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# Introduction

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# Introduction

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When markets or regulations fall short of our expectations, observers often point to regulatory capture as a culprit. Critics maintain that regulatory capture stunts competition and innovation, as firms able to capture their regulators effectively wield the regulatory power of the state, and can use it as a weapon to block the entry or success of other firms. Some critics even blame regulatory capture for the outbreak of financial crises and other manmade disasters. Recent years provide no exception. In the wake of the global financial crisis of 2007-2009, and following catastrophes ranging from massive oil spills to mine explosions, observers seemed to find capture everywhere.

In explaining the financial crisis, for example, both left and right pounced on the reputed capture of state and federal regulatory agencies. Forbes columnist Daniel Kauffman maintained that “There are multiple causes of the financial crisis. But we cannot ignore the element of ‘capture’ in the systemic failures of oversight, regulation and disclosure in the financial sector.” Chicago economist Gary Becker argued that “An economically disastrous example of the capture theory is provided by the disgraceful regulation of the two mortgages housing behemoths, Fannie Mae and Freddie Mac, before and leading up to the financial crisis.” After the Deepwater Horizon explosion and Gulf Oil spill of spring 2010, conservative columnist Gerald P. O’Driscoll wrote in the *Wall Street Journal* that “Obviously, regulation failed. By all accounts, MMS operated as a rubber stamp for BP. It is a striking example of regulatory capture: Agencies tasked with protecting the public interest come to identify with the regulated industry and

protect its interests against that of the public. The result: Government fails to protect the public.”<sup>1</sup>

Capture has thus been alleged – perhaps quite plausibly – to figure significantly in the major human and environmental crises of our time. And in the aftermath of these crises, capture has also been blamed for severely undercutting efforts at reform. The widespread belief that special interests capture regulation, and that neither the government nor the public can prevent this, understandably weakens public trust in government, and contributes to a sense that our political system is not capable of meeting the challenges it faces.

Surely, no system will be able to meet every challenge it encounters, and even effective political solutions will often – perhaps always – appear imperfect, as they address multiple and conflicting goals. But just as surely, political and regulatory solutions have met significant challenges in the past, from increasing the safety of our food supply and the security of our bank accounts to cleaning our air and water and reducing hazards on the road.<sup>2</sup> Regulatory capture is not always and everywhere the devastating problem it is often made out to be. In some cases, good regulation does prevail, in spite of the special interests. But what exactly does this imply? If we know that capture doesn’t affect all regulation equally, is it possible to translate this truism

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<sup>1</sup> Kauffman, “Corruption and the Global Financial Crisis,” *Forbes*, January 27, 2009; Becker at <http://www.becker-posner-blog.com/2011/06/capture-of-regulators-by-fannie-mae-and-freddie-mac-becker.html> (accessed July 21, 2011); Gerald P. O’Driscoll, Jr., “The Gulf Spill, the Financial Crisis and Government Failure,” *Wall Street Journal*, June 12, 2010. See also James Surowiecki, “The Regulation Crisis,” *New Yorker*, June 14, 2010.

<sup>2</sup> In fact, recent polling indicates strong support among Americans for regulation (and even for stricter regulation) in key areas. According to a 2011 Harris poll, “The strongest support for stricter regulation relates to food safety (73%), executive pay and bonuses (70%), the safety of pharmaceuticals (70%), banks and financial services (69%), air and water pollution (68%), consumer product safety (67%), and environmental safety (66%). Majorities also support more strict regulation of advertising claims (65%), big business (64%), and health and safety in the workplace (54%).” See “Do We Want More or Less Regulation of Business? It All Depends on What Is Being Regulated” The Harris Poll #76, June 10, 2010; [www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/407/Default.aspx](http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/407/Default.aspx) (accessed July 23, 2011).

into a deeper understanding of capture – of how to prevent it before it occurs, and how to detect and eliminate (or at least mitigate) it where it is found?

This volume represents a first step toward answering these questions. It brings together a set of authors from a range of disciplines who carefully examine contemporary regulation to gain a clearer grasp of what regulatory capture is, where and to what extent it occurs, what prevents it from occurring more fully and pervasively, and, finally, to distill lessons for policymakers and the public for how capture can be mitigated, and the public interest protected. Such a comprehensive approach is badly needed. Cries of regulatory capture, from all quarters, have been met with little more than murmurs from the academy for some time now.<sup>3</sup> A surfeit of claims has been neither demonstrated nor disproved. Although early models and stylized case studies greatly advanced our understanding of the danger, there has been relatively little follow-up in recent decades. Our conception of how capture works in practice, and what limits it, remains very far from complete. Indeed, no general volume on regulatory capture has been produced in more than three decades, since the 1981 publication of political scientist Paul Quirk’s *Industry Influence in Regulatory Agencies*.<sup>4</sup>

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<sup>3</sup> As Rhode Island Senator Sheldon Whitehouse remarked on the Senate floor in June 2011, “regulatory capture isn’t getting the attention it deserves.” *Congressional Record – Senate*, July 7, 2011, S4453.

<sup>4</sup> There have, of course, been numerous synthetic publications and new treatments on regulation, most notably Ian Ayres and John Braithwaite’s *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, 1992); Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Chicago: University of Chicago Press, 1990). More recent treatments include David Moss, *When All Else Fails: Government as the Ultimate Risk Manager* (Cambridge; Harvard University Press, 2005); W. Kip Viscusi, John M. Vernon and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* (Cambridge, MIT Press, 2005); Edward Balleisen and David Moss, eds., *Government and Markets: Toward a New Theory of Regulation*; Steven Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton, 2008); Marc Eisner, *Regulatory Politics in Transition* (Baltimore: Johns Hopkins University Press, 2000); and Cary Coglianese, ed., *Regulatory Breakdown: The Crisis of Confidence in U.S. Regulation* (Penn Press, 2012). The closest theoretical accounts in mathematical modeling occur in sections of Jean-Jacques Laffont and Jean Tirole’s *A Theory of Incentives in Procurement and Regulation* (Cambridge; MIT Press, 1992), and in Gene Grossman and Elhanan Helpman’s *Special Interest Politics* (Cambridge: MIT Press, 2003). Yet these books do not offer specific or general empirical tests of the theory, and the models have limited applicability to the kinds of regulatory capture that are most important for public policy discussions. We offer further critiques below.

