

3-2012

The Paranoid Style in Regulatory Reform

Jodi L. Short

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2012).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol63/iss3/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

Articles

The Paranoid Style in Regulatory Reform

JODI L. SHORT*

The U.S. administrative state has been involved in a decades-long regulatory reform project encompassing a shift away from what have been characterized as “command-and-control” approaches to regulation and toward approaches that are more market oriented, managerial, participatory, and self-regulatory in their orientation. Through a content analysis of the nearly 1400 law review articles that comprise the legal critique of regulation between 1980 and 2005, I show that the most salient critiques of regulation concern neither its cost nor its inefficiency, as many have assumed. Instead, they express a deep-seated anxiety about the fundamentally coercive nature of administrative government. In addition, I demonstrate that “voluntary” or “self-regulation” approaches that enlist regulated entities and citizens to perform core governmental functions like standard setting, monitoring, and enforcement emerged from the reform debate with particular prominence. Using both statistical and interpretive inference, I argue that framing regulation as a problem of coercive state power created a logic of governance uniquely suited to self-regulatory solutions that promised noncoercive ways of governing. I situate my empirical analysis in historical context, highlighting its continuities and discontinuities with the coercive-state rhetoric that has infused debates about expanded federal governance throughout U.S. history: at the Founding, during the New Deal, and in the postwar period. Drawing on these empirical and historical analyses, I argue that proponents of government regulation must recognize and engage the deep and abiding anxiety about state coercion. Before a convincing and durable case can be made for any particular regulatory policy, a case must be made for the state.

* Associate Professor of Law, Georgetown University Law Center. For generous reads and insightful critiques on drafts of this Article, I thank Barry Adler, Bobby Ahdieh, Jennifer Arlen, Ed Balleisen, Lisa Blomgren-Bingham, Bill Bratton, Laurie Edelman, Heidi Li Feldman, Neil Fligstein, Brian Galle, Bob Kagan, Greg Klass, Don Langevoort, Kristin Luker, John Mikhail, Hamsa Murthy, Jon Norman, Alvaro Santos, Jonathan Simon, and participants in the Georgetown Law Summer Faculty Workshop and the New York University Law & Economics Colloquium. Abhi Raghunathan, Michael Folger, Conor Larkin, Keigan Mull, Mary Greene, and Leslie Street provided invaluable research assistance.

TABLE OF CONTENTS

INTRODUCTION.....	634
I. CONVENTIONAL UNDERSTANDINGS OF REGULATORY REFORM.....	639
II. HISTORICAL ROOTS OF THE ANTI-COERCION LOGIC.....	643
A. FOUNDING	643
B. NEW DEAL	645
C. POSTWAR PERIOD	648
D. POSTWAR ECONOMIC CRITIQUES OF REGULATION	650
1. <i>The Costly State</i>	650
2. <i>The Captured State</i>	652
3. <i>The Cognitively Impaired State</i>	653
4. <i>The Coercive State</i>	654
III. THE LOGIC OF COMMAND AND CONTROL	656
IV. EMPIRICAL STUDY: THE LEGAL CRITIQUE AND REFORM OF COMMAND-AND-CONTROL REGULATION	662
A. TAXONOMY OF THE CRITIQUES	662
B. TAXONOMY OF THE PROPOSED REFORMS	664
1. <i>Deregulation</i>	664
2. <i>Liability-Based Regulation</i>	664
3. <i>Market-Based Regulation</i>	665
4. <i>Self-Regulation</i>	666
C. FINDINGS: COERCIVE-STATE ANXIETY AND THE RISE OF SELF-REGULATION	668
D. LATE TWENTIETH-CENTURY REGULATORY REFORM IN HISTORICAL CONTEXT	675
V. DISCUSSION AND CONCLUSION	678
METHODOLOGICAL APPENDIX	683
A. CONTENT ANALYSIS AS A METHODOLOGICAL APPROACH.....	683
B. CONSTRUCTING THE SAMPLE	684
C. CODING THE ARTICLES.....	685

INTRODUCTION

The promise of the late twentieth-century regulatory reform movement was a significantly deregulated polity in which the regulators that remained would manage the risks of contemporary society more efficiently and effectively, but four decades of regulatory reform have produced a society that is neither significantly less regulated nor significantly less risky. Recent economic and environmental catastrophes have renewed calls for regulatory reform. As the U.S. opens a new

conversation about regulation, this Article revisits the late twentieth-century regulatory reform debate to uncover insights and cautions it might hold for current and future efforts to reconceptualize the U.S. regulatory state.

My contention in this Article is that current understandings of this debate have failed fully to grasp what was and is at stake in regulatory reform, which hampers efforts to design, implement, and even imagine effective regulation. Scholarship assessing the meaning of late twentieth-century regulatory reform tends to understand it as a part of the broader assimilation of economic ideas and ideals into law and regulatory design, reshaping regulatory policy by filtering it through the lens of economic heuristics like marginal costs and efficiency.¹ This is no doubt a central theme in the regulatory reform story, but it has tended to dominate and eclipse other narratives. Specifically, what this conventional account tends to elide is the virulently anti-statist, often “tyrannophobic”² rhetoric that pervades elite academic discourse about regulation and that coexists alongside arguments about regulatory efficiency and efficacy even as it subtly undermines them. We have constructed a regulatory reform discourse that is antithetical to the very idea of government regulation.

This Article seeks to demonstrate how rhetoric about state coercion shaped the late twentieth-century debate about regulatory reform in the legal academy and to situate this contemporary debate in the ongoing historical dialogue about regulation in the United States. American political rhetoric about government regulation, particularly federal regulation, has long conflated regulation and tyranny. Each arguable expansion of federal government power has met with resistance on the ground that it will lead to authoritarian rule. At the Constitutional Convention, Anti-Federalists argued that the proposed document would create a “new King” with “powers exceeding those of the most despotic monarch we know of in modern times.”³ Battles over New Deal

1. See, e.g., Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 1983 (1998) (noting the centrality of cost-benefit arguments to debates about regulatory reform); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995) (characterizing significant regulatory reforms as motivated by cost and efficiency considerations); Sidney Shapiro, *Pragmatic Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, article 1, at 1 (characterizing regulatory reform as being principally concerned with “unnecessary and unduly costly regulations”); Rena I. Stienzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 112 (1998) (characterizing the regulatory reform critique as one concerned principally with economic efficiency and agency incompetence (which can be taken as a specific instance of inefficiency)). See generally JOHN L. KELLEY, BRINGING THE MARKET BACK IN: THE POLITICAL REVITALIZATION OF MARKET LIBERALISM (1997).

2. Eric A. Posner & Adrian Vermeule, *Tyrannophobia* 8 (Univ. of Chi. Public Law Working Paper No. 276, Harvard Univ. Public Law Working Paper No. 09-44, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473858.

