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Conclusion: A Focus on Evidence and Prevention

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Capture varies in both degree and kind, across regulations and agencies. This simple statement is as important as it is obvious, ultimately setting the stage for a new focus on the *prevention* of regulatory capture.

In tackling this variation head on, the study of capture is turning a corner. An early focus on models of regulatory decision making is increasingly giving way to fine-grained empirical work on special-interest influence in the regulatory process. To be sure, weakness on the evidentiary front has long been an open secret in the field. Already in 1974 Richard Posner observed that “empirical research [on capture] has not been systematic.”¹ As late as 2006, Ernesto Dal Bó declared in a review essay that “empirical evidence on the causes and consequences of regulatory capture is scarce.”² While Dal Bó’s observation is still broadly correct today, it is becoming ever less so. A more detailed picture of the phenomenon is beginning to emerge, and many students of capture – including the authors of this volume – are rethinking

¹ Richard A. Posner, “Theories of Economic Regulation,” *Bell Journal of Economics and Management Science*, Vol. 5, No. 2 (Autumn 1974), p. 353.

² Ernesto Dal Bó, “Regulatory Capture: A Review,” *Oxford Review of Economic Policy*, Vol. 22, No. 2 (2006), p. 220.

their approach, asking not just what causes capture and what problems it creates, but what accounts for its relative strength or weakness in real-world situations.

The essential variance of regulatory capture cries out for explanation, and it points to *capture prevention* as an empirical topic every bit as important as capture itself. One reason is that the older, more extreme diagnoses no longer have compelling evidence behind them. The latest empirical work is revealing a portrait far more nuanced than the stark black and white sketches of earlier times (covered in Parts I and II of this volume). Capture, we learn, is neither absolute nor uni-dimensional. The old rendition of capture – in which powerful incumbent firms inevitably buy (or otherwise influence) regulators to build barriers to entry in their industries, and always eviscerate the public interest in the bargain – continues to enchant many onlookers in both academic and policy circles, but is increasingly difficult to reconcile with the world as it is. Particularly with the rise of health, safety, and environmental regulation, industry-specific regulators have become far less common; and industry pressure to *reduce* the scope of regulation (“corrosive capture”) is probably now considerably more common than industry efforts to expand it. Entry barriers are by no means the only goal of industry interests when it comes to regulation, and most likely not the principal one. In some cases, influence over regulators may still be explicitly purchased, but such illegal activity is likely more the exception than the rule in the United States. Implicit quid pro quos are almost certainly more typical, whether through campaign contributions or the revolving door; and industry may find even implicit deals unnecessary when broader influence can be exercised, indirectly, through “cultural capture.”

Simply put, regulatory capture is not an all-or-nothing affair. The old Stiglerian notion of a fully captured regulator is most likely a rarity, if it exists at all. In fact, in recent years, the most searching analyses have cast doubt on some of the most celebrated cases of Stiglerian capture. Much of the evidence used in the older literature – including selective examination of the historical record and simple correlations between measures of special interest and regulatory outcomes – no longer suffices for rigorous analysis or understanding.

In a world where capture varies, it seems very likely that some regulatory systems and agencies have done a better job than others at resisting it. Put differently, the prospect of *preventing* or *limiting* capture becomes a distinct possibility and creates an exciting new frontier in social scientific research (as explored in Parts III and IV of our volume). Such research can and should begin with the relative successes of the past, for the prevention of capture actually has deep roots in regulatory practice. In Molière’s classic comedy *The Bourgeois Gentleman*, the central character Monsieur Jourdain is delighted to discover that he has been speaking prose all of his life, and without knowing it. Countless scholars and policymakers, it turns out, have been living in a similar state of blissful ignorance of an unrecognized capacity. Preventing capture is something our regulatory system has been doing all along, at least to a degree, without almost anyone recognizing it. In fact, this may be the most important finding to arise from this volume. Many regulatory bodies have developed surprisingly strong immune systems, apparently capable of keeping the worst forms of capture at bay. Our regulatory system has thus been speaking prose – and perhaps even a little poetry – without us knowing it. Past claims of capture, meanwhile, have often been greatly exaggerated, as if no regulatory defense mechanisms existed at all.