The chapters in this volume suggest that regulatory capture is very commonly misdiagnosed and mistreated. *Misdiagnosed* because the study of regulatory capture, in both academic and policy circles, has grown stale and ever more detached from practice. All too often, observers are quick to see capture as the explanation for almost any regulatory problem, making large-scale inferences about agencies and their cultures without a careful look at the evidence. At the same time, there appears to be a great deal of fatalism – some of it strategic, no doubt – about the impossibility of ameliorating or preventing capture, virtually ensuring that the ailment is *mistreated* in many cases. Some or even much of this may be the product of highly simplified models – models in which the complete capture of regulators by incumbent firms is all but inevitable. Once such simplified models permeated into policy discourse, it is perhaps not surprising that capture came to be seen as lurking nearly everywhere and that the range of options for treating capture became unduly narrowed (sometimes with deregulation being seen as the only viable option).

Consider a few recent “scandals” in the news: financial regulators missing investment fraud and toxic loans at the very time their staff was shuttling back and forth between Washington and Wall Street; energy regulators ignoring the risk of a catastrophic oil spill just as their inspectors and officials were cavorting with industry managers; a telecommunications regulator making a series of industry-friendly decisions, and just over a year later a prominent commissioner who was a pivotal vote in these decisions departing the agency to take a high-status vice-presidential position with a regulated company.<sup>5</sup> In all of these cases, capture certainly seems plausible.

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<sup>5</sup> See "Madoff Bragged About Profits To SEC While Advising On Oversight," *HuffPost Business*, December 16, 2008, available at [http://www.huffingtonpost.com/2008/12/16/madoff-bragged-about-prof\\_n\\_151332.html](http://www.huffingtonpost.com/2008/12/16/madoff-bragged-about-prof_n_151332.html) [accessed 20 October 2012]; Eric Dash, "Post-Mortems Reveal Obvious Risk at Banks," *The New York Times*, November 18, 2009, available at <http://www.nytimes.com/2009/11/19/business/19risk.html?pagewanted=all&r=0> [accessed 20 October 2012]; Edward Wyatt, "Promises Made, and Remade, by Firms in S.E.C. Fraud Cases," *The New York Times*, November 7, 2011, available at <http://www.nytimes.com/2011/11/08/business/in-sec-fraud-cases-banks-make-and-break-promises.html?pagewanted=all&r=0> [accessed 20 October 2012]; Noelle Straub, "Interior Probe Finds Fraternalizing, Porn and Drugs at MMS Office in La.," *The*

Plausibility, however, lies quite a distance from proof. If residents of an apartment complex witnessed a bitter argument between a father and son just days before the father was murdered, investigators might reasonably be interested in the son as a potential suspect. But evidence of the argument, by itself, would hardly be grounds for conviction. Unfortunately, students of regulation are not always as disciplined about distinguishing plausibility from proof, and claims of capture proliferate so broadly that they are rarely tested or examined closely. Even where they are well supported, such claims are often extended far beyond the available evidence. All too frequently, moreover, casual claims of capture are associated with demands that the regulatory policy or agency in question be not merely reformed but abandoned. Observers of regulation are often quicker to yelp about the evils of capture than to think hard about how it might be prevented or mitigated, short of wholesale deregulation.

This fatalism is seen in the center, the left, and the right of political discourse. As recent polling suggests, “This fatalism has over time deeply influenced not just scholars and inside-the-beltway cynics, but the broad mass of the American electorate. Public trust in the Federal government has slid ever lower over the last forty years and as of this writing, stands at under 20%.”<sup>6</sup> To the extent that assumptions about regulatory capture contribute to such fatalism, it is

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*New York Times*, May 25, 2010, available at <http://www.nytimes.com/gwire/2010/05/25/25greenwire-interior-probe-finds-fraternizing-porn-and-dru-45260.html?pagewanted=all> [accessed 20 October 2012]; Eric Lipton & John M. Broder, "Regulator Deferred to Oil Industry on Rig Safety," *The New York Times*, May 7, 2010, available at <http://www.nytimes.com/2010/05/08/us/08agency.html> [accessed 20 October 2012]; David Hatch, "Baker Stuns With Abrupt Move From FCC to Comcast," *National Journal*, May 12, 2011, available at <http://www.nationaljournal.com/tech/baker-stuns-with-abrupt-move-from-fcc-to-comcast-20110511> [accessed 20 October 2012]; Edward Wyatt, "F.C.C. Commissioner Leaving to Join Comcast," *The New York Times Media Decoder Blog*, May 11, 2011, available at <http://mediadecoder.blogs.nytimes.com/2011/05/11/f-c-c-commissioner-to-join-comcast/> [accessed 20 October 2012].

<sup>6</sup> “Public Trust in Government,” Pew Research Center, April 18, 2012, available at <http://people-press.org/2010/04/18/public-trust-in-government-1958-2010/> [accessed 21 October 2012].

incumbent upon us to move beyond simplified theories and carefully explore special interest influence with a closer eye on practice.

In this volume, we aspire to improve our understanding of capture, making it more rigorous, more thorough, and more practically useful to those who want to prevent capture. Capture is real and a genuine threat to regulation, we recognize, but regulation is also a fact of modern life, and undoubtedly necessary in some circumstances to protect the public and stave off catastrophe. The critical question is whether capture, where it exists, can be mitigated or prevented. We believe the evidence strongly suggests that the answer is yes, and that better study of regulation and special interest influence can show us how to limit capture and make regulatory governance a more useful tool for accomplishing public ends.

## Capture and the Academy

The principal problems with contemporary capture scholarship boil down to the link between theory and evidence. As the financial crisis of 2007-2009 unfolded, we began to notice some common features of the dozens (if not hundreds) of claims being made about captured regulatory agencies. The claims had the benefit of seeming to resonate with the unfolding story, yet a disturbing commonality among them was a lack of solid evidence. Unfortunately, much the same can be said about a large proportion of capture scholarship – that good stories, rooted in simple models, too often take the place of solid evidence.

Some of the earliest claims of capture within the academy came from scholars who were reviewing the early history of government regulation, and even then there was a tendency to rely heavily on especially juicy tidbits from the historical record. In 1892, Richard Olney, a prominent corporate attorney and soon-to-be Attorney General, advised Charles E. Perkins, a railroad president, against seeking the repeal of the Interstate Commerce Act, noting that

The [Interstate Commerce] Commission, as its functions have now been limited by the courts, is, or can be made, of great use to the railroads. It satisfies the popular clamor for a

government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a Commission gets to be, the more inclined it will be found to take the business and railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests.... The part of wisdom is not to destroy the Commission, but to utilize it.

