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PROSPECTS FOR A GENERAL THEORY OF ECONOMIC REGULATION

THOMAS D. BARTON*

A general theory of economic regulation ideally would draw together the diverse techniques that constrain or direct economic activity; it would guide our decisions about which economic activities are in need of regulation; and it would specify the appropriate combination of regulatory mechanisms that would best resolve particular problems. The theory would project the costs of regulation and would foresee any undesirable side-effects. Finally, it would assess the likelihood of achieving transcendent social or economic goals. An effective general theory of regulation would be a breakthrough in human governance rivalling any in modern political history.

Unfortunately, as two recent commentators put it, “[A]t present, there is no general theory of regulatory design with sufficient power to furnish good guidance on particular questions.”¹ Too much depends, they say, on general institutional and political developments, on idiosyncratic personalities, and on the subtle factual details of the regulatory setting.² Moreover, regulation creates trade-offs and side-effects of such diversity and possible volatility that “[u]nder many conditions, we might simply wish to opt for no regulation at all. . . .”³ These observations remain valid, and no breakthrough is at hand. In the short term, the value of attempted general theories will be only to inform legislators about alternative forms of regulatory mechanisms and to raise warnings against the possible clumsiness, inefficiency, or side-effects of legislative efforts. The formulation and acceptance of a more powerful theory awaits a broader political and academic consensus about how economic behavior is influenced, about how regulation and its effects should be studied, and about the ultimate purposes of regulation.

Studies of the meaning and effects of regulation diverge in at least three ways. First, studies of regulation may proceed from different philosophical perspectives, which I label the “microeconomic,” the “systemic,” and the “cultural.” Each perspective is directed by different underlying assumptions that affect analysis and conclusions. Secondly, studies of regulation vary in their sociological focus. Authors concentrate on the state, or interest groups, or individuals—whatever level is seen as the mainspring of regulatory

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1. E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 302 (1982).

2. *Id.* at 303-04.

3. *Id.* at 304.

success.⁴ Finally, the goal of the studies may be informational, seeking factual, scientific insights, or alternatively may be critical, assessing regulation with reference to various transcendent social, political, or economic values. For simplicity, the former approach will be termed "neutral" and the latter "prescriptive."

The divergence in philosophical perspective is the most important of these three differences. By shifting from the dominant microeconomic perspective to the systemic and cultural perspectives, apparent contradictions among various studies stemming from differences in focus and from differences about the relative importance of facts or values may be reconciled. Therefore, the crucial difference in perspective is explored at some length in part I of this Essay. Part II will survey the major disagreements of focus in regulatory studies, and will describe how such divergences affect both the meanings placed on regulation and the implied solutions to regulatory shortcomings. Certain disagreements in focus theoretically could be integrated into a successful general theory. Other points of departure, however, seem mutually exclusive, and thereby inhibit the creation of a larger theory. Part III uses the systemic perspective to speculate about the most promising structure for a general theory, and suggests the major elements of that theory. Finally, part IV adopts the cultural perspective, posing questions about the effects of regulation on human aspirations.

I. EXPLORING THE IMPORTANCE OF PERSPECTIVE

The dismantling of various government controls over commerce in the past ten years cannot be fully understood, nor should any recommendations about possible reregulation in the 1990s be made, without considering effects from at least three different perspectives: the microeconomic, the systemic, and the cultural. Each of these three perspectives from which regulation can be analyzed employs a particular language or set of assumptions that illustrates what is distinctive about that perspective. For the microeconomic perspective, the assumptions are grounded in the efficacy of cost/benefit analysis. The success and desirability of regulation are measured against standards of efficiency and wealth distribution. For the systemic perspective, the starting assumptions raise issues of effectiveness, propriety, and the limits of human control. For the cultural perspective, the assessments focus on meanings and values, addressing who we are and what we wish to become.

The language of microeconomics and cost/benefit analysis powerfully dominates public discourse in the latter half of the twentieth century, and

4. See D. McCaffrey, *OSHA AND THE POLITICS OF HEALTH REGULATION* 2-19 (1982). I am greatly indebted to this work. McCaffrey develops a valuable framework that analyzes whether regulatory phenomena prove a general hypothesis about regulation based on pluralism, or organizational theory, or "Capitalist State" theory. In this Essay I use a slightly expanded version of McCaffrey's categories to illustrate the differences in focus of various regulatory studies, without attempting to show that any of the three theories is more important than the others.

studies of regulation are no exception.⁵ The reasons for this are several. Although rational rather than empirical, microeconomic theory is grounded in descriptions of human behavior that resonate psychologically with any of us who have haggled over the price of an automobile or an antique. By its own assumptions, moreover, the theory is coherent and all-inclusive: the marketplace accords every nuance of decision a place in the aggregate of individual self-maximizing actions that constitute a final valuation. Finally, microeconomic discourse is fairly accessible, proceeding from a simple vision of human motivation and allowing clear, relatively uncomplicated, and seemingly precise examples in support of its conclusions. Indeed, it seems intuitively correct to pair an economic mode of analysis with issues about our economic lives. Much can be learned about particular regulatory issues from this perspective.

Yet the coupling of an economic methodology to an economic problem is not necessary, and can actually be confining and misleading with regard to the larger issues that touch regulation. Breaking apart the subject matter from the method of inquiry may reveal facets of the problem that otherwise would remain concealed. Microeconomic theory generally focuses on individuals, and assesses their aggregate behaviors by the criteria of efficiency and (less often) distribution of wealth. Political and social factors are a concern for microeconomic analysis only if they result in policies or habits that affect market transactions.⁶ State actions are judged by the same criteria as individual actions, and are thereby characterized either as unwarranted intrusions into the marketplace or as needed market corrections.

Systemic and cultural factors are hence largely absent from microeconomic assessments about deregulation or reregulation. Little information, for example, is revealed about the effects of various institutions on our concepts of needs and desires. Pareto efficiency (that is, that no further Pareto superior moves can be made) can be achieved under any set of institutional arrangements. Developing a general theory of regulation that would suggest *alternative* arrangements to give us better procedures or better institutions is unlikely to be achieved using only cost/benefit analysis. Assessments of alternative institutional arrangements are unquestionably richer when the microeconomic perspective is supplemented with the systemic and cultural perspectives. These alternative perspectives allow us to test any efficiency-derived conclusions against the assumptions—different from those that drive the microeconomic perspective—that persons differently situated may hold

5. See, e.g., G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); M. DERTHICK & P. QUIRK, *THE POLITICS OF DEREGULATION* 246 (1985); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Chickering, *Regulation: Hopes and Realities*, in *REGULATING BUSINESS: THE SEARCH FOR AN OPTIMUM* 219, 225 (D.P. Jacobs ed. 1978) [hereinafter *REGULATING BUSINESS*]; Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960).

6. For a notable exception, see Wilson, *The Politics of Regulation*, in *SOCIAL RESPONSIBILITIES AND THE BUSINESS PREDICAMENT* 135-168 (J. McKie ed. 1974), in which the costs and benefits of regulation are directly linked to political and psychological factors.

knowledge or problems in different ways, and that goals beyond wealth maximization influence people and governments.