Yet these defense mechanisms are widespread. Some, ranging from judicial review to the role of the media in informing the public and holding policymakers accountable, are built deeply into the institutions of American democracy. Others, such as the rules of administrative procedure (particularly the public notice and comment period), are the products of congressional action; while still others, such as standardized cost-benefit analysis run through the Office of Information and Regulatory Affairs (OIRA), hail from the executive branch. A quick list of some additional capture-prevention strategies at the agency level, which emerged across the chapters of this volume, include:

- Involvement of sub-national officials in federal notice and comment (Yackee);
- Creation of consumer empowerment programs tied to regulators (Schwarcz);

- Cultivation of diverse and independent experts (Kwak, Cuellar, McCarty);
- Institutionalization of “devil’s advocates” within agencies (Kwak); and
- Expanded retrospective review by OIRA to include agency *inaction* as well as action (Revesz and Livermore).

We review all of these strategies, as well as a number of others, in greater detail below. The point here is simply that there are many capture-prevention mechanisms already at work – and many others, including those proposed in this volume, that merit careful attention. To a significant extent, therefore, capture appears to be a treatable condition.

Until fairly recently, however, one rather radical treatment – deregulation – was the remedy of choice. Many saw it as the only remedy. If capture was absolute and deeply destructive of the public interest, then eliminating the offending regulation seemed like the appropriate response. Yet as we have seen throughout this volume, capture is almost always a matter of degree. While the presence of undue special-interest influence in the policymaking process means that the resulting regulation will be suboptimal from a public-interest perspective, it does not imply that the regulation will necessarily harm the public interest, on net. We stress this point by distinguishing between *strong* and *weak* capture, where the former is associated with regulation that actually harms the public interest, while the latter produces regulation that is less public-serving than it could be, but not harmful, on net. Although most – and perhaps all – regulatory systems are subject to some undue influence, and are thus weakly captured, only *strong* capture – which we suspect is far less common – creates a situation where outright elimination of the regulatory regime is justified.

Because we define weak versus strong capture relative to the *net benefit* of the captured regulation (a binary distinction that has obvious policy relevance), this distinction does not perfectly track the *degree* to which undue influence bends regulation from the public interest – that is, whether capture is *pervasive* or *limited* in an empirical sense.³ As we previewed in our Introduction, capture can in theory be empirically pervasive but still weak, if the social benefits of the captured regulation continue to outweigh its costs; and it can also be empirically limited but strong, if the captured regulation ends up harming the public interest overall. In practice, however, these two dimensions of capture – strong/weak and pervasive/limited – are likely to be linked, and a finding of pervasive capture may be suggestive of strong capture, and limited of weak, though the association is clearly far from perfect. What we can say, based on our review of both the literature and the empirical studies in this volume, is the following: while capture can (and does) take a range of forms, credible evidence of strong and/or pervasive capture is difficult to find, and we suspect that cases of both are quite rare.

It is worth pausing here and reflecting on the implications of even this “minimal” conclusion. If as we claim (and as many of our chapters have plausibly suggested), most agencies and regulations suffer at most only from weak capture, then like Molière’s Monsieur Jourdain,

³ The distinction between strong/weak and pervasive/limited can be represented in terms of variables in a simple linear welfare equation. Suppose that we can observe the benefits of a regulation B , its costs K and the reduction in benefits (or addition to costs) due to capture, C . We can assume all these variables to be continuous and non-negatively valued (≥ 0). When capture is more empirically pervasive, C will correspondingly take larger values, and C will take lower values when capture is limited. Yet whether capture is strong or weak depends upon how much capture disrupts the net welfare delivered by the regulation. A policy is considered desirable if $B - K \geq \eta$, where η is a cutoff value (≥ 0) that settles the choice between favoring a regulatory policy or something else. Yet strong capture would, by definition, reverse the inequality, such that $B - K - C < \eta$, with the critical “cutoff” value between weak and strong capture being simply $C = B - (\eta + K)$. When C is so pervasive as to be above this level, capture is strong; when C is sufficiently limited to rest below this level, it is weak.

