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# Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis

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## 1. INTRODUCTION

For at least 30 years, commentators have been engaged in a debate about what animates the regulatory process. Is the ultimate goal of regulation to pursue some conception of the general good, however mean-spirited, messy, and confused the process may seem at any given time? This hypothesis, widely known as the “public interest” theory of regulation, was dominant for many years, then left for dead by academics of the 1960s and 1970s, but has since been found alive, although in much weakened condition, in the 1980s. Or is regulation simply an arena in which special interests contend for the right to use government power for narrow advantage? This hypothesis, known variously as the capture theory, economic theory, or government-services theory of regulation, has been dominant for the past 25 years.

Embedded in this question is another philosophically related one: What motivates a regulator—a legislator, commissioner, agency head, or bureaucrat—faced with a regulatory decision? Do such actors seek the “best” policy

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in some civic sense, or are they motivated principally by the prospect of personal gain? The "best" policy can be hard to define in principle or to determine in practice, as we shall see, but in the sense it has been generally used, "best" has a primarily public or other-regarding cast, one that goes beyond individual self-interest. Personal gain can be the personal utility derived from officeholding (Downs, 1957, 1967), or it can be pecuniary, as in the postulate that regulators seek to maximize the value of their postgovernment employment (Eckert), but its dominant characteristic is that the gains sought are private to the officeholder, or to some other collection of private individuals in a position to provide private benefits to the officeholder.

A tradition starting at least with Plato, which has survived to this day, describes governmental policy-makers as "public" individuals, struggling to find the policy choice that is best for some polity in whose interests they govern.<sup>1</sup> The modern rhetoric of public life reinforces this notion. Politicians and bureaucrats describe themselves as "public servants." Many of them are described legally as "civil servants." Many of the statutes under which they act enjoin them to do so in the "public interest." But this account of public behavior has been challenged frequently by the cynical or scientific, and is currently regarded by most either as naive or unproductive.<sup>2</sup>

When regulators exercise public power, it seems necessary in a system that normally leaves nongovernmental individuals free to make their own choices to find a justification for their coercion. It is natural in such a system to justify their regulatory interventions as being required by public interest or necessity. From this perspective, we can see regulation as the necessary exercise of collective power through government in order to cure "market failures," to protect the public from such evils as monopoly behavior, "destructive" competition, the abuse of private economic power, or the effects of externalities. Something like this account, explicitly or implicitly, underpins virtually all public-interest accounts of regulation.

The classical public-interest theory is both a positive theory about what motivates policy-makers and a normative theory about what *should* motivate them.<sup>3</sup> The theory posits political actors who act, sometimes perhaps mistakenly, to further a vision of the public good (usually called in recent discussions "the public interest"). It is usually silent or arbitrary on the relationship between these publicly motivated policy-makers and their superiors and

1. In "Theories of Economic Regulation," Richard Posner cites Bonbright, Davis, and Friendly as modern examples of persons who subscribe to this philosophy (Posner:335).

2. Economists have accepted one form or another of the capture theory as commonplace (Migue:213-14). Legal scholars have been somewhat slower to adopt capture theories and somewhat cruder in formulating them, but they have slowly abandoned the public-interest theory and adopted a negative view of government. See sources cited in Farber and Frickey:873 n.4.

3. See sources cited *supra* note 1. For proof that this theory is not extinct, see Mikva and Kehman.

subordinates. If traditional public-interest theories focus on that relationship, it is usually to ask the classical political question about whether a policy-maker should further her own conception of the public interest or bow to her constituents' or superior's view of what that public interest is.

Opposing the "public interest" theory is the "capture," or "special interest" theory (also known as the "economic," or "government services" theory)<sup>4</sup> of regulatory behavior, which describes actors in the regulatory process as having narrow, self-interested goals—principally job retention or the pursuit of reelection, self-gratification from the exercise of power, or perhaps postofficeholding personal wealth.<sup>5</sup> These personal goods are acquired or cemented by using regulatory power to help others achieve similarly narrow goals, often pecuniary, in the course of which the whole process gives only lip service (or maybe "tiebreaking" recognition) to broader societal goals. In this model, government regulation reflects the influence of special interests, and is created and operated for their advantage.<sup>6</sup> This hypothesis has been dominant in the literature of regulatory analysis at least since the mid 1960s.

The modern "capture" theory of political behavior was given foundation by Downs (1957) and Olson, applied systematically to legislative behavior by Mayhew, and applied to regulatory behavior by Stigler, Posner, Peltzman, and Becker. Downs (1957) and Olson applied economics to political behavior, reasoning that individual maximization models applied in conjunction with recognition of transaction and information costs could help us understand and predict political responses.

All of these analysts postulate that people should be expected to act no less rationally or self-interestedly as politicians or bureaucrats than they do in the course of their private exchanges in markets. In Downs's view, private interests are willing to expend resources, in the form of efforts at persuasion, campaign contributions, or other forms of political action, to see policies put into effect which will enhance their wealth or, more generally, improve their utility positions. If politicians or bureaucrats can invent public policies that

4. There are numerous formulations of this approach, and each of these terms has a slightly different emphasis. We will use "capture" to refer to the entire family of regulatory theories based on private motivation and private-interest domination. Strictly speaking, "capture" historically refers to regulation which may have a public-interest origin but which comes to be dominated by well-organized special interests; whereas the broadest forms of the economic theory see all regulation as both originating and operating in the pursuit of private gain.

5. Amassing personal wealth during officeholding by making decisions for which one reaps pecuniary rewards is usually made illegal through bribery or conflict-of-interest statutes. One way of viewing these statutes is as attempting to eliminate the narrowest of "capture" orientations from the calculation of regulators.

6. Levine has described this as the "government services" theory, in which well-organized subgroups of the general population use government power to force wealth transfers in their favor. The theory is called by its progenitors the "economic theory" of regulation (Stigler, Posner, Peltzman).

improve the utility positions of groups of individuals or firms, the advantaged interest groups will become their political sponsors and make resources available which will enhance the private utility of the policy-makers by reelecting them or otherwise rewarding them.

Thus, in formulating policy, public officials will consider the costs and benefits of forming and maintaining the coalitions necessary to maintain them in office or enhance their wealth or power, while their sponsors will consider the costs and benefits of influencing government to act in their favor. Those policies will be pursued that produce the most private gain net of information, organization, monitoring, and influence costs (coalition costs). Like public-interest theories, capture theories do not explicitly consider the relationships among actors in the governmental process nor the mechanisms by which the acts of regulators are made to conform to the desires of organized subgroups.

It has become apparent through more recent studies of voters and political institutions that, even if we know the motivations and incentives of actors, we cannot predict outcomes because we have ignored the processes of politics. If a given motivation does not reliably cause a given outcome, then we cannot use outcomes to test motivations.

A new literature, which we call "postrevisionist," has emerged to address this gap. This literature uses tools of analysis (in particular, agency and information theory) and assumptions about behavior drawn from modern economics to address the mechanism by which voters' concerns are transformed by the political process into policy. In doing so, it fills an important gap left by both public-interest and capture theory. The mechanisms specified often allow explicitly for the existence of ideological preferences by legislators and for their expression in votes (e.g., Fiorina and Noll; Kau and Rubin; Weingast; Denzau and Munger; Kalt and Zupan, 1984, 1990).