This Essay therefore avoids microeconomic language in favor of a vocabulary about systems, and in brief conclusion, about culture. Through the systems perspective the current dissension as to the proper focus of regulatory studies may be resolvable; if so, we enable an inquiry about a general theory of regulatory design. Through the cultural perspective we may reconcile approaches to regulation that presume value neutrality with those that advocate specific goals; if so, we enable an inquiry into what we choose.

II. DIVERGENCE OF FOCUS IN STUDYING ECONOMIC REGULATION

As stated above, analyses of the development, history, and success of economic regulation diverge in underlying assumptions, in sociological focus, and in neutral or prescriptive aim, affecting not only how the issues of regulation are framed, but the solutions that are implied. In this part II of the Essay, the effects of shifting attention among the state, interest groups, and individuals will be examined. To aid analytical clarity, these distinctions have been sharply drawn into what appear as mutually exclusive categories. That is overly simple: some authors could be described as focusing on more than one sociological level, and certain theories about regulation, such as the well-known "capture" theory, blur the boundaries between the categories. The ideal model provides a taxonomy of broad tendencies.

A. *Regulation as Actions by the State*

Studies that focus on the state as the primary initiator and implementor of regulation diverge in the explanatory model used to fill out the meaning of the concept of "state." They share, however, a top-down hierarchical view of society with the state seen as capable of commanding legislation and directing its implementation. The motivation for promulgating regulatory legislation, and also the criteria of its success or failure, vary with the explanatory model used to comprehend the state.

Traditional conceptions of the state⁷ include the juristic model, like that of Kelsen, in which the state is a system of laws and norms with underived authority;⁸ the Hegelian image, in which the state is viewed as a directing intelligence, not as a social agency;⁹ the associational or contractual state of Hobbes, Locke, and succeeding liberals in which authority is derived from individuals and the state ultimately is constrained to act to further

7. Sabine, *State*, XIV ENCYCLOPEDIA OF THE SOCIAL SCIENCES 328 (A. Johnson & E. Seligman eds. 1938); Benn, *State* 8 ENCYCLOPEDIA OF PHILOSOPHY 7-10 (1967).

8. See J. HARRIS, *LAW AND LEGAL SCIENCE: AN INQUIRY INTO THE CONCEPTS "LEGAL RULE" AND "LEGAL SYSTEM"* (1979); H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945); H. KELSEN, *PURE THEORY OF LAW* (1967).

9. See Damaska, *Activism in Perspective*, 92 YALE L.J. 1189 (1983) (distinguishing between "managerial" state and "reactive" state).

individual ends or natural rights;¹⁰ and finally, there is an economic determinist or class struggle model which understands Western society to be directed by a relatively monolithic government whose purpose is to maximize the preconditions for growth of the capitalistic economy.¹¹

Among the state theorists, "regulation" tends to be shrunk conceptually to agency-directed command and control direction of an industry. It also tends to be intermittently dynamic.¹² As the domestic and international social, political, and economic landscape changes, so also must the policies of the state evolve to meet new demands, if the state is to achieve its aims. In the capitalist state model, government appears the handmaiden of economic determinism, and regulation part of a larger, comprehensive mechanism beyond the reach of democratic political process.¹³ For social contract theorists, in contrast, government regulation is always accountable to the interests of the citizenry. Because of the lack of importance of sociological detail in the workings of statist theories, the *subjects* of regulation are more likely to be presented as definable targets susceptible to manipulation, rather than as complex congeries of behaviors with ill-defined, changing boundaries capable of adapting against attempted regulation.

State-centered writings also diverge sharply in the degree to which particular social, political, or economic ends are prescribed, and what those ends might be. For example, statist views sometimes underlie strongly ideological writings of the right or left. Minimalists like Nozick prescribe a world—which they currently do not see—based on voluntary associations rather than the state.¹⁴ Capitalist state writers may be neutral, but if prescriptive they may advocate radical reforms to break the hold of the state on economic institutions.¹⁵

If current regulation is ineffective, the statist writer likely will advocate that the regulation be made more explicit by closing loopholes, and tightened by increasing penalties or prohibiting the exercise of discretion by those charged with implementing the regulation.¹⁶ It would be inconsistent for a

10. This is sometimes referred to as the "public interest" or "public welfare" model. See Benn, *supra* note 7, at 8-9; Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 268-69 (1987). See generally Mashaw, "Rights" in the Federal Administrative State, 92 YALE L.J. 1129 (1983).

11. W. CONNOLLY, *POLITICS AND AMBIGUITY* (1987); C. NOBLE, *LIBERALISM AT WORK: THE RISE AND FALL OF OSHA* (1986); K. POLANYI, *THE GREAT TRANSFORMATION* (1944); F. THAYER, *REBUILDING AMERICA: THE CASE FOR ECONOMIC REGULATION* (1984). It is difficult to distinguish writers with this orientation from those who perceive in society a "radical pluralism," that is, one dominated by interest groups rather than by a monolithic state, but in which the capitalist groups always prevail. Perrow, *Foreword*, in D. McCAFFREY, *supra* note 4, at viii. No attempt is made to categorize the writers in these two groups.

12. The exception to this is the strongly positivistic juristic model, which has no transcendent aims or intelligence, and hence is immune from environmental changes. See *supra* note 8 and accompanying text.

13. D. McCAFFREY, *supra* note 4, at 9-12.

14. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

15. See *supra* note 11.

16. E. BARDACH & R. KAGAN, *supra* note 1, at 34-36, 54-56; Mashaw & Harfst, *supra* note 10, at 268-69.

statist to recognize that the failure of regulation might stem from a difficult context in which the regulation is being implemented. The concept that an external environment might control the workings of the regulation conflicts with the statist hierarchical, top-down authority assumptions. The state is always, in this view, capable of achieving its ends; if it is currently frustrated, the fault must lie with an improperly worded law, or with sloppy administration.¹⁷

B. Regulation as Competition of Groups

If competing groups are made the focus of studies of economic regulation, views emerge that differ from those of the statist concerning what constitutes regulation, and how the subjects of regulation tend to react to being controlled. A much milder image of the top-down authority hierarchy underpins "groupist" theories. As part of this image, positions of authority and dominance are indeed achieved, but the preeminence is impermanent because subordinate groups constantly seek to undermine the authority and position of the prevailing group.¹⁸ Precise control and direction from above is therefore problematic, in contrast to the assumptions of the state theorists, because the subjects of regulation sometimes are better served by resistance or subterfuge. Because the sociological universe is expanded in these interest group theories, the concept of "regulation" may grow to include influences on economic behavior from sources other than the legislature and its agencies. The context of regulatory efforts is consequently richer and more complex, as economic actors are pulled simultaneously in many directions by demands made by government, competing groups, and self-interest.

Much of the writing of the recent deregulatory movement emerges from this pluralist perspective. "Business" interests are pitted against "regulators," "environmentalists," "public interest groups," or unions, with each group struggling to further its respective ends. The scholarly analysis using this approach may be neutral, simply describing the course of the battles; often, however, the study uses cost benefit analysis to assess regulatory agency performance against a prescribed standard of wealth maximization.¹⁹

For group theorists, ineffective regulation implies that the regulated actor is prevailing over whatever group or alliance of groups promulgated the regulation. Strategically, the tide can be reversed by strengthening the formal law, as in the statist scenario, or by weakening the opposition of the regulated actor. Administrators of the relevant regulations might there-

17. E. BARDACH & R. KAGAN, *supra* note 1, at 53-56; Damaska, *supra* note 9, at 1192 n.5.

18. This general statement must be qualified by noting such theories as C. WRIGHT MILLS, *THE POWER ELITE* (1956), which recognize little mobility among the groups: what appears to be social dynamism is merely the "circulation of elites." See also Perrow, *supra* note 11.

