European Journal of Law and Economics, 15: 165–194, 2003

The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?

MICHAEL HANTKE-DOMAS M.Hantke@uea.ac.uk; mphantke@yahoo.co.uk
Centre for Competition and Regulation, University of East Anglia, Norwich, Norfolk, NR4 7TJ, UK

Abstract

The *Public Interest Theory* of regulation explains, in general terms, that regulation seeks the protection and benefit of the public at large. This paper argues that possibly the Public Interest Theory does not exist as such for reasons that will be discussed later. In addition, the paper contends that the Stigler's and Posner's characterisation of the Public Interest Theory has similarities with the welfare economics rationale for regulation. Nevertheless, the similarities do not prove or deny a connection between both the concepts of public interest and the welfare economics rationale for regulation.

Keywords: theories of regulation, public interest, history of microeconomics, welfare economics, law and economics of regulated industries, regulation

JEL Classification: B21, D63, K23, L50

Microeconomic literature teaches of the existence of two contending theories of regulation. One, the *Public Interest Theory*, explains in general terms that regulation seeks the protection and benefit of the public at large. The other, the *Chicago theory*, suggests that regulation does not protect the public at large but only the interests of groups.

Richard Posner (1974), fellow of the *Chicago School*, was the first academic to attribute the traditional rationale for regulation at the time to a theory based on the concept of public interest. He recognised two arguments commonly used to support regulation, namely, (a) that markets were prone to fail and (b) that regulation was costless (zero transaction costs). Three years before, George Stigler (1971) had initiated a new theory explaining regulation: the Chicago theory (known as well as the *Economic Theory of Regulation*). The arguments individualised by Posner bear similarities with the idea of market failure in welfare economics.

Ensuing authors (Joskow and Noll, 1981; Viscusi, Vernon, and Harrington Jr., 1995; Aranson, 1990; den Hertog, 2000) have identified the Public Interest Theory as part of welfare economics, though none of them has ascribed the formation of the theory to anyone else. All these authors have seen the theory as a normative analysis presented as positive theory. This characterisation of the so-called Public Interest Theory has been the standard account given by microeconomic textbooks.

This paper delves into law, politics, and academic writing to discover the originators, if any, of that theory. British and American law accepts, at least since the nineteenth century, the idea of public interest as an argument for different forms of regulation. Politics historically uses the concept to justify government regulation of business. This paper focuses on the Progressive Era and the New Deal years of American history, especially prolific historical periods in regulatory initiatives. Despite both the law and politics supporting regulation in the public interest, none of their claims creates a specific theory of regulation.

After reviewing law, politics, and academic writing, one can conclude that no author has claimed intellectual ascendancy over the so-called Public Interest Theory, nor have they mentioned any author or supporter of it. From this evidence, one can conclude that the Public Interest Theory does not have any known origin; consequently, it does not exist as such. The evidence collected from academic writings shows that scholars identify the Public Interest Theory with the welfare economics conception of market failures (monopoly, public goods, asymmetry of information, and externalities). Despite there being some similarity, the characterisation is not identical because the concept of public interest is apparently absent from the concept of market failure.

The Public Interest Theory has two acceptable concepts. The first, embraced by Stigler (1971) and Posner (1974), explains that regulation seeks the protection and benefit of the public at large. The second, developed by ensuing academics, defines it as a system of ideas, which proposes that when market fails economic regulation should be imposed in order to maximise social welfare.

Section 1 surveys legal developments associated with public interest. Both the United Kingdom and America have important case law where the idea of public interest is dominant and they are closely linked with each other. Section 2 reviews the American political history between 1890 and 1945 where many decisions were allegedly taken in the light of public interest. Finally, Section 3 is devoted to the study of the development of the concept of public interest amongst academics.

1. Public interest and law

Intervention and control of the economy by governments is as old as the existence of human beings. The concept of public interest is as old as the political philosophy of government intervention. Indeed, the concept of public interest appears in the works of political philosophers such as Plato, Aristotle, Hobbes, Rousseau, and many others (Held, 1970). Thus, both government intervention and public interest coexist in the political, philosophical, and legal areas.

In the legal area, the idea of public interest in regulatory affairs can be traced back in the work of Lord Mathew Hale, *The Portibus Maris* (1787). The work of Lord Hale was fundamental in two judicial decisions during the nineteenth century, *Allnutt v. Inglis* (England) and *Munn v. Illinois* (America). Lord Hale argued that if there was only one public wharf in a port, the duties it charges for cranage, wharfage, or other services must be 'reasonable' and 'moderate.' In the light of this situation, Lord Hale concluded that if a wharf, crane, or other facilities enjoyed a monopolic activity licensed or chartered by the King, then they were affected with a public interest and, consequently, the business ceased to be *juris privati* only to become *juris publici* (*Allnutt*).

The idea of regulation in the public interest supported by Lord Hale has been an argument raised by many writers. In both Britain and America, the idea influenced the judiciary, which has important implications in today's world. Nonetheless, it is in America where the influence of public interest as a rationale for regulation has obtained political, judicial, and academic acceptance. It is also the place where it has been subject to criticism.

1.1. The British experience

Laissez-faire has been an essential element of British economic policy for centuries. Rooted in Common Law, the restraint of government interference in private business can be traced from the Middle Ages (Holdsworth, 1924). Laissez-faire has its origins in the belief that commercial transactions lie within the sphere of private business rather than in the Crown's, and private trade was of benefit to the whole community (Gilligan, 1997). Free trade was neither an absolute principle nor an absolute practice; hence, it had exceptions in the form of trade regulation (Gilligan, 1997). If free trade benefited the whole society, then why should it be the subject of regulation? There was no one answer.

In contemporary times, the answer can be multiple. Public pressure, rent seeking, public interest, altruism, and so on can be a plausible response. Public interest as one of those answers is commonly found in judgements of court or in Parliamentary Acts. For example, it is usual to find in the decisions of the court references to public interest used in the sense of protection for the interest of the community (i.e. *Ellis v. Home Office*; *R.v. Sussex Confirming Authority*; *Duncan v. Cammell Laird & Co.*; *R.v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte*). Likewise, current acts consider the idea of public interest, such as the Fair Trading Act or the Telecommunications Act 1984; even, the Public Interest Disclosure Act 1998 has a test for determining if the public interest is served or not by revealing secret official documents. Another example is the United Kingdom Competition Commission that has the duty to decide if a case presented before it passes the *test of public interest* (Wilks, 1999). In law, the judiciary is the enforcement branch that will decide ultimately, how the public interest is best served in some disputes. Despite the common occurrence of the term public interest, it is difficult to find a definition of it. An exemption is Campbell C.J., in *R.v. Bedfordshire* (24 L.J.Q.B. 84), who defined a matter of public interests as:

> [It] does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.

Economic interests, legal rights, and liabilities, according to Campbell C.J. can be affected and therefore it is a matter of public interest.

A similar argument was applied in *Allnutt v. Inglis* (1810), in a case about monopoly pricing. In short, the decision was whether a granted monopoly—by parliamentary licence—could lawfully deny service to a customer reluctant to pay certain price because he considered it to be 'unreasonable.' The court, based on *common callings*[1] and on Lord Matthew Hale's opinion, held that since the object of the licence was to encourage trade and commerce of Great Britain, its activities were affected with public interest. Hence, the monopoly licensee could not charge more than the 'reasonable' price for the provision of its services (Craig, 1991).

The idea of 'reasonable' price in *Allnutt* was similar to the common law idea of *just price*.[2] The idea of just price was originally a moral idea. Beliefs such as 'Lend freely, hoping nothing on return' or the Christian belief that one should do onto others what one is expecting others do onto oneself, influenced decisively the idea of just price (Lovewell, 2000). The rejection of high prices was closely based on the belief that they would create inequality in distribution. Additionally, the idea of accumulation was considered loathsome, and therefore was intolerable (Hamouda and Price, 1997). The origin of the idea of just price lies in the work of Aristotle but one of the most acknowledged authors is Thomas Aquinas (Hamouda and Price, 1997; Lovewell, 2000). Aquinas argued that just price was either the market price or a fixed price (by the authority), but limited to an amount that could keep the social position of the merchant (Friedman, 1987; Lovewell, 2000).

The law adopted the moral concept of just price and applied it mainly to the law of usury and the law of trade. It was expected that the seller would receive a 'moderate gain' instead of an 'excessive gain,' because the latter would be deemed unfair due to the difference in gains and consequently would be declared illegal (Holdsworth, 1903, 1924). Certain conduct, such as the manipulation of market prices, was severely punished as criminal practice. Offences like *forestalling* (manipulation of prices before goods arrived to the market), *regrating* (reselling goods in the same market), and *ingrossing* (intermediating between the farmer and the consumer) where enacted as early as the sixteenth century (Holdsworth, 1924). In addition to outlawing excessive gain in trade, price control was another tool to prevent unequal gains. A vast number of examples of price control have existed in the legal history, such as a proclamation of James I (1623) ordering that corn prices should be lowered in times of scarcity. It was not until 1825 and 1844, that price control and criminal conduct legislation enacted since the sixteenth century were abolished, following the suggestions in that sense of the new theories being put forward by economists like Ricardo (Holdsworth, 1924).

During the nineteenth century, morality and law were disciplines without clear boundaries. Morality condemned economic gains when they where considered to be excessive, and the law punished those who dared to engage in such lucrative businesses. *Allnutt* is an example of the application of these ideas. The court, in *Allnutt*, based its conclusion on the work of Lord Matthew Hale, which was influenced by the idea of just price.

In Lord Hale's work on ports, which offer monopoly services available to the public, suggested that the interests of the users, or *jus publicum*, outweighed those of the monopoly, or *jus privatum*. Consequently, the supremacy of the interest of users imposed an obligation upon the company of not charging excessive tolls. Lord Hale arrived at this conclusion because he regarded the relationship between the company and the users as mutually beneficial, so that it was necessary to keep a balance between the utility of the company and the utility of the users (an idea identical with the morals of just price.) Accordingly, a monopoly company that provided services to the public was 'affected with a public interest,' and therefore its prices should not be excessive (Craig, 1991).

From the argument of Lord Hale one can derive, that public interest is equivalent to the expectation of the public to be served 'reasonably' and with 'moderation.' On one hand, this obliges the monopolist to provide service on an equal basis ('fairness'). On the other hand, it entails the monopolist with the right to be compensated with a 'reasonable' price. Thus, when a business is affected with public interest it means that society is interested in the 'fairness' and 'moderation' of prices and the equal access to it, complemented by the correlative right to earn a reasonable price.