Postrevisionist theories demonstrate that modern democratic government allows many political actors to be free from oversight by the electorate or by those who do answer to the electorate.<sup>7</sup> Although they use many types of analytical tools, a focus on monitoring and agency relationships causes us to label them as "agency theories" for the sake of easy reference. The picture drawn by the myriad of political scientists, legal scholars, and economists

7. A precursor to the postrevisionist agency theories discussed here is the study of social choice. Public-choice scholarship tells us that even majority rule can be undemocratic, not because of the tyranny of the majority, but because of "voting paradoxes," which prevent solutions from being reached (Arrow). Only by using agendas, structures, and rules can voting cycles be broken. Voting in legislatures does, however, use these tools, perhaps to avoid voting cycles. The result is that voting procedures may influence outcomes because agendas, structures, and rules do have substantive effects, but voting barriers do not seem to cause legislatures to break down (Levine and Plott).

who work in this field is of the inability of voters or their intermediaries to effectively limit and control regulation within the complex political system. Thus, voters may have difficulty monitoring and controlling a legislature, a legislature may have similar difficulties monitoring and controlling its committees, and so on through the relationships between oversight committees and regulatory agencies and between agency heads or commissioners and their bureaucracies. Similarly, these organizations need to gather information about the world that they attempt to regulate. The costliness and uncertainty of information about that world and about the effects of policy in it affect relationships among themselves and with lobbyists, voters, and others.<sup>8</sup>

This way of looking at governing organizations does not treat them as a "black box," as do public-interest and capture theories, but rather attempts to describe the control and influence each actor in a hierarchical political system has over another (Spitzer). The theory describes mechanisms of supervision; it does not directly predict substantive outcomes.<sup>9</sup>

Notwithstanding its lack of institutional richness, the capture theory has served as a valuable heuristic and is the underpinning of revisionist scholarship, which seems to explain a great deal of regulatory activity and history (Levine). How can we reconcile the usefulness of "capture" analysis and prediction with the persistence of important examples of public-interest triumph and the common use of public-interest rhetoric? What is needed is a rework of the field which will assign "capture" and public-interest accounts of regulation to appropriate spheres. It will need to differentiate as well, as we will demonstrate below, not only between public and private interests, but also between regulatory policies and practices designed to pursue the other-regarding ("public") interests of a general polity and those designed to advance the other-regarding ("public") convictions of regulators themselves.

The ultimate goal is to understand the political economy of regulation well enough to generate reliable predictions about the behavior of regulatory processes. Short of this goal, it would be useful to have a theory well enough specified to allow explanations which could in principle be falsified—that is, qualitative identification of the variables that matter in regulatory processes,

8. Weingast, focusing on the processes of politics, describes an equilibrium created by low or intermittent presidential interest, clear court precedents, and stable patterns in public opinion. This stability can only be shaken by changes in interest-group power, congressional structure, court precedents, the president's policy program, or the economic analysis of regulatory policy itself.

9. Sometimes, however, agency theories make substantive predictions. Fiorina and Noll suggest that by knowing from which "level" the decision will come from, it is often possible to predict outcomes. This is because certain levels of decision-makers are relatively predictable in their motives, such as agencies that try to maximize their bureaucracy. Moe and Bendor dispute the fact of agency and legislator capture, not because of the public-interest motivation of these political actors, but rather because of the confines of the structures of government (Moe, Bendor and Moe).

which were sufficiently precise so that they could not be applied ambiguously to most situations, and the classification of regulatory behaviors into those that we could predict and those we could not, knowing at least what we would have to know in order to predict the outcomes of a process.

A metatheory of this kind would allow us to continue the remarkable progress that has been made in characterizing regulatory and political behavior by using powerful but necessarily simplistic tools and to accommodate the rhetorical and factual evidence that interests of a general polity can on occasion dominate well-organized activity designed to capture the regulatory process for narrower purposes (see Levine, Mashaw). In addition, we would then be able to accommodate the research that suggests that regulators at least occasionally have, and take, opportunities to use their power for ideological, rather than wealth-transferring, purposes (Kalt and Zupan, 1984). A fully developed metatheory would allow us to predict—for a given regulatory issue, a given set of underlying preferences and political views, a given set of likely impacts, and a given state of information, organization, and monitoring costs—whether the outcome would be determined by the preferences of concentrated special interests, of regulators, or of dilute general interests.

## 2. RECASTING THE PROBLEM AND CREATING A MODEL

Part of the problem in understanding how and for whose benefit regulation is undertaken lies in the ambiguity in the literature regarding what question is being asked. When we ask whether regulation is undertaken in the public interest, what are we asking? Are we asking whether regulation and regulators do what is “best” for the public? By what test of “best”? Are we asking whether regulation is efficient? Are we asking who benefits from regulation? Are we asking whether regulation is largely about wealth creation and transfer, or whether other values are at stake? Is a “public interest” theory a normative theory about the desirability of reflecting the preferences of a general polity over special interests? Is it a normative theory about the desirability of promoting other-regarding goals over self-regarding ones? Is it a positive theory about the degree to which regulators will promote general interests over special interests? Or is it a positive theory about the opportunities available to regulators to pursue personal but other-regarding views rather than policies that favor either general or special interest in increasing personal utility?

Kalt and Zupan claim that many regulatory outcomes can be explained by sophisticated analysis of private economic interests but that others can be explained by examining the ideology of legislators (Kalt and Zupan, 1984, 1990). This suggests to them that legislators sometimes act in the public interest. But in what sense is ideological behavior in the public interest? Are Jesse Helms and Ron Dellums both acting in the public interest when they

pursue their ideological agendas in Congress? If so, "public interest" must not be a descriptor of particular outcomes.

Perhaps they mean that some issues are ideological in character and some are economic. They are. But what kind of issue is the subject of regulatory attention is a different question from that of how best to model the motivations of the actors, or the question of how the political or regulatory process resolves conflicting interests and differing motivations.

A theory of regulatory origins and outcomes must address the motivation of the actors, the behavior of the processes, and the nature of the outcomes. Someone using it should be able to look at a problem and specify the appropriate mode of analysis and the nature of the evidence required to support it. Our contention is that the process by which regulatory institutions resolve both economic (should airline computer reservations systems be regulated, and how?) and noneconomic (must airlines allow blind people to sit in emergency exit rows?) regulatory questions is sometimes dominated by the preferences of the general polity and sometimes by those of special interests. The actors in the process are sometimes motivated by self-interest and sometimes by a concern for others. In theory, we should be able to use a model of the process along with information about motivation to predict process outcomes. We believe that the ambiguities in the existing theory prevent us from doing so. We hope to reorganize the question under discussion to make it possible to do this in principle.

The two major variables we have chosen to examine are monitoring costs and motivation—how expensive is it for one political actor to monitor a decision by another actor, and what is it that political actors try to maximize? "Monitoring costs" refer prototypically to the costs incurred by voters to observe the behavior of their elected representatives, or at least make assumptions about that behavior by observing the outcomes. But the same dimension exists in characterizing the relationship between legislators and committee members, between legislatures and agencies, and between agencies and their staffs. The cost to each actor in monitoring the behavior of its "agent" is critical to predicting the character of expected regulatory behavior. These costs may be incurred individually or collectively. Special-interest organizations perform a service for their constituencies by incurring costs to provide this monitoring.<sup>10</sup>

It seems obvious that any one issue may present different monitoring

10. Choosing to create or support a special-interest organization creates new monitoring problems. The interested actor-constituents must attempt to determine the diligence, reliability, and sympathy to or understanding of their needs displayed by their monitoring and lobbying agents. For example, a smaller company choosing to join a trade association should realize that the association agents may be inclined to support the needs of influential major contributor-members whose needs diverge from those of the smaller company; thus, the monitor will need monitoring.



costs to different actors at various points in time, and that costs will vary for a single issue at a single point in time, depending on where the observer fits within the political system, her preexisting levels of information, and how "distant" is the actor or how complicated and obscure is the process that she is observing. We assume costs vary along a spectrum and cannot be simply defined as either high or low. If monitoring costs are so high as to practically prevent principal A from observing agent B's behavior, then B has no incentive to conform her behavior to A's views.

Besides monitoring costs, we need to consider what motivates any individual's political behavior. The object here is to figure out what an actor might do when allowed "slack" (i.e., shielded from observation) in making a regulatory decision.<sup>11</sup> Is a political actor's motivation Downsian electoral-maximizing behavior that attempts to garner election votes by supporting issues that general constituents favor; is it Downsian electoral-maximizing behavior that attempts to garner reelection support by favoring nonconstituent special interests who promise campaign funds which will help secure broader electoral support; or is the motivating force unrelated to electoral concerns? (An example of electorally unrelated behavior is a Burkean legislator who votes in a manner designed to bring about her own conception of the ultimately "best" state of the world without trying to reflect the views of her constituents.) Both traditional public-interest models and recent capture models assume one or another fixed motivation on the part of regulators. Our model incorporates motivation—whether self-regarding or other-regarding—as a variable.

Our model first requires us to separate two senses of public interest that are usually confused. We divide interests along two dimensions: "private" interests versus "public" interests to distinguish between two kinds of motivation, and "general" interests versus "special" interests to distinguish between two kinds of political dominance. Then we discuss the mechanisms that facilitate and impede monitoring of regulators by a polity. Finally, we attempt to combine the two into a theory of regulatory performance.