19. See, e.g., S. BREYER, *REGULATION AND ITS REFORM* (1982); P. MACAVOY, *THE REGULATED INDUSTRIES AND THE ECONOMY* (1979); M. UTTON, *THE ECONOMICS OF REGULATING INDUSTRY* (1986).

fore seek broader, rather than weaker, discretion that could strengthen compliance conditions and hence be used to intimidate the regulated actor into a negotiated solution.²⁰

C. Regulation as Action by Individuals

The concern of studies of regulation that focus on individuals is not so much with the substance of the regulation as with the motivations for its creation and the ways in which regulation can be perversely or self-servingly implemented. Typically these writings center on bureaucratic role behavior within regulatory agencies²¹ or on evasive behavior by the regulated actors.²² They also may focus on policymakers, describing legislative initiatives as profoundly political events.²³ From this perspective, the concept of regulation begins to be swallowed up by the context in which regulation is implemented. Directives may look impermanent and unpredictable due to discretionary abandonment of enforcement, activist interpretation, corruption, or "capture." Formally, the target of regulatory effort is easily defined; yet as regulation becomes a bargaining process involving company executives, administrative officials, and elected officials, the entire network of individuals becomes in a real sense that which is "regulated."

Ineffective regulation would be explained by this group of writers as the result of corruption or capture or job protection strategies. The solution might be to make the regulatory administrators more secure and immune from political pressures, thereby reducing the need for turf and job protection behaviors. Conversely, the solution might be to increase the accountability of the administrators by adding another layer of internal or independent review of their behavior, or by decreasing the standards of official immunity from private liability suits.

20. Cf. E. BARDACH & R. KAGAN, *supra* note 1, at 37-39, 51-54.

21. See B. OWEN & R. BRAEUTIGAM, *THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* 18 (1978). Owen and Braeutigam write that one way of thinking about the process of regulation adopts

various 'rational actor' models, such as those of Peltzman, Noll and Fiorina, and Niskanen. In these models rational regulators with well-defined objectives seek their own ends. Generally, such models regard regulators as politicians seeking essentially political rewards by use of the government's power to redistribute income. These models tend to be cynical, or probably appear so to noneconomists.

Id.

22. See, e.g., Feldman & Zeckhauser, *Some Sober Thoughts on Health Care Regulation*, in *REGULATING BUSINESS*, *supra* note 5, at 112-117 (discussing evasive behaviors and controls exercised by health care providers over their would-be regulators).

23. See, e.g., M. DERTHICK & P. QUIRK, *supra* note 5, at 40-41 (suggesting that Senator Edward M. Kennedy convened important regulatory reform hearings in 1975 as much to seek consumerist voters as to improve industrial productivity or efficiency); S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* 114, 115 (chronicling President Nixon's creation of Occupational Safety and Health Administration to curry favor with AFL-CIO leader George Meany).

D. Conclusions

Serious academic disagreement afflicts the concept of regulation, including the mechanisms and ease of its implementation, and the scope of the subject of regulation. For a general theory of regulation to perform its ideal tasks, that is, identifying likely subjects of regulation, specifying the regulatory techniques that might best be used to solve particular problems, foreseeing costs and side effects, and assessing performance in meeting regulatory goals, the preliminary assumptions about the meaning, purpose, and effectiveness of regulation must be better integrated. It is at least very difficult to conceive of regulation as simultaneously a defined set of written rules, yet also a complex of behaviors influenced by a subtle and changing environment;²⁴ to consider the subjects of regulation as both a definable industry or economic market, and also the personalities that happen to be occupying key roles in the process of that regulation;²⁵ to imagine that regulation inevitably serves the ends of capitalism, and yet that its content is constantly up for grabs among widely different groups, including anti-capitalists;²⁶ and to reconcile that while regulation is imposed with authority, it also might never be effectively implemented.²⁷

The integration of these seeming contradictions may be accomplished; certainly their reconciliation cannot be proved to be impossible. Given the breadth of current disagreements about proper starting positions, however,

24. The same contradiction, between ideal law or rule and actual behavior, was described by Hoebel in his efforts to comprehend law itself. He attempted to transcend the disjunction methodologically, by focusing on disputes or "trouble cases." E. A. HOEBEL, *THE LAW OF PRIMITIVE MAN* 29-37 (1983). Developing a general theory of regulation, however, is more ambitious than Hoebel's efforts. Because it would attempt to create a framework that will predict and commend as well as elucidate, merely focusing research efforts on judicial review of administrative decisions will not suffice.

25. Thomas Schelling provides insights on why, for example, the actions of a group or business provide an unreliable guide to the motivations of the individuals constituting the group:

A bunch of timid people directing an enterprise do not necessarily make for a "timid" enterprise; everybody may lack the personal boldness to oppose a rash action. "Responsible" individuals may be so loyal to the organization that they acquiesce in policies that appear "irresponsible." Responsibility may be so diluted within an enterprise that there is no one to blame when the organization seems blameworthy, no individual to reward when the organization behaves uncommonly well. . . . To expect an organization to reflect the qualities of the individuals who work for it or to impute to the individuals the qualities one sees in the organization is to commit what logicians call the "fallacy of composition."

Schelling, *Command and Control*, in *SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT*, *supra* note 6, at 83-84.

26. The radical pluralist position that group competition persists while the long-range interests of capitalism are inevitably served does not truly reconcile this tension: it merely subordinates the behavioral aspect to the ideological. *See supra* note 11 and accompanying text.

27. Realistically, however, the pattern of authoritative regulation plus nonimplementation or counterproductive side-effects is common, if not the norm. *See Schelling, supra* note 25, at 79-80; *cf. S. FALK-MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 54-81 (1978).

a valid and acceptable general theory of regulation remains elusive. Its form, if ever a general theory is developed, would most likely describe a complex network of interacting factors that at times are mutually supportive, and at other times suppress one another. The importance of the context in which regulation proceeds—that is, the breadth or narrowness of the meaning of regulation—will expand and contract over time, and as the investigation moves among different regulatory problems. Moreover, no single level of society—state, groups, or individuals—will be preeminent, or always preeminent. The antagonism of focus that characterizes much regulatory study might be reconciled, therefore, in a framework that recognizes and legitimates the competing pressures at each level. The beginnings of such an approach will be sketched in part III below.

III. FRAMEWORK FOR A GENERAL THEORY

A successful general theory of regulation hence suggests an image of dynamic, conflicting factors that are never conceptually integrated, but instead jostle one another constantly. Rather than assume that all regulation is of the formally conceived, deliberative sort that originates from legislatures, a variety of alternative regulatory mechanisms would be described. Particular regulatory instances would be “governed” by combinations of various influences, the components of which would shift constantly in strength and direction. Most importantly, the regulatory system must evolve according to its *own* dynamics, based on inevitable internal conflicts and adjustments.