3. Isaac Kramnick, *Introduction* to THE FEDERALIST PAPERS 34 (Isaac Kramnick ed., 1987).

administrative reform were framed at the time as a “righteous fight to defend democracy from dictatorship.”⁴ World War II and the Cold War that followed “pushed a fear of totalitarianism . . . to the center of American political thought”⁵ and deeply influenced thinking about the appropriate role of the state as a regulator.⁶

Postwar economic thought, which formed the intellectual basis of late twentieth-century regulatory reform debates, suggested the possibility of a new approach to thinking about the state’s role as a regulator—an approach informed by rational, empirical analysis of the circumstances under which government regulation could most efficiently and effectively promote public goals. This literature was dominated by cost- and efficiency-based critiques of regulation inspired by Ronald Coase and aimed largely at improving regulation’s target selection and design.⁷ But like their intellectual contemporaries, postwar economists had their own dark visions of state power. Different strands of the economic literature saw a regulatory state that was not only costly or inefficient, but that was captured by the industries it was supposed to regulate, cognitively incapable of gathering enough information to regulate coherently, and downright coercive: the equivalent of authoritarian institutions “from fascism to communism and from socialism to serfdom.”⁸

This Article is about how these economic ideas were assimilated into mainstream legal critiques of regulation in the late twentieth century. The centerpiece of the Article is a rigorous content analysis of the nearly 1400 law review articles on command-and-control regulation that appeared between 1980 and 2005, which generates two key findings. First, I demonstrate that concerns about the coercive nature of administrative government pervade the late twentieth-century legal-academic dialogue about regulation and that these critiques rival concerns about the cost and inefficiency of regulation. Second, I document the rise of voluntary or “self” regulation over the course of this debate to become the most widely discussed reform in the mainstream legal literature. I argue that framing regulation as a problem of coercive state power created a logic of governance uniquely suited to self-regulatory solutions that promised noncoercive ways of governing. I

4. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1593 (1996).

5. ALAN BRINKLEY, *LIBERALISM AND ITS DISCONTENTS* 86 (1998).

6. *Id.*

7. See generally J.H. DALES, *POLLUTION, PROPERTY & PRICES* (1968) (developing an early pollution-trading model); ALLEN V. KNEESE & CHARLES L. SCHULTZE, *POLLUTION, PRICES, AND PUBLIC POLICY* (1975) (advocating pollution taxes); R.H. COASE, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

8. Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 105 (2004).

argue that proponents of government regulation must recognize and engage this deep-seated anxiety about state coercion. Before a convincing and durable case can be made for any particular regulatory program or policy, a case must be made for the state.

There are already countless well-told stories about regulatory reform: those making a case for it,⁹ those assessing its political and historical impact and import,¹⁰ and those analyzing and evaluating myriad particular reforms.¹¹ I do not purport to reprise those stories here. This

9. See generally EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982); JAMES F. GATTI, *THE LIMITS OF GOVERNMENT REGULATION* (1981); KNEESE & SCHULTZE, *supra* note 7; ROBERT E. LITAN & WILLIAM D. NORDHAUS, *REFORMING FEDERAL REGULATION* (1983); GEORGE J. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975); JAMES Q. WILSON, *THE POLITICS OF REGULATION* (1980); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 *STAN. L. REV.* 1333 (1985); Pildes & Sunstein, *supra* note 1; Richard B. Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 *CALIF. L. REV.* 1256 (1981).

10. See generally MARC ALLEN EISNER, *REGULATORY POLITICS IN TRANSITION* (1993); RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* (1989); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* (2010); *REGULATORY REFORM: WHAT ACTUALLY HAPPENED* (Leonard W. Weiss & Michael W. Klass eds., 1986); SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* (1992); Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 *YALE J. ON REG.* 85 (2008); Richard D. Cudahy, *The Coming Demise of Deregulation II*, 61 *ADMIN. L. REV.* 543 (2009); David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 *B.C. ENVTL. AFF. L. REV.* 1 (2005) [hereinafter Driesen, *Feasibility Principle*]; David M. Driesen, *Regulatory Reform: The New Lochnerism?*, 36 *ENVTL. L.* 603 (2006) [hereinafter Driesen, *New Lochnerism*]; Daniel A. Farber, *Rethinking Regulatory Reform After American Trucking*, 23 *PACE L. REV.* 43 (2002); Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan's First Term*, 2 *YALE J. ON REG.* 293 (1985); Robert W. Hahn et al., *Environmental Regulation in the 1990s: A Retrospective Analysis*, 27 *HARV. ENVTL. L. REV.* 377 (2003); Lisa Heinzerling, *Reductionist Regulatory Reform*, 8 *FORDHAM ENVTL. L. REV.* 459 (1996); Jacint Jordana & David Levi-Faur, *The Politics of Regulation in the Age of Governance*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE I* (Jacint Jordana & David Levi-Faur eds., 2004); Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 *YALE J. ON REG.* 325 (1990); Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 *U. PITT. L. REV.* 405 (1996); Thomas O. McGarity, *Our Science Is Sound Science and Their Science Is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 *KAN. L. REV.* 897 (2004); Thomas O. McGarity, *Regulatory Reform and the Positive State: An Historical Overview*, 38 *ADMIN. L. REV.* 399 (1986) [hereinafter McGarity, *Positive State*]; Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 *MD. L. REV.* 253 (1986) [hereinafter McGarity, *Reagan Era*]; Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189 (1986); Marianne K. Smythe, *An Irreverent Look at Regulatory Reform*, 38 *ADMIN. L. REV.* 451 (1986); David B. Spence & Lekha Gopalakrishnan, *Bargaining Theory and Regulatory Reform: The Political Logic of Inefficient Regulation*, 53 *VAND. L. REV.* 597 (2000); Leonard W. Weiss, *Introduction: The Regulatory Reform Movement*, in *REGULATORY REFORM: WHAT ACTUALLY HAPPENED I* (Leonard W. Weiss & Michael W. Klass eds., 1986).

11. See generally John C. Coates, *The Goals and Promise of the Sarbanes-Oxley Act*, 21 *J. ECON. PERSPECTIVES* 91 (2007) (arguing that Sarbanes-Oxley will bring long term net benefits, but needs effective enforcement strategies and oversight from administrative bodies); Joseph Goffman, *Title IV of the Clean Air Act: Lessons for Success of the Acid Rain Emissions Trading Program*, 14 *PENN ST. ENVTL. L. REV.* 177 (2006) (arguing that the first fifteen years of the emissions-trading program, a part

Article presents neither a history nor an evaluation of regulatory reform, but rather a genealogy¹² tracing how current practices and understandings of regulation are rooted in the historical construction of regulation as a problem. I adopt an innovative methodological approach that generates important new insights about regulatory reform. Through a content analysis¹³ of the legal critique of regulation, I demonstrate the prevalence of state-coercion arguments within regulatory reform discourse, the rise of self-regulation from within this same discourse, and the connection between the two. My findings suggest that legal academics came to see regulation as a particular kind of problem—a problem of state coercion—and this channeled legal-academic dialogue about reform toward particular kinds of solutions, notably those that promised noncoercive ways of governing. I argue that framing regulatory problems and solutions in this way has undermined rational consideration of the full range of regulatory alternatives, particularly those that entail an active role for the state, and that this has hobbled efforts to regulate effectively.

The Article proceeds as follows. Part I sets forth the prevailing understanding of regulatory reform as the extension of economic rationality, and specifically the rationality of efficiency, to regulatory

of the Clean Air Act, have been largely successful); Dennis D. Hirsch, *Project XL and the Special Case: The EPA's Untold Success Story*, 26 COLUM. J. ENVTL. L. 219 (2001) (arguing that the success of the XL program can be seen by its adaptation to the “special case”); Robert Innes & Abdoul G. Sam, *Voluntary Pollution Reductions and the Enforcement of Environmental Law: An Empirical Study of the 33/50 Program*, 51 J.L. & ECON. 271 (2008) (arguing that the 33/50 program has encouraged pollutant reductions in states with larger environmental constituencies); Brett H. McDonnell, *SOX Appeals*, 2004 MICH. ST. L. REV. 505, 509 (concluding that Sarbanes-Oxley is helping to improve corporate governance because it has “induced better-informed regulators and private actors to take action”); Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 MICH. ST. L. REV. 671 (arguing that many of the rules adopted in the wake of the Telecommunications Act of 1996 are unnecessary and duplicative); Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713 (1997) (concluding that OSHA’s experience confirms the importance of cooperation and punishment in regulatory enforcement); Lawrence E. Susskind & Joshua Secunda, *The Risks and the Advantages of Agency Discretion: Evidence from EPA’s Project XL*, 17 UCLA J. ENVTL. L. & POL’Y 67 (1998) (arguing that the implementation of Project XL has faced numerous obstacles in the efforts to adopt more flexible approaches to environmental regulation).