## 2.1. PRIVATE VS. PUBLIC INTERESTS

Private interests are the standard stuff of which modern economic and political analyses are made. Private individuals, some of whom hold public positions, have private preferences. These preferences determine the private welfare of the individual holding them, and are separate from those of other human beings. Related to choices between states of the world, they define

11. For a thorough discussion of what creates "slack" (i.e., nonmonitored situations, in the principal-agency relationship of voter and representative), see Kalt and Zupan (1984). Kalt and Zupan suggest that public-regarding behavior is likely to be exhibited in such slack areas, a finding supported by evidence which we would interpret differently. See *infra* Section 2.3.

an individual's "private interest," which can be inferred for each individual from a mapping of her private choices. Aggregated through a political mechanism, private preferences of individuals create either a general or a special interest. In the model we will use here, such preferences and the behavior maximizing the interests derived from them are characterized as "self-regarding."

Public interests, as we use them here, capture and recast only one dimension of "the public interest" as it has been discussed historically in connection with these questions. Public interests are derived from preferences held by individuals (who may or may not hold public office) about the private or collective behavior or condition of others, including the behavior of the government toward the polity at large or toward some subset of it. These preferences are those that are being taken into account when we see behavior of the kind which Kalt and Zupan (1984) call "ideological." They differ from private preferences in that they are "other-regarding"; unlike purely private preferences, they exist only in a social context. Maximizing one's welfare with respect to them requires specifying the behavior or condition of others.<sup>12</sup>

There is some ambiguity in our minds as to how public preferences relate to private preferences in determining the welfare position of an individual or her overall interests as expressed through the political process. In some sense, the utility derived from private preferences and the utility derived from public preferences appears substitutable—when one votes for an income transfer away from oneself, one is giving up wealth (which is one proxy for one's utility with respect to one's private preferences) in return for an enhancement of one's utility position with respect to one's public preferences (much as one might when one makes a political or charitable contribution). Similarly, if a regulator risked losing her position on an issue of ideological principle and somehow compared the degree to which her public preferences would be satisfied by promoting the principle with the degree and likelihood of loss of power, status, or loss of human capital which might be entailed, the regulator would clearly be maximizing her utility with reference to both her public and private preferences.

But these preferences have a different character from the private preferences, which are the standard stuff of welfare economics or rational choice

12. Public preferences are very different from private preferences. One characteristic of public preferences is that welfare states cannot easily be analyzed in terms of the Pareto principle. For example, it is not the case that one could improve one's welfare with respect to one's public preferences by changing one's own position for the better while leaving those of others alone. One can only improve one's position with respect to one's public preferences by changing the position of others. It also means that, for this sense of public interest, the preferences of others with respect to their positions may or may not be sovereign in determining one's view of their welfare, depending on the specific content of one's public preferences with respect to self-determination.

political economy. They are closer to the preferences for making public policy manifested by Fenno's legislators and integrated into Krehbiel's recent analysis. Moreover, in some respects, the utility derived from public and private preferences is not substitutable, as when an individual or polity concludes that no amount of wealth transfers in her or its favor would be acceptable substitutes for its preferences about the condition of others if the wealth derived from (let us say) slavery or drug dealing.

## 2.2. GENERAL VS. SPECIAL INTERESTS

Policies or actions, whether motivated by private or public preferences, can be defined as general interest or special interest, depending on what kind of support they would receive from the general polity if information, education, organization, and monitoring costs were zero. Private (self-regarding) interests can be either "general" or "special" in character, depending on whether they are widely shared by the polity. Public (other-regarding) interests can be "general" or "Burkean" in character.

General-interest policies or actions are those policies or actions adopted or undertaken by a regulatory agent that would be ratified by the general polity according to its accepted aggregation principles if the information, organization (including exclusion costs), and transaction and monitoring costs of the general polity were zero.<sup>13</sup> In other words, they would be adopted by a polity uninhibited by the problems identified by Downs, Olson, and modern agency theorists.

Special-interest policies or actions are those that would only be ratified by a self-interested subset of a polity. These policies or acts provide concentrated benefits to a subset of a polity at the expense of the general polity, but do not result from an other-regarding general-interest willingness to ratify a wealth transfer to the special beneficiaries. Special-interest policies or actions can exist in a democratic polity only if the magnitude of information, organization, and transaction and monitoring costs for a subgroup is lower in comparison to benefits which can be concentrated on them than they are for the general polity.<sup>14</sup> Such conditions, which may in fact be the typical case, offer a self-regarding subset of the polity and self-regarding regulators an opportunity to exploit jointly what Kalt and Zupan call "slack"<sup>15</sup> between the

13. We recognize that a problem exists in specifying for a polity the use under conditions of zero-monitoring and transaction costs of an aggregation rule that it might have adopted in part to avoid such costs.

14. Of course, a particular policy may be supported by one or more special-interest groups; indeed, at a certain point of coalition of special-interest support for a policy may create a general-interest policy. Additionally, conflict between opposing special-interest groups can publicize an issue and reduce slack. See *infra* Section 3.

15. Kalt and Zupan explain that the principal-agent relationship between a voter and her representative necessarily results in "slack," in which the representative may "shirk" her constituent's desires (Kalt and Zupan, 1984:282-84).

general polity and the regulator. Slack allows policy discretion which can be used to favor special-interest groups. The distributional fruits of this effort can be shared between the special-interest group and the regulator, who accepts political support from the special-interest group, or is regarded as "suitable" for postregulatory employment in the regulated industry.

Burkean policies or actions are acts undertaken by a regulator without the possibility of fostering gains in general support.<sup>16</sup> They are a product of the same slack-creating conditions that allow the maintenance of special-interest policies; however, unlike special-interest policies, they are not "sold" to subsets of the polity in return for support. Rather, these acts or policies are other-regarding.<sup>17</sup>

Burkean behavior comes in two forms: One represents the pursuit of general-interest policies under circumstances where information and other agency costs make it unlikely or impossible that the general polity will recognize them as such and reward the regulator with support. The other involves the pursuit from other-regarding motives of policies or acts that the general polity would not in fact ratify under conditions of perfect information, for example, imposing on them "for their own benefit" modes of behavior that embody values that they do not share with the regulator. Such policies and acts differ from their special-interest counterparts in that they are not fashioned to command special-interest support that can be turned to the advantage of the regulator.

For either Burkean case, slack is exploited by the regulator herself as a form of ideological consumption—that is, the policies adopted or actions taken by the regulator satisfy her public preferences but either incur political opportunity costs by forgoing special-interest support (or inciting special-interest opposition) or which risk incurring the political equivalent of out-of-

16. See Burke's "Speech to the Electors of Bristol" for a discussion of other-regarding behavior by public officials.

17. The view of public-interest behavior by courageous regulators and politicians who put their careers on the line to thwart some public swell of sentiment that is not in the national interest as properly understood by morally sensitive or educationally sophisticated individuals is exemplified by John F. Kennedy's *Profiles in Courage*. The "protections" afforded by the existence and organizational structure of the U.S. Senate and Electoral College shows that this view of the role of public servants is not a modern theory. Celebration of the advantages of avoiding the popular will at awkward moments go back at least to the framers. See, for example, Madison's discussion of the advantages of the Senate (Cooke):

As the cool and deliberate sense of the community ought in all governments, and actually will in all free governments ultimately prevail over the views of its rulers; so there are particular moments in public affairs, when people stimulated by some irregular passion, or some illicit advantage, or misled by the artful representations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow mediated by the people against themselves until reason, justice and truth, can regain their authority over the public mind? [*The Federalist* No. 63, at 425 (J. Madison)]

pocket costs (diminution of her political position or other self-interest benefits) to the regulator if the acts or their consequences are addressed by the general polity.

Kalt and Zupan's "ideological" acts are Burkean in our vocabulary, distinguishing them from ideological acts or policies that would be ratified by the general polity. A regulatory action that is Burkean is other-regarding, but not general interest, in character, such as when a bureaucrat engages in inaction or obfuscation to prevent implementation of a popular, but in her opinion ill-advised, policy—or uses the complexity of an issue to obscure adoption of a generally unpopular, but in her opinion publicly necessary, measure. A regulatory action which is special interest in character might be public (other-regarding) in its motivation but not Burkean, as where a right-to-life pressure group captures a public-health agency to adopt a more stringent (and, hence, unnecessarily cost-increasing or entry-reducing) set of regulatory standards for abortion clinics.