The interpretation of a mutual beneficial relationship to support price controls is vague, because it does not shed light on the 'reasonableness' or 'unreasonableness' of a price; neither, on the 'reasonability' in the determination of the utility margins both the company and consumers are entitled to earn. For example, a beneficial relationship between a port owner and customers can be achieved by price discrimination if the resulting price reflects different costs to provide the service to different customers (Tirole, 1997). In such a case 'discrimination' is present despite the relationship still being mutually beneficial.

A more subtle issue arises from *Allnutt* and its contentious price controversy; that is the scope of application of the concept of just price and, generally speaking, the basis for business regulation. In terms of scope, it is not only a monopoly that can be accountable for 'reasonability' and 'moderation' in prices. Indeed, almost all activities might be made accountable for as long as prices fail to comply with the 'moderation' and 'reasonability' test. In our contemporary understanding of the issue, 'reasonability' and 'moderation' are concepts that somehow are incorporated in rationales for economic regulation.

Nevertheless, in the time of *Allnutt* the idea of price regulation could have been extended by analogy to other situations where services were not provided on a basis of 'reasonableness' and 'moderation.' Thus, Hale's argument could have been extended from monopolies to any other activity; as public interest was nothing more than society's stake in its own benefit. Historically, the Common Law and the judiciary have shaped the content of these two concepts. *Allnutt* implies that trade could have been subject of restrictions (by the Judiciary in this case) based on the proposition that a private undertaker serving the *general public* should supply its services based on equal and reasonable access. Other cases followed the same thread such as *Harris v. Packwood* (1810), *Minister of Justice for the Dominion of Canada v. City of Levis* [1919], or the Scottish case law *Aiton v. Stephen* (1876), and *Magistrates of Kircaldy v. Greig* (1846) (Prosser, 1997). Professor Tony Prosser suggested that these cases could be interpreted as '. . . an expression of a socially-based right of public access to scarce resource' (p. 24).

Regulation of trade and its implications for property rights in the time of *Allnutt* was not a topic much discussed by either courts or academics. However, it is possible to derive a criterion to be followed by the court to limit property: (a) there is a government licence; (b) this licence creates a monopoly or grants the privilege to exploit a natural one; (c) the beneficiary of the licence is a private entity; and (d) the economic activity is for the benefit of the public.

> Where private property is, by the consent of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit (*Allnutt*, p. 527).

It is interesting to note that if entrepreneurs are granted Parliamentary licences to run businesses affected with public interest, and insofar as they are requesting it, then they are accepting the limitations imposed over the rights granted. Essentially, entrepreneurs are giving up part of their rights (*jus privatum*) thus enduring limitations to their exercise (by the expedient of *jus publicum*).

The influence of *Allnutt* in the way Britain regulates economic activity has not been studied so far. A workable answer-hypothesis might be that *Allnutt* contains an early reference to public interest although without a clear definition. The idea of public interest seems to overlap with the concept of just price; hence, public interest represents in one hand the community's interest on wealth distribution and in the other hand the rejection of 'excessive gains' by traders. Nevertheless, the impact of *Allnutt*'s idea of public interest seems to be irrelevant, as there is not much awareness of it neither in the judicial[3] reasoning nor in academic writings. However, *Allnutt* reasoning on 'reasonable prices' is not unique and is commonly found in many legislative Acts even nowadays.

Lord Hale's argument has been similarly neglected. Professor Paul Craig advanced the explanation that this trend was because '... Blackstone did not take up Hale's observation in this regard.' However, he added that a probable explanation was that the ad hoc legislation of public utilities passed in the nineteenth century, obviated '... the need for direct, common law regulation of price.' (Craig, 1991, p. 540).

Indeed, specialised bodies took over the control of certain industries, which were both affected and not affected with public interest from the nineteenth century onwards (Foster, 1992; Prosser, 1997; Ogus, 1994; Skuse, 1972). Perhaps one explanation of the judicial retreat in this matter might be found in the words of the Rt. Hon. Lord Woolf of Barnes (1995):

> When such [regulatory] bodies exist, judicial review pragmatically recognises that they, and not the courts, are the more appropriate means to achieve hands on control (p. 63).

Although the bearer of public interest is the whole community, only regulators and judiciary understand what the public interest is. By analogy, the argument of Lord Hale is interpreted here as defining public interest as the interest of society in being served 'reasonably' and with 'moderation.' On one hand, this is a licensee's duty, but in addition, it is the duty of the regulator to realise it as far as it is their mandate to achieve society's interests. On other hand, the judiciary is called to determine what public interest is in case a dispute arises between a company and a regulator. Traditionally, the English judiciary has restrained itself from intervening unless the regulator has exceeded its mandate. This is called *ultra vires* rule. Clearly, the *ultra vires* rule imposes an obstacle to review the action of a regulator. Nonetheless, since the middle of the 1980s, British jurisprudence has moved toward the protection of individuals and the control of power, which is a leap forward from the *ultra vires* rule (Oliver, 1987). The central case is *Council of Civil Service Unions v. Minister for the Civil Service* (1985). This movement towards a more active role for the judiciary in controlling 'power' is inspired by concepts such as 'fairness,' 'reasonableness,' 'arbitrariness,' and so on (Oliver, 1987). If one accepts that public law applies to 'public functions,' independent of the type of institution (either public or private),[4] then it is possible to see similarities (e.g. private business, business providing a public service and the application of principles of good administration) with *Allnutt*.

1.2. The American experience

The Supreme Court gave the first interpretation of public interest. In dealing with the scope of government powers to regulate private economic activity and private property rights the court established that: (a) regulation was a power inherent in government through the principle of sovereignty; (b) the government was allowed to regulate on those activities vested with public interest; (c) and its exercise through police powers was justly limited by the due process of law.

Regulation by the end of the nineteenth century and during the twentieth century was not absolute. A nation's ideology based on an individualistic tradition shielded by a strong constitution could not be overwhelmed by such a threat. Property rights were—and still are—protected by its Fifth and Fourteenth Amendments. Indeed, this political and legal tradition influenced the way the Judiciary approached regulation, and public interest played an essential role (Mitnick, 1980; Craig, 1991).

Munn v. Illinois. By the nineteenth century, liberty of contract had become the general principle—and remains so today. Nevertheless, regulation of private activity was imposed in many cases.[5] At that time, regulation was aggressively attacked mainly to curtail government action by the expedient of the Fifth and Fourteenth Amendments. This strategy generated an important discussion about economic due process in America (Craig, 1991).

In 1876, the Supreme Court formulated the first approach. In *Munn v. Illinois,* the Court decided a case about the unlawful operation of a grain elevator and warehouse because a licence was not taken out to provide the service, and additionally it was charging rates higher than the stated in the Illinois Regulate Public Warehouses and the Warehousing and Inspection of Grain acts of 1871. The Supreme Court accepted regulation on the ground that property rights were not supreme and absolute in the Constitution when the effects of their enjoyment had a public consequence. The individual, in the reasoning of the Court, was granting an interest to the community at large. Hence, and because it was in the public good, the individual had to submit it to the control of the public. The court also added that according to Common Law, the Government, derived from its sovereignty, could use police power to regulate the use of property by citizens when the good of the public deserved it. It was understood by the court that '. . . statutes regulating the use, or even the price of the use, of private property [did not] necessarily deprive an owner of his property without due process of law' (p. 134). The court even declared that the right to establish a maximum price is inherent in the power of regulation, and therefore if government has the power to regulate businesses in the public interest, then it has the right to establish maximum charges. The extent of government power in this area is controlled by the citizen through elections:

> We know that this is a power [rate regulation] which may be abused; but that is not argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts (p. 134).

This principle was similar to the British administrative law principle of *ultra vires*. The same view was supported 57 years later by *Nebbia v. New York*, and has been ever since the Supreme Court approach to regulation, with the exemption of reviewing legislation on the grounds of arbitrariness and irrationality (See *Hodel v. Indiana*).

Nebbia v. New York. Years after *Munn*, the Supreme Court struggled with the content of the concept 'affected with a public interest.'[6] A definitive precedent appeared with *Nebbia v. New York*.[7] This was a case concerning the failure by a grocer to observe a fixed price established by the New York Milk Control Board in 1933. The phrase 'affected with public interest' was understood to be equivalent to 'subject to the exercise of police power' (p. 533). Justice Roberts elaborated the argument about regulation. He stated that the Supreme Court tradition recognised that government inherently has an unquestionable power to promote general welfare. Thus, the Fourteenth Amendment allowed government regulation for the public welfare, but had to accomplish the end by methods consistent with due process (Killian and Costello, 1996).

> [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts (*Nebbia*, p. 525).

Another important consequence of *Nebbia* was the judiciary self-restraint to review the merits of government's economic policy, which legitimised the government's sphere of attributions in such area. Essentially, the court stated that the government was free to adopt its own economic policy to promote public welfare as long as *due process* was respected:

> The courts are without authority either to declare such [economic] policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. . . . Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. (p. 538)

2. American political actors and public interest: 1890–1945

The concept of public interest has not only been of the exclusive use of the judiciary; but it has also been used in politics. Even politics have influenced the law in conceiving what is public interest, like in the case of the common law concept of *just price* shared by medieval political philosophers. Despite this influence, the extent of application has differed from one discipline to another. In the law, as seen, public interest has helped judges to solve controversies on regulation; whereas in politics it has been a goal to achieve by regulation. In the latter application, public interest has been a vague aim, because it has not had a clear definition of its content. This has been a controversial area where academics have advanced different interpretations of the exact use of the concept of public interest in politics. For example, the lack of clear content might have provided an excuse for selfish politicians and policy-makers to advance their own interests as the *Public Choice Theory* has suggested, so that no public interest (assumed as to be an unselfish goal) has been achieved by regulation (Couch and Shughart, 1998).

History sheds light about the scope of public interest in politics and its use in regulation. History gives an uncompromising perspective to analyse past political issues. In this vein, it is possible to identify, in the political discourse, the appearance of the concept of public interest, the scope given to it, and in some cases, data that makes it possible to contrast that discourse with its effective implementation. Particularly prolific periods of regulation in history are America's Progressive (1890–1917) and New Deal (1933–1938) eras.