policymakers must have been doing something right (or avoiding doing something wrong) all along. To the extent that strong capture exists, the policy implications are obvious: either resolve the capture problem or remove the regulation.⁴ However, if weak capture is the reigning pattern, then the range of suitable reforms should extend far beyond simple deregulation, and – importantly – any reforms undertaken must account for the fact that the present structure has resisted capture, at least to a degree and potentially rather robustly.

The empirical turn in capture research that has brought us to this point has thus opened the door to new thinking on the prevention of capture, and how this might be accomplished. At the same time, it has invited new perspectives on capture itself, and how it functions in practice, and it is to those new perspectives that we now turn.

New Perspectives on Regulatory Capture

As Bill Novak suggests in his historical essay, special interest influence has been a perennial problem of American democracy. It has literally always been with us, and each attempt to address one manifestation of the problem has inevitably created others, whether in the form of legislative corruption or regulatory capture or private coercion. More often than not, it has been a story of two steps forward and one step back. The independent regulatory commission played a significant role in reducing the impact of legislative corruption, but also became subject to special interest influence itself. The “discovery” of capture in the early 1970s, in other words, did

⁴ We remind the reader here that resolving the problem could involve a kind of “blow it up and start over again” solution, as the Department of Interior did with the Minerals Management Service (MMS) after the Deepwater Horizon tragedy, or as France has recently done with its national medical products regulator (replacing the Agence française de sécurité sanitaire des produits de santé with a new regulator) in the wake of the Mediator scandal there. Martine Lochouarn, “France Launches New Drug Regulatory Agency,” *Lancet*, 379 (9832) 9 June 2012: 2136 [<http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2812%2960927-1/fulltext>, consulted December 21, 2012]. The key is that in the case of *strong corrosive capture*, the solution may require the abandonment of an existing regulatory structure followed by its replacement with one that is expected to be more effective.

not represent the identification of a dangerous new ailment of American democracy, which had the potential to be cured, but rather the *rediscovery* of a chronic disease that was far from fatal but still required ongoing management to limit its adverse effects.

Given this history, it should be no surprise that capture itself has continued to evolve. As Dan Carpenter suggests in his chapter on the FDA, for example, “corrosive” or “deregulatory” capture, where firms seek to avoid regulation or press for its elimination, may today be even more common than the more traditional notion of capture, where incumbent firms actively pursue regulatory barriers to entry. Tino Cuellar reinforces this observation in his essay, noting how frequently business interests find themselves fighting regulation – trying to prevent or dismantle it – rather than trying to build it. Richard Posner takes a similar observation still further, arguing that – because regulation has changed so fundamentally since the 1970s, particularly as a result of the movement for deregulation and the rise of non-industry-specific regulation – the term “capture” is itself no longer meaningful or relevant. Today, he suggests, firms regularly aim to weaken regulation to reduce the costs of compliance, rather than to grab hold of regulation (i.e., capture it) as an anti-competitive weapon. While we agree with Judge Posner about the changes in the regulatory landscape – with corrosive capture largely replacing entry-barrier capture over the past several decades – we favor a broader definition of capture, and therefore find the term still relevant.

Another variation on the traditional conception of capture is “cultural capture,” which James Kwak unpacks in his essay. Here, as Kwak explains, the problem is not that regulators are lured into favoring special interests at the expense of the public interest, intentionally and knowingly, but rather that they are so persuaded by the special interests’ worldview that they come to believe they can best serve the public interest by advancing the agenda of the special interests. Although this reflects corruption of a very different sort, if it can be called corruption at all, it is nonetheless a potentially powerful way in which special interests undercut the public interest, and thus highly deserving of further attention.