While characterizing motives as other-regarding or self-regarding helps us understand one aspect of what has been talked about as public interest, to talk about "public interest" versus "private interest" when discussing capture is confusing. The capture debate can be most profitably pursued as a debate about domination of the regulatory process, and not about motivation or about the ultimate goodness of policy. "Capture" is best analyzed in terms of the distinction between general and special interests. "Capture" is the adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs.

The opposite of capture is "general interest." A regulatory action that is in the general interest is one that would be ratified by a polity given an opportunity to consider it free of monitoring costs. It may or may not be efficient in its overall result or generous in its motivation. It is important analytically to separate the concept of capture by subgroups of a polity from the normative or efficiency consequences of policies adopted by regulators. Rent control in New York City is a classic example of a policy which is general-interest in our sense, but not efficient in its results. It has electoral support from tenant majorities for reasons which are often primarily self-regarding.

It may help the reader to visualize the interaction of these two distinctions—between private and public motivations and between general-interest and special-interest outcomes—if we use the following diagrams, which modify a suggestion made to us by Fiorina. First, consider Figure 1.

Note that in a democratic world without transaction or information costs, the right-hand column of the diagram would be a null set. No regulator could survive adopting a result that would not be ratified by the polity. Note as well that there is no operational distinction between the public servant and the Madisonian, since both self-interest and a regard for the preferences of the

		Absent transaction costs, would the polity ratify this outcome?	
		Yes	No
Is the regulator Other-regarding or Self-interested?	Other-regarding	Public Servant (Does best to do what the public wants)	Failed idealogue (Attempted to impose will on public)
	Self-interested	Madisonian (Constrained to do good by both governmental and social institutions)	Unsuccessful captured regulator (Attempted to support special interest position)

Figure 1. No slack.

polity would produce behavior designed to determine and implement policies that would be ratified by the polity (general-interest regulation, in our terminology). This is the world envisioned in Noll's comments on our article.

But let us now introduce transaction and information costs, a situation that we believe represents the normal case. Then a more complicated situation emerges (see Figure 2).

Slack allows a regulator to function without being perfectly observed by the polity. Under these circumstances, a regulator has a choice. She can adopt policies that are designed to maximize her own private utility. Generally, this will mean finding policies that will enhance the value of her office to her—either by courting her private support, which will enable her to stay in office, or by currying private support, which will maximize the value of her postregulatory employment. (Often these are the same policies.) In doing this, our self-interested regulator will be constrained by bribery and conflict-of-interest statutes and by the likelihood of exposure to the polity under circumstances that could cost her office. This regulator is "captured" in our model.

Alternatively, she could adopt policies designed to further her own con-

		Absent transaction costs, would the polity ratify this outcome?	
		Yes	No
Is the regulator Other-regarding or Self-interested?	Other-regarding	Burkian views coincide with polity	Burkian Independent ( <i>Profiles in Courage</i> )
	Self-interested	Happy Accident	Captured Regulator

Figure 2. Slack.

ception of the public good. These might be policies that the polity would ratify if only they knew about them and were willing to focus on them, or they might be policies that the polity would not support but which, in the other-regarding opinion of our regulator, they ought to support. If a regulator is committed on other-regarding grounds to pursuing only policies that would be ratified by the general polity, she is other-regarding but not Burkean, since her commitment, however altruistic, does not permit independent policy judgment. This seems to us to be an unusual case which is not represented in Figure 2. The continuation in office of such a person then depends on the *absence* of slack.

Either policy is adopted by the regulator at some risk to herself. If slack keeps a regulator from benefiting politically from a policy that might otherwise be ratified, the regulator runs the risk that special interests that can benefit from alternative policies will take actions designed to force those policies upon the public, possibly by contributing resources to remove the regulator from power so as to install one who will be more helpful to the special interests concerned. If the regulator adopts a policy that would not be ratified by the polity, she runs the risk of exposure under circumstances where interests that would benefit from a general-interest policy will have every incentive to assist in arranging accountability. Regulators who pursue policies that run either risk without benefiting their private interests are "Burkean" in our model.

In short, when a regulator has slack, she can invest it in officeholding or wealth by pursuing special-interest policies, or she can consume it by pursuing other-regarding policies not favored by her relevant polity. This slack is valuable either way, and it should not be surprising that regulation is often conducted so as to create or increase it.<sup>18</sup>

In a world where information is costly, slack is also inevitable and, just as candidates use party identifications and parties use ideological languages to allow electorates to economize on monitoring (Downs, 1957), regulators have adopted ideological language and public-interest rhetoric in an effort to generate general support or tolerance for actions or policies that cannot be fully monitored. This public-interest and ideological rhetoric serves to assure the polity that complicated regulatory acts are in the general interest (i.e., would be ratified by the polity if slack were eliminated).

The rhetoric is attractive for regulators to use because it helps to secure public support in situations where what the regulator is doing is too costly for the general public to monitor. But for this very reason, public-interest rhetoric makes it costly for the polity to distinguish between three situations: (i)

18. See Fiorina (1977) (delegation is favored by legislators because they can simultaneously avoid responsibility for the cost of regulation while claiming credit for the benefits); Niskanen (regulators control information so as to increase slack); McCubbins et al. (1977) (discussing various rationales for delegation to regulatory agencies).

the acts and policies of the regulator are in fact in the general interest; (ii) the regulator is acting in an other-regarding manner and believes the acts and policies are publicly desirable (the Burkean case); (iii) the regulator is acting in a self-regarding manner on behalf of self-regarding special interests, but wishes to reduce the likelihood of detection.

Much of the confusion in the public-interest–capture debate comes from a loose use of public-interest language to characterize a policy or action as good or bad in the global sense. Failure to adopt globally good policies is then said to be the result of capture, and the regulatory debate is reduced to a question of whether regulation is good or captured. Aside from the ambiguities we have already discussed, such characterizations and justifications depend on an ability to define good policy, which may be impossible and which, in any event, goes well beyond the scope of this article. This article is an attempt to fit public-interest characterizations into the social-science literature to make them operationally usable and testable. We leave questions about the final correctness or justification of public acts to those who wish to participate in a broader philosophical debate (e.g., Rawls, Nozick, Ackerman).

Other than the “globally good” claim, what then is meant when the claim is made that a policy or action is being taken “in the public interest”? When an agency or individual uses public-interest rhetoric, it or she means to signal (accurately or not) something other than special interest as we have defined it above (special-interest behavior is, of course, neither general interest nor Burkean in character), but it is ambiguous as to whether either generality of interest or Burkean spirit is intended. For a regulator to assert sincerely in an operationally meaningful way that something is in the public interest can mean either that “this is a policy which the polity would approve if it was fully informed and exercising its political rights on the question,” or the assertion could mean instead that “this action is the action that a person selflessly promoting the interests of others would approve, independently of whether the polity would support it.”

The distinction between the two is, of course, the classic Burkean one between the public representative as “mere” proxy synthesizer of public views and the public representative as someone selected by a polity to exercise independent judgment on issues, even when that judgment dictates actions which the representative either does not expect to get general polity credit for or knows would not be favored by her constituents.

We assert that our definitions capture most features relevant to the capture versus public-interest debate and, in addition, generate fact assertions that can be tested. While traditionally broad public-interest formulations are too ambiguous to falsify, we can in principle test whether an act is or is not in the general interest: it either would or would not be ratified by an informed polity. If an act is not in the general interest, we should also in principle be



able to identify the source of slack and tell whether the act is undertaken for self-regarding (special-interest) or other-regarding (public-interest) reasons.

Of course, like many fact issues of intention, the motivation of regulators may be difficult to ascertain. But motivation is, in principle, a fact question and there are facts available from which we can make inferences about a regulator's motivation. If we can identify sources of support for the action that will help the regulator maintain power or enhance future wealth, we can suspect special-interest behavior. If there is a plausible other-regarding justification for an act and no obvious self-interested advantage in it, we can suspect Burkean behavior (other-regarding behavior that will not produce general support). Mixed cases may, of course, be mixed. But at least we know what behavior we are looking for.