In the period between the two landmark cases, *Munn* and *Nebbia*, America endured one world war and an economic collapse. Facing those difficult situations, the government adopted drastic policies to boost the economy. Among many drastic policies, strong business regulation was one of them. The improvement of economic and political situations through economic regulation and anti-trust laws was for the sake of public interest. Two important political figures were Presidents Woodrow Wilson and Franklin D. Roosevelt, who developed political ideas and discourses based on concepts of public interest. Strong evidence shows that some part of their political discourse was not aimed to promote general welfare but allegedly to enhance their political position by giving extra economic help to those constituencies more inclined to vote for them (Kolko, 1963; Couch and Shughart, 1998).

2.1. Progressive Era (1890–1917)

A perceived economic power abuse by big businesses was a top concern for the political economy by the end of the nineteenth century and the beginning of the twentieth century. America's rapid industrialisation led businesses to accumulate wealth and power. This new political and economic realignment was completely unregulated causing great opposition from different interest groups (Kesler, 1989). This economic transformation implied a different allocation of resources that was blamed for raising urban poverty, political corruption, and seizure of power by trusts (i.e. oil trusts and railroads) (Eisner, 1993; Peritz, 1996). Grangers,[8] progressive politicians (e.g. Woodrow Wilson and Louis Brandeis), and new nationalists (e.g. Theodore Roosevelt or Herbert Croly), found common ground in the application of regulatory policies to overcome the increasing power of 'bad' trusts (Brandeis 1914; Hartman n.d.; Roosevelt, 1961; Wilson, 1913).

Classical political economy was severely questioned by the increasing market power acquired by trusts against all predictions that this could not happen without government support (Peritz, 1996). The power seized by trusts, especially railroads, was seen as unparalleled:

> The fruits of the toils of millions are boldly stolen to build up colossal fortunes for a few unprecedented in the history of mankind; and the possessors of these, in turn despise the Republic and endanger liberty. From the same prolific womb of governmental injustice we breed the two great classes-tramps and millionaires. ('People's Platform of 1892', in Porter and Johnson, 1956, p. 90).

Medium and small businesses faced harsh economic conditions, which were partly attributed to the market power that the new trusts held. A call for action was lobbied by these interest groups finding sympathy with progressive politicians. President Theodore Roosevelt during his period of office (1901–1910) and in his subsequent presidential campaign (1912) advocated the idea that government must protect public interest by acting as the agent of change (Davidson et al., 1997). Theodore Roosevelt 'like other reformers. . . feared that the "public interest" was being submerged in the drifting seas of indifference' (Bailey, Kennedy, and Cohen, 1998, p. 689). This rather paternalistic promise led to an unsurprising mixture between private business and government planning, known as 'regulated monopoly' (Davidson et al., 1997; Letwin, 1965). This was a trade-off between economic liberty (that favoured trusts' businesses) and a regulated economy (that benefited allegedly the general interest by controlling prices). If before this Progressive's policy there were some large monopolies organised as trusts, then with the advent of Progressive's economic policy there were hundreds of monopolies. Roosevelt argued that he was not against big businesses (i.e. 'good' trusts) but he believed that every citizen should have equal opportunities within the economic system and as some large companies were immensely powerful (i.e. 'bad trusts') that a single citizen could not compete except with the assistance of the government. Roosevelt campaigned for regulation, based upon the political idea that '[t]he right to regulate the use of wealth in the public interest is universally admitted' (Roosevelt, 1910).

New legislation, such as the Interstate Commerce Act (railroad regulation, 1887), the Sherman Act (anti-trust, 1890), and the Hepburn Act (gave the ICC the right to set reasonable rates, 1906),[9] was used to offset the power acquired by large 'bad' businesses (Heilbroner and Singer, 1994). One of those 'bad' businesses was the Northern Securities Company, which ran a railway monopoly in the Pacific Northwestern. In 1902, the Government sued Northern Securities Company, and won. After that major victory, Roosevelt was going to be known as the 'trust-buster.' In the subsequent years, his government 'busted' forty large corporations (Heilbroner and Singer, 1994).

Roosevelt's political ideas were overshadowed by Woodrow Wilson's presidential campaign in 1912. Wilson came up with a second idea of 'regulated competition' (Davidson et al., 1997; Wilson, 1913). Wilson shared the same view held as T. Roosevelt about equal opportunities for all citizens and the same view about the abuses by big companies to gain political influence that harmed competition on equal 'economic' basis (Wilson, 1913). Wilson proposed a different role for the state that relied on anti-trust policies rather than on close regulation of businesses by agencies that, in Wilson's view, allowed firms to capture the government. Competition was called for to restore industrial freedom. Most of the Progressive era initiatives were inspired by Wilson's approach to regulation and competition rather than Roosevelt's (Eisner, 1993).

This general account of the Progressive years has been strongly contested by academics (Kolko, 1963; Letwin, 1965; Stigler, 1985, cited by Ekelund, McDonald, and Tollison, 1995; Gilligan, Marshal, and Weingast, 1989, cited by Ekelund, McDonald, and Tollison, 1995; DiLorenzo, 1985, 1990 cited by Ekelund, McDonald, and Tollison, 1995). Gabriel Kolko (1963) argued that instead of a Progressive era, this period corresponded to a Conservative era. He has even suggested that in almost all economic decisions the interests of businesses prevailed over the general community interests, due to the control that businesses had over politicians and policy-makers. Kolko has provided several examples to prove his assertion, such as the Northern Securities, the creation of the Bureau of Corporations, the regulation of insurance, the Meat Inspection Law, the railways regulation, the banking reform, and the steel industry investigation by the Bureau of Corporations. To illustrate Kolko's evidence, I briefly examine the Beef Trust.

In 1904, a scandal over the miserable conditions manifest in the meat packing industry prompted Roosevelt and the Congress to pass the Meat Inspection law (1906), that had an indirect effect the elimination of the Beef Trust (Kolko, 1963). Despite this prompt action, the problem had existed in the beef industry for 20 years.

This was a story of governmental inactivity that was only pushed to pass legislation when the interests of the industry were at stake (Kolko, 1963). For example, in 1891 America made its first inspection meat law, with the specific aim of enhancing sanitary conditions in order to lift European prohibitions of importing meat due to perceived lack of hygiene of the American product. However, poor hygienic conditions continued, mostly caused by the inaction of federal authorities and an alleged lack of resources. According to Kolko these circumstances considerably benefited large packers because smaller ones were not inspected and consequently unable to compete within the USA and abroad because they were not certified. The Bureau of Animal Industry, part of the Department of Agriculture, recognised the lack of funding by 1906. The problem of funding was central because it was considered that as the benefit of inspection was for the meat industry rather than for consumers the industry should pay for the inspection. This question continued to be debated after the 1906 Meat Inspection Law was passed. It is interesting to note Kolko's perception of the lack of decisive action by the authorities who were much praised for combating big industries interests in favour of the public interest and the apparent contradiction with the facts laid by Kolko.

One possible answer to the question of the Progressive governments' lack of decisiveness is found in Public Choice. Scholars (Letwin, 1965; Ekelund, McDonald, and Tollison, 1995; McChesney, 1995) have studied the anti-trust legislation enacted during the Progressive era, concluding that far from achieving economic efficiency anti-trust legislation was serving different interests. A basic premise of this school is that the public sector behaves equally as ordinary markets behave; hence, public sector decision is driven by self-interest just as the microeconomic rational model teaches. Evidence shown by Ekelund, McDonald, and Tollison (1995) suggests that the Clayton Act produced wealth redistribution, in certain cases, from growing firms to large firms and small firms occupied in intrastate commerce. The same conclusion is extended to the Sherman Act (Ekelund, McDonald, and Tollison, 1995).

2.2. *The New Deal (1933–1938)*

The New Deal was the American politico-economic response to one of its most disastrous economic collapses in the twentieth century, the Great Depression (1929–1939 approx.) (DeLong, 1997). By 1933, America's real output had fallen by more than 30 per cent since 1929 and its unemployment rate had soared to 25 per cent. With such a gloomy panorama

President Franklin D. Roosevelt (1933–1945), advised by his *Brains Trust* (Adolph Berle, Raymond Moley, and Rexford Guy Tugwell), tried to promote economic reactivation through combined measures.

Two important measures, among others, were taken during this period. The first measure taken was the 1933 National Industrial Recovery Act (NIRA). In essence, it established self-regulation of industries supervised by the government (Eisner, 1993). In practical terms, industrial cartels were protected and supported. Industries were obliged to write and adopt 'Codes of Fair Competition' establishing prices, wages, entry requirements, and quotas for the adopting industries. Additionally to NIRA, anti-trust laws were relaxed (Taylor, 2002). This phase was 'an attempt to promote economic stability by means of an integrated regulatory framework governing production and pricing across multiple sectors of the economy.' (Eisner, 1993, p. 5). However, NIRA was short-lived and in 1935, the Supreme Court declared it unconstitutional (see *Schechter v. United States*).

After NIRA came the 1935 Public Utility Holding Company Act (PUHCA). The Securities and Exchange Commission (SEC) was entitled to '... regulate the holding companies' acquisitions and their issuance of securities, and to regulate the financial relationships between the holding companies and their operating subsidiaries' (Eisner, 1993, p. 113). The most powerful tool in the SEC's hand was the denominated *death sentence*, or the compulsory divestiture of the holding companies. This stringent regulation presented similarities with the Progressive approach taken at the beginning of the twentieth century that might demonstrate a certain degree of influence in the New Deal political economy (Eisner, 1993).

The pervasive regulatory character of the New Deal political economy could be understood, in some way, in the light of President Roosevelt's political and philosophical beliefs. He declared himself a *liberal*, as much as in the sense one understands liberalism nowadays. In economic terms, and specifically in terms of regulatory policy, Roosevelt's liberalism accepted that well self-governed large corporations produced wealth. Liberty, he believed, was essential for increasing wealth in America. Nevertheless, the creation of wealth and its associated power was vested with a social responsibility for public service, to which corporations and worker unions were deemed to serve (Wettergreen, 1989); consequently, regulators were in charge of supervising that this social responsibility was realised.

In addition to ensuring businesses' social responsibility for public service is maintained, the government also has to conciliate this with other interests. Roosevelt believed that a society was constructed by several other interests apart from the interests of businesses (e.g. military, religious, etc.), and that they were not necessarily concurrent with the interests of businesses. Government had a conciliatory role in this competition of interests, so that regulation was necessary to harmonise wealth and other purposes (Wettergreen, 1989).

According to Roosevelt, government had a conciliatory role because he believed that the President acts as a steward to the common well-being and the public welfare of the people (Schubert, 1960). Roosevelt's reliance upon regulation to conduct the economy may be explained by a combination of several of his views, such as his certainty about the presidential role (extended to the whole administration), his stewardship theory of the advancement of public interest, his legal powers delineated by the Supreme Court, his own political agenda, and his highly interventionist economic *Brains Trust.* Not to mention the economic crisis that America was experiencing and the consequent political uncertainty.