Luigi Zingales comes at a similar problem in a different way by focusing on academic economists and whether they are themselves subject to capture by special interests. If so, then reliance on their ostensibly neutral expertise could again end up shaping regulatory decisions in ways that mimic more traditional capture, even in cases where the regulators remain entirely uncorrupted. Zingales’s analysis gestures to a broader mechanism of regulatory capture – indirect capture of regulatory agencies by means of the capture of the professions on which those agencies rely for information, expertise and even appointments. For this reason, Zingales’s inquiry points to fundamental connections between conflict of interest, on the one hand, and regulatory capture, on the other.⁵

A New Empirical Approach to Diagnosing Capture

The studies in this volume are theoretically informed – they ask questions about the existence of weak versus strong capture, they ask about the kind of capture at work (anti-competitive versus corrosive), and they invoke mechanisms such as quid-pro-quo capture and cultural capture. Yet what most distinguishes them from an earlier generation of capture scholarship is their deep empirical focus. We will return to the issue of prevention shortly, but first we review the new empirical approach to diagnosing capture.

While some degree of capture may well be inevitable, several chapters in sections III and IV of the volume suggest that claims about the extent and effects of special interest influence in the regulatory process are often overstated. Since regulatory decisions will always favor one interest or another, it is all too easy to conclude – without much evidence – that the party that benefits must have captured the regulation. Indeed, several chapters show that initial inferences about regulatory capture can prove mistaken or exaggerated when assessed forthrightly against

⁵ Lessig, “Democracy After Citizens’ United,” *Boston Review*; Thompson, “Understanding Financial Conflicts of Interest,” *New England Journal of Medicine* (Volume 329 (8) (August 19, 1993), 573-576.

the historical record. David Moss and Jon Lackow examine a case that has been regarded as a classic historical example of capture – the broadcast spectrum restrictions of the Federal Radio Commission (FRC) – and show that the evidence for capture of the FRC in one frequently cited episode from 1927 is essentially zero. The FRC’s refusal to expand the broadcast spectrum in 1927 is commonly attributed to the quiet influence of incumbent broadcasters seeking to restrict the space available to their competitors. However, not only is there no evidence of broadcasters having tried to exert inappropriate influence in this case, but such an effort would hardly have been necessary given that *every* major interest group, from listeners to manufacturers, supported the FRC’s decision as a way of keeping costs down and maximizing the quality of existing radio broadcasts. Chris Carrigan, meanwhile, examines the Minerals Management Service (MMS), which is widely regarded along with financial agencies as emblematic of capture today. He shows that while special interest influence did buffet the MMS, a pro-industry influence also came from voters and elected legislators who wired the agency with potentially incompatible aims. And in a methodologically sophisticated analysis of responses to mining accidents, Sanford Gordon and Catherine Hafer show that at the Mine Safety and Health Administration, political appointees made a measurable impact on regulator actions over and above the influence of industry. Even accounting for strategic behavior, Gordon and Hafer demonstrate that changes in political leadership and the public salience of mine safety combine to shape enforcement in ways that transcend the interests and influence of the industry. To understand how regulation of mine safety works, they persuasively show that more sophisticated analysis is required.

A key insight regarding the tendency to over-diagnose capture also comes from Nolan McCarty’s chapter and its analysis of policy complexity. In complex regulatory settings, McCarty shows, politics and decision-making may seem to favor industry even when regulators are pursuing the public interest, because of their need to obtain specialized information from business.. McCarty argues that while certain complex situations force regulators to rely on industry in ways that industry can use to its favor, such results may in some cases be best for the

public relative to the alternatives of banning the activities or not regulating them at all.⁶ Combined with previous research showing industry and large-firm advantages can occur in regulation without capture,⁷ McCarty's theoretical contribution suggests that an inference of capture cannot be premised only upon agency design or upon observed industry or firm advantages, particularly in a context of regulatory complexity. Analysts must also examine the process by which the politics of attempted capture translates into regulatory results.