A. *Attributes of Major Alternative Decisional Mechanisms*

The alternative decisional mechanisms are best categorized by the various tools or methods they might employ. Economic activity can be strongly influenced by any of the following methods: command and control; free market; broad market-affecting legislation like taxes, subsidies, quotas, or general policing provisions like the antitrust laws; transferable regulatory credits; and private litigation based on common-law rights. Each of these methods has different attributes, and each method is better suited, and less well suited, to resolving certain kinds of problems.

The diverse attributes of the various decisional methods are revealed in the respective responses to the following questions: What is the nature and quality of information required to make a decision using this tool?²⁸ How much participation, and of what sort, do nondeciders have in the decisional process? Are decisions made locally, or centrally? Can the tool be brought to bear comprehensively, or only in a piecemeal fashion, with the enter-

28. See generally Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979); Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and “Fine-Tuning” Regulatory Reforms*, 37 STAN. L. REV. 1267 (1985).

prise?²⁹ Does this tool seek precise outcomes, or merely create boundaries within which much variability is expected? Will the decisions made in one instance "spread" by analogy to other instances? What opportunities does the device afford for manipulation or strategic behavior by the regulated actor? Does this tool rely on state-backed coercion to implement decisions, or does it somehow harness individual self-interest to be self-executing? If individual self-interest, how much coordination among the individuals is required to implement the solution?

Fitting these attributes to the various decisional mechanisms produces the following general descriptions.

1. Command and Control

Command and control techniques³⁰ are the most ambitious, and the most difficult to implement, of all the devices to influence economic enterprise. Knowledge of the entire enterprise is required to accomplish the regulatory purpose, which is to deal comprehensively with the problem by carefully managing all the contingencies.³¹ Command and control methods attempt to eliminate or direct all other influences, which means that much

29. See Kahn, *The Theory and Application of Regulation*, 55 ANTITRUST L.J. 177, 178-81 (1986). See generally Diver, *Policy-making Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

30. This term has been used in different ways. Latin, for example, defines command and control as regulation of specific conduct and notes it "is usually contrasted with economic incentive systems that use price mechanisms to encourage regulated parties to attain desired goals." Latin, *supra* note 28, at 1267 n.2. He then describes command and control techniques as employing uniform standards across a given industry. In contrast, I distinguish command and control techniques not only from transferable incentive systems, see *infra* notes 52-56 and accompanying text, but also from any penalty or reward-based system that uses more general, uniform standards, see *infra* notes 50-51 and accompanying text. Command and control is thus more particularized, tailored, and comprehensive regulation of an industry and its components, or of a problem like attaining clean water. See also Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1334 (1985).

31. Ackerman & Stewart, *supra* note 30, at 1336-37. As one commentator described the factors inhibiting the effectiveness of OSHA's command and control efforts:

Quite simply, OSHA's enforcement effort is too modest to create truly effective financial incentives for safety.

Even if these incentives were strong, not all risks could be eliminated. Many accidents stem from aspects of the work process other than the specific technological characteristics regulated by OSHA. That most workplace risks have not been readily amenable to the influence of OSHA regulations is in stark contrast to the optimistic projections of the framers of OSHA's legislative mandate, who anticipated a 50 percent drop in workplace risks.

The chief contributing factor relates to worker actions. Although the estimates of the role of the worker in causing accidents vary, in part because of the difficulty in assigning accidents caused jointly by worker actions and technological deficiencies, it is clear that worker actions play a substantial role.

Viscusi, *Reforming OSHA Regulation of Workplace Risks*, in REGULATORY REFORM: WHAT ACTUALLY HAPPENED 259-60 (L. Weiss & M. Klass eds. 1986) [hereinafter REGULATORY REFORM].

of the context in which an industry operates must also be monitored to create a sort of buffer that protects the integrity of the commands running the actual enterprise.³² Such all-encompassing direction may stifle market and social innovation.³³

Command and control techniques are usually centrally operated with formal but limited participation by outsiders, and rely on coercion for implementation.³⁴ Very precise outcomes are sought, but since regulations are inherently less subtle than their factual settings, side effects often arise.³⁵

Command and control methods work best where the context in which an enterprise operates is relatively simple, or where the regulatory goals are so vital that the context can be changed, forcibly if necessary, to accomplish those goals. Unless most persons affected by the regulation share its purposes, however, command and control is distinctly vulnerable to sabotage or manipulation by the regulated actors toward methods that emphasize self-interest rather than coercion.³⁶ On the other hand, because of their particularity, command and control decisions tend not to spread by analogy.

2. Free Market

The attributes of the free market contrast strongly with those of command and control techniques. The market adopts a radically decentralized, participatory, and piecemeal approach that can contain all shades of inconsistency. Far from attempting to craft precise outcomes, no particular outcome is contemplated by the market. Total knowledge of the enterprise context is desirable even in making market decisions, but the self-correcting

32. See, e.g., T. McCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 263-64 (1984) (route allocation process of Civil Aeronautics Board inevitably required regulation of many other aspects of airline operation, even trivial matters). This need to control minutiae had side effects: it precluded the CAB from formulating an overall regulatory strategy, and ultimately forced agency actions to adopt adjudicatory procedures to mask the comprehensiveness and arbitrariness of its decisions.

Alfred Kahn made a similar point:

Control price, and the result will be artificial stimulus to entry. Control entry as well, and the results will be an artificial stimulus to compete by offering commissions to travel agents, advertising, scheduling, free meals, and bigger seats. The response of the complete regulator, then, is to limit advertising, control scheduling and travel agents' commissions, specify the size of the sandwiches and seats and the charge for inflight movies. Each time the dyke [sic] springs a leak, plug it with one of your fingers; just as a dynamic industry will perpetually find ways of opening new holes in the dyke, so an ingenious regulator will never run out of regulatory fingers.

Interview with Alfred Kahn, *id.* at 272.

33. See Interview with Alfred Kahn, *supra* note 32. See generally Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256 (1981).

34. Stewart, *supra* note 33, at 1273-77.

35. Ackerman & Stewart, *supra* note 30, at 1335-36.

36. Feldman & Zeckhauser, *supra* note 22, at 114.

mechanisms are so strong that partial knowledge or even total ignorance in some decisionmaking is tolerated (although someone likely will be harmed through the bad decision made). Solutions depend on self-interest rather than coercion, although sometimes severe coordination difficulties like the familiar free-rider and moral hazard problems impede implementation. Market solutions work best for industries engaged in complex distribution of goods or services, or where the political or economic context is unsettled. Because market solutions are voluntary and each individual decision is so particularized, the decisions tend not to spread.

The contrasts between the first two possible regulatory techniques, that is, command and control versus the free market, are well illustrated by the airline industry's dramatic shift over the past decade from heavy reliance on command and control techniques to strong market regulation. From their respective descriptions above, one might predict that the regulatory shift toward a heavier influence of the market would be successful. As noted in greater detail below, however, certain consequences that have accompanied the system shift were not predicted, and some of those are counterproductive to the original aims of deregulation. This brief case study demonstrates the complexity of regulatory issues and should serve to warn against embracing simple regulatory design theories.