The definitions we use here allow us to recast the capture versus public-interest debate in our attempt to construct an operationally manageable metatheory. The approach we take formulates the questions to be investigated as follows: Under what conditions can we expect special-interest policies or acts to dominate the regulatory process, producing "capture," and under what conditions can we expect policies or acts which are either general-interest or Burkean in character? When regulation is other than general-interest in character, when will it be dominated by special interests and when will it be dominated by Burkean behavior on the part of regulators?<sup>19</sup>

19. Please note that we formulate this question in terms of outcomes and ratification. This leaves unaddressed (and for us, unaddressable) two questions: First, can outcomes that are ratified or ratifiable be said to reflect the preference of the polity? To answer this question, one needs a method of aggregating the preferences of individual group members, so that one could characterize an outcome on which each had an opinion (or was simply indifferent) as being in accordance with the preference of the group. To do this in a consistent and democratic way for all configurations of preferences is a task the successful performance of which has been precluded by Arrow's impossibility result.

This result has also been extended by further research to produce the discouraging findings discussed by McCubbins et al. (1990) in their comments. As they point out, unconstrained majority rule can lead to any economically and technically feasible outcome. Unconstrained majority rule therefore cannot be said to be associated with a unique general-interest outcome or set of outcomes. We do not dispute that claim. Indeed, as our commentators point out, we helped contribute to the findings that support it.

But we cannot agree with McCubbins et al. that this result presents a problem for us. We fully share in the widespread view that policy and electoral environments are far more stable than can be accounted for by institution-free majority rule notions. Our earlier work (Levine and Plott, 1977) discussed both the possibilities and the limitations inherent in using real-world institutions to determine policies. Our model does not depend on the stability or uniqueness of the outcomes of unconstrained majority rule. Its general-interest definition specifies outcomes that "would be ratified by a polity given an opportunity to consider it free of monitoring costs." By this we mean to call for the use of whatever real-world ratification technique has been adopted by a polity.

Our model therefore not only accepts, but relies on and applies, the insights underlying Shepsle and Weingast's assertion that details of institutional structure induce stability. Whatever features of a polity's institutions induce policy stability will also define the set of general-interest policies, with the exception of those features that enhance stability by introducing slack. The recent efforts of McCubbins et al. to specify the features of institutions that produce policy

### 2.3. THE MODEL

We are now in a position to specify our model. Figure 3 combines the specification of the no-slack world of Figure 1 (with the "impossible" right-hand column eliminated, and the left side collapsed into one outcome) with that of Figure 2. Only in the cases where the Burkean regulator is motivated to adopt an outcome that would be ratified by her polity or where no organized subgroup could benefit from the adoption of an alternative (extremely unlikely) can we expect general-interest regulation in the presence of slack.

This model draws its principal features from modern political analysis. It draws on Downs, Olson, and Fenno, along with the modern elaborations of information and agency theory. We postulate that regulators are either self-regarding or other-regarding. When they are self-regarding, they will pursue general-interest policies if there is little or no slack, or be captured if sufficient slack is present. When they are other-regarding, they will pursue policies that cannot get them general support, either because the polity does not accept the view of its own interest that the regulator holds or because information costs prevent a polity that would favor a policy from understanding and supporting it. This other-regarding and costly regulatory behavior is what we call Burkean, and slack is a necessary but not sufficient condition for its existence.

Burkean behavior may or may not produce policies that are in the general interest. It will produce general-interest policies when the other-regarding preferences of the regulator favor policies that would be supported by the general polity if only slack could somehow be eliminated. On the other hand, an other-regarding Burkean regulator, who favors for ideological reasons policies that the general polity would not ratify (because they do not share her vision of the general good), imposes her own preferences on the polity for "public," rather than capture, reasons.

For reasons that are at the heart of modern analysis, as long as information

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stability are very important and welcome, and are in no way inconsistent with our model. Our model simply assumes the existence of real-world institutions that constrain majority-rule processes to produce the stability widely observed in real-world outcomes. Whatever processes have been adopted by a polity to replace elected officials or to instigate policy change will operate as a constraint on regulatory actors in a no-slack situation and can be used as a basis for determining general-interest policies.

The other question left unaddressed may be related, but seems to be unexplored territory: when can one characterize a polity as acting in a self-regarding way and when in an other-regarding way? Since "self-regarding" and "other-regarding" are motivational concepts rather than outcomes, and the motivations characterize the behavior of individual members of the polity, one would need to explore whether motivations can be aggregated, perhaps by exploring how and whether such motivations could be mapped onto preferences. At best, this seems to lead to an Arrow result, but we have not explored the question of whether motivations are like preferences and are subject to the same possibilities and limitations in characterizing aggregations of individuals.

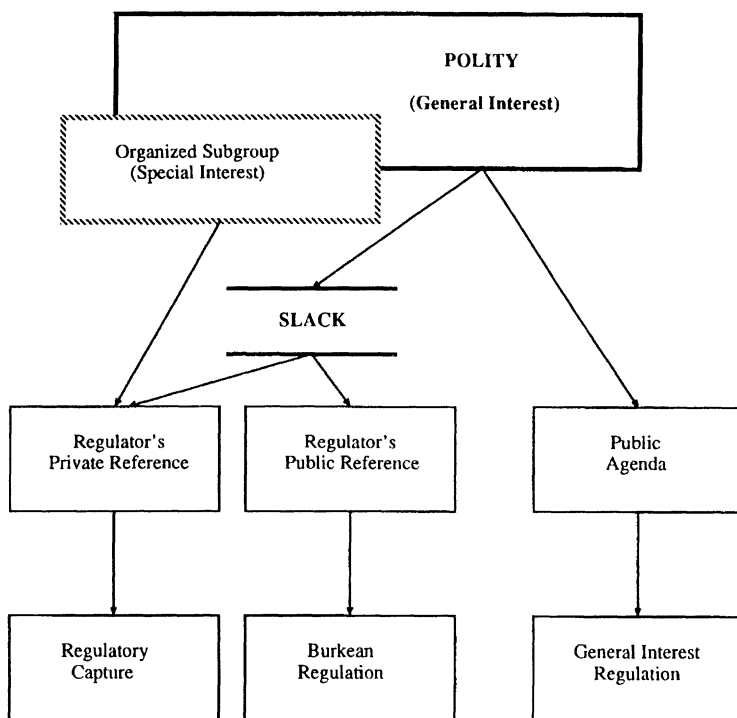


Figure 3. The model.

and political action costs are significant, regulatory policies—which spread benefits thinly over large groups whose information, organizing, and monitoring costs are large—will not generate effective political support. Environments in which information, organizing, and monitoring are costly foster regulatory policies that can concentrate large benefits on relatively small groups which are favored by low information, organization, and monitoring costs.<sup>20</sup> These environments tend to supply these benefits at the expense of those on whom their individual impact is small and whose costs of learning about and coping with those impacts are large. It will not be cost effective to oppose policies that spread costs thinly over large groups whose information, organizing, and monitoring costs are high. If policies impose similarly concentrated costs on similarly situated small groups, effective countermeasures can be taken.

20. There will often be more than one such group competing to capture regulations to secure adoption of opposing policies. The outcome of such competition will be affected by whether slack is maintained or reduced, which will, in turn, depend on a number of factors, including special-interest perceptions of the general polity. See *infra* Section 3.

The acts or policies themselves can contribute to the nature of the environment. Complex rules and procedures, substantively complex provisions or issues, subjects with narrow intrinsic interest, and subjects difficult to comprehend without sufficient education or background all present high information, monitoring, and organization costs.

High information, monitoring and organization costs create "slack," which shields officials from accountability to the general polity. Members of the general polity ordinarily do not have an incentive to learn issues well enough to comprehend their impact or to monitor and discipline the behavior of all those officials whose acts might affect them. This slack can be used by a regulator or her political sponsor to pursue officeholding self-interest (reappointment, reelection, or postregulatory pecuniary interests) by pursuing regulatory policies that benefit special interests. The regulator does this by using slack to avoid detection or effective restraint while she pursues policies of benefit to special interests who are willing to make political contributions, to sponsor the regulator for appointment or reappointment, or to provide lucrative postregulatory employment.

Alternatively, a regulator can use slack to pursue in a Burkean manner policies that would not be supported by the polity if monitored and understood. Slack can be used to raise or transfer revenue for noble purposes, to promote technological progress, which is widely misunderstood and feared, and to pursue ideological goals not shared by the polity but thought by the regulator to be in their interest.