Olney's remark has been repeatedly quoted and cited as evidence that even the earliest national regulatory agencies in the United States were captured. Its language inspired the work of Bernstein and Huntington, and it was rehearsed on the floor of the United States Senate.<sup>7</sup> While certainly powerful, it is critical to understand that Olney's letter provides no direct evidence that the Commission did in fact "take the business and railroad view of things," but only that one potentially interested observer predicted that the ICC would take such a view and that it could ultimately be harnessed by the railroads. Similarly, well before Stigler penned his famous essay, "The Theory of Economic Regulation," another economist later identified with the Chicago school, Ronald Coase, surveyed the early history of federal broadcast regulation and suggested it had been poorly designed and conceived. Although Coase's seminal paper on the FCC did not claim that broadcast regulation had been captured, his analysis appears to have set the stage for many of his followers to diagnose capture rather too easily, in some cases after only a cursory look at the historical evidence.<sup>8</sup>

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<sup>7</sup> Richard Olney to Charles E. Perkins, December 28, 1892, quoted in Bernstein, *Regulating Business by Independent Commission*, 265. For an early citation to this remark, consult Matthew Josephson, *The Politicos* (New York: Harcourt, Brace, 1938), 526. For a review of the intellectual history of the uses to which Olney's letter has been put, among other claims, see Eduardo Federico Canedo, *The Rise of the Deregulation Movement in Modern America, 1957-1980* (Ph.D. Dissertation, Columbia University, 2008). Olney's letter constituted a core reference and piece of evidence for some of the founding scholars of capture theory, including Bernstein (as above) and Huntington.

<sup>8</sup> Ronald Coase, "The Federal Communications Commission," *Journal of Law and Economics*, Vol. 2 (Oct., 1959), pp. 1-40. On later claims that broadcast regulation was captured from beginning, see especially Thomas W. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," *Journal of Law & Economics*, Vol. 33 (1990), 133-175; and Hazlett, "Assigning Property

These older claims about capture have been succeeded by scholarly arguments that make vast inferences from statistical correlations. Having claimed to show by statistical association that the relative wage and profit effects of labor safety and environmental regulation fell more heavily upon small firms and industries in Southern states, economists Ann Bartel and Lacy Glenn Thomas declared this to be a case of “predation by regulation”: “We have shown that regulation has become a predatory device that indeed is utilized to enhance the wealth of predators and to reduce the wealth of rivals.”<sup>9</sup> Thomas later claimed a similar effect for the profit-reducing effects of food and drug regulations. Similarly, in examining the stability of the cotton dust standards implemented by the Occupational Safety and Health Administration (OSHA), economist W. Kip Viscusi wrote in 1992 that “now that the large firms in the industry are in compliance, they no longer advocate changes in the regulation. Presumably, the reason is that the capital costs of achieving compliance represent a barrier to the entry of newcomers into the industry. This is simply one more illustration of the familiar point that surviving firms often have a strong vested interest in the continuation of a regulatory system.” The stability of any law or regulation, and the lack of opposition to these policies, could be due to capture, but also potentially to inertia, to the institutions in American politics (filibuster, bicameralism,

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Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?,” *Journal of Law and Economics*, Vol. 41, No. 2 (October 1998), 529-576. For an evaluation of the evidence relating to the alleged capture of early broadcast regulation, see the chapter “Capturing History” by Moss and Lackow in this volume.

<sup>9</sup> In a revealing rhetorical defense of these conclusions, Bartel and Thomas argued that their statistical associations were due directly to congressional calculations of the time. “We recognize that public interest theorists will object to our characterization of OSHA and EPA as predatory. From the viewpoint of these scholars, regulations inevitably have heterogeneous effects, and indirect effects are entirely innocent by-products of the public pursuit of work-place safety and environmental quality. We explicitly reject any such defense of OSHA and EPA behavior. ... [W]e ... find ample evidence of OSHA and EPA actions that unnecessarily exacerbate or even artificially create indirect effects for political purposes (what we call enforcement asymmetries). Furthermore, despite mounting evidence of the inefficiency of OSHA and EPA, Congress has continued to be uninterested in adequate monitoring of regulatory effect, much less in regulatory reform. All this suggests that indirect effects are far more than innocent by-products—indeed, they may well be the primary political concern.” Ann P. Bartel and Lacy Glenn Thomas, “Predation through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency,” *Journal of Law and Economics* 30 (2) (October 1987) 239-64.

presidential veto, the Administrative Procedures Act) that make policy change difficult, or to broad public support for the regulations. Yet Viscusi is quick to highlight a well-established capture argument -- incentives for creating or preserving entry barriers to competitors -- as the explanation. We believe that far more evidence is needed to make an accurate diagnosis of capture.<sup>10</sup>

In thinking this way, economists, legal scholars, and political scientists have been following the lead of George Stigler, who argued that empirical analyses of the operation and effect of regulation should be used to make inferences about the original purposes of its design:

The theory [of economic regulation] tells us to look, as precisely and carefully as we can, at who gains and who loses, and how much, when we seek to explain a regulatory policy.... It is of course true that the theory would be contradicted if, for a given regulatory policy, we found the group with larger benefits and lower costs of political action being dominated by another group with lesser benefits and higher cost of political action.... The first purpose of the empirical studies is to identify the purpose of the legislation! The announced goals of a policy are sometimes unrelated or perversely related to its actual effects, and *the truly intended effects should be deduced from the actual effects*.<sup>11</sup>

As Carpenter suggests in his chapter “Detecting and Measuring Capture,” Stigler’s rather casual standard of causal inference has been uncritically embraced by a subsequent generation of economists. With little circumspection on the limits of drawing broad theoretical conclusions from observational data analysis, scholars have repeatedly proclaimed empirical triumphs for capture theory after data analysis of select cases or highly aggregated cross-national datasets. Roger Noll correctly writes of “the lurking danger of tautology, i.e., of attributing causality to an inevitable consequence of any public policy action. It is impossible to imagine that regulation

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<sup>10</sup> Viscusi, W. Kip. 1992. *Fatal Tradeoffs* (New York: Oxford University Press), 177.

<sup>11</sup> George Stigler, “Supplementary Note on Economic Theories of Regulation,” in *The Citizen and the State* (1975), p. 140.

could be imposed without redistributing income. Hence, a look for winners in the process – and organizations that represent them – is virtually certain to succeed.”<sup>12</sup>

Perhaps the deepest problem with much of the research on regulatory capture is not merely its tendency to overstate the evidence for capture, but its lack of nuance in describing how and to what degree capture works in particular settings. As scholars in law, political science, economics, and other areas of policy have noted, sometimes almost in passing, capture often prevails in a matter of degrees, in some agencies or regulations more visibly and robustly, in others less so.<sup>13</sup> The regulatory world is one of shades of grey. Yet capture scholarship does not typically discriminate among these shades in ways that enable informed advice on the marginal value of regulatory (or deregulatory) policy options. Existing treatments of regulatory capture give us too little sense of the sources or patterns of variation in capture, and they fail to instruct readers as to how, given this variation, capture ought to be prevented or minimized.