Executive control of the airlines through the Civil Aeronautics Board was withdrawn in an effort to improve airline productivity and lower airfares for consumers.³⁷ Market influences thereby increased enormously, and were substantially complementary to the purposes of the deregulation: many fares dropped, and flight seating was fuller.³⁸ However, unwanted (though not wholly unanticipated) operational and financial side-effects of the system shift also were felt.³⁹ Operationally, some relatively unpopulated areas suffered fare increases⁴⁰ or deterioration of service.⁴¹ Overuse of "hub and

37. P. MACAVOY, *supra* note 19, at 112. As one commentator summarized:

It was widely accepted prior to 1978 that regulation had led to inefficiency in the [airline] industry and an unduly rigid industrial structure which did not properly cater for the changing pattern of consumer demands. De-regulation was expected to go a long way to remove the sources of inefficiency and to promote a more adaptable industry. According to a number of analyses that have been made of the industry since de-regulation, these predictions have, to a considerable extent, been proved correct although the transition has not been without its difficulties, some of which are still unresolved.

M. UTTON, *supra* note 19, at 199.

38. See, e.g., S. MORRISON & C. WINSTON, *THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION* 13-36 (1986); A. SAMPSON, *EMPIRES OF THE SKY: THE POLITICS, CONTESTS, AND CARTELS OF WORLD AIRLINES* 140 (1985); F. THAYER, *supra* note 11, at 77; M. UTTON, *supra* note 19, at 200; Kaplan, *The Changing Airline Industry*, in *REGULATORY REFORM*, *supra* note 31, at 51.

39. A. MARCUS, *THE ADVERSARY ECONOMY: BUSINESS RESPONSES TO CHANGING GOVERNMENT REQUIREMENTS* 118-19 (1984); F. THAYER, *supra* note 11, at 78-87.

40. A. SAMPSON, *supra* note 38, at 141; F. THAYER, *supra* note 11, at 80-81.

41. T. McCRAW, *supra* note 32, at 298; A. SAMPSON, *supra* note 38, at 141; see also S. MORRISON & C. WINSTON, *supra* note 38, at 47-50. Concern about this effect was voiced

spoke" routing may have caused inefficiencies in fuel use and greater risks associated with more frequent than necessary takeoffs and landings.⁴² Moreover, routine maintenance schedules have lengthened, and pilot experience lessened, raising additional safety concerns.⁴³ Some commentators foresee a precarious financial position for the industry, manifested in airline bankruptcies and takeovers.⁴⁴ Others worry about the growing market concentration of merged airlines and the barriers to entry represented by their ability to dominate scarce airport docking berths⁴⁵ and computerized reservation systems, although this latter barrier was softened in a late CAB official action.⁴⁶

As important as this enhanced market influence and related side effects may be, they do not exhaust the decisional system shifts that followed CAB withdrawal. The Federal Aviation Administration and Department of Transportation have increased their vigilance, edging over into issues that previously would have been the concern of the CAB.⁴⁷ The most visible of these is the recent requirement that airlines publish monthly records of their timeliness in meeting departure and arrival schedules.⁴⁸

Airline deregulation may well prove a successful effort to produce particular effects, in this case better productivity and service, by deliberately reconstituting an industry's regulatory mix. Most evidence suggests an outcome more or less as planned.⁴⁹ Yet even ten years after the major deregulatory decisions, the results are not fully assured. The industry remains in turmoil, with side effects only gradually being revealed.

3. Broad Legislation

Boundary-setting legislation that contains or confines economic enterprise through general restrictions or quotas, or that guides it in a particular direction through taxes or subsidies, shares several attributes with the

throughout the deregulation process, and Chairman Kahn attempted to meet it through vigorous application of microeconomic theory. T. McCRAW, *supra* note 32, at 290-92. Nevertheless, at the time the Airline Deregulation Act was passed Congress appended the Essential Air Service Program, which subsidized, but also required, service to continue to the small communities listed in carriers' certificates in 1978. S. MORRISON & C. WINSTON, *supra* note 38, at 67-68; Kaplan, *supra* note 38, at 67-68.

42. F. THAYER, *supra* note 11, at 81.

43. *Id.* at 84-87; A. SAMPSON, *supra* note 38, at 143-44. *But see* Kaplan, *supra* note 38, at 70.

44. F. THAYER, *supra* note 11, at 78; *see also* A. SAMPSON, *supra* note 38, at 138-40. *But see* S. MORRISON & C. WINSTON, *supra* note 38, at 36-41, 73.

45. Kaplan, *supra* note 38, at 68-69.

46. M. UTTON, *supra* note 19, at 200-02; *see also* S. MORRISON & C. WINSTON, *supra* note 38, at 68-71; Kaplan, *supra* note 38, at 65-66.

47. Miller, *The Administration's Role in Deregulation*, 55 ANTITRUST L.J. 199, 203 (1986).

48. Department of Transportation, Airline Service Quality Performance, 14 C.F.R. §§ 234, 255 (1988).

49. M. UTTON, *supra* note 19, at 202; *supra* note 38 and accompanying text.

command and control technique.⁵⁰ It is centrally created or directed, usually with limited participation by nondecisionmakers, and it is coercively enforced. Like command and control, it most often operates industry-wide, although the scope of some legislation, like that of the antitrust laws or general business taxes, is far more general. Unlike command and control, this form of regulation does not seek outcome precision. On the contrary, it permits wide latitude in industry activity by merely monitoring the boundaries it sets,⁵¹ or providing incentives or subsidies toward some goal. Because it announces broad policy of the government, the influence of the penal type of this form of regulation may spread beyond its formal application. It usually does not address problems piecemeal or within local context, but rather adopts a particular style of affecting an entire industry uniformly. Because of its relative inattention to context, unintended side effects may accompany its use, as where subsidies inhibit innovation and productivity, or import quotas contribute to price inflation. Boundary or guidance legislation is best used to address particular problems or patterns that recur across many different industries. It is also a relatively good technique where little is known about context, where information generally is difficult to obtain, or where diversity of regulated actor behavior is desirable.

4. Transferable Regulatory Credits

Transferable credit devices harness self-interest to achieve regulatory purposes.⁵² A general policy goal is centrally set, not necessarily with much participation by nondecisionmakers. The primary goal is accomplished, however, only with the substantial participation of the regulated actors, and therefore is probably less assured than where control and command methods are used.⁵³ The actors earn credits for compliance with a regulatory policy goal like reduction of industrial discharge of polluting substances, which credits can then be sold or otherwise transferred to other regulated actors. The overall policy goal is met, but not by imposing uniform behavioral requirements on the actors. In theory, this form of regulation is more efficient than command and control because compliance will be attained by some actors (those for whom the required behavior is cheapest) doing a great deal more than the average amount of the behavior.⁵⁴ Actors for whom performing the behavior would be very expensive comply by purchasing credits from the "overachievers." A more traditional variation of

50. See generally Breyer, *supra* note 28, at 578-82 (discussing antitrust laws, disclosure regulations, and taxes).

51. *Id.* at 580-81.

52. See generally B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER & D. HENDERSON, *THE UNCERTAIN QUEST FOR ENVIRONMENTAL QUALITY* 260-75 (1974); S. BREYER, *supra* note 19, at 171-74; Breyer, *supra* note 28, at 582; Stewart, *supra* note 33, at 1332-37, 1373-74.