Strategies and Mechanisms for Preventing Capture

All of these insights – and many others from this volume and beyond – reinforce our belief that close empirical work will continue to foster a richer, more nuanced, and more expansive understanding of regulation and regulatory capture. Such work is especially important from a policy standpoint because it allows for new possibilities in the critical area of prevention. The fact that some agencies appear more or less captured than others – a fact that Tino Cuellar highlights in his chapter – is fundamental to this project. Variation across agencies provides

⁶ It is worth keeping in mind that, as with all general models, McCarty's analysis focuses upon a certain kind of complexity. Not every complex situation creates these constraints, and there are cases – such as in American pharmaceutical regulation – where the informational benefits of regulation overcome these problems. See e.g. Daniel Carpenter, "Reputation, Information and Confidence – The Political Economy of Pharmaceutical Regulation," in Daniel Farber and Anne Joseph O'Connell, eds., *Public Choice and Public Law* (Northampton, Massachusetts: Edward Elgar Publishing, 2009). As a consequence, it is important not to view complexity as an inescapable "institutions trap" from which society – in all cases – can escape only by resorting to the extremes of outright bans on the one hand or no regulation (*laissez-faire*) on the other.

⁷ Carpenter, "Protection without Capture: Product Approval by a Politically Responsive, Learning Regulator," *American Political Science Review* 98 (4) (2004) 513-31. A similar conclusion is reached in a game-theoretic model applied to "approval regulation" contexts such as licensing and permitting, or the review of new drugs and medical devices at the FDA; Carpenter and Michael M. Ting, "Regulatory Errors with Endogenous Agendas," *American Journal of Political Science* 51 (4) (October 2007) 835-853.

both a compelling reason to believe that capture *can* potentially be prevented and, at the same time, a source of strategies, ideas, and proposals for prevention.

Today, deregulation (or lack of regulation) is often seen as the best antidote to regulatory capture. Sometimes this may be right. But there is a danger of throwing the baby out with the bathwater. The more we understand the nature of special interest influence over regulation, the more we should be able to devise a *spectrum* of remedies to reduce the scope of regulatory capture – remedies including, but not limited to, deregulation.

Although research on strategies for preventing capture remains at an early stage, there have been some notable contributions over the past several decades, which we review below in combination with contributions from this volume.

Dividing Power. In the 1990s, a number of scholars began to focus on the division of power across multiple regulators (or, more specifically, the division of responsibility for oversight of a particular industry across multiple regulators) as a means of preventing capture. One prominent argument was that competition among regulators could reduce the likelihood of collusion between individual regulators and a regulated industry by driving up the costs. As the game theorists Jean-Jacques Laffont and David Martimort explain, “Separation of regulators divides the information at their disposal and thus limits their discretion in engaging in socially wasteful activities. ... As a result, the transaction costs of collusive activities increase and preventing collusion becomes easier. ... The separation of regulators may be an optimal organizational response to the threat of capture.”⁸ The political scientist Terry Moe has observed,

⁸ Jean-Jacques Laffont and David Martimort, “Separation of Regulators Against Collusive Behavior,” *RAND Journal of Economics*, Vol. 30, No. 2 (Summer 1999), pp. 233, 257.

meanwhile, that the “American separation of powers system virtually guarantees that the losers, opposing interest groups, will have enough power to participate in some fashion as well.”⁹

Although these are powerful arguments, here too the essays in our volume can render a more nuanced understanding, one that has policy relevance and that also lays the groundwork for further research. McCarty’s analysis suggests that in highly complex industries – with finance as the exemplar – the problem is sometimes *not* that a monopoly on information leads self-interested regulators to collude, but that ambiguous information and a lack of expertise combine to prevent even the most benevolent regulator from creating policies that advance public welfare. If McCarty is right, it seems unlikely that dividing that information among multiple regulatory agencies would address the underlying problem. Indeed, such division may even exacerbate it, by decreasing capacity and therefore increasing the agencies’ dependence on industry insiders. As with other cases of “observational equivalence” among capture theories (and between capture and non-capture theories), casual analysts might find it difficult to determine whether a Laffont-Tirole collusion model or a McCarty capture-by-complexity model is at work in a particular case. Yet the two mechanisms would likely call for very different policy responses. This underscores once more the importance of carefully diagnosing the causes of capture, and evaluating alternatives, before advocating reform.