All these political and economic events promoted an empowerment of corporations and unions, by giving them a self-regulatory task, as NIRA did. That empowerment was not meant to go unregulated by government, especially when the corporations and unions were expected to serve the public interest. Legislative initiatives gave the American government (e.g. Securities and Exchange Commission, National Labour Relations Board, etc.) important powers to supervise that corporations were complying as expected. New Deal officials, however, were wary of the agencies' regulation as, they believed, big businesses were keen to capture them (Wettergreen, 1989).

President F. Roosevelt's New Deal approach to regulation was similar to the political discourse supported by the progressivists. Indeed, President F. Roosevelt had declared himself a follower of Wilson's progressive ideas (Kesler, 1989). Despite his declaration, it is unclear whether the New Deal is a continuation of the Progressive era because most of its followers found the idea of the use of federal power 'sickening' to protect urban life rather than to protect rural life, something that betrayed their own progressive political stance (Graham, 1967). This political quarrel, notwithstanding, it is evident, in the field of government regulation, that the New Deal followed a path of intervention with substantially more intrusive legal tools (e.g. NIRA and PUHCA), reaching levels of intervention deemed unconstitutional in some cases (e.g. NIRA).

A recent study (Couch and Shughart, 1998) shows a similar pattern of correlation between the public interest discourse of the New Deal and effective government action, somewhat similar to the one registered during the Progressive era. Empirical evidence shows that the distribution of emergency funds to relieve economic hardship were routed in great proportion towards the Midwestern, Mountain, and Pacific states, to the detriment of Southern states which in comparison suffered higher rates of poverty (Biles, 1994, cited by Couch and Shughart, 1998). This is apparently a contradiction between the political discourse during the New Deal (that advocated for the protection of the public interest) and the effective relief of economic hardships of all American citizens. Several alternative explanations have been suggested to explain these phenomena.

One explanation advanced was that the cost of living differed from state to state, so that those who received more resources were in more need of them due to a higher cost of life (Patterson, 1969, cited by Couch and Shughart, 1998). This argument has been weakened by criticisms citing an existent small difference in the cost of living between the favoured states and the Southern states (Couch and Shughart, 1998). Another explanation was that the requirements for requesting federal help were not always satisfied by Southern states, such as the requirement of co-funding between the help demander and the federal government. Regression analysis (Wallis, 1987, cited by Couch and Shughart, 1998) has shown support for the hypothesis of the fulfilment of requirement. The last explanation puts the blame on politics (Couch and Shughart, 1998). Anderson and Tollison (1991) using regression analysis showed evidence that in the allocation process of federal funds during the New Deal it was Congress and not the President who determined the allocation. Apparently, this conclusion does nothing more than merely confirm a procedure established in the Constitution. However, Anderson and Tollison went further to illustrate that the Congress' procedure to assign revenue was biased in favour of politicians holding important political positions within the Congress. Using different variables, they showed that states represented in one of the following variables received more funds than other states not represented in the same variables: (a) states with more valuable farm land, (b) states represented by senior congressmen, (c) states with more electoral votes, (d) states represented by the Senate's majority leader and its president, and (e) states members to the House Appropriations Committee—in charge of assigning revenue to the Government.

Why did federal funding go to Midwestern, Mountain, and Pacific states, to the detriment of Southern states? Two competing explanations exist, as seen. Did the favoured states satisfy the requirements and the Southern states not? Probably, yes. Did politics have influence? Probably, yes. Any chance of coincidence between requirements and politics? Probably, yes.

3. American academics and public interest

The influence of academics in judicial and political decisions is evident from the impact of the work of Lord Hale and the influence of the Brains Trust during the government of President F. Roosevelt. However, before the 1930s academics had not approached the issue of regulation and public interest systematically. It was in America where the idea of public interest as a rationale for regulation blossomed in academics' writing. Academics during the 1930s and the 1940s started to link administrative regulation with the ideal of public interest (Mitnick, 1980). They produced important works in the field of administrative law and social studies. At the beginning of the 1960s, some academics came up with important criticisms of the effectiveness of regulation (Stigler and Friedland, 1962). Ten years later academics labelled 'traditional' regulation as being principally a device to serve the public interest. Opposed to it, they propounded a theory explaining that the regulatory phenomenon did not pursue public interest but political self-interest. Later, its reviewers further developed the view that regulation aimed at the public interest was part of welfare economics.

3.1. Administrative law approaches (1930s–1940s)

The political idea of public interest developed from the Progressive and the New Deal eras probably permeated the academic field. Various writers adopted the vision that regulation had as its ultimate aim the necessity of achieving what the public was interested in.

Among those writers were Robert E. Cushman (1941) and James M. Landis (1938), who constructed a complex argument about how state agencies should had been organised and how they should have accomplished goals regarded as being in the interest of the public (Mitnick, 1980). It is not possible to argue that those authors devised a special theory of public interest in regulation. Mitnick asserts that 'In older literature it is only rarely that something like an explicit "Public Interest Theory" of regulation is put forth. This is largely a construct imposed by later work.' He adds that many works, especially legal ones, adopted a 'structural/legal/rights protection public interest approaches' (p. 97). Cushman's and Landis' work does not reflect any theoretical construction neither explaining what the public interest was nor forecasting the application of regulation in certain situations. Conversely, their work appears to be a mere legal articulation of political values prevailing at that time concerning the control of governmental power. Avery Leiserson (1942) explained this idea in terms of socio-political theory, as ‘a satisfactory criterion of the public interest is the preponderant acceptance of administrative action by politically influential groups’ (p. 104).

Administrative law writers’ involvement with the New Deal influenced the way which they conceived the state’s role in realising the public interest. For these writers public interest was obtained by the action of the administrative bodies. Landis (1938) represented this strand of thinking in the area of administrative law (McCraw, 1975; Eisner, 1993; Benedict, 1998).

3.2. 1940s and 1950s socio-political approaches

The origins of this approach may be found in the writings of Arthur F. Bentley (1870–1957). This American political scientist wrote *The Process of Government* (1908), in which he presented his theory of political groups. Bentley argued that groups capture control of regulatory agencies to advance their interests. He dismissed the idea of public interest as a fiction that represented only the interests of groups.

Several writers followed Bentley’s ideas relating to group’s interests. Marver H. Bernstein (1955, cited by Mitnick, 1980) explained that regulatory bodies are formed to answer a ‘public-interest-spirited regulation’ gained by the pressure exerted by groups that were seeking compensation for what they regarded as abuses committed by business against them (Priest, 1993). Mitnick concludes from Bernstein’s work that he considered that groups act in the public interest. Merle Fainsod and Lincoln Gordon (1941, cited by Mitnick, 1980) developed the same idea at an early stage, in the vein of the alleviation of aggrieved groups. Fainsod and Gordon saw regulation as a ‘public-interest-inspired’ effort to control abuses and to solve problems without any ‘. . . farsighted plan or design or the result of any thoroughly worked out rationale or theory’ (Fainsod and Gordon, 1941, cited by Mitnick, 1980). As groups have stakes in the formulation, execution, and frustration of public policies, their intervention has to be borne in mind when analysing the regulatory process. Thus regulation is seen by Fainsod (1940, cited by Mitnick, 1980) as a process where it is necessary additionally to take into account; (a) the conditioning factors (‘technology, economic organisation, ideology, law and other institutional factors’) that determine where interested parties have a function to play, (b) interested parties in regulation (investors, financial groups, management, labour, consumers, and industry suppliers) and their relative bargaining power to allocate resources in their own benefit, (c) and the actual political instruments that give the structure to operative controls (competitive party politics, legislative activity, the exercise of administrative discretion, and judicial determination).

For this socio-political approach, public interest appears to be essential in the quest for alleviating group’s suffering from the abuse of businesses. However, it appears contradictory to serve the public interest and simultaneously to serve the interests of groups. The aggregation of all interests is doomed to fail when resources are scarce and therefore conflict will arise (Fainsod, 1940, cited by Mitnick, 1980). Nevertheless, Fainsod emphasises that agencies have a crucial role in developing ‘new social values in the public interest,’ arguing that theoretically and frequently in practice, agencies are capable of translating a group's interests into a more public or general interest. Avery Leiserson (1942, cited by Mitnick, 1980) added to this discussion by suggesting that public interest was nothing more than the identification of the action of officials with the interest of certain group. This will be the measure to create regulatory bodies. Accepting that both regulators and groups have their own agenda of interests, public interest will be achieved by the groups' acceptance of regulation (Leiserson, 1942, cited by Mitnick, 1980). In practice, public interest will be inexorably identified with certain groups selected by bureaucrats in a bargaining process (Heering, 1936, cited by Leiserson, 1942, cited by Mitnick, 1980). In this scenario, the government must experiment to find a formula to respond to the changing interests of groups.

By the 1960s and the 1970s, the regulatory trend in America shifted its focus from the development of economic stability to the protection of consumers (or *social regulation*) (Eisner, 1993). This new focus suggested that regulation was a pervasive intrusion into business activities since its aim was to target production processes.

3.3. George Stigler

By the end of the 1960s and the beginning of the 1970s, academics from the University of Chicago started to theorise about regulation, eventually constructing a new theory of the origins of regulation (the Chicago Theory of Regulation) that contrasted largely with their characterisation of the existing regulatory framework at that time. George Stigler (1971) was the first scholar to enunciate the Chicago Theory of Regulation. Subsequent work of Sam Peltzman (1976) and Gary Becker (1983) gave substantial theoretical development to the theory. Stigler (1971), in his famous article *The Theory of Economic Regulation* opposed his Chicago Theory of Regulation to a 'widely held' view of regulation, characterising that view as being 'instituted primarily for the protection and benefit of the public at large or some large subclass of the public' (p. 3). As seen previously, this view of regulation is identical with the legal and political approach. He discarded this view of regulation and all the previous approaches by assuming that regulation '... is acquired by the industry and is designed and operated primarily for its benefits' (p. 3). Now the similitude is with Arthur F. Bentley

3.4. Richard Posner

A contemporary of Stigler, Richard Posner (1971) wrote a seminal article, *Taxation by Regulation*, concerning his view on regulation as to be a taxation mechanism based on the use of subsidies. The main thrust of the article was to explain how regulated industries provide services at a low price and in large quantity, something not attainable by an unregulated industry. He argued that neither the two contending *views* (not theories) explaining regulation, namely the protection of the public against monopolies (later labelled as Public Interest Theory) and the regulation procured by 'politically effective groups' (p. 22) (the Chicago Theory), could explain that phenomenon. Posner's hypothesis was that 'one of the functions of regulation is to perform distributive and allocative chores usually associated with the taxing or financial branch of government' (p. 23). Interestingly, Posner was not suggesting that the theories be discarded or making a defence for them, he was only making suggestions to modify and complete them.

