of capture.

It is important to recognize that much if not most of the public and academic discussion about capture in recent decades is about regulatory corrosion. Hence the capture and regulatory failure of the past few decades is distinct from the kind that Huntington, Bernstein and Stigler were concerned with in the middle twentieth century. Entry-barrier capture was the process by which regulators intervened in markets with the effect of privileging one set of producers over another (the railroads and trucking regulation, the Civil Aeronautics Board) and often producers over consumers altogether. But in these early models, it was the application of regulation directly to markets and firms that marked capture, not the application of deregulation or weak regulation.

By contrast, it is apparent that as far as plausible capture is concerned, something quite different was going on over the past several decades. It was capture evinced in the weak application (or non-application) of regulatory tools. In other cases it was the application of jurisdictional

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boundaries to prevent other agencies from regulating. Regulatory pre-emption – the move by which state and local regulations are invalidated by the imposition of national-level supremacy – became a favorite tool of officials in the George W. Bush Administration as means of achieving deregulation. In some cases pre-emption of state regulation was asserted by regulatory agencies themselves, such as when the Office of Thrift Supervision (OTS) and the Office of the Comptroller of the Currency (OCC) issued rulings in the 1990s and early 2000s pre-empting the application of state mortgage laws to federal thrifts and national banks.³⁰ Another form of boundary manipulation comes in regulatory arbitrage, or when banks choose their markets or institutional form so as to fit themselves to the least rigorous regulator.

The plausible mechanisms of corrosive capture are, to some degree, well known from the literature on capture in general. Firms and industries that want lower regulation, relative to the preferences of the public and or the regulatory aims expressed in statute, will rely upon campaign contributions, pressure upon politicians and perhaps the “revolving door” to reduce their individual and collective regulatory burdens. Yet another mechanism is available, one hard to prove, but one that seems to us increasingly relevant: what James Kwak, in this volume, terms “cultural capture.” It is always possible that cultural capture, through the shaping of assumptions, lenses and vocabularies, can be used to support more traditional forms of Stiglerian capture. Yet cultural capture seems less likely to be deployed for the erection and maintenance of entry barriers than for deregulatory purposes. It would seem easier for industry to coordinate on a single message to reduce regulation – the benefits are industry-wide and the losers in this process are probably

³⁰ Kathleen Engel and Patricia McCoy, *The Subprime Virus: Reckless Lending, Regulatory Failure and Next Steps* (New York: Oxford University Press, 2011), 157-62.

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consumers – than to coordinate on a message in which some firms win and other firms (even if they are weaker or smaller) lose. So too, the innovation and *laissez-faire* ideologies that have shaped regulation in the past thirty to forty years have been deregulatory in their aim, and the existing accounts of cultural capture emphasize these ideological framings as central to recent developments in financial regulation.

Preview of the Book

Our book proceeds by advancing three claims, one of which is critical and the second and third of which are hypotheses. First, capture is often misdiagnosed, and these misdiagnoses are enabled by kitbag of weak evidentiary standards that have arisen in economics, history, political science and sociology for making inferences about capture in regulation. Second, deregulation is no panacea for capture, and in fact deregulation may itself reflect capture through a process we call “corrosive capture.” Third and finally, capture is, at least at the margins, preventable and both analysis and advocacy of particular measures should focus on degrees of capture rather than on the unproductive and false binary of “pure” versus “captured” regulations. These three claims, we think, bear tremendous potential implications for how we think about when and how to use the tools of regulatory governance to best achieve the common good.

Preventing capture will require conceptual clarity on what capture is, and evidentiary clarity on where, how, and to what extent capture is turning regulatory decision making against the public interest. In focusing on the goal of prevention, we’ve identified gaps in the scholarly understanding that require rigorous study. This volume is just a first step toward building our understanding in ways that will guide wise actions toward preventing capture, but it is an important one.

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