Administrative Procedure. In 1987, Mathew McCubbins, Roger Noll, and Barry Weingast hypothesized that administrative procedure was introduced and employed with strategic ends in mind, precisely so that elected lawmakers could control unelected bureaucrats

⁹ Terry M. Moe, “The Politics of Structural Choice: Toward a Theory of Public Bureaucracy,” in Oliver E. Williamson, ed., *Organization Theory: From Chester Barnard to the Present and Beyond*, expanded edition (New York: Oxford University Press, 1995), p. 147.

and, in turn, prevent “agency officials [from allowing] the bureau to be ‘captured’ by selling out to an external group.”¹⁰

More recently, in a 2008 volume based on a series of case studies, Steven Croley re-focused attention on administrative procedure as a powerful device for preventing capture, but suggested an almost opposite logic from McCubbins, Noll, and Weingast. Instead of subjecting regulators to greater oversight and control by legislators, administrative procedure (according to Croley) effectively gives regulators greater autonomy from legislators and ends up leveling the playing field across interests, weak and strong, by requiring greater openness (public notice) and broader input (public comment). “[W]hile it is true that notice-and-comment rulemaking enables regulated interest groups and Congress to monitor agencies more easily,” Croley writes, “the rulemaking process also allows other types of groups—public-interest law firms, the media, the public, government watchdog groups—to keep abreast of agency action more easily as well. Relative to these groups, Congress and regulated parties would certainly have a comparative advantage at monitoring agencies, if agency rulemaking processes were not standardized.”¹¹

Media Coverage and Journalistic Scrutiny. In recent years, the media has also been held up as a potential bulwark against capture, including legislative capture – again on the basis of detailed empirical work. Moss and Mary Oey (2010) show that in each of three major cases in which weak interests prevailed over better organized ones, significant legislative movement followed the appearance of relevant horror stories in the press, which presumably alerted the public to an underlying problem. In 1980, for example, Superfund was enacted over the

¹⁰ Mathew D. McCubbins, Roger G. Noll, Barry R. Weingast, “Administrative Procedures as Instruments of Political Control,” *Journal of Law, Economics, & Organization*, Vol. 3, No. 2 (Autumn, 1987), p. 247.

¹¹ Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton: Princeton University Press, 2008), pp. 143-144. An earlier empirical demonstration of this pluralist outcome appears in Steven Balla, “Administrative Procedures and Political Control of the Bureaucracy,” *American Political Science Review* 1998.

vehement objections of the chemical industry after revelations about Love Canal exploded in the national media.¹² Alexander Dyck, Moss, and Zingales (2008), meanwhile, show that lawmakers during the progressive period were more likely to alter their normal voting patterns after a piece of muckraking journalism appeared on the issue in question. More generally, they argue that “profit-maximizing media firms can play an important role in reducing the power vested interests have on policymaking. ... By informing voters, media help make elected representatives more sensitive to the interests of their constituencies and less prone to being captured by special interests.”¹³

Chapters in this volume extend this logic by pointing to the importance of public debate and media coverage in plausibly reducing or preventing capture. The various regulatory initiatives covered by Cuellar had the property of being intensively followed by general media interests and by consumer and health specialists. Gordon and Hafer find that mine safety regulators are more aggressive in the aftermath of highly publicized disasters. And both Cuellar and Carpenter point to the legitimacy of existing regulatory arrangements (the reputations and acknowledged expertise of an implementing agency), which means in part that the media organizations responsible for shaping an agency’s reputation can affect administrative behavior.¹⁴

¹² David Moss and Mary Oey, “The Paranoid Style in the Study of American Politics,” in *Government and Markets: Toward a New Theory of Regulation*, edited by Edward Balleisen and David Moss (Cambridge: Cambridge University Press, 2010).

