

Conclusion

David Moss and Daniel Carpenter

As the essays in this volume make clear, the study of regulatory capture is turning a corner. An early focus on *models* of regulatory decision making is increasingly being complemented by fine-grained empirical work on special-interest influence in the regulatory process.

In fact, problems on the evidentiary front were apparent from an early time. Already in 1974 Richard Posner observed that “the empirical research has not been systematic.”¹ In particular, Posner acknowledged that the “‘consumerist’ measures of the last few years – truth in lending and in packaging, automobile safety and emission controls, other pollution and safety regulations, the aggressiveness recently displayed by the previously lethargic Federal Trade Commission – are not an obvious product of interest group pressures, and the proponents of the economic theory of regulation have thus far largely ignored such measures.”²

Remarkably, much the same problem remained three decades later. In a review essay for the *Oxford Review of Economic Policy* in 2006, Ernesto Dal Bó declared that

¹ Richard A. Posner, “Theories of Economic Regulation,” *Bell Journal of Economics and Management Science*, Vol. 5, No. 2 (Autumn 1974), p. 353.

² *Ibid.*

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Do not copy or distribute without the permission of the Tobin Project.

“empirical evidence on the causes and consequences of regulatory capture is scarce.”³

While Dal Bó’s observation is still broadly correct today, it is becoming ever less so; and our hope is that the present volume marks a significant contribution in this respect.

New Perspectives on Regulatory Capture

The chapters that comprise this volume offer numerous insights on regulation and regulatory capture – too many to review in depth in this short conclusion. Several, however, are sufficiently general as to merit attention here, particularly those that have the potential to shape the contours of future research on the subject.

As highlighted in the introduction, the distinction between strong and weak capture could prove especially valuable. To the extent that the term “capture” implies special-interest influence that is so far reaching as to render the resulting regulation detrimental to the broader public – that is, *strong* capture – there is little consensus among empirical researchers that this sort of capture is widespread. Some even question whether it exists at all. However, to the extent that “capture” implies a degree of special interest influence that is sufficient to undercut the public purpose of regulation but not to render it detrimental to the broader public – that is, *weak* capture – there is broad agreement that this sort of influence is widespread and worthy of very careful attention.

³ Ernesto Dal Bó, “Regulatory Capture: A Review,” *Oxford Review of Economic Policy*, Vol. 22, No. 2 (2006), p. 220.

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

As Bill Novak suggests in his essay, special interest influence has been a perennial problem of American democracy. It has literally always been with us, and each attempt to address one manifestation of the problem has inevitably created others, whether in the form of legislative corruption or regulatory capture or private coercion. More often than not, it has been a story of two steps forward and one step back. The independent regulatory commission played a significant role in reducing the impact of legislative corruption, but also became subject to special interest influence itself. The “discovery” of capture in the early 1970s, in other words, did not represent the identification of a dangerous new ailment of American democracy, which had the potential to be cured, but rather the *rediscovery* of a chronic disease that was far from fatal but still required ongoing management to limit its adverse effects.

Another closely related theme that emerges from the volume is that capture, whether it occurs in weak or strong form, is not uni-dimensional. As Dan Carpenter suggests, “corrosive” or “deregulatory” capture, where firms seek to avoid regulation or press for its elimination, may be even more common than the more traditional notion of capture, where incumbent firms actively pursue regulatory barriers to entry. Tino Cuellar, in particular, reinforces this observation in his essay, noting how frequently business interests find themselves fighting regulation – trying to prevent or dismantle it – rather than trying to build it.

Another variation on the traditional conception of capture is “cultural capture,” which James Kwak unpacks in his essay. Here, as Kwak explains, the problem is not that regulators are lured into favoring special interests at the expense of the public interest,

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Do not copy or distribute without the permission of the Tobin Project.

intentionally and knowingly, but rather that they are so persuaded by the special interests' world view that they come to believe they can best serve the public interest by advancing the agenda of the special interests. Although this reflects corruption of a very different sort, if it can be called corruption at all, it is nonetheless a potentially powerful way in which special interests undercut the public interest (whether intentionally or not), and thus highly deserving of further attention.

Luigi Zingales comes at a similar problem in a different way by focusing on academic economists and whether they are themselves subject to capture by special interests. If so, then reliance on their ostensibly neutral expertise could again end up shaping regulatory decisions in ways that mimic more traditional capture, even in cases where the regulators remain entirely uncorrupted.