All of this is not to say that capture scholarship has failed to progress beyond the seminal contribution of George Stigler in 1971.<sup>14</sup> Path-breaking work on capture preceded Stigler, and outstanding work has followed him as well.<sup>15</sup> In fact, economic models of interest-group politics

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<sup>12</sup> Roger G. Noll, “Economic Perspectives on the Politics of Regulation,” in Richard Schmalensee and Robert D. Willig, eds, *Handbook of Industrial Organization*, Vol. II (1989), pp. 1276-1277. For a mathematical demonstration of the invalidity of Stigler’s principle of inference, consult Daniel Carpenter, “Protection without Capture: Product Approval by a Politically Responsive, Learning Regulator,” *American Political Science Review* 98 (4) (November 2004) 613-31.

<sup>13</sup> See esp. Stephen Breyer, *Regulation and Its Reform* (Cambridge, Massachusetts: Harvard University Press, 1982).

<sup>14</sup> George Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economics and Management Science*, vol. 2, no. 1 (Spring 1971), pp. 3-21.

<sup>15</sup> Several of the pioneering works include Samuel Huntington, “The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest,” *Yale Law Journal*, Vol. 614 (1952), pp. 467-509; Marver Bernstein, *Regulating Business by Independent Commission* (Princeton: Princeton University Press, 1955); and Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History: 1900-1916* (New York: Free Press, 1963). Major contributions that built on – and extended – Stigler’s model include Sam Peltzman, “Toward a More General Theory of Regulation,” *Journal of Law and Economics*, vol. 19, no. 2 (August 1976), pp. 211-240; Gary S. Becker, “A Theory of Competition Among Pressure Groups for Political Influence,” *Quarterly Journal of Economics*, vol. 98, no. 3 (August 1983), pp. 371-400; and Gene M. Grossman and Elhanan Helpman, “Protection for Sale,” *American Economic Review*, vol.

have evolved considerably since 1971, allowing for the interplay of multiple groups exerting influence on policymakers and multiple motivations on the part of policymakers themselves. But the essential idea that policymakers are for sale, and that regulatory policy is largely purchased by those most interested and able to buy it, remains central to the literature.<sup>16</sup> And far too much of the relevant empirical work has sought to confirm this thesis (often rather casually), rather than to test it or discover its limits.

Beyond this, arguments stipulating capture often carry policy prescriptions. They move quickly from “is” to “ought,” and they are especially likely to recommend deregulation. This move – from the postulated fact of capture to strong arguments for the dismantling or avoidance of regulation – was a central stratagem of Stigler, and many specialists have since followed it. This is especially true of studies – such as the article “The Regulation of Entry” (2002) by former World Bank economist Simeon Djankov and co-authors – that posit two possible states of the world: “good” public interest regulation versus “bad” captured regulation. Notwithstanding the obvious fact that reality could fall anywhere between these two extremes, Djankov and co-authors proceed from the premise that, if the empirical evidence on entry regulation appears consistent with the existence of the bad regulatory world, then such regulation must be bad worldwide. On the basis of aggregate-level data and the authors’ starting premise, they conclude that the regulation of entry “does not yield visible social benefits,” and that the “principal beneficiaries” of strict entry regulations “appear to be the politicians and bureaucrats themselves.” If such regulations benefit the powerful few at the expense of the broader public, then it seems only a very short leap to the conclusion that the world would be better off without such regulation. Although no *explicit* leap of this sort is made within the article, Djankov’s subsequent

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84, no. 4 (September 1994), pp. 833-850. See also Jean-Jacques Laffont and Jean Tirole, “The Politics of Government Decision Making: A Theory of Regulatory Capture,” *Quarterly Journal of Economics*, vol. 106, no. 4 (1991), pp. 1089-1127.

<sup>16</sup> See Ernesto Dal Bó and Rafael Di Tella, “Capture by Threat,” *Journal of Political Economy*, vol. 111, no. 5 (2003), pp. 1124; David Moss and Mary Oey, “The Paranoid Style in the Study of American Politics,” in Edward Balleisen and David Moss, eds., *Government and Markets: Toward a New Theory of Regulation* (Cambridge University Press, 2010), p. 260.

actions provide an especially revealing example of the move from analysis to advocacy. In the years following publication of “The Regulation of Entry,” Djankov and his World Bank colleagues established a highly structured, Bank-funded deregulatory initiative that recommended and tracked reforms worldwide with the intent of easing barriers to the creation or launch of a new business.<sup>17</sup>

As a result of these trends in the literature, we now know much more about how regulation can fail as a result of capture than about the conditions under which regulation sometimes succeeds, or can be made to succeed, when capture is constrained. What is needed, we believe, is a new wave of scholarship on regulatory capture, where the goal is to better understand what special interest influence actually looks like in practice, what mechanisms already exist for limiting such influence, and the circumstances under which these preventive measures work well or poorly. Careful research of this kind should ultimately help both scholars and practitioners to deepen their understanding of how capture manifests in the real world and, ideally, to improve upon existing mechanisms for mitigating capture.

## Degrees of Capture: Strong vs. Weak

As a first step, we distinguish between *strong capture* and *weak capture*.<sup>18</sup> A central claim of this volume is that, to the extent capture exists, it prevails by degrees rather than by its presence or

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<sup>17</sup> Simeon Djankov, Rafael La Porta, Florencio Lopes-de-Silanes, and Andrei Shleifer, “The Regulation of Entry,” *Quarterly Journal of Economics*, 117 (1) (February 2002) 1-37, quotes from p. 35. More generally, see Shleifer and Robert Vishny, *The Grabbing Hand: Government Pathologies and Their Cures* (Cambridge: Harvard University Press, 1999). The World Bank’s Doing Business Project launched in 2002, the year of the Djankov et al publication, and in addition to running deregulation seminars for policymakers in developing and industrialized countries, also provides individualized national tracking of deregulatory reforms and even simulators for policymakers to examine the possible effects of deregulation (see <http://www.doingbusiness.org> [accessed 28 July 2011]).

<sup>18</sup> A general definition of capture appears shortly.

absence.<sup>19</sup> A critical corollary of this argument is that the existence of capture need not translate into a rationale for full-scale dismantling of regulation. While a certain degree of capture (what we call “strong capture”) can vitiate the purposes and rationale for regulation, much capture is likely of the weaker form, such that its existence can and does coincide with healthy regulatory functioning. This is not to deny that, where weaker capture exists, it would better for the polity and the economy to reduce its severity. Yet reducing the severity of capture – or, to invoke the title of our volume, preventing capture – is a far cry from responding to the threat of capture through the wholesale purging of regulation.