The idea of the existence of a theory of public interest is not present in this work of Posner. However, the 'idea' of public interest is present in his 1971 work. Indeed, he identifies the *view* of regulation that protects the public from monopoly power as being a public interest approach:

> I hope to show that any theory that conceives the function of regulation to be to approximate the results of competition, or to enrich the regulated firms, or to do sometimes the one and sometimes the other, is incomplete. But it does not follow that a broadened *public-interest* approach (one that accommodated certain subsidy elements) or a broadened effective-political-group approach (one that viewed certain customers classes as effective political groups) might not be tenable (p. 23).

Posner believes that there is evidence to show that regulation of public utility might be a government device to provide services, which a competitive market would not provide, because it is too expensive for consumers to afford. Indirect subsidies play a crucial role in financing the provision of these services. Despite Posner's negative criticisms against subsidies, he leaves open the possibility that they could serve the public interest: 'Perhaps few subsidies are in the public interest' (p. 47). Although this clear statement, it is not possible to know for sure Posner's idea of public interest and how it constitutes a proper theory.

In 1974, Richard Posner started to talk about the existence of a Public Interest Theory of regulation. Indeed, he devoted part of his paper *Theories of Economic Regulation* to explain it. He espoused the theory without attributing it to any author. He suggested that the theory was based upon two assumptions developed during the period starting with the enactment of the first Interstate Commerce Act in 1887 and ending with the foundation of the *Journal of Law and Economics* in 1958. Those two assumptions were (a) that markets were prone to fail if left alone and (b) that the transaction cost of government regulation was zero. Thus, market imperfection justified regulation without any cost.

Posner's statement was the first to attribute premises to this theory. Far gone were the days of administrative law and socio-political approaches. Market failure was recognised by Posner as part of the Public Interest Theory of regulation. Although, the idea of market failure was a premise of welfare economics, advocated by A.C. Pigou, W.J. Baumol, and F.M. Bator, Posner did not refer to those authors. He just mentioned the work of some authors such as J. Bonbright, K.C. Davis, and H.J. Friendly, as embodying the Public Interest Theory; however, Posner recognised that the 'theory' was '... more often assumed than articulated' (Posner, 1974, p. 335).

Posner criticised his own assumptions that he had used to depict the Public Interest Theory. Posner's criticisms were related to the non-correlation between (a) regulation and the presence of external economies or diseconomies, (b) the monopolistic market structure, and (c) the non-existence of transaction costs of regulation, according to the empirical evidence available at that time (Posner, 1974).[10] In other words, public agencies controlled non-monopolistic activities despite the assumption that regulation was aimed to control monopolistic markets. In addition, enforcing regulation imposed a cost to the government (personnel, buildings, etc.) and therefore there were positive transaction costs.

Posner (1974) argued that empirical evidence showed a disappointing performance of the regulatory process. A defence against that evidence was that the disappointing performance was not explained by the unsoundness of the premises or the nature of the process, but by the weaknesses encountered by the regulatory process in terms of either personnel or procedures. Posner took the defence as a reformulation of the Public Interest Theory in the following terms:

> the public interest theory of regulation holds that regulatory agencies are created for bona fide public purposes, but are then mismanaged, with the result that those purposes are not always achieved (p. 337).

Nonetheless, he found his reformulation unsound because (a) there was evidence that socially undesirable results of regulation frequently benefited groups that have influenced in the enactment of regulatory legislation; (b) the evidence supporting a mismanagement case was feeble; and (c) there was no persuasive theory explaining why agencies were less efficient than other organisations (Posner, 1974).

Posner (1974) introduced two new elements to the mismanagement reformulation: (a) the tasks conferred upon regulators are unmanageable (for example, price regulation is based on the firm's costs and the instruments to measure them probably do not exist), and (b) the cost of legislative supervision on the agencies' performance increase as the output (legislative supervision) increases. If the tasks imposed on the agencies are uncontrollable then why do 'legislatures assign such tasks to agencies' (p. 339). Posner saw two implications in the cost of legislative supervision. First, as time passes from the creation of the agency, the legislature focuses its concerns on different matters other than the one that gave origin to the agency, and therefore the cost of controlling the created agency is higher. This is an application of the *life cycle* theory of administrative regulation, which proposes that an agency is created by the legislature to bring issues under their own control. As time passes and new issues arise, then the control of the agencies is less as the cost of devoting time to it increase. Second, administrative failure becomes, on average, larger as the agency grows in size and the economic issues become more complex. Finally, Posner added that the Public Interest Theory did not contain a mechanism to translate the perception of public interest into legislative action. As a conclusion, he observed that this theory had not reached the stage of a refined theory and the most promising attempt to understand regulation was being developed by the Chicago Theory. The main problem with Posner's exposition, independently of the soundness of his criticisms, is that he oddly chose two assumptions from a non-existent theory and developed his criticisms at his own pace. Those assumptions were ill-presented in contrast to the refinement of his counter-arguments.

Articles written after Posner, for example Peltzman (1976) repeated Posner's and Stigler's characterisation of public interest in regulation. They assumed the existence of a 'theory' that had some assumptions. Nevertheless, these authors did not mention either the origins of public interest, or its authors, or its premises, or even predictions made by it. The same pattern appears in both Stigler's and Posner's work. They did not differentiate between the political concept (public interest) and a hypothetical-deductive proposition made in the context of a scientific theory (Public Interest Theory). Thus, the spheres of analysis were mixed up.

In 1986, Gary Becker showed evidence that the Chicago Theory, as presented by Sam Peltzman (1976), was supported by his regression analysis. Furthermore, he presented initial evidence explaining that using that theory, public interest was protected in some cases.

3.5. Paul Joskow and Roger Noll

In 1981, Paul Joskow and Roger Noll reinforced Posner's assumption of the connection between the idea of market failures and the Public Interest Theory. They characterised it as a *normative* analysis in the form of *positive* theory:

> The essence of this normative analysis as a positive theory is that one begins an analysis of a regulatory process with the assumption that its purpose is to maximize some universal measure of economic welfare, such as consumer surplus or total surplus (p. 36).

Besides identifying the Theory of Public Interest with the idea of market failure, Joskow and Noll identify it with the theory of welfare economics.

Joskow's and Noll's work was not devoted to the study of the Public Interest Theory, although they made a statement concerning it that has been accepted by scholars such as Viscusi, Aranson, and den Hertog. Despite this acceptance, Joskow and Noll did not provide empirical evidence or cite any author supporting their conclusion or the Public Interest Theory.

The authors believe that it is incorrect for the theory of welfare economics to present itself as a positive theory of regulation; because it is demonstrated by economists that regulatory agencies do not always maximise economic welfare. Specifically, their arguments against the Public Interest Theory of regulation is (a) individuals have, besides economic objectives, non-economic objectives (i.e. 'guarantees of procedural fairness, constitutional freedoms, and pleasant human relations' p. 36) that are affected by regulation although they are not accounted for by welfare economics at the moment of maximising general welfare; (b) politicians acts are influenced by 'political institutions and administrative processes' (p. 36). These two arguments are the premises that lead Joskow and Noll to conclude that 'a rational regulator would be unlikely to seek to maximise conventional measures of economic welfare' (p. 36).

Joskow and Noll assume that the Public Interest Theory of regulation is nothing more than the normative theory of welfare economics without any evidence to support such statement. It would have been useful to know how they reached this conclusion, especially because they were two of the first academics to produce a particular interpretation that influenced subsequent authors' account of the Public Interest Theory, such as Viscusi, Vernon, and Harrington Jr. (1995). Moreover, their use of the distinction of positive and normative economics is vague because they do not provide a definition of what is understood as such; nor do they provide a definition of the normative theory of welfare. Because of the lack of definition, many interpretations can be derived from their distinction, such as that the 'Theory' of Public Interest is a normative statement disguised as a positive statement, so that it can overcome the known problem of subjectivism of normative analysis (see Blaug, 1992).

3.6. Kip Viscusi, John Vernon, and Joseph Harrington Jr.

These authors (1995) enunciate the Public Interest Theory in these words:

> Normative analysis as a positive theory (NPT) uses normative analysis to generate a positive theory by saying that regulation is supplied in response to the public's demand for the correction of a market failure or for the correction of highly inequitable practices (p. 325).

Thus, according to the Public Interest Theory a natural monopoly does not bring about a first-best solution because of its fundamental conflict between allocative efficiency and productive efficiency and the public, aware of this, demand that the monopoly to be regulated (Viscusi, Vernon, and Harrington Jr. 1995).[11] In the authors' words:

> Productive efficiency requires that only one firm produce, because only then is the value of resources used to supply the market minimized. However, a lone producing firm will be inclined to set price above cost in its objective of maximising profit. Then allocative efficiency is not achieved. To generate allocative efficiency, we need enough firms that competition drives price down to marginal cost. But then there is productive inefficiency because there are too many firms producing in the market (pp. 323–324).

Another implication is that unrestricted competition '. . . will result in either too many firms producing and/or price exceeding the socially optimal level' (p. 325). Thus, regulation will be an answer to the public's call for net welfare gains. This last assertion seems to be identical with the political mandate given by the people to their authorities in terms that the government must advance the economic conditions of its population. No reference to any author to whom to adjudicate the Public Interest Theory is given by Viscusi, Vernon, and Harrington Jr. Similarly, the authors do not prove the connection between net welfare gain and the idea of public interest. Apparently, they identify these two ideas as to be the same but then they must confront Peter Aranson's (1990) criticism about the democratic mechanism of elections as to be too general to be an accurate demand to advance by regulators.

The authors believe that there are two major problems with the theory of public interest regulation. First, it is recognised as a very incomplete theory, and second, there is a large amount of evidence to refute the theory. Despite the soundness of the arguments, it is not possible to overlook that both are constructed by the authors themselves rather than built upon the exposition of the arguments of those who created the Public Interest Theory of regulation. It is important to note that the market failure element is recurrent in the description given by the authors. Nevertheless, there is no reference to welfare economists at all. The authors reviewed a reformulation of the 'theory,' that essentially is a repetition of Posner's work (1974) and Joskow's and Noll's work (1981).