### 3. INFLUENCING THE AMOUNT OF SLACK

The possibility of affecting the creation and transfer of wealth in a world too complicated for the polity to monitor cheaply creates the "stewardship" question, which is at the heart of the dispute over regulation. In whose interests are regulators regulating? It is expensive to educate the general public and to keep them informed. In fact, in an analogue of Downs' characterization of electorates, polities affected by regulation would find it inefficient to become educated on all the issues facing regulators and, in some sense, assent to the creation of regulation precisely in the hope that they (and their elected representatives) will not have to. However, if an agency relationship between public and regulator is desirable, and the slack that this implies can be exploited by special interests, how can a public monitor the process and limit the damage that is done? The incentives for capture in the regulatory process are obvious once identified and elaborated by a generation of theorists, but what incentives exist to allow process to exhibit the general-interest or Burkean behaviors preferred by the general polity?

There are a variety of institutional features in the political system that act to reduce the amount of slack in the system and to reduce the likelihood that

slack will protect regulators from the consequences of capture or Burkean behavior. These features can function either protectively, reducing the cost to individual members of the polity of monitoring what regulators do, detecting and publicizing special-interest behavior (McCubbins and Schwartz), or they can function proactively, developing and publicizing general-interest initiatives which can be introduced into the regulatory arena through the political process.

The first slack-reducing institutional feature is incumbent self-publicity. Although one might imagine that incumbents would generally prefer to create and maintain slack, selling the benefits of capture or consuming them as Burkean behavior, another strategy is available. If a regulator or legislator who has slack can invest time, effort, and resources in being on the general-interest side of issues that become very "hot," she can generate more general support from reducing slack than by investing the proceeds of capture in reelection. Such efforts can have dual benefits: not only can they reduce slack and engender widespread political support for general-interest positions, but they can also be used by regulators to signal trustworthiness on those issues for which it will continue to be too costly for the general polity to monitor the regulator. The regulator can call attention to her policy record on a particular issue and explain why her policy should have the support of the general polity. In doing so, she will hope both to get support on the issue in question and to reinforce the notion that her unobserved behavior is equally in step with the preferences of the polity.

Another very important slack-reducing institutional feature is political competition. This competition can create opportunities for monitoring, much as do organizations, the press, and broadcast media. It is worthwhile for others who wish to hold public office to invest in ferreting out regulatory behavior, which would not be approved by the polity if known and understood, and then to publicize it where possible. This publicity can be used to justify support for electoral changes, or can require legislators responsible to an electorate to press for regulatory change. Dramatic recent examples can be found stemming from the Savings and Loan "crisis" of the late 1980s and early 1990s. Media exposure caused the resignation of one of the chief regulators involved and focused attention on congressional votes and acts, which clearly depended on slack for their political viability (see Kagay, Nash).

Political competition can also create opportunities for policy entrepreneurship, as do organizations and scholars. In addition, those running for office or trying to gain appointments as regulators function as policy entrepreneurs, devising and often publicizing general-interest regulatory policies in an effort to secure electoral support. Of course, electoral support is difficult and costly to acquire, and this difficulty partly accounts for the existence of slack in the first place. And, of course, slack produces opportunities for capture, which ordinarily will prove more politically rewarding

than publicizing and pursuing general-interest policies. There is little doubt that the general-interest deregulatory policies of the 1970s, which were instrumental in reopening the debate to which this article is meant to contribute, were in part the products of the interests of presidential candidates Ford and Carter for widely available price reductions during an inflationary period, and of Senator Edward M. Kennedy for an issue that would allow him to approach the general polity as both consumer-oriented and *laissez-faire*.

A third institutional feature of the system that reduces slack is the existence of organizations or interests that function both protectively and proactively. Because of the familiar Olsonian factors of concentration of benefits and free-rider problems, these slack-reducing organizations (trade associations or single-issue organizations are a common example) compete among themselves and are generally supported by special interests, who use them to monitor regulatory processes to warn of policies or acts that are Burkean or that favor competing interests or sometimes general interests. But some of these organizations (e.g., Common Cause or Public Citizen) purport to represent general interests; and, of course, many special-interest organizations find it convenient to attempt to get general support for policies that they believe are general interest in character but that will benefit their constituents as well.

Whether competition among these organizations or interests will reduce slack depends upon several factors: First, it depends upon the conception of the preferences of the general polity. Reducing slack only makes sense as a form of interest competition if at least one interest believes that the general polity would ratify the outcome it prefers. Second, whether interest competition will reduce slack depends on the success of any interests that adopt slack reduction as a strategy in moving issues onto the public agenda. If no interest group believes that resorting to the general polity is likely to be beneficial, or if no group succeeds in attracting public attention, competition among these interests will take place by marshalling resources in aid of the private goals of regulators or by attempting to persuade Burkean regulators to adopt an interest's cause as their own.

Representing yet another slack-reducing institution are the scholars and quasi-scholars who constitute the public-policy intelligentsia. University professors and employees of think tanks face a reward structure that makes it highly advantageous for them to identify special-interest behavior on the part of regulators or to proactively develop and try to publicize policies that they regard as being in the general interest. In fact, much of the power of this institution comes from the presumption that its members have a culture and face career rewards that depend on the assumption that their work is either general interest or other-regarding. In other words, they are expected to have an orientation that either identifies and promotes policies that the

general polity would support if inexpensively informed and organized or identifies and promotes policies that would require a Burkean regulator to implement.

While university reward structures do not nominally emphasize the dissemination of the work of public-policy intelligentsia to the general public, several factors operate to help this work reduce slack. First, scholars and public-policy experts appear to enjoy seeing their names and work product in the media as a form of consumption. They cooperate with and educate reporters, and have even been known to try to persuade reporters to cover a story in the scholars' areas of expertise. Second, while many institutional reward systems for scholars explicitly disregard public notoriety for scholars or the policies they espouse (and may even occasionally penalize on an exemplary basis those scholars who are thought to be unseemly in their pursuit of publicity for their views), many scholars correctly see insertion of their public-policy views into the public arena as creating name recognition that broadens their career options both in and out of academia. Such recognition enhances their professional mobility, and creates both consulting opportunities and the possibility for temporary or permanent public-service jobs as an alternative to academic work. Of course, those public-policy intellectuals who find their work outside universities are explicitly rewarded for "impact" (i.e., the successful insertion of their views into the media and political debate).

A final slack-reducing institution, and perhaps the most powerful, is the news media. Commercial-media profits depend on attracting mass audiences. Hence, reporters and editors spend much of their energy finding stories that will maximize readership or viewership. While much of what interests the public—celebrity love affairs, human-interest stories, disasters—has little to do with slack, a significant amount of public-affairs reporting by news media consists of trying to interest the public in one or another special-interest public policy or government practice, of which the general polity would disapprove if they were aware.<sup>21</sup> Such activity is most obvious when done as "investigative reporting," but much routine media coverage of public affairs has this effect.

However, competition for public attention is fierce, since that attention can be sold profitably by the media to advertisers and by political entrepreneurs to politicians. Again, following modern analysis, it simply does not pay members of the polity to devote substantial resources, time, or attention to most issues, even those that the media attempt to bring to their

21. Examples are too numerous to mention, but an obvious recent one is the reporting of accusations of favoritism in the award of HUD contracts during the Reagan administration. For one dramatic example of exposure of special-interest intervention into the operation of a regulatory program and of the consequences of that exposure for a U.S. Senator, see "Poll: D'Amato Rating Plummet" (*Newsday*, February 10, 1990:12).

attention. So, while the media can be a powerful slack-reducing tool, the cost of political information to individual members of the polity is sufficiently high that they limit their consumption of it, even when it is widely and fairly easily available. Much media reporting of regulatory affairs is in fact read only by those who already have an interest in regulatory outcomes by virtue of concentrated benefits or costs. The economics of the media, especially the print media, make it possible to inform them profitably even if they are only a relatively small subset of the general polity.