Finally, several chapters suggest that while some degree of special-interest influence over the regulatory process is inevitable, claims about the extent of that influence are often overstated. Since regulatory decisions will always favor one interest or another, it is all too easy to conclude – without much evidence – that the party that benefits must have captured the regulation. But several of the authors (including especially David Moss and Jon Lackow regarding the Federal Radio Commission, Chris Carrigan regarding the Minerals Management Service, and Sanford Gordon and Catherine Hafer regarding the Mine Safety and Health Administration) show that initial inferences about regulatory capture are not infrequently mistaken or exaggerated. Nolan McCarty also suggests that complex regulatory settings, in particular, may give the appearance of capture even when it has not occurred.

Moss, David and Carpenter, Daniel. "Conclusion." Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Do not copy or distribute without the permission of the Tobin Project.

Preventing Capture

All of these insights – and many others from this volume and beyond – reinforce our belief that close empirical work will continue to foster a richer, more nuanced, and more expansive understanding of regulation and regulatory capture. Such work is particularly important from a policy standpoint because it allows for new possibilities in the critical area of prevention.

Today, deregulation (or lack of regulation) is often seen as the best antidote to regulatory capture. Sometimes that may be right. But when applied broadly, it is tantamount to suggesting that confiscating drivers' licenses would be the best antidote to automobile accidents. Surely, if no one were permitted to drive, auto accidents would cease to be a problem; yet it is difficult to believe that the cost to society of eliminating driving would be worth the benefit. Fortunately, there are other ways to prevent accidents and limit their adverse consequences, and the same is likely true of regulatory capture. The more we understand the nature of special interest influence over regulation, the more we should be able to devise a *spectrum* of remedies to reduce the scope of regulatory capture – remedies including, but not limited to, deregulation.

The Literature

Although research on strategies for preventing capture remains at an early stage, there have been some notable contributions over the past several decades. In 1987, for example, McCubbins, Noll, and Weingast hypothesized that administrative procedure was

Moss, David and Carpenter, Daniel. "Conclusion." Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Do not copy or distribute without the permission of the Tobin Project.

introduced precisely so that elected lawmakers could control unelected bureaucrats and, in turn, prevent “agency officials [from allowing] the bureau to be ‘captured’ by selling out to an external group.”⁴

In the 1990s, a number of scholars began to focus on the division of power across multiple regulators (or, more specifically, the division of responsibility for oversight of a particular industry across multiple regulators) as a means of preventing capture. The logic here was that competition among regulators could reduce the likelihood of collusion between individual regulators and a regulated industry by driving up the costs. As Laffont and Martimort explain, “Separation of regulators divides the information at their disposal and thus limits their discretion in engaging in socially wasteful activities. ... As a result, the transaction costs of collusive activities increase and preventing collusion becomes easier. ... The separation of regulators may be an optimal organizational response to the threat of capture.”⁵ More generally, Moe has observed that the “American separation of powers system virtually guarantees that the losers, opposing interest groups, will have enough power to participate in some fashion as well.”⁶

⁴ Mathew D. McCubbins, Roger G. Noll, Barry R. Weingast, “Administrative Procedures as Instruments of Political Control,” *Journal of Law, Economics, & Organization*, Vol. 3, No. 2 (Autumn, 1987), p. 247.

⁵ Jean-Jacques Laffont and David Martimort, “Separation of Regulators Against Collusive Behavior,” *RAND Journal of Economics*, Vol. 30, No. 2 (Summer 1999), pp. 233, 257.

⁶ Terry M. Moe, “The Politics of Structural Choice: Toward a Theory of Public Bureaucracy,” in Oliver E. Williamson, ed., *Organization Theory: From Chester Barnard to the Present and Beyond*, expanded edition (New York: Oxford University Press, 1995), p. 147.

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

More recently, the field has begun to see more granular looks at the evidence generating new ideas about prevention. Based on a series of case studies in a 2008 volume, Croley re-focused attention on administrative procedure as a powerful device for preventing capture, but suggested an almost opposite logic from McCubbins, Noll, and Weingast. Instead of subjecting regulators to greater oversight and control by legislators, administrative procedure (according to Croley) effectively gives regulators greater autonomy from legislators and ends up leveling the playing field across interests, weak and strong, by requiring greater openness (public notice) and broader input (public comment). “[W]hile it is true that notice-and-comment rulemaking enables regulated interest groups and Congress to monitor agencies more easily,” Croley writes, “the rulemaking process also allows other types of groups—public-interest law firms, the media, the public, government watchdog groups—to keep abreast of agency action more easily as well. Relative to these groups, Congress and regulated parties would certainly have a comparative advantage at monitoring agencies, if agency rulemaking processes were not standardized.”⁷

In recent years, the media has also been held up as a potential bulwark against legislative capture – again on the basis of detailed empirical work. Moss and Oey (2010) show that in each of three major cases in which weak interests prevailed over better organized ones, significant legislative movement followed the appearance of relevant horror stories in the press, which presumably alerted the public to an underlying problem. In 1980, for example, Superfund was enacted over the vehement objections of the chemical

⁷ Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton: Princeton University Press, 2008), pp. 143-144.