12. For purposes of this Article, I use the term genealogy to describe an analytic framework that examines how discourses evolve over time and how they constitute the subjects they purport merely to analyze. This is a shorthand definition, suited to the task at hand, that does not engage the many complex methodological and normative implications of genealogical practice. See, e.g., Michel Foucault, *Nietzsche, Genealogy & History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE 139 (D. Bouchard ed., 1977); Michel Foucault, *The Discourse on Language*, in THE ARCHAEOLOGY OF KNOWLEDGE 215 (Michel Foucault ed., 1972).

13. Please see the Methodological Appendix to this Article for a detailed description of content analysis generally and my application of it here. I am aware of only one other content analysis of regulatory reform discourse, conducted on a much smaller sample of texts and confined to the environmental field. See Timothy F. Malloy, *The Social Construction of Regulation: Lessons from the War Against Command and Control*, 58 BUFF. L. REV. 267 (2010).

policymaking. I characterize this narrative as one about a shift in the “logic” of regulation, but one that fails to account for other logics driving the debate about regulatory reform: specifically, anti-coercion logics. Part II documents the prevalence of anti-coercion logics in key historical debates about the expansion of government regulation: at the Founding, during the New Deal, and in the postwar periods. It outlines in greater detail the different conceptions of the state that emerged from the postwar economic literature, specifically the “costly state,” the “captured state,” the “cognitively impaired state,” and the “coercive state.” Part III describes and justifies the setting for my study, the late twentieth-century legal critique of regulation; introduces the logic of “command and control” organizing this debate; and provides a brief genealogy of that term. In Part IV, I present my empirical analysis of the legal critique of command-and-control regulation. I lay out a taxonomy of the various arguments deployed in this critique, as well as the reforms considered, and I present the results of my analysis, documenting the dominance of “coercion” arguments in the legal critique of regulation and the rise of self-regulation over the life of the sample. I conclude in Part V by discussing my findings, their historical significance, and the contemporary implications of designing regulation around the fear of a coercive state.

I. CONVENTIONAL UNDERSTANDINGS OF REGULATORY REFORM

The late twentieth-century regulatory reform movement¹⁴ was a response to the expansion of economic and social regulation that occurred during the New Deal and postwar periods, respectively. It sought to deregulate markets that were tightly controlled by the government, such as airlines and trucking, and to blunt the impact of social regulation, especially in the fields of health, safety, and environmental protection, by subjecting it to skeptical regulatory analysis. The roots of regulatory reform can be traced to postwar economic critiques of regulation,¹⁵ but the movement gathered steam and political prominence in the 1970s, as it linked the nation’s poor economic performance to the onerous regulatory burdens borne by business.¹⁶

Presidents Ford and Carter made important contributions to the regulatory reform project, establishing mechanisms for review and

14. While the term “regulatory reform” has been used by some to describe the proregulatory mobilizations that occurred in the New Deal and postwar periods as well as ongoing contemporary efforts to reform regulation, it more commonly refers to the deregulation and related regulatory reform efforts that occurred from roughly the 1970s into the twenty-first century. Unless otherwise indicated, I use the term in the Article to refer to this historically specific regulatory reform effort.

15. See *infra* Part IV.C.

16. See GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN’S REGULATORY DILEMMA 17 (1984).

analysis of agency decisions, urging agencies to consider the economic implications of their actions, and deregulating major sectors of the economy.¹⁷ But it was Ronald Reagan who made regulatory reform a touchstone of his presidential campaign and a foundational pillar of his economic agenda.¹⁸ In office, President Reagan pursued a policy of “regulatory relief,” taking steps to scale back regulatory burdens on businesses and consumers.¹⁹ He also enacted reforms to the regulatory process, the most prominent of which was Executive Order 12291, which consolidated regulatory oversight in the executive Office of Management and Budget and required agencies to justify proposed rules on the basis of the relative costs and benefits they were expected to generate.²⁰ The 1990s produced a second wave of regulatory reform. President Clinton initiated a drive to “reinvent government,” launching a top-to-bottom review of agency practices designed “to make government work better and cost less.”²¹ His Republican rivals in Congress included competing regulatory reform provisions in their Contract with America that would have required more sweeping and stringent cost-benefit analysis of new regulatory actions and imposed additional procedural burdens on agencies to slow the flow of regulation.²² Although these policies were not enacted, cutting costs and relieving regulatory burdens remained the lodestars of regulatory policy into the twenty-first century.

Scholarship assessing the broader significance of regulatory reform has tended to coalesce around a “familiar script”²³ that portrays it, for good or for ill, as the extension of economic rationality to regulatory policymaking. As Marc Eisner argues in his comprehensive history of regulatory politics, the regulatory reform movement of the 1970s and 1980s established an “efficiency regime,” which was “based on a return to the market, and the supremacy of economics in regulatory decision-making.”²⁴ Numerous scholars have observed that regulatory reform prompted agencies to adopt an economic approach to regulation,²⁵

17. *Id.* at 1, 69–75; Weiss, *supra* note 10, at 10–12.

18. EADS & FIX, *supra* note 16, at 1; McGarity, *Reagan Era*, *supra* note 10, at 261.

19. EADS & FIX, *supra* note 16, at 1.

20. *Id.*; McGarity, *Reagan Era*, *supra* note 10, at 265–67.

21. ALBERT GORE, NAT’L PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, at i (1993).

22. Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L. REV. AM. U. 35, 43 n.47 (1996); Ronald M. Levin, *Administrative Procedure Legislation in 1946 and 1996: Should We Be Jubilant at this Jubilee?*, 10 ADMIN. L. REV. AM. U. 55, 59 (1996).

23. KYSAR, *supra* note 10, at 1.

24. EISNER, *supra* note 10, at 133.

25. See generally EISNER, *supra* note 10; KYSAR, *supra* note 10; Driesen, *New Lochnerism*, *supra* note 10; Hahn et al., *supra* note 10; Malloy, *supra* note 13; Mashaw, *supra* note 10; Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, article 4; McGarity, *Reagan Era*, *supra* note 10; Spence & Gopalakrishnan, *supra* note 10; Weiss, *supra* note 10.

meaning that regulators now looked to economic concepts like marginal costs and efficiency to rationalize regulatory decisionmaking and to discipline the unruly “excesses of [their] early attempts to regulate.”²⁶ Even the most recent and systematic analyses of the regulatory reform debate conclude that it was driven by concerns about economic efficiency.²⁷

In the conventional narrative, cost-benefit analysis (“CBA”), an approach that requires agencies to analyze proposed regulations by quantifying and comparing the magnitude of the costs and benefits those regulations are expected to yield, has come to be seen as the embodiment of the economic approach to regulation and the crowning policy achievement of regulatory reform.²⁸ Surveying his own efforts as a regulatory reformer, John Graham identifies CBA as the mechanism by which “reformers gained ground.”²⁹ Thomas McGarity concurs that CBA was the most fully realized of all the goals of the regulatory reform movement.³⁰ Douglas Kysar suggests that CBA now “provides our *übernorm* for public policy making.”³¹ And Cass Sunstein has pronounced that we live in a “Cost-Benefit State.”³² The association between CBA and regulatory reform has become so taken for granted that many scholars conflate the two or refer to them interchangeably.³³ Perhaps the most telling evidence of CBA’s influence is that proponents of regulation tend to assume that the arguments they need to meet or counter are arguments about the costs, benefits, and efficiency of a given regulatory scheme.³⁴

The significance of CBA went far beyond the analytic demands it placed on agencies. It was, as McGarity argues, a “cognitive reform” designed to change fundamentally the way regulators defined the possibilities and limitations of regulation.³⁵ CBA created a framework

26. KYSAR, *supra* note 10, at 1.

27. Malloy, *supra* note 13, at 289–92.

28. See generally EISNER, *supra* note 10; KYSAR, *supra* note 10; THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991); MCGARITY, *Positive State*, *supra* note 10; MCGARITY, *Reagan Era*, *supra* note 10.