53. Stewart, *supra* note 33, at 1326, 1328-30, 1334-37.

54. *Id.* at 1264.

transferable regulatory credits is a coupon system of rationing in which a predesignated amount of consumption is permitted through distribution, perhaps for a fee, of coupons or tokens.⁵⁵ If the coupons are transferable, theoretically the rationing system will be more efficient, because those persons with a higher preference for the rationed substance will purchase coupons from persons who value the item less.

Besides its easier implementation through self-interest rather than coercion,⁵⁶ the transferable regulatory credits system has the advantage of requiring relatively less knowledge on the part of the policymaking authority. It is best suited to regulate where nonstandardized treatment among various actors is required. This might be the case, for example, where the severity of the problem is related to context, and that context is subtle or complex; or where factors external but significant to the problem (like politics, for example) change constantly.

5. Private Litigation

Like the marketplace, common-law litigation inherently constitutes a more piecemeal, rather than comprehensive, form of regulation.⁵⁷ Moreover, litigation operates more locally than centrally, and it is therefore quite context sensitive.⁵⁸ Litigation requires more comprehensive knowledge about a problem to make an effective decision than does the atomized free market,⁵⁹ however, and regulation through litigation is basically coercive rather than implemented through self-interest. Although each particular lawsuit decision results in a precise outcome, the common law as a whole aggregates varying decisions, thus reducing precision levels below those of some other regulatory methods.⁶⁰ Moreover, costs and practical problems like injury latency and problematic causation inherent to many regulatory contexts limit the usefulness of litigation as a regulatory device.⁶¹

The effects of litigation often spread by analogy to related settings, without need of organized coordination. What amounts to new regulation

55. *Id.* at 1326-32.

56. Ackerman & Stewart, *supra* note 30, at 1342-46. *But see* Fix & Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan's First Term*, 2 *YALE J. ON REG.* 293, 305-08 (1985); Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 *UCLA L. REV.* 343, 408-09 (1981).

57. Bardach & Kagan, *Liability Law and Social Regulation*, in *SOCIAL REGULATION: STRATEGIES FOR REFORM* 239 (1982). "Courts impose liability only for behavior that actually has caused harm, not for behavior that might cause it. The adjudicatory process and private negotiations that accompany it tend to elicit evidence and focus attention on the risks and equities in each specific case." *Id.*

58. "[L]iability standards applied by the courts usually are more generally worded and open ended (and hence, more sensitive to the particular context) than the detailed specification standards enforced by regulatory agencies." *Id.* at 239; *see also id.* at 249.

59. *See* Harter & Eads, *Policy Instruments, Institutions, and Objectives: An Analytical Framework for Assessing "Alternatives" to Regulation*, 37 *ADMIN. L. REV.* 221, 248 (1985).

60. Breyer, *supra* note 28, at 583.

61. *See* Stewart, *supra* note 33, at 1337, and sources cited therein.

is achieved by self-restraint or the enacting of prophylactic measures.⁶² Such spreading in a given instance may or may not be appropriate. Where inappropriate, the resulting behavior is an unintended side effect of the litigation. One example of this would be the commonly described problem of practicing overly defensive medicine in response to medical malpractice litigation.

Litigation is a particularly appropriate regulator of economic activity where coupled with a strong influence from the free market. In such settings, the legal outcomes are said to correct whatever defects exist in the market due to free rider or externality problems. Private litigation also can be a useful adjunct in implementing boundary legislation like the antitrust or employment discrimination laws.

B. *Structural Considerations*

The difficulty in designing good regulation is that the normal approaches are either simplistic, or unrealistic. The simplistic approach attempts to choose the most appropriate regulatory tool for the particular problem at hand. Although that sort of thinking reflects conceptual progress, the issues and factual contexts surrounding regulation are simply too subtle for any single regulatory device to be effective. By contrast, any theory that presumes to mix the use of regulatory techniques in different degrees, as though one were designing a stew to taste a particular way, overestimates our ability to predict the ways in which law, group interests and politics, and administrative behaviors all interact.

A regulatory design that attempts to be subtle yet realistic starts with a recognition and description of the various influences on economic behavior. It then fashions a system in which many of those influences come into

62. Bardach & Kagan, *supra* note 57, at 238:

The mere threat of such lawsuits [for injuries and illnesses caused by dangerous products or pollutants] . . . would seem to provide strong incentives for enterprises to control any aspect of their activities that might lead to damage claims, even if the protective measures needed to avoid liability are not mandated by direct regulations. . . .

The behavioral effects of spreading can be equivalent, or perhaps even superior, to direct regulation. Bardach and Kagan continue with their example:

Where the threat of such damage suits is present, enterprises establish their own safety staffs and quality control units to conduct intensive internal inspections, or they submit to inspections by the loss control representatives dispatched by liability insurance companies. These private inspectors are present more often than government inspectors and are more knowledgeable about specific risks posed by each facility. Also, largely because they are free of the legal constraints and accountability pressures under which their government counterparts operate, private inspectors can tailor protective standards more closely to the hazards presented by the particular enterprise and thus minimize unreasonableness.

Id. at 239.

play at different levels, *in ways that predictably conflict*.⁶³ Rather than design a system that is unified or harmonious, in other words, the better system is one in which mutually exclusive influences buffer each other, accommodate themselves to one another, and cause each other to change to meet environmental demands.⁶⁴ Truly effective regulatory systems are to a degree beyond human imagination; the complexity and required flexibility of response cannot be fully engineered. We must settle for erecting institutions that can then constantly build themselves. This image should not be revolutionary: it is simply applying to the design of laws those same principles of institutional checks and balances we readily accept in our political system.⁶⁵ The concepts of separation of powers and federalism are ways in which cross-cutting influences at the level of state, group, and individual are created, but not consciously managed.⁶⁶ Ironically, although the process writ large of our government is visible, its precise interactions on any question are unfathomable. Yet the outcome of any particular problem is not wholly unpredictable; the substance of government decisions generally lies within a fairly narrow band of broadly consensual values as more radical proposals weaken the effects of one another.⁶⁷

The effective regulatory system works similarly. Each level should be equipped with a number of different tools or powers, which can be strong and should be conflicting. Within limits it may not then matter if, for example, at the state level the law purporting to govern economic behavior is written in a blunt, unequivocal, even foolish manner. Even the most direct law can be softened if the various affected groups have access within the larger system in which the law is administered, as where the regulated actor controls much of the technical information and expertise on which the administrators depend⁶⁸ or where administrative rulemaking procedures

63. S. BREYER, *supra* note 19, Harter & Eads, *supra* note 59, and Stewart, *supra* note 33 each offer useful frameworks that recognize the mutual influences of the various alternative regulatory techniques. None of the three, however, embrace the conflicts among the techniques and none is as skeptical as this Essay about the efficacy of human engineering. Although not offering a general theory, Yellin, *Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking*, 92 YALE L.J. 1300, 1329-30 (1983) and Carter, *Separation and Skepticism*, 92 YALE L.J. 1334 (1983) stress a conflict-based approach for regulatory settings.