3.7. Peter Aranson and Johan den Hertog

Finally, some authors went further in their identification of welfare economics and the Public Interest Theory. Peter Aranson (1990) believes that theoretical justifications on public interest to regulate economic activities 'form a subdivision of the economic theory of welfare' (p. 249). He suggests that this subdivision when applied to regulation is called 'public interest' theory of regulation. Joskow and Noll (1981) argue in the same vein. This suggestion allows Aranson to make several criticisms to welfare economics' approach to regulation leaving it as a *wishful thinking*.

Aranson's assumption that public interest is a subdivision of welfare economics is unsupported by any evidence. For example, Aranson does not show how the idea of public interest is linked to the idea of Pareto-optimality. Reviewing the theoretical and historical development of Pareto-optimality through the work of Kaldor, Hicks, and Scitovsky (see Waddams Price, 1977; Koning and Jongeneel, 1997), it is not possible to detect the concept of public interest informing its theoretical development. Therefore, Aranson's argument of the connection between welfare economics and public interest is weak. This weakness is extensive in the work of Joskow and Noll (1981) and Viscusi, Vernon, and Harrington (1995) as they earlier adopted the same approach.

Aranson criticises welfare economics. He suggests that the theory states that inefficient markets produce external costs, imperfect information, and market power, so that regulation is necessary to solve them. Aranson sees the theory as normative 'and not necessarily positive (explanatory and predictive)' (p. 259). For him, the theory takes a value (wealth, 'consumer surplus' [*sic*] or variants of efficiency), and 'asks what policy government might adopt to achieve that value' (p. 259). He suggests that it is not true that government can act according to a social-welfare function because of a series of shortcomings posed mostly by preference revelation.

The author assumes that regulation is imposed because the price system fails to give the necessary information to consumers to make the best decisions. If the price system fails, according to the public interest, the government has to step in to address the failure. However, Aranson believes that if individuals fail to know what the best decision for them is, then the government equally fails. Hence, regulatory measures may produce worse results.

Aranson opens the discussion about failure of regulatory measures to the field of externalities. In this matter, he follows the mainstream approach suggesting that the government should treat the environment as a private good thus assigning property right. This is a form, according to Aranson, of ascertaining preferences through prices. However, Aranson's argument begs the question. Aranson's premises are that markets, through prices, reveal preferences and that regulation cannot do that accurately, so that market mechanisms (property rights and prices) will reveal preferences.

Aranson suggests that markets and government have different mechanisms to reveal preferences, differing as well in techniques to avoid transaction costs and free-rider problems.

Governments may use elections to reveal preferences. Likewise, people's use of elections is twofold. First, to establish the amount of the regulated 'thing' they want, and second, to establish a payment (tax) to get the regulated 'thing.' However, elections do not precisely specify these regulatory decisions. Additionally, elections can be manipulated. 'Democratic decision processes...cannot guarantee that the results of an election will be an improvement of citizen's welfare' (p. 263).

If a democratic decision process, as elections is, does not guarantee welfare maximisation the whole idea of regulation is doomed to fail. Again the idea of impossibility of regulation appears. Aranson continues by presenting regulation as an effort to determine how to achieve market equilibrium. To obtain equilibrium the regulator must know several pieces of information. The *London School of Economics*, as Aranson labels it, proposes that relevant pieces of information are opportunity costs because they influence decision processes. Aranson resorts to the *Austrian school of economics* to stress that individuals are organised in a decentralised way so that it is impossible for the regulator to know how individuals decide in certain topics and consequently, regulators cannot know individual's opportunity cost. Likewise, Aranson argues that decentralisation impedes the regulator ability to know individuals' reaction to regulation. He affirms that regulatory decision may encourage unintended behaviours because of the impossibility to know individuals' decisions.

Aranson believes that the Common Law and federal legislation are the alternatives to administrative regulation.

Johan den Hertog (2000) also identifies the Public Interest Theory with welfare economics; his basic assumption is that public interest is 'the best possible allocation of scarce resources for individual and collective goods' (p. 225). This characteristic is identical with one of the maxims sustained by modern welfare economics in the area of allocation propositions, that 'social welfare is increased if the distribution of a given output is better in some sense' (Mishan 1981: 9). It is possible to suggest that the author does count welfare economics as being the Public Interest Theory, because his account of it appears to be a description of classical problems studied by welfare economics. These include lack of competition ('unbalanced market operation'), asymmetry of information ('information problems'), externalities ('external effects'), and public goods. Den Hertog's criticism targets basic assumptions of welfare economics as being market failure and economic efficiency driven by regulation. He adds two criticisms taken from Posner; firstly, the existence of transaction cost in government regulation; and secondly, the unclear procedure of translating public interest into legislative action.

4. Conclusion: A non-existent theory?

4.1. Non-existence of the so-called Public Interest Theory of Regulation?

The review of the legal discipline shows that its perception of public interest has to do with the realisation of political and moral values. Whereas, the concept of public interest supplies the judiciary with a base from which to decide disputes within the realm of the community's interest.

In the cases reviewed the judiciary is concerned with solving disputes in accordance with certain 'values' such as (a) protecting citizens from unfair treatment (e.g. due process); (b) enforcing state's police power; and (c) controlling government's power. Judicial interpretation of public interest constitutes a limitation of the legal scope of government's intervention in the economy, and provides the judiciary with a rhetorical base for resolving questions of political economy. At least in America, public interest historically provides a stable rhetorical form for the Supreme Court to decide political economic matters (Peritz, 1996).

Public interest is part of an ideological posture about the aims of the state, or the government if preferred. The review of the presence of the concept of public interest within the political regulatory discourse shows that its implications are far deeper than the mere description made in this work. Ideologically, the idea of a state pursuing public interest can be seen as its proper role. Others disagree arguing that the state is a fiction and public interest is a way to hide group interests (e.g. public choice school), and even Marxists argue that the state is an instrument used by capitalists to advance their own interests (Dunleavy and O'Leary, 1987).

Both Progressive and New Deal politicians advocated for the protection of the public interest. In areas of regulation and anti-trust, the alleged protection was a straightforward protection of the middle class (e.g. medium and small businesses) against the damaging action of large trusts and monopolies (Wettergreen, 1989).

Empirical evidence, presented by academics from the Public Choice School, shows that in various cases the alleged protection of the public interest was not such but was the protection of personal interests of politicians and policy makers. The evidence casts serious doubts upon the exact content and scope of public interest; however, it is not possible to definitively conclude that the protection of public interest by politicians and policy-makers would always lead necessarily to the protection of their personal interests. The correlation between non-public-interest regulation and self-interested politicians—and policy-makers—is not conclusive evidence to affirm what one might call the impossibility of regulation, or the impossibility to achieve public interest through regulation. Partly, because there may be some alternative explanations of regulatory failure, such as the probable incompetence of regulators, inadequate legislation, or the impossibility to know individual preferences by regulators. If an alternative explanation proves to be a plausible cause of regulatory failure, then the unqualified application of the rational agent proposed by Public Choice might be a fallacy that affirms the consequent (i.e. because no public interest is achieved by regulation, therefore the cause might be in the utility function of politicians and policy-makers). Nevertheless, the only evidence academics have now, thanks to Public Choice scholars, is that declared political goals based on public interest do not always coincide with the actuality of the policy.

Despite the evidence shown, it is not possible to talk about the political discourse on public interest regulation of the Progressivism and the New Deal as to be a scientific theory of regulation. Regulatory pervasiveness contrasts with the welfare economics idea of market failure in that the latter has conditions to be imposed (monopoly, asymmetry of information, externalities, and public goods). This leaves the idea of public interest confined to a political discourse.

The Public Choice School has raised relevant concerns about the correspondence between political discourse on public interest and effective political action. Kolko (1963) presented strong arguments showing the benefit that business gained from regulation. The same dis-association between political discourse and effective measures was shown by Couch and Shughart (1998) in the distribution of federal emergency funds during the Great Depression. One might conclude that the idea of public interest may be manipulated up to a certain point that could render the concept hollow.

If the concept of public interest to a certain extent is hollow then it is perhaps impossible to produce a theory without the risk of constructing an ad-hoc theory. That would be an impossible task. If so, why renowned academics have recognised its existence? Does their recognition mean that this theory exists? Probably not. The formulation of the concept of the 'Public Interest Theory' was arguably Stigler's and Posner's attempt to create a benchmark for the newly created Chicago Theory or regulation. Posner's characterisation possibly is a hybrid between the legal-political approach to public interest and the welfare economics approach to regulation. Despite this apparent failure, Stigler's and Posner's work is remarkable because it is the first attempt to systemise the existent (incomplete) knowledge at the time.

After reviewing the history of the concept of public interest in law, politics, and academia, and without finding any source constructing a theory of regulation based on public interest, it is possible to argue that the Public Interest Theory is not a theory. The most one can say is that in the field of law and politics it is a concept argued to support regulation in philosophical and political terms. In economics, the idea of public interest is absent, despite the efforts of various scholars to connect the political discourse with welfare economics theorisation. Hence, it is possible to conclude that our knowledge in this field is still incomplete, and consequently our current understanding of public interest in regulatory affairs is imprecise. In practical terms, there is no apparent evidence to support a 'theory' on public interest.

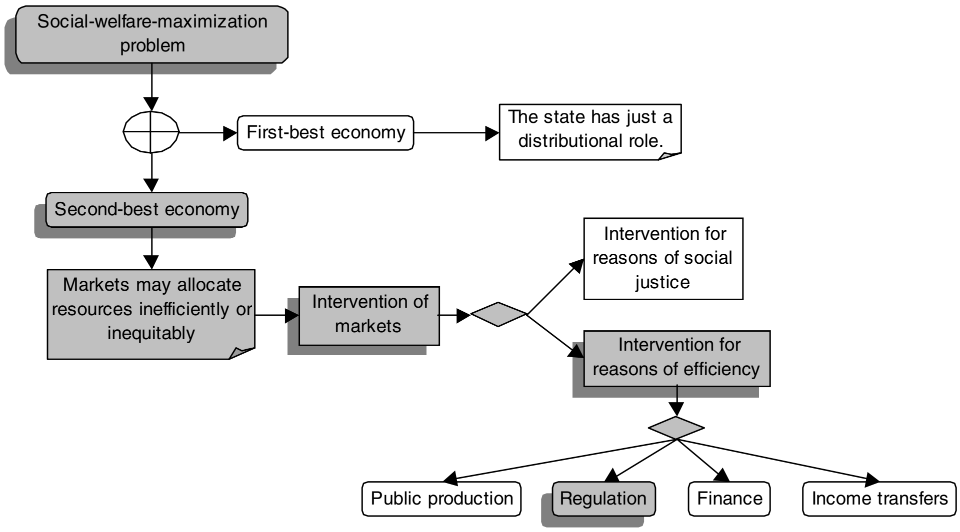
4.2. Academics unjustly criticise welfare economics

Following Stigler's and Posner's work academics continued to mention the existence of a Public Interest Theory. Though these works are not devoted to the study of theories of regulation (except Aranson and den Hertog) but to the general study of regulation. Nevertheless, it is possible to argue that Joskow and Noll (1981) started to link the idea of public interest with welfare economics, something that Posner suggested years before.