29. John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 401 (2008).

30. MCGARITY, *supra* note 28, at xvi.

31. KYSAR, *supra* note 10, at 15.

32. CASS R. SUNSTEIN, THE COST-BENEFIT STATE ix (2002).

33. See generally Coglianesi, *supra* note 10; Driesen, *Feasibility Principle*, *supra* note 10; Farber, *supra* note 10; Heinzerling, *supra* note 10; David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1 (1983).

34. See, e.g., RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 3 (2008); Thomas O. McGarity & Sidney A. Shapiro, *OSHA’s Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 587 (1996).

35. Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1493 (1996).

that permitted consideration of quantifiable variables like the costs of implementation but that marginalized consideration of unquantifiable variables like justice or fairness.³⁶ It moved regulators away from broad considerations of whether a given policy served the public interest to quantitative analysis of whether that policy's monetizable benefits exceeded its expected costs. This required regulators not only to justify regulation very differently than they had before, but literally to think about regulation very differently than they had before. In this way, CBA changed the logic of regulation, not merely the procedures by which it was enacted.

Social scientists refer to the cognitive frameworks that shape individual and collective decisionmaking as "logics." A logic is a set of practices and ideas that supplies the organizing principles for a given institution or social arrangement.³⁷ Logics are "socially shared, deeply held assumptions and values that form a framework for reasoning [and] provide criteria for legitimacy."³⁸ They provide the building blocks of individual thought and collective action and, in this way, they shape and constrain what it is possible to think and what it is possible to do.³⁹ Social spaces are typically governed by multiple, overlapping, and often conflicting logics.⁴⁰ For instance, logics of the capitalist market, the bureaucratic state, democracy, the family, and Christianity all operate powerfully in the U.S., even as they are sometimes at odds with one another. This multiplicity creates a kind of social dynamism by making available multiple frameworks in which individuals can understand and justify their actions and coordinate with others.⁴¹

Robert Baldwin and Julia Black have argued that "regulatory logics" are an underappreciated problem in regulatory design.⁴²

36. I am presenting here the conventional account of the significance of CBA and the impact it had on regulatory policymaking. Note that some scholars have argued that CBA can be made to encompass seemingly nonquantifiable variables, like quality of life or existence value. *See, e.g.*, REVESZ & LIVERMORE, *supra* note 34, at 12–13 (arguing for a statistical understanding of compassion that can be realized through CBA); *see also* Heidi Li Feldman, *Loss*, 35 N.M. L. Rev. 375, 375–76 (2005) (arguing that there is no basis in economic theory for precluding intangible harms from welfare calculations).

37. Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 232, 232 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

38. Mary B. Dunn & Candace Jones, *Institutional Logics and Institutional Pluralism: The Contestation of Care and Science Logics in Medical Education, 1967–2005*, 55 ADMIN. SCI. Q. 114, 114 (2010).

39. *See, e.g.*, MARY DOUGLAS, *HOW INSTITUTIONS THINK* 61–63 (1986); Friedland & Alford, *supra* note 37; Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273, 278–79 (1996).

40. LUC BOLTANSKI & LAURENT THÉVENOT, *ON JUSTIFICATION: ECONOMIES OF WORTH* (Catherine Porter trans., 2006); Friedland & Alford, *supra* note 37, at 232.

41. Friedland & Alford, *supra* note 37.

42. Robert Baldwin & Julia Black, *Really Responsive Regulation* 1, 15 (London Sch. of Econ. Law, Soc'y and Econ., Working Paper 15, 2007), available at www.lse.ac.uk/collections/law/wps/wps.htm; *see also* Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*,

A “regulatory logic” embodies a set of understandings, assumptions, and predictions about how regulators and regulated entities behave, how they interact with the regulatory institutions in which they are embedded, and how they will respond to certain regulatory interventions. It constructs regulators and regulated entities as particular kinds of subjects, with particular kinds of interests and incentive structures. Baldwin and Black argue that the efficacy of a regulatory system depends in part on the accuracy of the assumptions reflected in its “regulatory logic.”⁴³

The gist of the conventional account of late twentieth-century regulatory reform is that it shifted the logic of regulation, replacing old logics like justice, fairness, precaution, and the aspiration to regulate in the public interest, with the economic logic of cost and efficiency. There is no doubt that this account captures something essential about regulatory reform. My argument is not that the conventional account is wrong, but that it is incomplete. The relentless focus on the economic logic of regulation has elided other key logics operating in the debate about regulatory reform, including the ongoing salience of coercive-state anxiety. It is important to recognize the parallel logic of anti-coercion because, like the economic logic, it shapes how policymakers and citizens think about regulation, its possibilities, and its limitations. Moreover, it also potentially contradicts and undermines the logic of efficient regulation.

II. HISTORICAL ROOTS OF THE ANTI-COERCION LOGIC

A. FOUNDING

A deep-seated anti-coercion logic has shaped conceptions of American identity and governance from the nation’s earliest days.⁴⁴ The threat of tyranny was enshrined in the Declaration of Independence as the primary justification for the States’ “separation” from Britain.⁴⁵ In the view of the founding generation, the American Revolution was a “war in defense of liberty,”⁴⁶ fought “to secure ourselves from despotism.”⁴⁷ The revolutionary experience fostered a “tendency to counter-pose ‘government’ and ‘liberty’”⁴⁸ and shaped the earliest

103 MICH. L. REV. 2073, 2108 (2005) (suggesting that when we design regulation, we make assumptions about the way targets will respond).

43. Baldwin & Black, *supra* note 43, at 15.

44. Posner & Vermeule, *supra* note 2.

45. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.”).

46. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 469 (1969) (quoting Richard Henry Lee writing in opposition to the ratification of the Constitution).

47. Alexander Hamilton, Speech to the New York Ratifying Convention (June 24, 1788).

48. Kramnick, *supra* note 3, at 19.

governmental institutions established in the States and the young nation. State constitutions drafted after 1776 reflected an abject “fear of rulers and of magisterial authority”⁴⁹ that was manifest in the dominance of state legislatures and an outsize enthusiasm for direct democracy. Despotism anxieties were also evident in the loose post-Revolutionary structure of the Union under the Articles of Confederation, which provided no central executive or judicial authority and gave no meaningful power to the Continental Congress, the only central governmental institution created by the Articles. This lack of administrative structure was justified based on the revolutionary experience of struggle “against authority and power, against kings.”⁵⁰

Tyrannophobia persisted as the revolutionaries became nation builders and sought to strengthen and create national governance institutions under a new Constitution. Tyrannophobic rhetoric suffused the debates surrounding the drafting of the Constitution and its ratification, directed primarily against the document’s proponents, but ultimately appropriated by them as well. Anti-Federalists, who opposed a stronger central government, charged that the Constitution would create a “President-General, or, more properly, our new King,” with “powers exceeding those of the most despotic monarch we know of in modern times.”⁵¹ They condemned the proposed Senate as a “tyrannical aristocracy.”⁵² At the constitutional convention, Anti-Federalists “tended to see in every limited act of government a larger plan aiming to subvert popular liberty,”⁵³ and in the ratification debates, they repeatedly likened the Federalists’ ambitions to those of Caesar, Cromwell, and other prominent historical despots.⁵⁴

The Federalists countered with their own charges of tyranny, invoking the specter of a despotic majority imposing its will on the minority through legislative absolutism and mob rule. The Constitution’s supporters acknowledged that, historically, threats to liberty “came primarily from monarchs and the executive branch. In America, however, James Madison wrote, the chief threat to liberty came from the ‘legislative power’ and ‘legislative usurpation.’”⁵⁵

Madison elaborated in the Federalist Papers: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed,

49. *Id.* at 21.

