

What Is Regulatory Capture?

By PHILIP WALLACH

Review of *PREVENTING REGULATORY CAPTURE: Special Interest Influence and How to Limit It*, by Daniel Carpenter and David A. Moss, eds.

Cambridge University Press, 2014

Most scholarly edited volumes are narrow and intensely academic; by professors, for professors. *Preventing Regulatory Capture* has much grander ambitions: it seeks to reorient scholarship of regulation, but also to lend intellectual heft to a rather undisciplined political idea presently coming back into fashion, namely, that special interests exert a profound and corrosive influence on our policymaking system by capturing their regulators. Under the auspices of the Tobin Project, a Cambridge, Massachusetts, non-profit billing itself as “a catalyst for transformative research in the social sciences,” the editors have collected impressive contributions from seventeen scholars from several disciplines, as well as a short postscript by the former Chairman of the House Financial Services Committee (James Leach) and the junior senator from Rhode Island (Sheldon Whitehouse).

The result is a rich volume that a wide audience would benefit from engaging with. But the book’s influence is much likely to be greater among those who never pick it up, and in that regard it is a fascinating case study in how the authority of social science is forged into rhetorical weaponry suitable for political battle. It is worth considering some of the authors’ reasons for seeking to reorient capture theory, as well as what that attempt can tell us about the relationship between careful scholarship and political discourse.

Careful Evaluation and Narrowing

In the introductory chapter, the two editors establish a cautious tone befitting their well-earned reputations as consummate scholars. Moss (the founder of the Tobin project), was trained as an economic policy historian and has established himself as a leading scholar of regulation. Carpenter has established himself as political science’s leading light on America’s executive branch, bringing a rare mix of quantitative and qualitative methodological prowess to his work, including *Reputation and Power* (Princeton University Press, 2010), his impressive tome on the Food and Drug Administration (FDA).

Noting that most claims of capture are made without any effort to rigorously establish any well-specified causal claim, they furnish a more precise definition: “Regulatory capture is the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself” (13). Bringing “the” public interest into this definition is important. They explain that there can be no claims of capture without strong and well-specified normative ideas about what sorts of policies serve the public interest. Establishing capture requires far more than showing regulated firms getting their way: regulators must be shown abandoning the public interest at industry’s behest.

This is an exceptionally demanding definition because it is difficult to identify the public interest. Indeed, the authors admit (a bit bashfully, in a footnote) that there is probably not a single case in which it can be satisfied without controversy. They venture that the Civil Aeronautics Board of the early 1970s “would appear to come closest,” but even here they note that the evidence of capture is generally weaker than the conventional wisdom implies, with “proof remain[ing] elusive” for “the empirical pervasiveness of the capture itself” (15, FN 29).

Some of the book’s essays utilize this skeptical approach to claims of capture—especially to question the way that capture was invoked in its 1970s heyday. William Novak rails against the historical assumptions underlying the capture theory first developed in the 1950s by Samuel Huntington and Marver Bernstein and later given harder ideological edges by Gabriel Kolko, James Weinstein, and Martin Sklar on the left and Gary Becker, George Stigler, and Sam Peltzman on the right. According to Novak, the idea that the architects of America’s administrative state opened it up to corporate capture by failing to consider institutional design is simply mistaken. The question of public versus private interests was always a central one in the creation of regulatory commissions; although the vocabulary of “capture” was invented in the mid-twentieth century, extensive concern with undue corporate interest went back well into the nineteenth and a preoccupation with “corruption” runs back to the beginning of the Republic and beyond—indeed, it is deeply embedded in the foundations of western political thought. By arguing that regulatory choices favoring industry incumbents resulted from flawed economic thinking rather than purposeful and legitimate political choices, Novak explains the capture theorists of the 1970s “went somewhat astray” (47).

Moss and Jonathan B.L. Decker make a narrower indictment of one of the classic tales of the capture genre, which featured the Federal Radio Commission’s 1927 decision not to expand the broadcast spectrum. While capture theorists, especially Thomas Hazlett, held this choice up as an exemplar of capture, actually probing the historical record calls it into question. Hazlett relied heavily on one source, *Radio Broadcast*, to support his story of broadcasters happily limiting available spectrum and thus excluding potential competitors, but it turns out that a wide array of interests opposed spectrum expansion: radio engineers worried about interference from new channels, manufacturers worried about the obsolescence of existing radios, and amateurs objected to having more of the usable spectrum taken by commercial broadcasters. Broadcasters, on the other hand, were split, with some actually providing the strongest support for expansion. Capture theorists’ “quick and dirty history” is thus far too much like law office history: profoundly motivated and likely to overlook conflicting evidence, even when it is readily available (207).