64. The envisioned system closely resembles the "incrementalist" model (as contrasted with the "comprehensive rationality" model) developed by Charles Lindblom and described by Professor Diver, *supra* note 29, at 399-401. Diver makes intelligent recommendations about when one paradigm is preferable to the other, and when the transition from one to the other should be made. The system described in this Essay differs from Diver's incrementalist model in that it is much broader in scope, accepting as functioning components more than Diver suggests. Also, I do not accept a clear dichotomy between incrementalism and comprehensive rationality; I view the latter as unrealistic in any social context.

65. Yellin, *supra* note 63, at 1322.

66. *Id.*

67. See M. DERTHICK & P. QUIRK, *supra* note 5, at 256-57.

68. D. MCCAFFREY, *supra* note 4, at 40 discusses, for example, some major controls exercisable by OSHA-regulated businesses:

include hearings open to the public. The blunt law further can be buffered where administrators have discretion over interpretation or enforcement,⁶⁹ although safeguards against corruption must then also be strengthened.

Good regulatory design thus follows certain principles:

1. Do not overspecify the content of regulation by seeking total integration or consistency; let internal conflicts transform the system from a static one to a dynamic one.⁷⁰

2. Build in ways for regulatory mechanisms to shift in the strength of their influence. This is one of the most difficult goals to achieve, but also one of the most vital. Network linkages must be created to draw in participation from alternative regulatory mechanisms. Requirements of public hearings in rulemaking serve this function, as would enhanced agency "services" such as those recommended for OSHA: more complaint inspections, worker training programs, and "information oriented" regulations.⁷¹ Include a role for the state through an initial law; include a role for politics through the budget and appointment process⁷² or through institutions that regularly require participation by the public and the media;⁷³ and include a

What are the pressures business can bring to bear *against* [chemical regulation]?

First, business controls employment. If workers believe that cleaning up workplace conditions will cost them their jobs, they will probably not support chemical control until their lives or abilities are clearly, imminently in danger. Second, business controls the bulk of scientific, technical, and legal resources in occupational health work. This means that businesses overwhelmingly influence what information is released to workers and the public and what issues are pushed hardest in regulatory proceedings.

69. See Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 195-98 (1986).

70. P. MACAVOY, *supra* note 19, at 28, 87. MacAvoy describes the extreme detail of equipment specifications, rather than performance standards, that came to dominate OSHA rules. Because it became so difficult to generate new standards, some areas of industrial production were governed in minute detail, while other areas were neglected. This in turn led to uneven treatment among firms.

Such overdesign by too much detailed specification ironically also creates a chronic underdesign. Because the OSHA regulations were so comprehensive in what they *did* do, workers had no participatory role in ensuring their own safety conditions, leading to the conclusion that

the OSH Act left the existing organization of work and industrial relations essentially untouched and grafted state power onto that system. Managers remained in charge of the labor process; workers remained subordinate to them, shut out of the most important decisions about working conditions. Occupational safety and health remained a by-product of market-based investment decisions. The incentives to employers to undersupply occupational safety and health, and the disincentives to employees to participate in decisions about the conditions of work, remained in place.

C. NOBLE, *supra* note 11 at 98; see also D. McCAFFREY, *supra* note 4, at 40 (citing case of worker's compensation schemes and withering of common law tort recovery for worker injury to warn against regulation that displaces other useful regulatory mechanisms).

71. D. McCAFFREY, *supra* note 4, at 156-57.

72. Cf. S. TOLCHIN & M. TOLCHIN, *supra* note 23, at 22, 93 (criticizing Reagan Administration budgetary cutbacks at EPA and OSHA).

73. Yellin, *supra* note 63, at 1323-24, 1328-29.

role for individual administrative discretion through general language or standards in the regulations that must be interpreted.⁷⁴ Monitor against corruption or abuse of administrative discretion through judicial review⁷⁵ or facilitating private causes of action.

3. Different regulatory techniques require different sorts of information, or different quantities of information, to be effective.⁷⁶ Include in every regulatory system ways for every different sort of information to make an impact.⁷⁷

4. Build in ways for the implementation of controls to be atomized and decentralized.⁷⁸ generally, the smaller each decision, the lesser the consequences of error. The more frequent the decisions, the more responsive to change in the environment. The more local the decisions, the more sensitive to nuances of context.

The focus of this part III is not efficiency, which is the prevailing concern of microeconomic analysis. Rather, the evaluative concept in the systemic perspective is "effectiveness" in designing an appropriate and dynamic mix of regulatory mechanisms to deal with a given problem or industry. Because the framework offered above is sketchy and preliminary, no conclusions can be made about its efficacy. The desirability of working towards its development, however, can be addressed by shifting finally to the cultural perspective.

IV. CONCLUSION: CULTURAL DIMENSIONS OF ECONOMIC REGULATION

In concluding an Essay that offers only a little room for optimism about achieving substantial improvement in regulatory design, it is fitting to explore briefly what is at stake. The cultural implications of our regulatory efforts are revealed through such evaluative concepts as fairness, human dignity, self-determination, and political stability.

74. See *supra* note 69 and accompanying text. If regulatory language is so strict or detailed as to preclude such discretion, the regulated actors are more likely to perceive the administrative process as "unreasonable." E. BARDACH & R. KAGAN, *supra* note 1, at 71-77.

75. See generally Mashaw, *supra* note 10; Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 YALE L.J. 1174 (1983); Scalia, *supra* note 69, at 191-98; Thomas, Wildemann, & Brown, *The Courts and Agency Deregulation: Limitations on the Presidential Control of Regulatory Policy*, 39 ADMIN. L. REV. 27 (1987).

76. Harter & Eads, *supra* note 59, at 248-49, 251-57. See generally Yellin, *supra* note 63.

77. If information is bottled up by regulatory agencies, or required to be supplied only in a constricted format, worker participation in safety enforcement may be impaired, D. McCaffrey, *supra* note 4, at 45-53; C. Noble, *supra* note 11, at 26-27, or industry innovation may be stifled, Boies, *Deregulation in Practice*, 55 ANTITRUST L.J. 185, 187-88 (1986).

78. See Ackerman & Stewart, *supra* note 30, at 1355-59; Stewart, *supra* note 33, at 1359-61. Professor Stewart does maintain, however, that a centralized rather than decentralized administrative process is more easily policed by citizen groups, unions, and lobbyists. Stewart, *supra* note 33, at 1265; see also Huber, *Electricity and the Environment: In Search of Regulatory Authority*, 100 HARV. L. REV. 1002 (1987), who argues in favor of centralized, unified regulation of electricity supply. Huber's article squarely opposes the uncoordinated, pluralistic vision of regulatory systems suggested in this Essay.