50. *Id.* at 19.

51. *Id.* at 34.

52. *Id.* at 64.

53. Posner & Vermuele, *supra* note 2, at 7 (quoting MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 67 (2003)); see also THE ANTI-FEDERALIST PAPERS No. 3, No. 25, No. 70 (Morton Borden ed., 1965).

54. THE ANTI-FEDERALIST PAPERS No. 66; see also Kramnick, *supra* note 3, at 76.

55. Kramnick, *supra* note 3, at 49.

or elective, may justly be pronounced the very definition of tyranny.”⁵⁶ Thomas Jefferson similarly remarked that “[a]n *elective despotism* was not the government we fought for.”⁵⁷ In addition, the Federalists highlighted the rampant private coercion—the “terrifying lawless mob”—that would reign in the absence of strong executive authority. “[A]narchy leads to tyranny, and better have one tyrant than so many at once.”⁵⁸ It was in this way that the Federalists marshaled the fear of tyranny to justify the expansion of federal executive and judicial authority.

B. NEW DEAL

“The Founding generation bequeathed to its descendants a ‘chronic antagonism to the state’”⁵⁹ that would resurface again and again to shape debates about the appropriate role and scope of American government. Fears that the central government established by the Constitution would turn tyrannical were muted initially because in the decades after ratification, that government largely avoided what de Tocqueville called “centralized administration.”⁶⁰ The federal government “established the general principles of government,” but it rarely “descended to the details of their application.”⁶¹ It “regulated the great interests of the country,” but did not “descend to the circle of individual interests.”⁶² Instead, administration in the young republic was left largely to local authorities. De Tocqueville argued that this distinction between centralized governance and centralized administration was what preserved citizens’ freedoms in the American democracy and protected them from “the puerilities of administrative tyranny.”⁶³

The New Deal marked the federal government’s most significant peacetime expansion into the realm of centralized administration. While debates about New Deal programs and policies implicated a broad range

56. THE FEDERALIST PAPERS NO. XLVII, at 303 (Isaac Kramnick ed., 1987).

57. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., Univ. of N.C. Press 1954) (1787).

58. Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution 103 (Jan. 9, 1788) (statement of Mr. Smith).

59. AARON L. FRIEDBERG, IN THE SHADOW OF THE GARRISON STATE 12 (2000).

60. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 346 (Henry Reeve trans., 1862). *But see* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1366 (2010) (arguing that administration played a more central role in pre-Progressive era governance than conventional accounts typically recognize).

61. DE TOCQUEVILLE, *supra* note 60, at 346.

62. *Id.*

63. *Id.* at 347. I have omitted from this Part an analysis of discourse about government tyranny during Confederate secession, the Civil War, and Reconstruction. While this is no doubt a crucial part of the history and genealogy of anti-coercion discourse in U.S. politics past and present, it falls outside the immediate domain of my analysis, which deals specifically with the expansion of the federal government’s administrative capacity.

of economic, political, philosophical, and moral concerns, state tyranny was prominent among them. “Administrative reform touched a sensitive societal nerve and became for many a righteous fight to defend democracy from dictatorship. Rather than argue arcane issues of administrative efficiency, constitutional balances, or New Deal politics, both sides in the administrative reform debate expressed real fears of dictatorship and communism.”⁶⁴

As Congress took up early New Deal legislation, Congressman, prominent lawyer, and former Solicitor General James Beck warned ominously, “We are about to transform a democracy into a dictatorship.”⁶⁵ Ex-President Herbert Hoover called the New Deal “the most stupendous invasion of the whole spirit of Liberty that the nation has witnessed since the days of Colonial America.”⁶⁶ Initiatives like the National Industrial Recovery Act, the Agricultural Adjustment Act, and the Tennessee Valley Authority raised the specter of economic “planning” and fueled the “charges of dictatorship, of conflicting claims of fascism and socialism leveled at the New Deal.”⁶⁷ According to conservative opponents of the New Deal, the National Industrial Recovery Act was an attempt to “sovietize America;”⁶⁸ the Agricultural Adjustment Act would “place[] in the hands of a dictator supreme control of the wealth of America;”⁶⁹ and the Tennessee Valley Authority was “another step on the road to Moscow.”⁷⁰ Using similar rhetoric, President Roosevelt’s critics on the left “damned the NRA [National Recovery Administration] as a ‘fascist slave program’” and charged that it was the same “as Hitler’s program.”⁷¹

The tyrannophobic rhetoric grew increasingly pervasive and shrill as anti-New Dealers mobilized and campaigned against the programs Roosevelt had enacted. The American Liberty League was founded in 1934 by an alliance of Republicans, dissident Democrats, and industrialist funders like du Pont and General Motors, to develop and disseminate the opposition’s views.⁷² The Liberty League published pamphlets on topics including: “The President Wants More Power,” “Will it Be Ave

64. Shepherd, *supra* note 4, at 1593.

65. GEORGE WOLFSKILL & JOHN A. HUDSON, *ALL BUT THE PEOPLE: FRANKLIN D. ROOSEVELT AND HIS CRITICS, 1933–39*, at 213 (1969).

66. ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 473 (1958).

67. George Wolfskill, *New Deal Critics: Did They Miss the Point?*, in *ESSAYS ON THE NEW DEAL* 49, 62 (Harold M. Hollingsworth & William F. Holmes eds., 1969).

68. WOLFSKILL & HUDSON, *supra* note 65, at 213.

69. *Id.* at 209 (quoting Rep. Ray P. Chase).

70. *Id.* at 210.

71. DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945*, at 222 (1999).

72. GEORGE WOLFSKILL, *THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE, 1934–1940*, at 108 (1962).

Caesar?” and “The Way Dictatorships Start.”⁷³ In the 1934 midterm election campaigns, “New Deal socialism, communism, and dictatorship were all some Republicans could find to talk about.”⁷⁴ One Senate candidate campaigned for reelection against the “‘arrogant dictatorship and ruthless destruction of our constitutional rights’ by New Deal ‘bureaucratic busybodies’ and their ‘mad schemes of collectivism and regimentation’ in a ‘headlong rush of events carrying us on the road to Moscow.’”⁷⁵ The Republican party’s national chairman castigated the New Deal as “government from above,” based “on the proposition that the people cannot manage their own affairs and that a government bureaucracy must manage for them.”⁷⁶ Although the Republicans lost seats with this strategy,⁷⁷ partisans of Roosevelt’s opponents in the 1936 presidential election continued to “rage[] about the dictatorship in Washington” and Roosevelt’s “damnable tyranny.”⁷⁸ Major newspapers covering the presidential election weighed in with their own barrage of tyrannophobic rhetoric. “With the single-mindedness of a trip hammer many daily newspapers—notably those of Hearst and McCormick—proclaimed the ‘crisis’ of the imminent Communist revolution in the U.S. and portrayed Roosevelt and his Brain Trust as Reds.”⁷⁹