In fact, Posner's two assumptions used to describe the Public Interest Theory are part of welfare economics. Welfare economics assumes that, in a second-best economy, markets are likely to fail to deliver the best allocation of resources. Regulation is one of the mechanisms to intervene for reasons of efficiency (Barr, 1998). Diagram (a) shows a graphical representation of the way that regulation fits within normative economics. Posner assumes that the Public Interest Theory regards markets as prone to fail if left alone. Then, he assumes that the theory does not take into account the existence of transaction costs. Nonetheless, welfare economics accepts the cost-benefit analysis of regulatory decisions as a measure for evaluating the effectiveness of regulation (Barr, 1998). Thus, both assumptions are part of welfare economics.

Diagram (a)

Construction of the Regulatory Argument by Normative Economics



Posner's description refers to welfare economics, though he misrepresents it, as he does not develop the whole argument for intervention, giving just two random assumptions. This characterisation oversimplifies welfare economics and its argument in favour of regulation. Indeed, normative economics raises the idea of social welfare maximisation. In a first-best economy, markets allocate resources efficiently but inequitably in some cases so that economic intervention is necessary to overcome it. In a second-best economy, markets do not behave as in a first-best economy because one or more conditions of efficiency are not satisfied (for example lack of perfect competition, or information). Therefore, markets may allocate resources inefficiently and/or inequitably and hence intervention is required to overcome the failures. Posner's mischaracterisation leads him to make inaccurate conclusions.

If Posner identifies the welfare economics theory with the Public Interest Theory why then does he not criticise welfare economics; or why does he not mention some distinguished authors who have contributed to the development of the welfare economics theory; or why does he label the argument of regulation as a Public Interest Theory and not as welfare economics? He mentions just some authors who arguably support the Public Interest Theory, without mentioning an author like F.M. Bator, and his paper *The Anatomy of Market Failure* (1958). Additionally, it remains unclear why Stigler, Posner, Peltzman, and others did not refer directly to the work of A.C. Pigou or W. Baumol or others. This apparent inaccurate description leaves the so-called Public Interest Theory exposed to criticism. Nevertheless, some authors believe that despite the criticisms suffered by the theory, it has survived. '[A]dministrative regulation has gotten more expert, more skilled at using analysis and information in decision making, and more responsive to useful change' (Jones, 1988, p. 1103).

Despite this effort to clarify Posner's argument, it remains unclear how he connects welfare economics with public interest. Subsequent works arguably suffered from the same lack of precision. Most of the reviewed academic authors have not corrected Posner's apparent erroneous portrayal. The tendency is to repeat what has been already said without producing a new understanding of the Public Interest Theory. In fact, those works are reviews of the Public Interest Theory based on Posner's unproven work of 1974. Some authors were more inclined to associate market failures (Joskow, Noll, Viscusi, Vernon, Harrington Jr, Aranson, and den Hertog) with the Public Interest Theory ascribing to it the general welfare economic discourse. All these authors, despite ascribing public interest to welfare economics continue to label it as the Public Interest Theory. This arguably misinterpretation, and without qualifying intentions, created a weak argument to contrast it with the Chicago theory of regulation.

From the analysis of Stigler's, Posner's, and others works, one can draw parallelism between the so-called Public Interest Theory and welfare economics rationale for regulation. However, it is not possible to confirm this proposition because further research is needed to prove or deny a connection between both the concepts of public interest and the welfare economics rationale for regulation.

Acknowledgments

I would like to thank Steve Davies, Janet Dine, Morten Hviid, Tony Prosser, Verónica Torres, Catherine Waddams Price, and two referees for helpful comments. All the mistakes remain mine.

Notes

1. Those who provide services available to the general public—common calling—can charge only a reasonable rate for it.
2. This similarity was pointed out by a anonymous referee.
3. *Corporation of Stamford v. Pawlett* (1930), 1 C. & J. 57, 400; *Iveagh v. Martin and Another* (1960), 1 Lloyd's Rep. 692 QDB [Westlaw].
4. See for example the opinion of Lord Woolf of Barnes (1995).
5. See 3 Stat. 587, sect. 7 (1820) or 9 id. 224, sect. 2 (1848).
6. See *Wabash v. Illinois*, 118 U.S. 557 (1886); *Budd v New York*, 143 U.S. 517 (1892); *Brass v North Dakota* ex rel. *Stoeser*, 153 U.S. 391 (1894*); Lochner v. New* York, 198 U.S. 45 (1905); *German Alliance Insurance Co. v. Kansas*, 233 U.S. 389 (1914); *Chas Wolf Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923); *Tyson and Brother v. Banton*, 273 U.S. 418 (1927); *Ribnik v McBride*, 277 U.S. 350 (1928); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).
7. Between *Munn v. Illinois* and *Nebbia v. New York* it is worth mentioning an important dissenting decision in *Lochner v. New York* (1905). For an in-depth study, see Paul Kens (1998).
8. Grangers were a group of farmers gathered under the name "Patrons of Husbandry" during the nineteenth century, to advance their own interest as a rural association.
9. Other important pieces of legislation were the Elkins Act (against the system of the rebate, 1903. Rebates were 'partial refund of the total price paid for goods or services. In the United States, rebates were historically given by railroads to favored shippers as a return on transportation charges' (The Columbia Encyclopedia, 2001); the Transportation Act (1920), the Clayton Act (Anti-trust, 1914), the Federal Reserve Act (1913), among the principal statutes.

10. External economies of scale 'arise because the development of an industry can lead to the development of ancillary services of benefit to all firms: a labour force skilled in the crafts of the industry; a components industry equipped to supply precisely the right parts; or a trade magazine in which all firms can advertise cheaply' (Bannock, Baxter, and Davis, 1998).

    Diseconomies of scale are: 'A tendency for making an operation larger to decrease its average efficiency' (Black, 1997).

    Transaction costs are: 'The costs associated with the process of buying and selling' (Bannock, Baxter, and Davis, 1998).
11. First-best is defined as 'A state of the economy in which all the necessary and sufficient conditions for efficiency are satisfied simultaneously' (Black, 1997).

References

Case law

Aiton v. Stephen, 3 R (HL) 4 (1876).
Allnutt v. Inglis, 12 East 530 (1810).
Brass v North Dakota ex rel. Stoeser, 153 US 391 (1894).
Budd v New York, 143 U.S. 517 (1892).
Chas Wolf Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923).
Corporation of Stamford v. Pawlett, 1 C. & J. 57, 400 (1930).
Council of Civil Service Unions v. Minister for the Civil Service, A.C. 374 (1985).
Duncan v. Cammell Laird & Co, A.C. 624 (1942).
Ellis v. Home Office, 2 Q.B. 135 (1953).
German Alliance Insurance Co. v. Kansas, 233 U.S. 389 (1914).
Harris v. Packwood, 3 Taunt. 263 (1810).
Hodel v. Indiana, 452 U.S. 314 (1981).
Iveagh v. Martin and Another, 1 Lloyd's Rep. 692 QDB (1960).
Lochner v. New York, 198 U.S. 45 (1905).
Magistrates of Kircaldy v. Greig, 8 D 1247–1248 (1846).
Minister of Justice for the Dominion of Canada v. City of Levis, A.C. 505 (PC) (1919).
Munn v. Illinois, 94 U.S. 113 (1876).
Nebbia v. New York, 291 U.S. 502 (1934).
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).
R. v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte, 2 W.L.R. 827 (1999).
R. v. Bedfordshire, 24 L.J.Q.B. 84.
Ribnik v. McBride, 277 U.S. 350 (1928).
Schechter v. United States, 295 U.S. 495 (1935).
Tyson and Brother v. Banton, 273 U.S. 418 (1927).
Wabash v. Illinois, 118 U.S. 557 (1886).

General

Anderson, G. & Tollison, R. (1991). "Congressional Influence and Patterns of New Deal Expending." *Journal of Law & Economics*. 34, 161–175.

Aranson, P. (1990). "Theories of Economic Regulation: From Clarity to Confusion." *Journal of Law & Politics*. 6, 247–286.

Bailey, T., Kennedy, D., & Cohen, L. (1998). *The American Pageant: A History of the Republic*, 11th edn., Boston: Houghton Mifflin.

Bannock, Baxter, & Davis. (1998). "The Penguin Dictionary of Economics." Available at <http://www.xrefer.com/entry.jsp? xrefid=445136&secid=.->, accessed 01 August 2001.

Barr, N. (1998). *The Economics of the Welfare State*, 3rd edn., Oxford: Oxford University Press.

Bator, F. (1958). "The Anatomy of Market Failure." *Quarterly Journal of Economics*. 72, 351–379.

Becker, G. (1983). "A Theory of Competition among Pressure Groups for Political Influence." *Quarterly Journal of Economics*. 98(3), 371–400.

Becker, G. (1986). "The Public Interest Hypothesis Revisited: A New Test of Peltzman's Theory of Regulation." *Public Choice*. 49, 223–234.

Benedict, M. (1998). "Law and Regulation in the Gilded Age and Progressive Era." Available at <http://www2.h-net.msu.edu/~shgape/pres98.html>, accessed 19 December 2000.

Bernstein, M. (1955). *Regulating Business by Independent Commission*, Princeton, NJ: Princeton University Press.

Biles, R. (1994). *The South and the New Deal*, Lexington: University Press of Kentucky.

Black, J. (1997). *Oxford Dictionary of Economics*, Oxford: Oxford University Press.

Blaug, M. (1992). *The Methodology of Economics: or How Economists Explain*, Cambridge Surveys of Economic Literature, 2nd edn., Cambridge: Cambridge University Press.

Brandeis, L. (1914). *Business-A Profession*, Boston: Small, Maynard.