*Strong capture* violates the public interest to such an extent that the public would be better served by either (1) no regulation of the activity in question – because the benefits of regulation are outweighed by the costs of capture – or (2) comprehensive replacement of the policy and agency in question.<sup>20</sup> For example, if captured regulation reduced consumer welfare (on net) by completely blocking entry into an industry, this would be a case of strong capture – precisely the sort that Stigler and his disciples saw (and, to some extent, still see) as an inevitable fact of life in regulation, in both developed and developing economies. In Stigler’s writings, the existence of capture is enough to reject the public interest theory of regulation altogether. This rejection not only means factually that democracy is not working as advertised, but also that the proper policy response is to weaken or fully remove regulation. It is of course possible that reform of strongly captured regulation would be better than non-regulation, yet for purposes of definition we

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<sup>19</sup> We distinguish here between strong and weak capture by asking whether the degree of capture vitiates the public-interest-serving characteristics of the regulatory policy. But underlying this normative distinction is an empirical one – just how pervasive empirically is the capture described? In the Conclusion, we take up a related distinction – pervasive versus limited capture – which in theory takes the form of a continuous variable. We focus on “strong” versus “weak” here both to retain simplicity in our introductory essay and to focus on the policy implications of capture diagnoses.

<sup>20</sup> As we discuss below, wholesale replacement of the existing regulatory order is an option when capture involved is not anti-competitive but “corrosive.”

assume that there might exist a form of capture so robust and incorrigible that it cannot be reformed and hence that abandoning the resulting regulation entirely would best serve the public interest.

*Weak Capture*, by contrast, occurs when special interest influence compromises the capacity of regulation to enhance the public interest, but the public is still being served by regulation, relative to the baseline of no regulation.<sup>21</sup> In other words, weak capture prevails when the *net* social benefits of regulation are diminished as a result of special interest influence, but remain positive overall.<sup>22</sup>

Our priors are that some amount of weak capture may well be fairly ubiquitous; and the evidence collected in this volume partially corroborates this view. In the chapters that follow, contributors carefully examine a range of agencies (mostly in the American context), from the Food and Drug Administration to the Department of Transportation, and find that capture is far from complete in each of these cases – the result of numerous limits and checks on industry influence. When capture exists, it appears to be empirically *limited* rather than empirically *pervasive*. The picture that emerges, therefore, is quite different from the one George Stigler envisioned, where capture by industry was virtually inevitable and complete. As a result, the optimal policy responses may be quite different as well. When capture is empirically limited, it is much less likely to vitiate the potential benefits of regulation and is more likely, in our terms, to take the form of weak capture than of strong.

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<sup>21</sup> By the baseline of no regulation, we mean nonexistence of the captured regulation/regulatory regime. So given an accurate diagnosis of weak capture, the proper comparison is between the weakly captured regulation as it is (“warts and all”) and a state of non-regulation.

<sup>22</sup> Our weak capture/strong capture distinction is meant to differentiate between (a) regulation influenced to a slight degree away from the regulator’s best guess at the public interest and (b) regulation that is largely or wholly in the service of the special interest. As we have constructed the distinction here, it is possible for regulation to be motivated wholly by service to the industry’s interests and still be weakly capture, because we have distinguished strong from weak capture based on the degree to which the public interest is not served (partially - weak, wholly not served - strong) instead of the degree to which the regulator acts in the interest of industry.

## Defining Capture

Many of capture theory's problems boil down to the lack of a clear definition for the central concept. Capture is often equated with corruption, influence, and regulatory failure. It is also associated with distributive politics<sup>23</sup>, even though the two are quite distinct. Given the manifold problems in bringing conceptual structure to capture – and the more nuanced picture of capture that emerges in this volume (where capture can be either strong or weak) – we begin our effort at definition by offering one that is both broad and flexible. As with any definition or model, numerous amendments must be (and will be) made in order to apply the term as we understand it. With that said, our definition is as follows:

*Regulatory Capture* is the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.

Our definition rests upon several critical terms, especially “public interest,” intent,” and “regulated industry,” which we take up in turn:

**PUBLIC INTEREST.** To begin with, capture moves regulation away from the service of one goal (public interest) and toward another (industry interest).<sup>24</sup> Understanding capture thus requires an understanding of these two concepts or variables and when they diverge. Measuring the “public interest” is a thorny problem as old as democracy itself. Some would maintain that

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<sup>23</sup> See Stigler, “The Theory of Economic Regulation,” *supra* note 14; Sam Peltzman, “Toward a More General Theory of Regulation,” *Journal of Law and Economics*, Vol. 19, no. 2 (1976): 211-240.

<sup>24</sup> These and other features of our definition cohere with general models of capture and industry influence in regulation, including Quirk's *Industry Influence in Federal Regulatory Agencies*, Stigler's foundational notion that “regulation is acquired by the industry and designed and operated primarily for its benefit,” and Laffont and Tirole's model of producer protection in a multi-player political economy game (*A Theory of Incentives in Procurement and Regulation*, Chapter 11, and esp. Proposition 11.1 and 11.2 and surrounding discussion, pp. 485-493).

the repeated actions of democratic citizen majorities (or the repeated actions of the elected representatives of those citizens) constitute the most legitimate measure of the public interest.<sup>25</sup> Others would argue that calculations rooted in welfare economics should serve as the measure. We do not choose among these alternatives, but note that, in lieu of an ability to directly perceive and measure the public interest, we must build *defeasible models*<sup>26</sup> of the public interest for purposes of assessing whether a particular regulation is captured.

INTENT. Under our definition, the fact that an industry is well served by regulation is deeply insufficient for a judgment of capture. Both intent and action on the part of the regulated industry are required. Unless the industry (or elements of it) actively and knowingly push regulation away from the public interest, there can be no capture. The fact that industry benefits from regulation is, by itself, insufficient because it could be alternately explained by bureaucratic drift, coincidence, or mistakes, or as a simple byproduct of public-serving regulation. We recognize that the high evidentiary bar associated with the necessity of showing intent, to meet our definition, may lead us to under-diagnose capture; but we believe that over-diagnosis is currently far more common and that our approach testifies to the robust empirical standards that are needed for scholarly analysis to move beyond journalistic descriptions and claims of capture.

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<sup>25</sup> Such an idea of repeated democratic expressions of the interest of the whole, as opposed to (a) near-term or short-run expressions of interest or (b) special interests, animates the idea of the public good in James Madison's *Federalist* #51, where the celebrated concept of "faction" is defined as in opposition to the 'permanent and aggregate interests of the community': "By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

<sup>26</sup> By *defeasible* we mean to stress two different but complementary features of accounts of the public interest: First, they must be capable of being shown to be false (tautological or vacuous definitions are unacceptable). Second, we recognize that there is no certainty in making a value claim about the common good -- interesting claims will be contestable, and can be shown to be mistaken through persuasive argument. What matters is that an account of what is in the public interest be offered, and defended so readers and future researchers can engage appropriately with the argument.