After Roosevelt’s reelection in 1936, coercive-state rhetoric continued to drive debates about New Deal policy, the reform of New Deal policy, and Roosevelt himself. Roosevelt unwittingly fanned the flames of tyrannophobia with his attempt to expand the membership of the Supreme Court and fill the new vacancies with justices who would be more sympathetic to New Deal legislation. Business groups that had long been opposed to Roosevelt and his New Deal policies used the “court-packing plan” to plant seeds of doubt about Roosevelt’s motives in the minds of the broader public. “Provoked by anti-New Deal business groups . . . some voters began to fear that the president sought the same absolute authority as the dictators who had recently achieved power in Europe.”⁸⁰

Arcane debates about administrative reform also took a tyrannophobic turn in the late New Deal period. The usually staid American Bar Association Special Committee on Administrative Law, chaired by Roscoe Pound, issued a report in 1938 condemning “administrative absolutism” and accusing administrators of autocracy in

73. *Id.*

74. WOLFSKILL & HUDSON, *supra* note 65, at 217.

75. *Id.*

76. WOLFSKILL, *supra* note 72, at 12.

77. *Id.* at 13 (noting that Democrats picked up nine seats in the Senate and thirteen seats in the House, adding to their already overwhelming majorities in Congress).

78. WOLFSKILL & HUDSON, *supra* note 65, at 107.

79. *Id.* at 181.

80. Shepherd, *supra* note 4, at 1581.

their pursuit of efficiency.⁸¹ Proponents of expanded judicial review of administrative actions claimed that reform was needed to reign in “dictatorial, vicious and undemocratic” agencies that had run amok in their “centralization of authority, . . . greed for power, . . . [and] disregard for individual and minority rights.”⁸² Administrative reform was sold as a bulwark against “this wave that is going all over the country, of just taking hold of everybody and telling them what street they get off at.”⁸³ Tyrannophobic rhetoric similarly dominated congressional debates about the Walter-Logan bill, legislation designed to curtail agency discretion by requiring agencies to observe certain due process procedures and providing for expanded judicial review of agency action. The House report contended that the bill was necessary to control agencies that were exercising “autocratic powers.”⁸⁴ Floor debate raised fears that the U.S. government had become “a government of men and not of laws.”⁸⁵

C. POSTWAR PERIOD

If the New Deal’s expansion of administrative governance raised the specter of state tyranny, then World War II, and the Cold War that followed, “pushed a fear of totalitarianism (and hence a generalized wariness about excessive state power) to the center of American political thought.”⁸⁶ The clash between free society and totalitarian rule became the defining struggle of the postwar period.⁸⁷ The U.S. encounter with totalitarianism served to confirm the worst fears of conservatives who had opposed the New Deal, but perhaps more significantly, it planted seeds of doubt about the role of the state among liberal New Deal supporters. Statist liberals who had once looked to Europe as the model of modern and efficient administrative government were shocked and appalled by the ends to which many of these nations had deployed state power. Even among the traditional supporters of administrative governance, “[t]he dreams of an extensive regulatory state were coming to seem unrealistic, perhaps even dangerous.”⁸⁸ There was a sense, during

81. Roscoe Pound, *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 342–43 (1938).

82. Daniel R. Ernst, *The Politics of Administrative Law: New York’s Anti-Bureaucracy Clause and the O’Brian-Wagner Campaign of 1938*, 27 LAW & HIST. REV. 331, 341 (2009).

83. *Id.* at 347.

84. H.R. REP. NO. 76-1149, at 7 (1939).

85. SCHLESINGER, *supra* note 66, at 476.

86. BRINKLEY, *supra* note 5, at 86.

87. DAVID CIEPLEY, *LIBERALISM IN THE SHADOW OF TOTALITARIANISM* 19 (2006). *See generally* ARTHUR M. SCHLESINGER, *THE VITAL CENTER: THE POLITICS OF FREEDOM* (1949).

88. BRINKLEY, *supra* note 5, at 54; *see also* Desmond King & Marc Stears, *The Missing State in Postwar American Political Thought*, in *THE UNSUSTAINABLE AMERICAN STATE* 116, 123 (Lawrence Jacobs & Desmond King eds., 2009) (“The immediate postwar and early Cold War United States was indeed characterized by widespread anxieties about totalitarianism, even on the Far Left of American politics. A whole host of pre-war radicals thus turned their back on their more ambitious state-

this period, that “American democracy should strive first and foremost to avoid becoming like” the European dictatorships.⁸⁹

The fear of tyranny was also a defining feature of the Cold War. The Cold War was framed as an epic conflict between democracy and dictatorship, with the U.S. cast as the defender of liberty against totalitarian aggression both abroad and at home.⁹⁰ In a speech to Congress, President Truman made international defense against tyranny a cornerstone of U.S. foreign policy. He argued that the U.S. must commit itself to helping “free peoples to maintain their free institutions and their national integrity against aggressive movements that seek to impose upon them totalitarian regimes”⁹¹ in order to foster “conditions in which we and other nations will be able to work out a way of life free from coercion.”⁹² This formulation of U.S. interests and responsibilities “forged a powerful link between anticommunism abroad and anticommunism at home. If communism was indeed such an insidious, all-encompassing menace, it could crop up in one’s own neighborhood just as easily as in some foreign land!”⁹³ The anxiety about this link led to a postwar domestic policy focused on avoiding conquest by Soviet tyrants or subversion by their agents within U.S. borders.⁹⁴ Americans broadly supported policies that many would have found unthinkable prior to the Cold War, including the development and stockpiling of atomic weapons as essential in a world “threatened by a savage dictatorship.”⁹⁵ The public was also generally supportive of public and private efforts to expose subversive elements and purge them from government employment and other positions of influence in order to exorcise the “specter [of Communism] haunting America.”⁹⁶

centered plans at this time . . .”).

89. BENJAMIN L. ALPERS, *DICTATORS, DEMOCRACY, AND AMERICAN PUBLIC CULTURE: ENVISIONING THE TOTALITARIAN ENEMY, 1920S–1950S*, at 302 (2003).

90. *Id.* at 254; JOHN FOUSEK, *TO LEAD THE FREE WORLD: AMERICAN NATIONALISM AND THE CULTURAL ROOTS OF THE COLD WAR* 42, 130 (2000).

91. Harry S. Truman, President of the U.S., Special Message to the Congress on Greece and Turkey: The Truman Doctrine (Mar. 12, 1947), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=12846>.

92. *Id.*

93. PAUL BOYER, *BY THE BOMB’S EARLY LIGHT: AMERICAN THOUGHT AND CULTURE AT THE DAWN OF THE ATOMIC AGE* 103 (1994).

94. ALPERS, *supra* note 89, at 277.

95. BOYER, *supra* note 93, at 349.

96. STEPHEN J. WHITFIELD, *THE CULTURE OF THE COLD WAR I* (2d ed. 1991); see also RICHARD H. PELLIS, *THE LIBERAL MIND IN A CONSERVATIVE AGE: AMERICAN INTELLECTUALS IN THE 1940S AND 1950S*, at 264 (1985). See generally RICHARD M. FRIED, *NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE* (1990).

D. POSTWAR ECONOMIC CRITIQUES OF REGULATION

It was this postwar atmosphere that incubated the economic critiques of regulation that would form the intellectual basis for late twentieth-century regulatory reform. Ironically, as the state receded from other social scientific disciplines during this time period,⁹⁷ it took center stage in economic theory. It did so in four different guises: the costly state, the captured state, the cognitively impaired state, and the coercive state. Though there is conceptual overlap between and among these categories, and some sophisticated critiques weave the four together,⁹⁸ each represents a distinct way of thinking about the problem of regulation and, more broadly, the problem of state regulatory power.

