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Regulation in Perspective: Historical Essays

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REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS. Edited by Thomas K. McCraw. Cambridge, Mass.: Harvard University Press. 1981. Pp. ix, 246. \$17.95.

Regulation in Perspective: Historical Essays presents a collection of five essays, originally presented at a Harvard Business School Conference. The contributors focus on the history of regulation, generally avoiding economic analysis. Instead, the authors — four historians and a political scientist — describe American regulatory schemes as a function of the society in which they arose. This results in some interesting commentary from some relatively uncommon analytic perspectives.

Each author begins by closely examining a particular phase of economic regulation. The subjects range from the regulations of various industries prior to the New Deal to the independent role of regulatory agencies in the structure of American government. Historical episodes are compared and contrasted throughout, with the aim of understanding the past and predicting, as well as guiding, the future. The central theme uniting the contributions is a common concern for the felt need which inspired different regulatory enterprises. While those needs varied greatly across time and across industries, the contributors agree with Morton Keller's assertion in the second essay that a nation's regulatory system reflects its history and the development of its society. As Gerald Berk notes in his concluding essay, the history of regulation "is, in large part, a history of how people thought about and debated the nature of the market, economic efficiency, business social responsibility, and acceptable levels of health and environmental risk in industrial society" (p. 187).

The authors, of course, go beyond the somewhat unsurprising conclusion that public ideology has shaped the regulatory environment. One of the most interesting aspects of the book is the contributors' analyses of the role of economic as opposed to other influences in the formation of the public attitudes governing the scope of regulation. For example, Thomas McCraw challenges the primacy of economic efficiency in the original understanding of antitrust legislation. At least some early reformers, notably Brandeis, supported trade regulation because of political and social, rather than economic, considerations. McCraw translates the antitrust debate of the early twentieth century into the contemporary vocabulary of industrial concentration economics,¹ and concludes that Brandeis rested his support for regulation on other grounds. For ideological reasons derived from the progressive movement, Brandeis perceived the antitrust issue as an opportunity to maximize the absolute number of business units in the economy, despite whatever welfare losses might be imposed by foregone economies of scale.²

While a credible development of Brandeis' views, McCraw's analysis

1. Much of McCraw's analysis relies on the distinction between center firms and peripheral firms and the theory of the dual economy. See generally R. AVERITT, *THE DUAL ECONOMY: THE DYNAMICS OF AMERICAN INDUSTRY STRUCTURE* (1968).

2. McCraw, of course, is not the first to suggest that some of the goals of the Sherman Act

bears little relation to current antitrust law. Not only is there little support for the conclusion that more pivotal reformers such as Senator Sherman based their beliefs on political rather than economic concerns,³ but congressional inaction has long since placed an imprimatur of approval on the economic approach.⁴ Moreover, especially with respect to a statute as facially obscure as the Sherman Act, speculations regarding the motives of its authors can hardly be conclusive. Indeed, McCraw if anything seems reluctant to exalt the political over the efficiency rationale for trade regulation, as evidenced in his discussion of Brandeis' support for exempting small businesses from price-fixing prohibitions (pp. 49-50). Nevertheless, McCraw asserts that the American experience with antitrust regulation evidences "a powerful disinclination to persist in hard economic analysis that may lead away from strong ideological preferences" (pp. 54-55). Perhaps, but contemporary antitrust policy is the domain of technocrats, not reformers. The closest thing to ideology in the regulation of industrial concentration is almost surely the wealth-maximization of Posner and his disciples.⁵ If so, the implicit distinction between political (or intellectual) ideology and economic analysis may be limited to an historical observation.

Another theme uniting the various contributions to *Regulation in Perspective* is America's historical ambivalence between corporate power on the one hand and governmental power on the other. While scarcely an original insight,⁶ this ideal leads to some interesting commentary by Morton Keller. Keller convincingly suggests that this ambivalence has fostered a highly complex regulatory system, one which reconciles one of the world's most extensive regulatory networks with one of its freest economies, and one of the strictest antitrust policies with one of the highest levels of merger activity.

Generalizing from history, the authors also look to recent changes in American regulation. These changes, suggests David Vogel, include shifting ideologies, heightened concern for social issues, and more intense political debate about the intrusiveness of federal regulation and its costs to the private sector. But Vogel also points out the rise of administrative agencies as independent sources of public policy, illustrating his assertions with examples drawn from recent environmental and consumer-protection legislation.

were inconsistent with consumer welfare maximization. See generally Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

3. See Weaver, *Antitrust Division of the Department of Justice*, in *THE POLITICS OF REGULATION* 130 (J. Wilson ed. 1980).

4. At least since *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *affd. per curiam*, 347 U.S. 521 (1954), the courts have viewed the antitrust laws primarily as guardians of economic efficiency. The congressional failure to repudiate the economic approach arguably constitutes approval of the statutory interpretation. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 102 S. Ct. 1825, 1841 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

5. See R. POSNER, *ANTITRUST LAW* (1976). Posner has since ranged far from industrial market structure in developing his ethical system of "wealth maximization." See, e.g., R. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

6. See E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 472-73 (1966).

The authors' greatest contribution is locating regulation in its historical context. Too often, regulation is described as an autonomous phenomenon, not a human institution. Instead, as the authors make clear in the several contexts they have chosen and in the themes they sound in common, public ideology gave rise to regulation and in large part explains its current forms. As James Q. Wilson has remarked concerning the development of regulation, "we must be struck at every turn by the importance of ideas."⁷ It follows that those who would understand — or influence — the future of regulation must attend to the public attitudes that have called forth the administrative arm of modern government.⁸

7. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 393 (J. Wilson ed. 1980).

8. *Regulation in Perspective* is also reviewed by Ritchie, *Book Review*, 56 *BUS. HIST. REV.* 87 (1982).