REGULATED INDUSTRY. Consistent with many of the earliest expressions of capture theory, from Huntington to Stigler, we have focused in our definition on cases in which *industry* captures regulation for its benefit. In principle, one could replace the word “industry” with “interest” in the definition, reflecting the fact that other regulated actors, such as labor unions, have the potential to twist regulation to serve their own interests at the expense of the broader public. Clearly, though, industry has a special position with respect to regulation, and it is no coincidence that early treatments of capture focused on business interests and their attempts to influence regulation. For the most part, we will do the same in this volume.

### *Evidence*

Our definition suggests a set of standards for making statements about whether capture has occurred in the case of a given regulation or agency. We offer a more detailed analysis of these empirical standards for detection and measurement (or what we more casually call “diagnosis”) in the second chapter of this volume. Yet three general empirical standards follow straightforwardly from our definition. In order to claim capture, an argument ought to

- provide a defeasible model of the public interest;
- show a policy shift away from the public interest and toward industry (special) interest; and
- show action and intent by the industry (special interest) in pursuit of this policy shift sufficiently effective to have plausibly caused an appreciable part of the shift.

If an argument that capture has occurred lacks one of these necessary components, then scholars making claims about capture should exhibit considerable circumspection about what

exactly has been established. Showing all three components is, we believe, the gold standard for a diagnosis of capture.<sup>27</sup>

Very often, claims of regulatory capture are silent on the third standard – action and intent – presumably because industry efforts to influence regulators against the public interest are not always easy to identify and document. In these cases, *motive* is sometimes seen as a legitimate substitute. But indications that a regulated industry has a motive to twist regulation in its favor (and against the public interest) is not sufficient under our definition. Nor is “functionalist” evidence that a regulation happens to benefit some firms or interests at the expense of others.<sup>28</sup> As the novelist P. D. James once observed through a character, “Every death

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<sup>27</sup> In the American context, the case that would appear to come closest to this gold standard demonstration is probably air transport entry regulation as performed by the now defunct Civil Aeronautics Board (CAB), in which all three of the above claims were advanced. In addition to widely advanced claims that the public interest was not served by airline regulation, it was claimed openly in congressional hearings in 1975 that the agency behaved in ways that reflected capture or “cartelism.” As Donald Baker, then Deputy Assistant Attorney General in the Department of Justice’s Antitrust Division, remarked in calling for a fundamental change in statute, “the fault lies with the discretion the agency has and the use of it. Now this is not a unique situation with the CAB. In fact, the history of regulatory agencies generally has been that they have been granted ‘broad discretion, they have generally been influenced heavily by the people they were supposed to regulate, and they have generally exercised the discretion in favor of the people who they were supposed to regulate.” *Oversight of Civil Aeronautics Board: Practices and Procedures*, Volume 1, Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, February 14, 1975, p. 666, available at [http://archive.org/stream/oversightofcivil01unit/oversightofcivil01unit\\_djvu.txt](http://archive.org/stream/oversightofcivil01unit/oversightofcivil01unit_djvu.txt) [accessed December 4, 2012].

Even here, however, there is reason to question the empirical basis of this inference. It is easy, in light of the abolition of the CAB and the subsequent literature (including Thomas McCraw’s famous *Prophets of Regulation: Charles Francis Adams; Louis D. Brandeis; James M. Landis; Alfred E. Kahn* (Belknap Press of Harvard University Press, 1986)), to assume that the CAB was a case of strong capture. Yet as far as the empirical pervasiveness of the capture itself – “the requirement to show action and intent by the industry (special interest) in pursuit of this policy shift sufficiently powerful to have plausibly caused at least part of the shift” – the proof remains elusive.

<sup>28</sup> For a mathematical model that examines and debunks some of these older functionalist claims, see Carpenter, “Protection without Capture.” By functionalism we mean the kind of “actor-centered functionalism” described by Paul Pierson, whereby analysts observe the way an institution functions and then make the inference that strategic actors must have designed the institution to function in exactly this way (*Politics in Time: History, Institutions and Social Analysis* (Princeton: Princeton University Press, 2004), 14, 104-127).

was a suspicious death if one looked only at motive.”<sup>29</sup> To be sure, this creates a challenge. When a social scientist examines the writing of a rule, the passage of new legislation, or the enforcement of a policy, causal inference of the sort achieved in a randomized experiment in biology, medicine, or psychology is most often impossible. Yet this impossibility does not relieve scholars of the responsibility to examine their claims carefully, to distinguish between statistical association and causation, and to qualify whatever cause-and-effect claims they advance when important evidence is missing. Over the long run, greater care on the part of scholars is likely necessary for improving the accuracy of practical judgments, which will almost always need to be made on the basis of inconclusive data by citizens and policymakers alike.

### *Corrosive Capture*

Our definition does not, it is important to note, require that a captured policy process produce *more* rent-enhancing regulation, as Stigler and others imagined. A captured policy process can also result in *less* public-interest-serving regulation, and (as a consequence) reduce or eliminate regulatory costs that fall on industry. Capture, in other words, can drive deregulation as readily as it drives regulation. We call this “corrosive capture,” which can dismantle regulation even in the absence of public support or a strong welfare rationale for doing so.

Corrosive capture occurs if organized firms render regulation less robust than intended in legislation or than what the public interest would recommend. By less robust we mean that the regulation is, in its formulation, application or enforcement, rendered less stringent or less costly for regulated firms (again, relative to a world in which the public interest would be served by the regulation in question). The consequence of corrosive capture could potentially take the form of reduced entry,<sup>30</sup> but would far more commonly be observed in the reduction of costly rules and

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<sup>29</sup> Quoted in Moss and Oey, “Paranoid Style in the Study of American Politics.”

<sup>30</sup> For an intriguing example, see Randall S. Kroszner and Philip E. Strahan, “What Drives Deregulation? Economics and Politics of the Relaxation of Bank Branching Restrictions,” *Quarterly Journal of Economics* (1999), pp. 1437-67.

enforcement actions that cut into profits. Although corrosive capture can occur within either a legislative or an administrative context, it is quite plausible that deregulation through electorally sanctioned mechanisms would be less likely to meet our definition of capture than deregulation initiated by a regulator. This is because the “corrosion” of regulation within an administrative agency occurs not with the express sanction of voters in repeated elections, but rather – in many cases – as a result of increased independence of the regulator vis-à-vis the legislature and possibly reduced fidelity to its statutory obligations.