Two other chapters confront contemporary examples of regulatory failure and push back against little-substantiated capture explanations. Sanford Gordon and Catherine Hafer examine mine safety, where new legislation generally follows news-making accidents. Critics of the Mine Safety and Health Administration see this pattern as evidence of capture: the industry dominates its regulators, with predictable underinvestment in preventative safety leading to accidents, which are followed by ephemeral periods of resistance and adjustment. Gordon and Hafer propose an alternative account of “conditional forbearance,” in which the regulatory agency is sensitive to changing political winds, such that choices usually ascribed to agency capture can be understood as “electorally sanctioned pro-business government” (209). In other words, rather than being in thrall to industry views, regulators sometimes favor industry’s positions, especially under Republican administrations. That distinction may be too fine for many observers to care

about, but the two stories have far different implications. Whereas the capture story implies that accidents could be prevented if only we had more pure-hearted regulators, conditional forbearance acknowledges that there is often balancing between competing values at work (exemplified in the mining context by the perpetual struggle between firms and unions). Having a Democrat or a Republican as a boss changes the weight given to these objectives, as does an accident that shocks the public, but this is far from showing that the firms are effectively dictating terms.

Christopher Carrigan explores the purported capture and subsequent regulatory failure of the Minerals Management Service (MMS) in the Department of the Interior leading up to the April 2010 Deepwater Horizon oil spill in the Gulf of Mexico. Carrigan admits that it is easy to make a prima facie case for capture of the MMS: there were documented cases of outright bribery, excessive gift-giving, and other inappropriate relationships between its officials and employees of regulated firms. But he goes deeper into the (now defunct) agency's recent history to exonerate it of the larger capture charge. While many observers have been quick to blame capture for the agency's prioritization of energy production, Carrigan shows that there was a broad public consensus behind this choice. Far from perverting its mandate, MMS was embracing it when it rushed to open 5.8 million acres of previously restricted Gulf property to development.

Taking the skepticism about capture to its logical conclusion, Judge Posner notes that the original capture theorists were confronted with an entirely different kind of governmental body than contemporary regulatory agencies represent—ones that could be credibly (if hardly unproblematically) understood as embodiments of industry cartelization. But the regulatory landscape changed dramatically beginning in the 1970s, with subject-oriented agencies such as the Environmental Protection Agency and Consumer Product Safety Commission rising to prominence. The older debates about whether ostensibly public-interested regulation actually serves rent-seeking incumbent firms have mostly been displaced by debates about the stringency of regulation. Consequently, Posner sensibly wonders if “perhaps in the interest of clarity the term *regulatory capture* should be retired” (55).

Ambitious Expansion

But Carpenter and Moss and some of the other contributors to the volume have something different in mind. Although they believe capture is an epistemologically difficult thing to establish convincingly, they are catholic about how it might work and what it might do. Although the old, strong version of capture theory is to be regarded critically, the concept is to be rehabilitated and repurposed. And so even as some of the book's most empirically rich chapters call into question the validity of existing claims of capture, another set seeks to expand the theoretical work that capture can be called upon to do by diagnosing “corrosive capture,” “cultural capture,” “weak capture,” and even the capture of academia itself.

Carpenter and Moss first explain how capture need not involve regulation actively serving industry, but instead could manifest itself in less regulation serving the public good than would otherwise prevail. The older theorists of capture would not recognize such failures to act as true instances of capture at all, but Moss and Carpenter insist that “corrosive capture” of an anti-regulatory nature can be fruitfully added to the new scholarly paradigm of capture (16). After briefly ticking off a litany of George W. Bush administration actions that might fit this mold,

Carpenter delves more deeply into his area of expertise, food and drug regulation. Whereas he provides evidence that the old-fashioned industry-protecting form of capture does not apply to the FDA, he is more sympathetic to the idea that reliance on user fees from pharmaceutical firms has allowed “the political organizations of the global pharmaceutical industry...to shape the conversation about how drugs ought to be regulated,” resulting in hurried, lax drug reviews and a generally deregulatory culture (164).