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

industry after revelations about Love Canal exploded in the national media.⁸ Dyck, Moss, and Zingales (2008), meanwhile, show that lawmakers during the progressive period were more likely to alter their normal voting patterns after a piece of muckraking journalism appeared on the issue in question. More generally, they argue that “profit-maximizing media firms can play an important role in reducing the power vested interests have on policymaking. ... By informing voters, media help make elected representatives more sensitive to the interests of their constituencies and less prone to being captured by special interests.”⁹

Perhaps most striking of all is Gunnar Trumbull’s claim that diffuse interests typically exercise a great deal of influence, and play a powerful role in preventing capture by concentrated interests, despite being portrayed by traditional capture theory as inevitably too weak to stand up to those concentrated interests. As Trumbull shows – once again through a series of detailed case studies, particularly involving consumer groups – diffuse interests are far more capable of organizing than is commonly believed. He argues further that these diffuse interests prove influential because of their considerable legitimacy.¹⁰ If so, then an important challenge in contemplating how best to prevent capture will involve

⁸ David Moss and Mary Oey, “The Paranoid Style in the Study of American Politics,” in *Government and Markets: Toward a New Theory of Regulation*, edited by Edward Balleisen and David Moss (Cambridge: Cambridge University Press, 2010).

⁹ Alexander Dyck, David A. Moss, and Luigi Zingales. “Media versus Special Interests,” NBER Working Paper Series, No. 14360, September 2008, p. 31.

¹⁰ Gunnar Trumbull, *Strength in Numbers: The Political Power of Weak Interests* (Cambridge: Harvard University Press, forthcoming).

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

determining the conditions under which diffuse interests are (and are not) able to organize effectively, since they apparently stand as a strong potential counterweight to narrower interests, including industrial lobbies.

New Evidence and Arguments

In this volume, close empirical studies of the regulatory process and the role of special interests have yielded a number of new ideas about the prevention of regulatory capture. Most of these ideas relate, in one way or another, to the value of ensuring (1) diversity of opinion within an agency, (2) reasonable input from a diverse set of external interests and parties, and (3) legal checks on agency process and decisions from outside actors.

In her close study of rulemaking at the U.S. Department of Transportation, for example, Susan Webb Yackee stresses the importance of engaging with a diversity of interests and experts, beyond the regulated industry itself. In particular, she emphasizes (as a result of her empirical analysis) the highly constructive role of sub-national officials in the public comment period, which “may provide a foil to business interests and thus may deter agency capture” (p. 29). Similarly, Dan Schwarcz focuses on the potential for consumer empowerment in regulatory processes, whether through dedicated governmental entities designed to reflect consumer interests or through formal empowerment of independent groups representing consumer interests, and how this too might constitute a valuable counterweight to concentrated industrial interests in some circumstances.

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Do not copy or distribute without the permission of the Tobin Project.

Liz Magill, meanwhile, highlights the power of judicial review to invalidate captured decisions after the fact. While recognizing that this mechanism is far from perfect (because it only kicks in after a regulation is in place, and because a party with standing has to take the initiative before any review can occur), she nonetheless sees it as an important mechanism for limiting capture, and calls for its expansion. In particular, judicial review helps to level the playing field, allowing weak as well as strong to be heard, and is often effective in detecting cases in which the logical or evidentiary foundation for a particular regulatory action is weak. In most cases, moreover, judges (as compared to regulators) may be less liable to being captured themselves, because of lifetime tenure and greater independence from political actors.

Richard Revesz and Michael Livermore remind us that OIRA (the Office of Information and Regulatory Affairs inside the OMB) already plays an important role in limiting capture. This is not because the office is an extension of the president (as is commonly argued), but rather principally, in their view, because OIRA creates an additional external check on agency behavior and decisions through standardized cost-benefit analysis. Revesz and Livermore also suggest that OIRA is itself quite difficult to capture, because it is a “general institution” rather than a “single-issue” institution, because it coordinates across many agencies that are likely tied to a range of interest groups, and because it engages in retrospective review, which dramatically expands the types of investments firms would have to make to successfully capture a regulation. In fact, given their assessment of its effectiveness, Revesz and Livermore call for an expanded role for OIRA – to further limit possibilities for capture of federal regulation.