It is important to recognize that much if not most of the public and academic discussion of capture in recent decades has pertained to regulatory corrosion. Indeed, the types of capture that have triggered the most alarm over the recent period have rather little in common with the types that Huntington, Bernstein, and Stigler warned about in the middle of the twentieth century. Entry-barrier capture, which was their principal concern, was the process by which regulators intervened in markets with the effect of privileging one set of producers over another, incumbents over entrants and (as a consequence) producers over consumers. In these early models, it was the acquisition of regulation that marked capture, not the reduction or weakening of regulation.

By contrast, it is apparent that as far as plausible capture is concerned, something quite different has been going on over the past several decades. It was capture evinced in the feeble application (or non-application) of regulatory tools. In other cases, it was the application of jurisdictional boundaries to prevent potentially aggressive agencies from regulating. Regulatory pre-emption – the move by which state and local regulations are invalidated by the imposition of national-level supremacy – became a favorite tool of officials in the George W. Bush Administration as means of achieving deregulation. In some cases pre-emption of state regulation was asserted by regulatory agencies themselves, such as when the Office of Thrift Supervision (OTS) and the Office of the Comptroller of the Currency (OCC) issued rulings in the 1990s and early 2000s pre-empting the application of state mortgage laws to federal thrifts

and national banks.<sup>31</sup> Another form of boundary manipulation comes through regulatory arbitrage – for example, when banks choose their markets or institutional form so as to fit themselves to the least rigorous regulator. In each case, however, the result is *corrosive* of existing regulation.<sup>32</sup>

### *Mechanisms of Capture*

There are a range of different empirical and theoretical conditions under which capture of regulation prevails. We aim to provide greater clarity on the mechanisms already under consideration, as well as to subject new or understudied mechanisms to careful examination. In political science, economics, and law, there are models of implicit bribes or rent-seeking (Laffont and Tirole<sup>33</sup>; Grossman and Helpman<sup>34</sup>). There are models by which a regulator might be inclined to pursue the public interest but is scared off from doing so by industry threats of political or legal retaliation, which are something different from an implicit bribe (Gordon and Hafer; Dal Bo and DiTella).<sup>35</sup> There are arguments about the cultural or social influence of

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<sup>31</sup> Kathleen Engel and Patricia McCoy, *The Subprime Virus: Reckless Lending, Regulatory Failure and Next Steps* (New York: Oxford University Press, 2011), 157-62.

<sup>32</sup> To preview one concern here, what would the existence of strong corrosive capture imply for policy? Strong capture is defined as that whose existence implies such a reduction in the benefits of the policy that deregulation would be suggested. Yet if corrosive capture is the problem, the “solution” may be less deregulation in the sense of removing regulatory constraints upon the firm and more the wholesale replacement of the existing regulatory framework (the “blow it up and start over” paradigm) by one which better imposes the necessary constraints in fidelity to either statutory intent or the public interest.

<sup>33</sup> Jean-Jacques Laffont and Jean Tirole, “The Politics of Government Decision Making: A Theory of Regulatory Capture,” *Quarterly Journal of Economics*, vol. 106, no. 4 (1991).

<sup>34</sup> Gene M. Grossman and Elhanan Helpman, “Protection for Sale,” *American Economic Review*, vol. 84, no. 4 (September 1994).

<sup>35</sup> Consider the paper by Gordon and Hafer, contributors to this volume, “Flexing Muscle: Corporate Political Expenditures as Signals to the Bureaucracy,” *American Political Science Review* 99 (2) (May 2005) 245-61; or the essay of Dal Bo and DiTella, “Capture by Threat,” *Journal of Political Economy* 111 (5) (2003) 1123-54.

repeated interaction with the regulated industry (as in Johnson and Kwak, *13 Bankers*;<sup>36</sup> and Kwak in this volume), such that the regulator begins to think like the regulated and cannot easily conceive another way of approaching its problems. In the case of cultural or social capture, the legislator or agency may not be fully conscious or aware of the extent to which its behavior has been captured. What is important about our conception of capture, including its strong and weak variants, is that it is not model-dependent or mechanism-dependent. Our definition is robust, in the sense that it can accommodate all the various models and mechanisms described above. It is also robust because it can accommodate both legislative capture<sup>37</sup> and administrative capture.<sup>38</sup>

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<sup>36</sup> Simon Johnson and James Kwak, *13 Bankers: The Wall Street Takeover and the Next Financial Meltdown* (Pantheon, 2010).

<sup>37</sup> A principal mechanism by which regulation can come to serve the industry's interest rather than the public's interest is for the industry to acquire regulation in statute. The historical and statistical annals of legislative studies are filled with evidence for how business interests and other special interests (including labor unions) use their resources – voting blocs, campaign contributions, volunteer labor, networks, information, perhaps the (implicit or explicit) promise of future employment, and other tools – to induce politicians to bend. Stigler's classic examples of regulatory capture – state trucking weight limits and occupation licensing – were, on the whole, regulations passed by legislatures, and less the result of state agency decisions based upon statutory delegation from governors and state legislators. In some cases the outcomes of policy can be hardwired into statute, the most obvious case being entitlements. Even in those cases where outcomes depend upon agency decisions, it is plausible to argue that once a statute has been tilted in favor of the industry's interest, it will be exceedingly difficult for other forces to direct the agency's administration of a statute toward the public interest. See Richard Hall and Alan Deardorff, "Lobbying as Legislative Subsidy," *American Political Science Review* (2005); James M. Snyder, Jr., "On Buying Legislatures," *Economics and Politics* 3 (1991): 93-109; Richard Hall and Frank Wayman, "Buying Time: Organized Interests and the Mobilization of Bias in Congressional Committees," *American Political Science Review* (1986). On the idea that various procedures in an agency's statute and in restrictions on rulemaking allow congressional majorities to "hardwire" administrative outcomes at the stage of rulemaking, see Mathew McCubbins, Roger Noll and Barry Weingast (writing under the collective McNollgast), "Administrative Procedures as Instruments of Political Control," *Virginia Law Review*. For another argument that statutes are strategically constructed so as to hardwire administrative outcomes, see John Huber and Charles Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (New York: Cambridge University Press, 2002).