James Kwak fleshes out the idea of “cultural capture.” In their reflection on America’s financial regulatory system and its responses to the financial crisis, *13 Bankers*, Kwak and his co-author Simon Johnson denounced America’s government officials as effective puppets of a new oligarchy. That book, while quite carefully researched and argued, reads like a polemic. Here, Kwak is circumspect, admitting that it is hard to know whether deregulatory changes were clearly against the public interest as it was knowable at the time, even if hindsight has made many of the decisions look tilted toward industry at the expense of the greater good. Looking for quid pro quos will mislead investigators trying to find capture, according to Kwak, because “regulators are susceptible to nonrational forms of influence, which interest groups can exploit to achieve the practical equivalent of capture—favorable policy outcomes” (76). The main mechanisms of this cultural capture will be: group identification, in which regulators come to identify themselves with regulated firms and their employees, sometimes because of the existence of revolving doors; deference to high-status regulated executives; and deference to those with whom one has face-to-face relationships, because of empathy or the desire to avoid conflict. Kwak realizes that this kind of subliminal capture may not meet the exacting standards of the definition set out by the editors, but insists it is a pervasive phenomenon important for social scientists to study.

Using formal modeling, Nolan McCarty adds another subtle mechanism to capture’s repertoire: “weak capture,” in which policy complexity allows regulated firms to effectively dictate the terms of regulation. McCarty is to be congratulated for trying to enhance principal-agent models of agency regulation by allowing subject matter complexity to factor in as something other than a single unobserved parameter, which is unfortunately the standard modeling choice. In his beefed up model, he finds that firms get “expertise rents,” and that strategic considerations related to the nature of these rents might ultimately lead a legislature to prefer an agency sympathetic to the firms it regulates. But two of his assumptions—that accurate knowledge of regulatory effects can be ascertained by a sufficient expenditure, and that firms themselves have complete understanding of the social costs of their behavior—drive his results, and both are highly questionable. McCarty’s forbidding math yields a conclusion similar to Kwak’s: that even if the case for capture in the editors’ narrow, intentional conception is lacking, some weaker version may still hold sway allowing industry to get its way. If the specific mechanisms are hard to show, we can attribute this to the very policy complexity that creates the expertise rents at issue.

The book’s most excited chapter comes from Luigi Zingales, who argues that “capture of economists by business interests exists, and is pervasive” (125). As mechanisms for this pernicious influence, which he fears corrupts the whole academic enterprise of studying business, Zingales identifies career concerns motivated by a desire to preserve opportunities in the corporate world, including on corporate boards, as well as a desperate need for new data that private industry can provide. At times he gets rather wild in his use of capture, for example suggesting that any academic economist who takes the “political process” into account when formulating policy suggestions has essentially been captured and subjected to “the political

constraints imposed by lobbying” (141). Economists’ capture, in his telling, results in “subtle biases” that tilt academic publications toward pro-industry conclusions (131).

If that rather unspecific anxiety seems hard to fit into the earlier exacting definition of capture, several other contributions heighten the tension by providing object lessons in how, all of the careful fencing in of the concept notwithstanding, capture can still be used as a social scientific license to question the motivations of those you disagree with.

Susan Webb Yackee, one of the leading empirical scholars of the rulemaking process, looks to identify capture in notice-and-comment rulemaking by the Department of Transportation between 2002 and 2005. She begins by disentangling influence and capture but then goes ahead and uses showings of considerable influence in the rulemaking process to infer capture, using the following formula: sustained, disproportionate involvement in the rulemaking process + consistent influence = “agency decision making ‘controlled’ by the” industry, at least if the direction of influence seems to run counter to “other political actors” (301, with scare quotes remarkably in the original). Using this test, Webb Yackee is confident that she has found evidence of capture, even without furnishing any explicit notion of the public good from which regulators are supposed to be deviating. She does nothing to address the observational equivalence in her data between “illegitimate business capture” and “business winning arguments legitimately.”

Mariano-Florentino Cuéllar (who in January 2015 became an Associate Justice of the Supreme Court of California), meanwhile, shows how a baseline assumption of capture can be used to generate praise for new policies which, by implication, can be seen as working in the public interest. He takes as his material three instances of public health agencies overcoming concerted industry opposition to implement new regulations serving the public good, and identifies the agencies’ hard-won reputations for neutral, science-based competency as the key to their success. But his analysis demonstrates how contestable notions of the public good must be at the heart of stories about capture and its defeat.