¹³ Alexander Dyck, David A. Moss, and Luigi Zingales. “Media versus Special Interests,” NBER Working Paper Series, No. 14360, September 2008, p. 31.

¹⁴ There is growing evidence for a more general association between media coverage and agency behavior; Daniel Carpenter, “Groups, the Media, Agency Waiting Costs and FDA Drug Approval,” *American Journal of Political Science* 46 (3) (July 2002) 490-505; Sanford Gordon, “Politicizing Agency Spending: Lessons from a Bush-Era Scandal,” *American Political Science Review* 105 (4) (November 2011) 717-34.

Consumer Empowerment and the Promise of Diffuse Interests. Dan Schwarcz focuses on the potential for consumer empowerment in regulatory processes, whether through dedicated governmental entities designed to reflect consumer interests or through formal empowerment of independent groups representing consumer interests, and how this too might constitute a valuable counterweight to concentrated industrial interests in some circumstances. Schwarcz's analysis of consumer empowerment programs suggests particular conditions for their effectiveness, including a unity of purpose and focus among consumer representatives, and a combination of legitimacy and expertise among consumer organizations.

An especially striking claim about diffuse interests, including consumers, comes from the political scientist Gunnar Trumbull, who argues that diffuse interests typically exercise a great deal of influence, and ultimately play a powerful role in preventing capture by concentrated interests. This represents a sharp departure from traditional capture theory, which portrays diffuse interests as inevitably too weak to stand up to those concentrated interests. As Trumbull shows – once again through a series of detailed case studies, particularly involving consumer groups – diffuse interests are actually far more capable of organizing than is commonly believed. He argues further that these diffuse interests prove influential because of their considerable legitimacy.¹⁵ If so, then an important challenge in contemplating how best to prevent capture will involve determining the conditions under which diffuse interests are (and are not) able to organize effectively, since they apparently stand as a strong potential counterweight to narrower interests, including industrial lobbies.

Diverse and Independent Expertise. Several of the studies in this volume invoke the issue of expertise and the opportunities for reducing the risk of capture by diversifying the sources of expertise in regulatory decision making. In her close study of rulemaking at the U.S.

¹⁵ Gunnar Trumbull, *Strength in Numbers: The Political Power of Weak Interests* (Cambridge: Harvard University Press, 2012).

Department of Transportation, for example, Susan Webb Yackee stresses the importance of engaging with a diversity of interests and experts, beyond the regulated industry itself. In particular, she emphasizes (as a result of her empirical analysis) the highly constructive role of sub-national officials in the public comment period, which “may provide a foil to business interests and thus may deter agency capture” (p. 29). Similarly, in his chapter on cultural capture, James Kwak highlights the potential value of academic advisory boards that some agencies convene to review data and methodologies. According to Kwak, “the external academic community might do a better job of ensuring that agencies consider a diversity of relevant opinion and research.” Looking across regulators, Tino Cuellar examines three public health agencies (USDA, FDA, and CDC) and asks why they have been able to achieve at least a degree of independence from the industries they regulate, especially as compared to an agency like the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which has been far less independent relative to gun dealers. With respect to expertise, Cuellar observes that the more independent agencies had succeeded in developing their own “scientific expertise and technical competence,” which heightened agency legitimacy and autonomy. Along much the same lines, McCarty suggests that “Government agencies who regulate complex domains need to develop career paths and educational opportunities for ... key personnel that are more autonomous from the regulated industry.”