<sup>38</sup> The original focus of capture scholars, ranging from Gabriel Kolko to Sam Huntington and Marver Bernstein, concerned not regulatory capture by legislation, but instead the capture of administrative agencies. Following Bernstein, consider Olney's letter to Perkins. It counsels the (railroad-friendly) reader not to worry about the ICC because the Commission will eventually depart from its moorings in consumer protection and public interest and come to see the railroad's point of view. (There is a powerful gesture in this letter, written over 120 years ago, to the concept of "cultural capture" as James Kwak defines it in this volume). Once the administrative

## *Cultural Capture*

The plausible mechanisms of both traditional and corrosive capture are, to some degree, well known from the literature on capture in general. Firms and industries that want more or less regulation, relative to the preferences of the public or the regulatory aims expressed in statute, may rely upon campaign contributions, pressure on politicians, and perhaps the “revolving door” to reduce their individual and collective regulatory burdens. As just suggested, however, another mechanism is available, one that is hard to prove but that seems to us increasingly relevant: what James Kwak, in this volume, terms “cultural capture.” It is conceivable that cultural capture, through the shaping of assumptions, lenses and vocabularies, could be used to support more traditional forms of Stiglerian capture. Yet cultural capture seems less likely to be deployed for the creation and maintenance of entry barriers than for deregulatory purposes, such as the weakening or dismantling of health, safety, or environmental regulations. It would seem easier for firms to coordinate on a single message of deregulation – the benefits of which could plausibly accrue to business across the board, in the form of lower costs, potentially at the expense of citizens or consumers more broadly – than to coordinate on a message of increased regulatory entry barriers, in which some firms win and other firms (even if they are weaker or smaller) lose.

Either way, the key questions that our definition raises for claims of cultural capture are (1) does the resulting regulation or deregulation advance firms’ private interests at the expense of the public interest and (2) did the firms that benefit intentionally and actively set out to achieve such an outcome *ex ante*? To be sure, shifts in the intellectual climate, which can occur for a whole host of reasons, have the power to influence the direction of regulation. But such shifts cannot be considered products of capture, according to our definition, unless they can be shown

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agency does adopt the industry’s way of viewing things, then most or all of the threat posed by the regulatory legislation will dissipate. Furthermore, because a regulatory organ exists, it will represent an important bulwark of legitimacy for the industry, which can always turn to its critics and point to the existence of a regulatory agency as a means by which the public is protected.

to be deleterious to the public *and* stem from the deliberate efforts of firms to shape the intellectual climate for their own private benefit. Our definition, in other words, treats cultural capture no differently from corrosive capture or Stiglerian entry-barrier capture or any other form of capture, requiring the same tough evidentiary standards across the board.

## The Promise of a New Approach

It is said that a little knowledge is a dangerous thing. With respect to regulatory capture, as we have seen, policy analysts are often quick to see capture whenever an interest group appears to benefit from regulation, or even when there is merely *motive* for capture. Many observers also – almost instinctively – conceive of capture in black-and-white terms when considering potential policy responses. Both steps are fraught with risk, and yet both are often seen as entirely legitimate, rooted not only in common sense but also (importantly) in powerful scholarly work on the subject. While early research on capture – especially early modeling of the phenomenon – has taught us a great deal, it has somehow left the impression of an ailment so pervasive and so absolute that casual diagnosis and drastic remedies are entirely reasonable. Just as physicians once believed that the only effective way to treat infection was to cut it out surgically, it is commonplace today to believe that capture can only be treated by “amputating” the offending regulation. Fortunately, the evidence that emerges in this volume suggests that less drastic remedies may be as or more effective, and that some are already working – like the body’s own immune system – almost invisibly behind the scenes.

And this presents an opportunity. Pushing forward with a new wave of research on regulatory capture, which is more empirical and more grounded in the realities of regulation and special interest influence, promises to give new purchase on an old problem. If some agencies are more or less captured than others, then naturally we need to understand why. Have some agencies developed defense mechanisms of various sorts that would be useful elsewhere? Are some types of regulation simply less vulnerable to capture than others? Are there institutional or cultural factors, whether inside or outside of the regulatory process itself, that enhance or

attenuate the influence of special interests? These are the types of questions that need to be addressed in a new wave of capture scholarship – to deepen our understanding of the phenomenon and, ultimately, better inform regulatory practice.

To be sure, moving beyond an exclusive, and what today seems like a barbaric, reliance on surgery in treating infection required enormous advances in medical understanding – about the nature of infection, about the workings of the body’s immune system, and about ways of supplementing the immune system (through antibiotics, for example). We believe that reaching a new level in the treatment of regulatory capture will require analogous advances in understanding – about the nature of capture itself and about mechanisms for mitigating it.

Our book thus advances three claims, one of which is critical in nature and the second and third of which are advanced as hypotheses. First, capture is often misdiagnosed, and these misdiagnoses are enabled by a kitbag of weak evidentiary standards that have arisen in economics, history, political science, and sociology for making inferences about capture in regulation. Second, while deregulation may sometimes be a very useful tool, it is no panacea for capture, and in fact deregulation may itself reflect the power of special interest influence through a process we call “corrosive capture.” Third, capture is, at least at the margins, preventable, and both analysis and advocacy of particular measures should focus on degrees of capture rather than on the unproductive and false binary of “pure” versus “captured” regulation. These three claims, we believe, bear large potential implications for how we think about tools of regulatory governance, including when and how to use them to best achieve the common good.

The volume is structured in four sections. The first section on the “Failures of Capture Scholarship” reconsiders capture theory, casting new light on the long history of special interest influence on regulation (Novak), the evolution and role of capture theory since the mid-twentieth century (Posner), and how more rigorous definition and evidentiary standards for diagnosing capture could yield better understanding of the problem and potential solutions (Carpenter). The second section on “New Conceptions of Capture: Mechanisms and

Outcomes” suggests that regulated entities utilize a wider variety of means to influence regulation toward a wider variety of regulatory outcomes than typically recognized, ranging from cultural capture (Kwak) and influence through expertise and information (McCarty) to corrosive capture (Carpenter) and even the capture of scholars in academia (Zingales). While traditional capture theory would predict regulatory capture to be pervasive, this volume’s third section on “Regulatory Case Studies” suggests that capture frequently has been over-diagnosed in the past (Moss/Lackow, Carrigan, Gordon/Hafer, and Yackee) and that internal mechanisms exist, within regulatory agencies and processes, for limiting the extent of industry influence (Yackee and Cuellar). Building on existing preventive mechanisms highlighted in Section Three, the final section features essays discussing both existing and new ways to prevent capture (Schwarcz on consumer advocacy; Magill on the courts, and Revesz/Livermore on OIRA).

Preventing capture will require conceptual clarity on what capture is, and evidentiary clarity on where, how, and to what extent capture is turning regulatory decision making against the public interest. In focusing on the goal of prevention, we have sought to identify gaps in scholarly understanding that require additional and rigorous study. This volume, we hope, marks a step toward building our understanding in ways that will allow better diagnosis and treatment of capture, so as to limit its scope, and even prevent it where possible, in the rough-and-tumble world of regulatory practice.