1. *The Costly State*

The paradigmatic vision of the “costly state” is developed in Coase’s seminal article *The Problem of Social Cost*. There, he articulates the deceptively simple insight that “the governmental administrative machine is not itself costless. It can, in fact, on occasion be extremely costly.”⁹⁹ Coase meant this as a corrective both to government policymakers, who tended to ignore the costs of their regulatory actions, and to economists, who tended to ignore how the actions of policymakers might affect their understandings of the economy.¹⁰⁰ He made a plea for both to better understand and address the costs of government regulation.¹⁰¹ Specifically, he argued that legal institutions should consider the economic implications of the rules they promulgate, and that economists should consider the impact of legal rules and institutions on their models.¹⁰² Legal decisionmakers, for instance, “should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions.”¹⁰³

In this conception, the state is a problem when the costs of government regulation diminish rather than enhance social welfare. Specifically, Coase challenged the prevailing assumption that government intervention is always warranted to correct for externalities.¹⁰⁴ Instead, he argued for a better understanding of the economic consequences of legal

97. King & Stears, *supra* note 88, at 118.

98. See generally STIGLER, *supra* note 9.

99. Coase, *supra* note 7, at 18.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 19.

104. *Id.* at 9–10.

rules and the circumstances under which they were warranted.¹⁰⁵ In Coase's model, state intervention was unnecessary to correct for externalities where parties could bargain with one another to reach efficient outcomes.¹⁰⁶ However, Coase demonstrated that state intervention could be justified and might, in fact, be necessary if information barriers, transactions costs, or wealth effects impeded private bargaining.¹⁰⁷ In his view, there was no inherent reason why "on occasion, such governmental administrative regulation should not lead to an *improvement* in economic efficiency."¹⁰⁸ After all, "government has powers which might enable it to get some things done at a lower cost than could a private organisation."¹⁰⁹ The key was to analyze the trade-offs inherent in government decisions about regulation:

[T]he problem is one of choosing the appropriate social arrangement for dealing with the harmful effects. All solutions have costs and there is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market or the firm. Satisfactory views on policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects.¹¹⁰

Thus, the cost-based critique of regulation did not repudiate government outright as a means of achieving social goals. Instead, it reconceptualized the state as one of many problem-solving institutions, whose merits should be adjudicated based on "the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system."¹¹¹

Conventional accounts of regulatory reform are an outgrowth of Coasian cost-based critiques. From this perspective, regulatory reform is about cutting costs, imposing them in proportion to benefits, and attending to insights about the incentive structures of regulated entities toward the end of regulating them more efficiently and effectively. While this framework posits efficiency as a constraint on state power, it also envisions a clear role for the state, perhaps even an empowered state that is more effective in its efforts to regulate its citizens. Although influential, this was not the only vision of the state found in postwar economic theory. Like their intellectual contemporaries, postwar economists had their own dark visions of state power.

105. *Id.* at 10.

106. *Id.* at 3–5.

107. *Id.* at 10.

108. *Id.* at 18 (emphasis added).

109. *Id.* at 17.

110. *Id.* at 18.

111. *Id.* at 44.

2. *The Captured State*

The “captured state” is the conception of the state that emerges from public-choice theory. Public-choice theory applies neoclassical economic principles to the policymaking process.¹¹² From this perspective, the regulatory state is a forum in which regulated entities compete for public goods, “a fulcrum upon which contending interests seek to exercise leverage in their pursuit of wealth.”¹¹³ The rational pursuit of these interests, coupled with collective action problems faced by diffuse publics, produces a system in which agencies tend to promote the private interests of small, highly organized groups (in particular, regulated industries) at the expense of the broader public interest.¹¹⁴ Regulators are, in this sense, “captured” by the industries they are charged with regulating.¹¹⁵ In his *Economic Theory of Regulation*, for instance, George Stigler demonstrated that major transportation regulations benefitted incumbent firms in the trucking industry at the expense of new entrants and used these findings to argue more broadly that “regulation is acquired by the industry and is designed and operated primarily for its benefit.”¹¹⁶ James Buchanan and Gordon Tullock argued that industry prefers (and can secure) command-and-control-type regulatory schemes over other, more efficient regulatory tools that would provide a greater public benefit, because direct regulation has the effect of imposing quotas that raise the prices and profits of regulated firms.¹¹⁷ Similarly, Roger Noll attributed the Food and Drug Administration’s (“FDA”) laxity in drug regulation to the desire of FDA staffers for employment with pharmaceutical companies.¹¹⁸

In the captured state, regulation is driven by, and serves the interests of, private groups and individuals rather than the public at large. The theory explicitly rejects the possibility that a regulator might seek “not to maximize his own utility, but to find the ‘public interest’ or ‘common good.’”¹¹⁹ In this view, there is no collective action (or collective good) apart from the aggregation of private, individual, utility-maximizing choices. This drive to “exclude the notion of a public good”

112. Daniel A. Farber & Anne Joseph O’Connell, *Introduction: A Brief Trajectory of Public Choice and Public Law*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 1, 1 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010).

113. Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212 (1976).

114. See generally James M. Buchanan & Gordon Tullock, *Polluters’ Profits and Political Response: Direct Controls Versus Taxes*, 65 AM. ECON. REV. 139 (1975).

115. See, e.g., ROGER G. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS (1971); Buchanan & Tullock, *supra* note 114.

116. STIGLER, *supra* note 9, at 114.

117. Buchanan & Tullock, *supra* note 114.

118. NOLL, *supra* note 115.

119. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 20 (1962).

and to “treat all social actors as inherently self-seeking”¹²⁰ characterized much postwar work in the social sciences. Some have suggested that it was a product of anti-totalitarian anxieties and associated research-funding priorities, which funneled research support to those projects that sought to construct a model of democratic politics distinct from the collectivist visions of European dictators.¹²¹

Despite this pedigree, its prescriptions for the role of the state were ambiguous. Capture arguments were taken up across the political spectrum to argue for radically incompatible visions of the state. At one pole, Ralph Nader and his consumer-protection movement mobilized the capture critique to argue that Congress should aggrandize agencies and insulate them from the corrosive effects of private power with layers of new statutory prescriptions and procedures.¹²² At the other, libertarians like F.A. Hayek deployed them to support their position that the regulatory state should be significantly circumscribed.¹²³

3. *The Cognitively Impaired State*

The “cognitively impaired state” is most closely associated with Hayek and the Austrian school of economics. Hayek stressed the extreme knowledge constraints under which human beings and human institutions operate. From this perspective, the limitations of the state lie in the cognitive limitations of individuals, specifically “the necessary and irremediable ignorance on everyone’s part of most of the particular facts which determine the actions of all the several members of human society.”¹²⁴ According to Hayek, human knowledge is both fragmented and tacit. Each individual “can have only a small fraction of the knowledge possessed by all, and . . . each is therefore ignorant of most of the facts on which the working of society rests.”¹²⁵ Moreover, individuals are incapable of accurately and explicitly articulating the limited knowledge they have about the rules and conventions that govern the working of society.¹²⁶ According to Hayek, these limitations are an inherent function of human cognition and, thus, they cannot be overcome simply by getting more knowledge.¹²⁷

120. CIEPLEY, *supra* note 87, at 180.

121. *Id.* See generally S.M. AMADAE, *RATIONALIZING CAPITALIST DEMOCRACY: THE COLD WAR ORIGINS OF RATIONAL CHOICE LIBERALISM* (2003).