Cuéllar presents the Food and Drug Administration’s attempt to regulate tobacco using the Food, Drug, and Cosmetic Act (FDCA) during the 1990s as an example of an agency overcoming capture, and seamlessly connects this attempt to the passage of the Family Smoking Prevention and Tobacco Control Act of 2010. He treats it as obvious that aggressively trying to regulate using the FDCA was the right thing to do and that opposition to that maneuver (including by every former FDA Chief Counsel) was attributable to capture by the tobacco industry. But there were many reasons to be wary of the FDA’s innovation other than being solicitous for the fortunes of the tobacco industry. If applied to tobacco, the FDCA would seemingly have required its complete removal from legal markets (since its safety as a drug could never be established), which would have upended decades of incremental regulation of the tobacco industry and arguably given rise to a chaotic black market. Of course the industry opposed that outcome for self-interested reasons, but it does not follow that everyone who agreed that the FDA was overstepping its bounds was captured.

Ironically, Cuéllar misses a part of the story of tobacco regulation that fits well into the old sort of capture theory. He writes, “It is difficult...to tell a story in which Philip Morris’s preferred policy outcome involved FDA tobacco regulation,” but this is mere bluster (348). As he acknowledges, in the 2000s Philip Morris aggressively lobbied for FDA regulation, and it is easy

to tell a story in which its major motivation for this support was to create a regulatory environment inhospitable to any upstart competitors (complementing the protection it receives through the Master Settlement Agreement of 1998, also similarly well-understood as an exemplar of old-fashioned capture). By implying that an FDA that declined to apply the FDCA to tobacco would have been captured, but refusing to entertain any notion that new regulation might serve industry incumbents, Cuéllar shows us the selective nature of the new paradigm of capture being worked out here.

What are we to make of the book's strange mix of careful, narrowing work that criticizes capture's theoretical past with ambitious new theoretical directions and loose applications of the concept?

Social Scientific Authority for Political Rhetoric

Solving this puzzle requires rejecting the book's premise that a lack of conceptual clarity made the earlier intellectual movement around capture a failure. The editors' introduction and Novak's chapter both frame capture's earlier career as vaguely disreputable, with Novak noting its legacy in "the resilient influence of neoliberal policies such as deregulation and privatization as well as in the rise of more virulent and populist forms of anti-statism" (25). Novak, at least, regards the earlier school of regulatory capture as a failure because the program of regulatory reform it helped legitimate, in his mind, "ended up being as shortsighted as the myopic history that stood behind it" (48).

But before we can even begin to normatively evaluate those reforms, we must first dwell on the fact that capture moved from the academy into active politics at all, and indeed then helped shape the political agenda for well over a decade. That makes the 1970s vintage of capture one of the most politically influential episodes of social science ever. The fact that it apparently contained its share of overwrought theory and shoddy empirics did not hamper it. Indeed, while Novak scolds the original capture theorists for analyzing regulatory policy wholly in the language of economics rather than politics, it is clear that this was crucial to their rhetorical success. If what you want to do is persuade people politically, talking about the basically political nature of your position is rarely an effective tactic.

The story of how ideas of capture created bipartisan space for deregulation, which encompassed Ted Kennedy and Jimmy Carter just as much as Bob Packwood and Ronald Reagan, received a masterful exposition back in 1985, in Martha Derthick and Paul Quirk's *The Politics of Deregulation* (Brookings Institution Press)—which is, amazingly, cited nowhere in *Preventing Regulatory Capture*. In Derthick and Quirk's telling, the pessimistic theories of capture ultimately transformed political language in a way that enabled public officials to serve diffuse publics rather than concentrated interests. The leaders of the very commissions being most harshly criticized came to accept the critiques and began turning the wheels of reform, with Congress following their leads. In the face of this sea change in thinking, industry backed away from conflict with surprising passivity. Anti-competitive regulations for air travel (issued by the Civil Aeronautics Board), interstate trucking (issued by the Interstate Commerce Commission), and long-distance telephony (issued by the Federal Communication Commission), among others, were dismantled. And Novak's protests notwithstanding, there is a consensus that democratizing commercial air travel, reducing trucking rates, and making long-distance calls an everyday part of life all benefited the public.

If this is failure, there are surely many social scientists who would like to fail so well. This is how we should understand the efforts to expand and repurpose the meaning of capture in Carpenter and Moss's edited volume. The old capture story was told in the service of deregulation then, and they want to put the new one in service of "reregulation" or more regulation now—but the term's previous success makes it worthwhile to do the scholarly maneuvering necessary to put new content in the old container. Meanwhile, the sharp critical chapters that expose the old applications as imprecise, ahistorical, and perhaps even specious give the new enterprise the feel of hard-won social scientific progress.