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Do not copy or distribute without the permission of the Tobin Project.

Looking across regulators, Tino Cuellar examines three public health agencies (USDA, FDA, and CDC) and asks why they have been able to achieve at least a degree of independence from the industries they regulate, especially as compared to an agency like the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which has been far less independent relative to gun dealers. Cuellar highlights three important differences, which he suggests help to differentiate the experience of the USDA, FDA, and CDC from the ATF: (1) “scientific expertise and technical competence” that heighten agency legitimacy and thus autonomy; (2) broad statutory mandates, which render the public health agencies less vulnerable to congressional and executive meddling; and (3) linkages and alliances with a broad range of interests and authorities, which empower and insulate the agencies vis-à-vis any particular interest.

In an important sense, Cuellar’s emphasis on variation across agencies – the fact that some appear more or less captured than others – is fundamental to the broader project, providing a compelling reason to believe that capture *can* potentially be prevented and, at the same time, suggesting an analytic strategy for generating ideas and proposals to get there.

Finally, although James Kwak explores a very different type of special interest influence – cultural capture – his proposals for prevention dovetail nicely with the others. Once again, the emphasis is on ensuring diversity of opinion within agencies (in this case, through the appointment of a public advocate and even an official skeptic, or devil’s advocate, to raise contrarian viewpoints and thus to help “debias” thinking within agencies); diversity of external voices (by involving competing interest groups in

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Do not copy or distribute without the permission of the Tobin Project.

negotiations over proposed rules and by giving a relevant NGO full access to the regulatory process); and checks from outside entities (like those provided by OIRA, with respect to both information and analysis used in regulatory processes).

Looking Ahead

While the proposals outlined in these pages are by no means exhaustive, they do provide an indication of the types of remedies that may be most promising in combating regulatory capture going forward. The empirical work on which they are based, moreover, suggests that many institutional protections against special-interest influence are already in place, and that at least in some cases these mechanisms may be considerably more effective than is commonly assumed, particularly against conventional forms of capture.

Most of the chapters do not directly address the question of weak versus strong chapter, because the authors were not specifically asked to make this assessment. Nevertheless, much of the empirical work that informs the chapters seems to cast doubt on the prevalence of strong capture. While a great deal more work will need to be done, agency by agency, before claims of strong capture can be either accepted or rejected with any confidence, the questions about strong capture that have been raised here are at least consistent with our basic intuition. Consider the following thought experiment. If Americans were asked whether special interests exercise too much influence over the nation's major regulatory agencies, it seems very likely that the majority would answer in the affirmative for most, if not all, agencies. However, if they were asked whether special-interest influence is so severe that it would be better to eliminate one or more of the

Moss, David and Carpenter, Daniel. "Conclusion." Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Do not copy or distribute without the permission of the Tobin Project.

agencies altogether (including agencies such as the FDA, FAA, EPA, SEC, FDIC, NRC, and so forth), it seems doubtful that anything like a majority would say “yes” to the elimination of many (or perhaps any) of them. Yet this is exactly what strong capture would imply and what some early models of capture would have predicted – that society would literally be better off without the regulation.

What all of this suggests is that the increasingly empirical approach to capture that has been taking hold in recent years – and that we hope is exemplified in this volume – promises not only a more realistic picture of the problem, but also the possibility of more finely tuned remedies. We also hope that this shift toward the empirical in the study of capture presages a new orientation on government failure more generally, focused not just on whether failures exist, but also how they play out in practice and how (and under what conditions) they can be prevented or minimized.¹¹ Surely, there would be little satisfaction with cardiologists if they could tell us only that heart failure exists, without having much to say about how to prevent it or limit its effects. Political economists should face the same challenge with respect to government failure. Deregulation may be a valuable remedy in some cases, but it can hardly be the right remedy in all cases. Deeper and more detailed understanding is required, and it is our hope that this volume constitutes at least a helpful step in the right direction.

¹¹ See especially David Moss, “Reversing the Null: Regulation, Deregulation, and the Power of Ideas,” in Gerald Rosenfeld, Jay W. Lorsch, and Rakesh Khurana, eds., *Challenges to Business in the Twenty-First Century* (Cambridge: American Academy of Arts and Sciences, 2011), pp. 35-49.

Moss, David and Carpenter, Daniel. “Conclusion.” Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Moss, David and Carpenter, Daniel. "Conclusion." Draft chapter (as of 10.31.11) in Daniel Carpenter and David Moss (Eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It* (forthcoming).

Do not copy or distribute without the permission of the Tobin Project.