Diverse Viewpoints and Interests. Even beyond the question of expertise, several authors stress the value of exposing the rule-making process to diverse perspectives and ideas. Cuellar, for example, highlights the importance of regulators forging linkages and alliances with a broad range of interests and authorities, which diversify information sources and empower and insulate the agencies vis-à-vis any particular interest. And Kwak recommends a variety of strategies for injecting greater diversity into the process, including “[n]egotiated rulemaking, in which competing interest groups are invited to the agency’s table to negotiate proposed rules,” efforts to “increase the set of backgrounds from which regulators are drawn, thereby requiring a diversity of

viewpoints,” and even the institutionalization of “independent ‘devil’s advocates’ within agencies to represent contrarian viewpoints.”

Judicial Review of Regulatory Decisions. Liz Magill, meanwhile, highlights the power of judicial review to invalidate captured decisions after the fact. While recognizing that this mechanism is far from perfect (because it only kicks in after a regulation is in place, and because a party with standing has to take the initiative before any review can occur), she nonetheless sees it as an important mechanism for limiting capture, and calls for its expansion. In particular, judicial review helps to level the playing field, allowing weak as well as strong to be heard, and is often effective in detecting cases in which the logical or evidentiary foundation for a particular regulatory action is weak. In most cases, moreover, judges (as compared to regulators) may be less liable to being captured themselves, because of lifetime tenure and greater independence from political actors.

Executive Review of Regulations Based upon Cost-Benefit Analysis. Richard Revesz and Michael Livermore remind us that OIRA (the Office of Information and Regulatory Affairs inside the OMB) already plays an important role in limiting capture. This is not because the office is an extension of the president (as is commonly argued), but rather principally, in their view, because OIRA creates an additional external check on agency behavior and decisions through standardized cost-benefit analysis. Revesz and Livermore also suggest that OIRA is itself quite difficult to capture, because it is a “general institution” rather than a “single-issue” institution, because it coordinates across many agencies that are likely tied to a range of interest groups, and because it engages in retrospective review, which dramatically expands the types of investments firms would have to make to successfully capture a regulation. In fact, given their assessment of its effectiveness, Revesz and Livermore call for an expanded role for OIRA –

including the application of retrospective review not only to agency actions, but to agency *inaction* as well – to further limit possibilities for regulatory capture in all of its forms.¹⁶

Looking Ahead

While the proposals outlined in these pages are by no means exhaustive, they do provide an indication of the types of remedies that may be most promising in combating regulatory capture going forward. The empirical work on which they are based, moreover, suggests that many institutional protections against special-interest influence are already in place, and that at least in some cases these mechanisms may be considerably more effective than is commonly assumed, particularly against conventional forms of capture.

Ultimately, we believe that the increasingly empirical approach to capture that has been taking hold in recent years – and that we hope is exemplified in this volume – promises not only a more realistic picture of the problem, but also the possibility of more finely tuned remedies. Ideally, this shift toward the empirical in the study of capture presages a new orientation toward government failure more generally, focused not just on whether failures exist, but also on how they play out in practice and how (and under what conditions) they can be prevented or minimized.¹⁷ Surely, there would be little satisfaction with cardiologists if they could tell us only that heart failure exists, without having much to say about how to prevent it or limit its effects, short of killing the patient. Political economists should face the same challenge vis-à-vis

¹⁶ President Obama’s first director of OIRA, Cass Sunstein (now at Harvard Law School), has offered similar general arguments about the promise of cost-benefit analysis to avoid both particularistic and populist errors, though his focus has not been placed upon capture per se; see “Empirically Informed Regulation,” *University of Chicago Law Review* 78 (2011) 1349.

¹⁷ See especially David Moss, “Reversing the Null: Regulation, Deregulation, and the Power of Ideas,” in Gerald Rosenfeld, Jay W. Lorsch, and Rakesh Khurana, eds., *Challenges to Business in the Twenty-First Century* (Cambridge: American Academy of Arts and Sciences, 2011), pp. 35-49.

government failure: they should feel the need to identify a range of preventive measures and remedies, and the conditions under which each would be most effective. With respect to capture in particular, deregulation may be a valuable remedy in some cases, but it can hardly be the right remedy in all cases. A deeper and more detailed understanding of capture is required, and it is our hope that this volume constitutes at least a helpful step in the right direction.