In addition, the high costs to the public of becoming informed on issues which are specialized in their concentrated impact considerably influence the competition for public attention. Much apparently slack-reducing activity by public officials is itself designed to focus public attention away from issues that might be damaging, and to force those who would expose them to attempt to communicate exactly the kind of detailed and complex material in which it is difficult to get the public to invest in absorbing. Furthermore, much slack-reducing activity by opponents of those in office is conducted at the same summary and highly emotive level. Such activity on either side is expensive. It depends on the existence of slack and makes it profitable to sell slack in the form of capture (because it will be difficult to expose the sale on most issues in a way that will affect the polity), and to use the proceeds to selectively "reduce" it through the use of media consultants and costly information management.<sup>22</sup> Most detailed information about policy or actions that affect most voters in a dilute way simply cannot compete for attention with the "issue of the day" or its mudslinging reciprocal.

This increases the opportunities both for capture and Burkean behavior, but means that an issue that becomes salient is one on which slack is dramatically reduced, raising the risk of impact on a public official.<sup>23</sup> How much of this slack will be invested in capture and how much spent on Burkean behavior becomes a function of the costs and benefits of each activity. In turn, these depend in part on the preferences and motivations of public

22. Of course, attempts to manage slack through the use of simple but extremely powerful "sound bite" summaries carry their own risks. While making it difficult to inform the polity on complex issues, such attempts carry the risk that the natural complexities of governing will force successful public officials to adopt policies that are difficult to reconcile with the simple communication device chosen. For example, President Bush's simple, often-repeated promise not to raise taxes ("read my lips; no new taxes") was a much more powerful communications device than earnest and complicated proposals for balancing the budget offered by his 1988 presidential opponent. But this easily communicated formula provided an awkwardly clear touchstone against which his budget-balancing proposals could be judged. See Savitz and Katz.

23. These effects are often noted, but not often understood. Hence, the *New York Times* complains on its editorial page that public officials no longer follow their consciences to take Burkean positions, but proposes that the cure is to allow politicians more and longer free TV exposure. If our model is correct, more free TV for politicians either will have no effect at all on an electorate which is not willing to invest in monitoring public officials at length, or worse will have the effect of reducing slack and, hence, *discouraging* Burkean behavior! See "Serious Times, Trivial Politics" (*New York Times*, March 25, 1990:Sec. 4, p. 18).



actors. A very secure incumbent, highly other-regarding in her motivational structure, can be expected to engage in a great deal of Burkean behavior. If she is highly self-regarding in her motivation, she can become a fund-raising powerhouse and can influence—through contributions of support—the political fortunes of regulators other than herself. If her hold on power or position is tenuous, we can predict that she will be very open to capture in order to secure special-interest support, which can be turned into activity that influences the general polity. Of course, she can pursue a mixed strategy, in which she is captured on many issues so as to allow Burkean behavior on a few that mean a great deal to her.<sup>24</sup>

The normal state of affairs is that slack exists and permits capture, and it will often seem necessary or desirable to a regulator to allow herself to be captured. As we have seen, slack-reducing institutions may be important, but they certainly do not (on balance) eliminate slack. The existence of substantial amounts of slack is the normal case for any reasonably large polity in an environment complicated enough to require specialization and expertise. This “normal” slack makes intense competition for public attention on issues a critical factor in whether monitoring actually takes place and slack is reduced or eliminated.

A self-interested regulator or other political actor is generally forced to make a choice between reducing or using slack: She can pursue political support by adopting—or offering to adopt—general-interest policies, and attempting at considerable expense and risk to reduce slack sufficiently for the general polity to support her because of them. Alternatively, she can solicit or accept capture, pursuing policies in return for special-interest political support, which can be substituted for (or, as in the case of political contributions, generate) general support. The principal risk in pursuing a capture strategy is that one of the slack-reducing institutions will expose the captured acts or policy to the general polity, which will then reject the regulator. However, this will rarely happen, and the captured regulator can reduce her risk further by making sure that the special-interest policies she pursues are not illegal (indictments are easily communicated) or easily summarized for a general audience.

In the ordinary case, the second strategy is much less risky than the first. Slack is an important feature of most regulatory environments. Most regulatory issues are highly specialized and do not generate much general attention. Complexity and lack of salience make efforts to overcome slack on regulatory issues—especially issues of economic regulation—particularly costly. Accordingly, most regulators faced with slack do not try to overcome

24. The late Senator William Fulbright allowed himself to be captured by Arkansas agricultural interests and supported general-interest (for his white Arkansas polity) positions on race issues, so that he could pursue the Burkean positions on foreign relations that made him a hero to Easterners who could not vote for him.

it. Instead, they use it, either to invest in political support through capture or to consume it in pursuit of other-regarding agendas through Burkean behavior.

#### 4. THE PUBLIC AGENDA

When, then, will general-interest policies prevail? When will slack-reducing activities actually create issue environments in which the polity monitors the regulatory process? How do we get airline deregulation, tax reform, and other activities difficult or impossible to reconcile with capture theories?<sup>25</sup> The answers can be found in the same economics of information that supports the capture theory in the first place. Information costs and the slack they create are the key to both capture and Burkean behavior. In a world free of information and organization costs, slack would not exist, and regulators could neither be captured nor indulge themselves in following their consciences contrary to the wishes of the polity.

Although a world without information costs is unattainable, information costs do have unusual characteristics. Most important, information is a public good. Consuming a unit of information does not deprive anyone else of the opportunity to consume the same unit. Indeed, under many circumstances, *excluding* a potential consumer from exposure to a unit of information can be more costly than including her. Information generally exhibits economics both of scale and of scope; it is less expensive to transmit the next unit of the same information than the previous one, and less expensive to transmit a different unit of information to someone who is already "plugged in" (is perusing a publication, viewing or listening to a broadcast, or has otherwise made the commitment to acquire multiple units of information) than it is to get someone to pay attention in the first place.

It is an additional characteristic of information that costs are entailed both in producing it and in acquiring (receiving) it. Slack exists, as we have seen, not only because it is costly to produce information for the polity about particular government actions or policies, but because it is costly (in time invested and other activities forgone) for members of the polity to acquire and understand it. Those not specially affected by regulatory information do not ordinarily invest in acquiring it.

However, at any given time in any given polity, there is a small set of issues that has become the object of intense public attention. These issues are very widely attended to. They are covered in virtually every issue of every printed news medium, and are reported on constantly by the broadcast media. These issues pervade the information atmosphere. It is almost

25. The inability of capture theories, which dominated the literature in the 1970s (see Posner, Peltzman, Becker), to explain events such as the deregulation of airlines (see Levine) first led us to examine other forces driving the political marketplace.

costless to expose another individual to a wide range of information about them, and it is very inexpensive for anyone who is already attending to news media to acquire information on these issues. In fact, it is in some cases more costly to exclude oneself from information on these issues (given that one is going to acquire news information at all) than it is to become informed about them. Let us call the set of these issues the "public agenda."<sup>26</sup>

Strictly speaking, the characteristic of being on the public agenda is not a binary one. Issues are more or less salient to a degree that is continuous and can be measured. Such measurements are the stock in trade of political consultants and news organizations. But the intensity of interest in, or exposure to, issues that are most salient greatly exceeds that of other issues of interest, and those issues are subject to levels of exposure which gives them the special characteristics we have described. An example can be found in Figure 4, taken from the *New York Times* (Kagay).

How such issues arise and are selected is beyond the scope of this article. Securing public attention to an issue so as to facilitate monitoring of one's own behavior (presumably favored by the polity) or the (presumably disfavored) behavior of one's issue opponent is a key factor in the outcome of the political process. War and mass catastrophe close to home clearly possess intrinsically characteristics that make them salient and put their causes and effects on the public agenda. But why airline regulation in the mid 1970s and again in the mid 1980s? Why tax reform in 1986 and not on previous occasions for revision of the Internal Revenue Code? Why the environment in 1970 and in 1990 and not in 1985? The slack-reducing institutions described above often focus on getting issues from the ordinary category, in which the cost of acquiring information about them exceeds the benefit that most members of the general polity would gain from knowing it, onto the public agenda. Skill in doing so is the stock in trade of media executives, political entrepreneurs, political consultants, and policy entrepreneurs.