What made capture so successful back in the 1970s, and what its new peddlers hope will make it successful now, is that it allows accusations of bad faith to be dressed up as value-neutral scientific evaluations, which are acceptable in nearly every forum of public debate. In practice, accusing an agency of being captured relieves the accuser of the burden of showing why a particular policy fails to serve the public interest, because anyone who attempts to rebut their claims can be dismissed as a tool (whether knowing or unconscious) of "special" interests. Claims of capture thus help to end debate about difficult questions—not because they provide definitive scientific evidence bearing on these questions, but because they suggest that seriously entertaining one side's claims is inherently problematic.

The stakes are made clearest by Kwak's chapter. We know that Kwak has elsewhere tirelessly argued that the American financial industry is a predatory group working against the public interest. To the extent regulators sympathize with Wall Street's policy positions, he wants to be able to say that they are victims of cultural capture whose willingness to credit industry's arguments is "shaped by a host of nonrational factors, many of which can be manipulated by interest groups and not by the free competition of ideas and evidence" (79). The upshot is that if you favor harsh regulations that the industry dislikes, then we can enter the realm of rational discourse and discuss policy ideas on their merits. If you favor easing regulations in industry's favor, well, you may be well-intentioned but sadly you have fallen prey to cultural capture. Such rhetorical innuendo is what wins political arguments adjudicated in the court of public opinion. Social scientists provide intellectual credibility to those who would make use of it, and in turn get to be lionized as having devised original ways to speak truth to power.

Evaluating Capture's Future

So how should we judge this new paradigm for capture, and where will it lead?

Believers in social science's sacred objectivity may feel inclined to condemn the new capture project for blurring the lines between doing political science and doing politics. In some moods that is my reaction, but in other moods social scientific objectivity seems too fanciful a concept to merit impassioned defense. Really, it is hard to say anything very compelling against those who would weaponize their academic credentials in service of normative goals they deem important. Often their zeal will lead them astray, and we must hope for careful scholarship of the sort exemplified by the Moss and Decker chapter will expose their errors. Sometimes having capture in their rhetorical arsenal will help them advance worthy policy reforms, and that is all to the good, regardless of whether there is anything very scientific in their reasoning.

Preventing Regulatory Capture has its own set of policy prescriptions in closing chapters that mostly ignore the skeptical approach to capture theory propounded elsewhere in the book. The variety of the reforms on offer suggests the flexibility of capture as a rhetorical tool. Daniel Schwarcz suggests that the pervasiveness of cultural capture or weak capture based on informational advantages should be counterbalanced by dedicated consumer proxies participating in the regulatory process, or perhaps by officially empowering independent public interest groups. M. Elizabeth Magill explains that the threat of capture justifies a more pervasive scope for judicial review through expanded standing for taxpayers or even ideological plaintiffs, or through subjecting more kinds of government choices, including failures to act or enforcement patterns, to judicial review. When decisions effectively driven by capture are brought before judges, she argues they are well positioned to strike them down as illegal. Michael Livermore and Richard Revesz argue that, by forcing decisions to be justified in the language of cost-benefit analysis and to be subjected to review by multiple agencies, the Office of Information and Regulatory Affairs (OIRA) helpfully combats capture, and they recommend expanding its capacity and responsibilities.

There is much to be said in favor of, and against, all of these reforms. One could certainly justify them all on grounds other than capture: enhancing democratic deliberation, expanding access to courts, or increasing government's internal expertise. But making these arguments on the basis of alleged capture gives them far more rhetorical edge and urgency: now we must consider the possibility that these institutional improvements go unmade because our government is in the grasp of special interests.

The book ends with a mention of one reform suggestion that is indeed wholly dependent on capture theory. In their Afterword, former Representative Leach and Senator Whitehouse note that Whitehouse has floated the idea of "an inspector general for regulatory capture" (473). Imagining exactly what such a roving champion of the public good would actually *do* is left as an exercise for the reader. For my own part, I prefer Senator Whitehouse keep the cape and cowl for himself and criticize policy positions on their merits. But, most apparently, I am not the target audience for capture rhetoric. We shall see what the public, policymakers, and the politicians themselves make of the revival.

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