To speak of the cultural impacts of economic deregulation and reregulation is to step to a significantly higher level of abstraction than is addressed by either the microeconomic or systemic perspectives. The mood of the cultural dimension is best captured by questions like the following: What are the purposes of economic regulation? Is there some value to preserving the public or common ownership feeling that attaches to industries regulated through command and control techniques?⁷⁹ Is it wise to depend solely on market techniques of allocation, regardless of suddenness in distributional shifts?⁸⁰ In its interactions with the public, does a traditionally regulated industry communicate different messages about human worth or equality than those communicated by market-led enterprises?⁸¹ Should human goals themselves be regarded as commodities, to be tested for their worth in the marketplace?⁸²

The questions are being slowly, and to date obliquely, addressed by modern administrative law. The progress is best seen in the "fundamental tensions" described by Professor Sunstein: first, the courts are encouraging a pluralistic rationality "by ensuring representation of all affected interests"⁸³ in the decisionmaking. This reflects judgment by the courts that regulation is not purely, or perhaps even primarily, economic; rather, it is social.⁸⁴ In conflict with that participatory ethic, says Sunstein, is a desire that agency decisions should not be merely a response to private interests equipped with preexisting preferences. They should instead be an attempt to decide upon and implement the public values at stake in regulatory choices.⁸⁵ This policy recognizes that even economic decisions emerge from a cultural context that is collectively created, and that can be collectively affected. The ends of

79. As stated in Chickering, *supra* note 5, at 226:

Although their general commitments are very different, the commitment to smallness that binds the old regulation and the new may highlight the competing social value which regulation often serves in preference to efficiency. The issue of smallness recalls the problems of lost community, and of declining social trust that depends on close personal relationships and contact.

80. B. OWEN & R. BRAEUTIGAM, *supra* note 21, at 1, 22-24, 35.

81. Chickering, *supra* note 5, at 26-27.

82. *Cf.* W. CONNOLLY, *supra* note 11, at 23, 30.

83. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 183.

84. According to Weaver:

The real purpose of governmental regulation is not to correct the deficiencies of markets, but to transcend markets altogether—which is to say, government regulation is not an economic policy, but social policy. It is an effort to advance a conception of the public interest apart from, and often opposed to, the outcomes of the marketplace and, indeed, the entire idea of a market economy. (That is why economists of all political views end up being so critical of government regulation, at least as it works out in practice. They think regulatory policy should make sense economically—which, of course, it never quite does.)

Weaver, *Regulation, Social Policy, and Class Conflict*, in REGULATING BUSINESS, *supra* note 5, at 193, 208; *see also* B. OWEN & R. BRAEUTIGAM, *supra* note 21, at 1-2, 22-25, 35; *infra* note 93 and accompanying text.

85. Sunstein, *supra* note 83, at 188, 213.

both pluralism and commonality are laudable, and so also is the continuing tension and consequent struggle between them. Implementing public values without a strong mechanism for their debate and modification is dangerous, but aggregating preferences without cultural reference can end in nihilism.

We seem to have arrived at a watershed regarding the relative influence of public and private control of economic enterprises, a time when the successes and failures of both welfare liberalism and supply side conservatism are accessible even to relatively young memories.⁸⁶ The issues are complex and imply solutions that may conflict at different levels of abstraction. So, for example, one might accept that efficiency is enhanced by the return of a given industry to market regulation rather than by its continuation with government regulation. This solution might even be confirmed at a systemic level, where the side effects of the existing regulatory technique are glaringly revealed and the marketplace is predictably the most efficacious regulatory mechanism among the several available. And yet the issue should not be considered concluded.⁸⁷ We would have resolved the issues made comprehensible by "what profits us?" and "what works best?" but not the issues suggested by "what do we want for ourselves and our culture?" This latter question, although arguably central to our relationships with each other and our physical environment, is rarely discussed.

Yet the issue is neither marginal nor impractical. Culture can indeed be affected by our collective responses when the question of human direction is raised and followed by serious dialogue. The successes of the civil rights movement and feminism, for example, are evidence that political culture can be reshaped significantly within a single generation. Why then should economic culture be regarded as immune to conscious human efforts to change it?⁸⁸ Why do we so assiduously avoid even raising the question?⁸⁹ Perhaps because our models of the alternatives are so impoverished, swung back and forth by rhetoric about freedom and greed.⁹⁰ Or perhaps out of frustration, because we feel that while political issues are within human grasp, economic conditions are beyond it. Ironically, *laissez-faire* and Marx-

86. *Id.* at 19-20; see S. TOLCHIN & M. TOLCHIN, *supra* note 23, at 15. See generally Weaver, *supra* note 84.

87. See generally Weaver, *supra* note 84.

88. According to McCraw, however, regulation that disrespects the market most often has failed in its objectives, whereas regulation that works in conjunction with the market has succeeded. This suggests that successful regulation in the future should strive to reconcile all three of the vocabularies of the paper. T. McCRAW, *supra* note 32, at 308-09.

89. For a thoughtful exception to this general avoidance, see Weiss, *supra* note 56.

90. C. NOBLE, *supra* note 11, at 241:

As a rule, Americans are trapped in a dichotomous way of thinking about the political economy that counterposes the state and the market and fails to consider the complex relationships between them. As a result, Americans swing back and forth between bouts of enthusiasm for state intervention and moods of deep distrust of all forms of public life—leaning first to 'big government' and then to the 'free market.' It is commonplace to point out that neither image is accurate.

ist economists share a bedrock belief in economic determinism, be the causative hand invisible or on the controls of the means of production.⁹¹

If economic determinism is rejected, then the dialogue about public and private control of economic enterprise is free to include questions about equality, both distributional and spiritual;⁹² it can include questions about whether people should be regarded by the due process rights they hold, or rather by the wealth or social status they possess;⁹³ and it can include questions about the accessibility of information to create meaningful dialogue.⁹⁴ In the choices that emerge from such dialogue, the antagonism between neutral and prescriptive approaches to regulation is muted, and ultimately not very useful. Regulatory rationality should transcend both the outcomes of cost benefit studies and the simple counting of preferences.⁹⁵ The same broad rationality should accompany efforts to design general theories of regulation.

91. Perhaps the prominence of economists in regulatory policymaking will fade. Looking at their role from a historical perspective, McCraw concludes:

[T]he 'economist's hour' of the 1970s and 1980s . . . represents a phenomenon of unpredictable duration. Certainly the economist's hour in the history of regulation came relatively late, long after other notably different hours during which the muckraker and the lawyer alternately held center stage. This history makes it seem unlikely that any single approach to regulation will ever triumph.

T. McCRAW, *supra* note 32, at 305.

92. See W. CONNOLLY, *supra* note 11, at 30.

93. T. McCRAW, *supra* note 32, at 302-03:

[I]t seems clear that the concern about legal process has controlled the outcome of regulation more often than has the concern about the substance of economic efficiency. In economists' language, this means that the concern for equity has generally triumphed over the quest for efficiency. In lawyers' terms, it means that in regulation the judicial model has usually triumphed over the legislative and administrative model. In cultural terms, it means that the concern for fairness and for the protection of the diverse interests of all affected individuals has most often won out over the concern for overall growth in the national economy. More generally in political terms, it means that regulation is best understood as a political settlement, undertaken in an effort to keep peace within the polity.

Overall, the conclusion appears inescapable that regulation in America has more often functioned as a protective device rather than as a promotional or developmental one. Of course, protection was not always inappropriate. By holding in check socially destructive forms of behavior, protective regulation often cushioned the impact of rapid industrial change. In America, in contrast to older societies, so many other forces consistently acted to promote pell-mell economic growth that regulation can hardly be condemned for not always doing so.

94. See *supra* notes 76-77 and accompanying text.

95. See Carter, *supra* note 63, at 1335-36, 1338, 1341; Sunstein, *supra* note 83, at 188, 213.