Couch, J. & Shughart, W. (1998). *The Political Economy of the New Deal*, Cheltenham: Edward Elgar.

Craig, P. (1991). "Constitutions, Property and Regulation." *Public Law*. 538–554.

Cushman, R. (1941). *The Independent Regulatory Commissions*, New York: Oxford University Press.

Davidson et al. (1997). "Nation of Nations: A Narrative History of the American Republic 3/e." Available at <http://www.mhhe.com/socscience/history/usa/david/olc/269.htm>, accessed 04 July 2001.

DeLong, J. (1997). "Slouching Towards Utopia? The Economic History of the Twentieth Century. XIV. The Great Crash and the Great Slump." <http://econ161.berkeley.edu/TCEH/Slouch_Crash14.html>, accessed 27 December 2000.

Den Hertog, J. (2000). "General Theories of Regulation." In B. Bouckaert & G. de Geest (eds.), *Encyclopedia of Law and Economics: Volume III. The Regulation of Contracts*, Cheltenham, UK, Edward Elgar.

DiLorenzo, T. (1985). "The Origins of Antitrust: An Interest-Group Perspective." *International Review of Law and Economics*. 5, 73–90.

Dunleavy, P. & O'Leary, B. (1987). *Theories of the State: The Politics of Liberal Democracy*, Basingstoke: Macmillan.

Eisner, M. (1993). *Regulatory Politics in Transition*, Baltimore: Johns Hopkins University Press.

Ekelund, R., McDonald, M., & Tollison, R. (1995). "Business Restraints and the Clayton Act of 1914: Public- or Private-Interest Legislation?" In F. McChesney & W. Shughart (eds.), *The Causes and Consequences of Antitrust: The Public Choice Perspective*, Chicago, The Chicago University Press.

Fainsod, M. (1940). "Some Reflections on the Nature of the Regulatory Process." In C. Friedrich & F. Mason (eds.), *Public Policy*, Cambridge: MA, Harvard University Press.

Fainsod, M. & Gordon, L. (1941). *Government and the American Economy*, New York: Norton.

Foster, C. (1992). *Privatization, Public Ownership and the Regulation of Natural Monopoly*, Oxford: Blackwell.

Friedman, D. (1987). "Just Price." In J. Eatwell, M. Milgate, & P. Newman (eds.), *The New Palgrave Dictionary of Economics*, 1st edn., Vol. 2, London, The Macmillan Press Limited, pp. 1043–1044.

Gilligan, G. (1997). "The Origins of UK Financial Services Regulation." *Company Lawyer*. 18(6), 167–176.

Gilligan, T., Marshal, W., & Weingast, B. (1989). "Regulation and the Theory of Legislative Choice: The Interstate Commerce Commission Act of 1887." *Journal of Law & Economics*. 32, 35–62.

Graham, O. (1967). *An Encore for Reforms: The Old Progressives and the New Deal*, 1st edn., London: Oxford University Press.

Hale, M. (Sir) (1787). "A Treatise, in Three Parts. Pars Prima, De jure maris et brachiorum ejusdem. Pars Secunda, De portibus maris. Pars Tertia, Concerning the custom of goods imported and exported. Considerations touching the amendment or alteration of laws. A discourse concerning the Courts of King's Bench and Common Pleas." In A. *Hargrave, Collection of Tracts*, Vol. I.

Hamouda, O. & Price, B. (1997). "The Justice of the Just Price." *The European Journal of Economic Thought*. 4(2), 191–216.

Hartman, D. (n.d.). *Order of the Patrons of Husbandry—The Grange*. Available at <http://www.connerprairie.org/historyonline/grange.html>, accessed 08 August 2002.

Heering, P. (1936). *Public Administration and the Public Interest*. New York: McGraw-Hill.

Heilbroner, R. & Singer, A. (1994). *The Economic Transformation of America since 1865*, Fort Worth: Harcourt Brace.

Held, V. (1970). *The Public Interest and Individual Interest*. New York: Basic Books.

Holdsworth, W. (Sir) (1936 Vol. II; 1937 Vol. IV; 1938 Vol. XI; 1971 Vol. VI). *A History of English Law*, London, Methuen & CO. Ltd.

Jones, D. (1988). "Regulatory Concepts, Propositions, and Doctrines: Casualties and Survivors." *Journal of Economic Issues*. 22(4), 108–190.

Joskow, P. & Noll, R. (1981). "Regulation in Theory and Practice: An Overview." In G. Fromm (ed.), *Studies in Public Regulation*, MIT Press Series on the Regulation of Economic Activity, Cambridge, MA, The MIT Press.

Kens, P. (1998). *Lochner V. New York: Economic Regulation on Trial*, University Press of Kansas.

Kesler, C. (1989). "The Public Philosophy of the New Freedom and the New Deal." In R. Eden (ed.), *The New Deal and Its Legacy: Critique and Reappraisal*, New York: Greenwood Press.

Killian & Costello, A. (1996). "The Development of Substantive Due Process, The Constitution of the United States of America: Analysis and Interpretation Annotations of Cases Decided by the Supreme Court of the United States to June 29, 1992." Washington, U.S. Government Printing Office. Available at <http://caselaw.lp.findlaw.com/data/constitution/amendment14/03.html#2>, accessed 30 August 2002.

Kolko, G. (1963/1967). *The Triumph of Conservatism*, 1st edn., Chicago: The Free Press of Glencoe. Quadrangle Books.

Koning, N. & Jongeneel, R. (1997). *Neo-Paretian Welfare Economics: Misconceptions and Abuses*, (Issue 05-97). Available at <http://www.wau.nl/wub/wep/nr9705/wep05.htm>, accessed 27 July 2001.

Landis, J. (1938). *The Administrative Process*, New Haven: Yale University Press.

Leiserson, A. (1942). *Administrative Regulation: A Study in Representation of Interests*. Chicago: University of Chicago Press.

Letwin, W. (1965). *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act*, New York: Random House.

Lovewell, M. (2000). "One for Another: Thomas Aquinas and the Just Price." *Understanding Economics: A Contemporary Perspective*. Available at <http://www.ryerson.ca/∼lovewell/aquinas.html>, accessed 07 August 2002.

McChesney, F. (1995). "Be True to your School: Chicago's Contradictory Views of Antitrust and Regulation." In F. McChesney & W. Shughart (eds.), *The Causes and Consequences of Antitrust: The Public Choice Perspective*, Chicago, The Chicago University Press.

McCraw, T. (1975). "Regulation in America: A Review Article." *Business History Review*. 49(2), 159–183.

Mishan, E. (1981). *Introduction to Normative Economics*, New York: Oxford University Press.

Mitnick, B. (1980). *The Political Economy of Regulation. Creating, Designing, and Removing Regulatory Forms*, New York: Columbia University Press.

Ogus, A. (1994). *Regulation: Legal Form and Economic Theory*, Oxford: Clarendon Press.

Oliver, D. (1987). "Is the Ultra Vires Rule the Basis of Judicial Review?" *Public Law*. 543–545.

Patterson, J. (1969). *The New Deal and the States*, Princeton, NJ: Princeton University Press.

Peltzman, S. (1976). "Towards a More General Theory of Regulation." *Journal of Law and Economics*. 19, 211–240.

Peritz, R. (1996). *Competition Policy in America, 1888–1992: History, Rhetoric, Law*, New York: Oxford University Press.

Porter, K. & Johnson, D. (1961/1956). *National Party Platforms, 1849–1960*, 2nd edn., Urbana: University of Illinois Press.

Posner, R. (1971). "Taxation by Regulation." *Bell Journal of Economics and Management Science*. 2(1), 22–50.

Posner, R. (1974). "Theories of Economic Regulation." *Bell Journal of Economics and Management Science*. 5(2), 335–358.

Priest, G. (1993). "The Origins of Utility Regulation and the 'Theories of Regulation' Debate." *Journal of Law and Economics*. 36(1), 289–323.

Prosser, T. (1997). *Law and the Regulators*, Oxford: Clarendon Press.

Roosevelt, T. (1910). "The New Nationalism: From a speech given in 1910." Available at <http://www.nv.cc.va.us/home/nvsageh/Hist122/Part2/TRNewN1910.htm>, accessed 04 July 2001.

Roosevelt, T. (1961). *The New Nationalism*, Englewood Cliffs, N.J: Prentice Hall, (originally published in 1910).

Schubert, G. (1960). *The Public Interest. A Critique of the Theory of Political Concept*, Illinois: The Free Press of Glencoe.

Skuse, A. (1972). "Government Intervention and Industrial Policy." In *Studies in the British Economy*, 2nd edn., London: Heinemann Educational Books Ltd.

Stigler, G. (1971). "The Theory of Economic Regulation." *Bell Journal of Economics and Management Science*. 2(1), 3–21.

Stigler, G. (1985). "The Origin of the Sherman Act." *Journal of Legal Studies*. 14, 1–12.

Stigler, G. & Friedland, C. (1962). "What Can Regulators Regulate? The Case of Electricity." *Journal of Law and Economics*. 5, 1–19.

Taylor, J. (2002). *The National Industrial Recovery Act of 1933 and the Compliance Crisis of 1934*, (Working Paper), The University of Virginia.

The Columbia Encyclopedia. (2001). 3th edn., Columbia University Press. Available at <http://www.bartleby.com/65>, accessed 07 August 2002.

Tirole, J. (1997/1988). *The Theory of Industrial Organization*, 11th printing, Cambridge, MA: The MIT Press.

Viscusi, K., Vernon, J., & Harrington Jr., J. (1995). *Economics of Regulation and Antitrust*, 2nd edn., Cambridge, MA: The MIT Press.

Waddams Price, C. (1977). *Welfare Economics in Theory and Practice*, London: The Macmillan Press Ltd.

Wallis, J. (1987). "Employment, Politics, and Recovery during the Great Depression." *Review of Economics and Statistics*. 49, 516–520.

Wettergreen, J. (1989). "The Regulatory Policy of the New Deal." In R. Eden (ed.), *The New Deal and Its Legacy: Critique and Reappraisal*, New York, Greenwood Press.

Wilks, S. (1999). *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission*, Manchester: Manchester University Press.

Wilson, W. (1913). "The New Freedom. A Call for the Emancipation of the Generous Energies of a People." Available at <http://1912.history.ohio-state.edu/1912Documents/EmancipationofBusiness.htm>, accessed 08 August 2002.

Woolf of Barnes (Lord) (1995). "Droit Public-English Style." *Public Law*. 57.