What we can say is that to the degree that one or another slack-reducing process puts an issue on the public agenda, slack diminishes drastically, and both capture and Burkean behavior become extremely difficult. Public-agenda issues are always addressed in the presence of a general public deluged with information on those issues and in a position to ratify or reject as a polity the policies and acts of public officials. Remember that "general interest," as we use it here, is not a statement about the intrinsic worth of a

26. There are several literatures on agendas that should not be confused with what we are attempting to do here. First, in voting-theory literature, agendas are often crucial elements, especially ordering of agendas (Levine and Plott; Plott and Levine). Political scientists also have studied the formulation of agendas, both in response to voter-theory literature, and because of agendas' influence on final choices of decision-makers (e.g., Baron and Ferejohn; Hammond et al.; Cobb et al.). What we are doing here is closer to, but much more narrowly defined and limited in purpose than, the activities studied by public-opinion researchers focusing on the creation of "public agendas" resulting from media influence (e.g., Leff et al.).

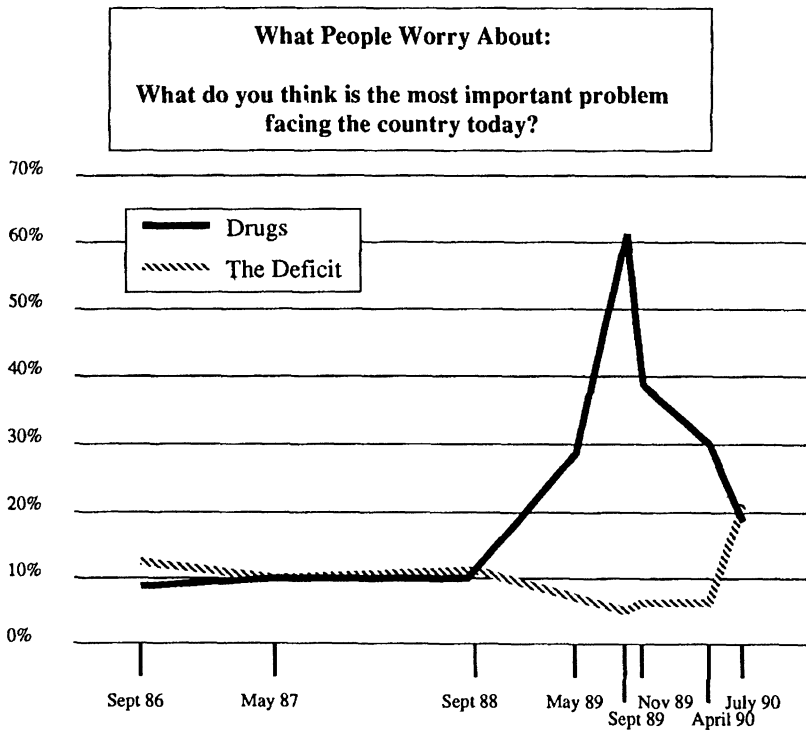


Figure 4. The public agenda. Copyright © 1990 by the New York Times Company. Reprinted by permission.

policy. We use general interest as the opposite of “captured” or “Burkean,” to define policies or acts that would be ratified by a perfectly informed general polity. Moreover, we conclude that if capture and Burkean behavior require slack, and if that slack is created as a result of a comparison by the general polity of the costs and benefits of monitoring and organizing (per Olson and Downs), then a dramatic reduction in information costs should radically change that calculus and drastically reduce slack.

We are now in a position to state our general hypothesis: Whether a regulator will be captured or not is a function of whether slack has been drastically reduced by moving an issue onto the public agenda and, if not, whether or not the regulator with the relevant slack will behave in a Burkean manner. That in turn depends on her demand for Burkean behavior—the costs of which are the risk of exposure and the loss of the opportunity to sell slack, and the benefits of which are the strength of her other-regarding convictions and the utility she gets from seeing them carried out (this is a variant of Fenno’s dually motivated legislator). If one or more of the relevant regulators faces the conditions we have just specified as supporting Burkean

behavior, we predict that Burkean policies or acts (i.e., other-regarding, but not necessarily general interest) will prevail instead of capture. If the issue is or can be gotten on to the public agenda, we should predict general-interest policies or acts instead of capture.

While we certainly do not claim to have worked out a protocol for testing this hypothesis, we maintain that it is testable in principle. Whether an act or policy is in the general interest can be determined by polling an informed polity or, if an issue is not on the public agenda and the polity is not informed, by constructing surrogates (e.g., paid focus groups selected according to sampling techniques and informed on the issues in question). Whether it is an example of capture depends on the existence of a group that would be specially benefited by the policy or act and the identification of an offer of a support *quid pro quo* by that group to the regulator in a position to act or to influence the policy. Whether an act is Burkean is a little more uncertain, requiring as it does the identification of motivation on the part of the regulator. However, if there seems little special-interest support for a policy (or even special-interest opposition) and little prospect of general support, one would certainly want to look for evidence of the regulator's internal other-regarding preferences and expect to find some that supported the act in question.

Finally, whether something is on the public agenda as defined here is also quantifiable and testable. In the age of Nexis and Nielsons, it is possible to monitor both information availability and the degree to which it is acquired by members of the public. Availability can be measured by counting mentions, column inches, broadcast minutes, etc., which are devoted to an issue and are weighted by circulation figures, readership surveys, and broadcast ratings. The ultimate test is, of course, awareness and opinion surveys. Figure 4 represents an observation of this kind drawn from polling. Focus group testing and media analysis are other ways to observe the degree to which an issue has captured the attention of the media and the public.

The cost of acquiring information on an issue ranges from very expensive to nearly free. Where on that continuum one wishes to identify the "public agenda" as starting is immaterial. For our purposes, it is only important that some regulatory issues fall into that category.

Our most important prediction is that if there are regulatory issues that are on the public agenda, outcomes on those issues will more frequently than not be characterized as general interest, as we have defined it. For those issues that are not on the public agenda, we predict capture or Burkean outcomes. It would be highly desirable to be able to separate Burkean acts from capture, but the most important characteristic of either for our purposes is that neither would produce support that would help a self-interested regulator to maximize her welfare.

## 5. CONCLUSION

We are well aware that the model we have described here has flaws. In decomposing public-interest models of regulation into models of motivation (public interests versus private interests) and conformity to democratic values (general interest versus special interest), we may be asking for a great deal in the way of vocabulary reform. Most analysis of regulation has taken one form of motivation or another (whether "private" or "public") as given, and then has attempted to analyze the constraints placed on a regulatory actor by the system and circumstances. In making motivation a variable subject to the constraint of monitoring, we take a risky course through largely uncharted waters. But the approach we take addresses directly the ambiguities and inadequacies of public-interest and capture theories. We have assigned a role to such difficult-to-specify factors as motivation (and especially "other-regard"), because preexisting models ignoring these factors have failed to predict or account for important regulatory events.

Our model combines the most modern tools available (from what we call the "postrevisionist" agency literature) and direct motivational analysis to restructure the problem of regulatory behavior. Notwithstanding its complexity, it separates motivation, influence, and outcomes, thus clarifying what we mean when we talk about "special-interest" or "public-interest" regulatory action. The confusions of the existing literature seem to force us in this direction.

Undoubtedly, the approach we suggest here can be refined further. More importantly, it needs to be tested. We have not done a formal media analysis of airline deregulation, but there is little doubt in our minds that the Kennedy-organized Senate hearings of 1975<sup>27</sup> began a process that resulted in intense media coverage of the issue from 1976–1978. This coverage, we believe, placed the issue on the public agenda, destroying the capture relationship, which had characterized the relatively arcane subject of air-transport regulation for at least 40 years, and ultimately making it impossible for the industry to successfully oppose (at the congressional level) a group of CAB regulators who were attempting to destroy slack on the issue.

If this description survives careful research and can be extended (e.g., to the Tax Reform Act of 1985 or to other Carter-era deregulations), one could then attempt historical reconstructions of the regulatory events that have so engaged revisionists—the establishment of the ICC and other regulatory agencies of the Progressive and New Deal eras. We may well find that some

27. See "Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcommittee on Administrative Practices and Procedures of the Committee on the Judiciary of the U.S. Senate," 94th Congress, 1st Session (1975).

represent instances of capture and that others do not. We may find that many represented attempts at general-interest regulation at moments when issues were on the public agenda but that, once the regulatory issues in question fell from the public agenda, slack returned and, with it, capture and Burkean acts.<sup>28</sup>

The issues we are addressing here are complex and difficult to characterize. We have attempted to structure them so as to capture their real-world features without introducing so much ambiguity that falsification becomes impossible. Much testing will be required before we have a robust theory of regulatory origin and conduct. Our hope is that this reformulation of the problem has made that testing possible.

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28. This scenario would share many features with Weingast's model.

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