122. EISNER, *supra* note 10, at 179–80.

123. See *infra* notes 125–34.

124. 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY, RULES AND ORDER* 12 (1973).

125. *Id.* at 14.

126. Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 363.

127. Andrew Gamble, *Hayek on Knowledge, Economics, and Society*, in *THE CAMBRIDGE COMPANION TO HAYEK* 11, 117 (Edward Feser ed., 2006).

The limited cognitive ability of individuals, in turn, renders “attempts to influence intelligently the processes of society very much more difficult, and . . . places severe limits on what we can say or do about them.”¹²⁸ If knowledge is “dispersed and much of it tacit, there is no way a central authority, such as a legislature or a court, can obtain and integrate the knowledge necessary for sensible decisions on issues of law or policy.”¹²⁹ Even well-intentioned state efforts to regulate are doomed to fail under such inhospitable circumstances.

By contrast, Hayek argued that markets provide a much more effective means of social organization than does government regulation because markets function without any intentionality or design from imperfect human actors.¹³⁰ Markets move social action “in the right direction”¹³¹ through the mechanism of price rather than conscious planning. If a raw material is scarce, it will command a high price, forcing people to use it more sparingly. If more grain is needed to expand the production of ethanol, it will be planted based on the promise of profits. “At no time does a central planner need to understand why resources are moving as they are or attempt to anticipate how their movements ought to change next week.”¹³² This, according to Hayek, is the “marvel” of the market and its source of superiority over state-based regulation.¹³³

4. *The Coercive State*

Some postwar economists pushed the logics of capture and cognitive impairment further, to argue that because regulators wield state power to favor one set of private interests over others, and because they are incapable of doing otherwise, they should be viewed with the kind of suspicion and reproach typically reserved for dictators. In this view, government regulation of private individuals is nothing more than bald coercion that threatens the freedom of all citizens.

The paradigmatic articulation of this critique is Hayek’s *The Road to Serfdom*. Hayek argued that, with the expansion of welfare policies and economic regulation, western democracies had “progressively abandoned that freedom in economic affairs without which personal and political freedom has never existed in the past.”¹³⁴ Like the public-choice theorists, Hayek saw no empirical or theoretical basis for the concept of

128. HAYEK, *supra* note 124, at 12.

129. Richard A. Posner, *Hayek, Law and Cognition*, 1 N.Y.U. J.L. & LIBERTY 147, 159 (2005).

130. *See generally* Chen & Hanson, *supra* note 8.

131. FRIEDRICH A. HAYEK, *THE USE OF KNOWLEDGE IN SOCIETY* 15 (1945).

132. Chen & Hanson, *supra* note 8, at 24.

133. *Id.* This perspective on the state contrasts sharply with Coasian accounts that are more optimistic about the government’s ability to mimic market allocations of resources by correcting market failures. Posner, *supra* note 129, at 161.

134. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 13 (1944).

a “public” or “common” interest separate from the interests of individuals. He argued instead that the concept of a broader “public good” was pretextual, used to justify “legislation to authorize coercion, not merely to prevent unjust action but to achieve particular results for specific persons or groups.”¹³⁵ Because of its coercive potential, Hayek saw great danger in legislative and administrative power: “Legislation, the deliberate making of law, has justly been described as among all inventions of man the one fraught with the gravest consequences, more far-reaching in its effects even than fire and gun-powder.”¹³⁶

These arguments were animated by a “slippery slope” logic that saw isolated exercises of state power leading ultimately and inexorably to fascism. No regulatory restrictions could be justified, because “[e]ach degree of restraint imposed by the State multiplies the danger of taking a next restrictive step.”¹³⁷ As one late twentieth-century economist articulated: “Freedom is not divisible. You cannot deny basic rights to one segment of the society, without denying them to every segment, right down to the individual.”¹³⁸ According to this logic, regulation “is not a system which can be coolly experimented with and then dropped, if it fails, with no greater loss than a return to the status quo. There is no easy way back.”¹³⁹

Hayek’s libertarian critique of regulation deeply influenced Chicago School economic thinking about regulation. Henry Simons, the first economist at the University of Chicago Law School, was “genuinely spooked at what he saw as threats not just to the free market, but the free society.”¹⁴⁰ He thought that “totalitarian dictatorship could be avoided only by a drastic revival, rebuilding, and unyielding preservation of the ‘libertarian’ society and economy as conceived in the eighteenth century.”¹⁴¹ Stigler similarly echoed Hayek’s concerns about the connection between economic regulation and fascism:

If the expansion of control of economic life which has been under way in Britain, the United States, and other democratic western countries should continue long enough and far enough, the totalitarian system of Nazi Germany and Fascist Italy will eventually be reached. . . . [T]otalitarian systems are an extreme form of, not a different type from, the democratic “welfare” states. . . .¹⁴²

135. *Id.* at 2.

136. *Id.* at 72.

137. JOHN JEWKES, *ORDEAL BY PLANNING* 195 (1948).

138. Harry J. Bolwell, *A New Threat to Freedom: The Challenge of the 1980s*, in *THE LIMITS OF GOVERNMENT REGULATION* 25, 30 (James F. Gatti ed., 1981).

139. JEWKES, *supra* note 137, at 9 (emphasis omitted).

140. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 91 (2008).

141. O.H. Taylor, *The Economics of a “Free” Society: Four Essays*, 62 Q.J. ECON. 641, 651 (1948).

142. STIGLER, *supra* note 9, at 17.

He argued that the U.S. regulatory state threatened not only the markets in which it interfered directly, but the panoply of individual liberties that the free market was meant to safeguard. “Let us begin with the most fundamental issue posed by the increasing direction of economic life by the state: the preservation of the individual’s liberty—liberty of speech, of occupation, of choice of home, of education.”¹⁴³ Milton Friedman adapted these arguments to reflect Cold War anxieties in *Capitalism and Freedom*, where he equated the threat of U.S. government regulation with Soviet threats of annihilation.

The one threat is obvious and clear. It is the external threat coming from the evil men in the Kremlin who promise to bury us. The other threat is far more subtle. It is the internal threat coming from men of good intentions and good will who wish to reform us.¹⁴⁴

These four conceptions of the state embody very different logics of government regulation. The next two Parts will examine how they have shaped the legal debate about regulatory reform.

III. THE LOGIC OF COMMAND AND CONTROL

The logics of a particular institution are often revealed by the way people talk about it—specifically, by the way they critique or justify it.¹⁴⁵ For instance, the pervasive criticism of politicians who pursue personal ends while in office suggests the widely shared ideal that public office holders should surrender their individual interests to the greater public good. Such discourse reveals what one might call a “civic” or “public interest” logic governing public office holding in a democracy.¹⁴⁶ To ascertain the logic of late twentieth-century regulatory reform, I examine the criticisms that were made of regulation, the reforms that were considered, and the justifications that were proffered for reform. My analysis focuses on academic discourse about regulation, specifically the debate about command-and-control regulation and its reform that developed in law review scholarship between 1980 and 2005.

Though my focus on legal-academic discourse necessarily limits the kinds of empirical claims I can make, the insights generated by this analysis have broader practical relevance. Academic discourse and regulatory practice have long been inextricably intertwined. Regulatory regimes consist not only of the institutions that administer regulatory policy and the policies they implement, but the ideas justifying their control over private activity.¹⁴⁷ This has been nowhere more evident than in the U.S. administrative state, where significant intellectual capital has

143. *Id.* at 5.

144. MILTON FRIEDMAN, *CAPITALISM & FREEDOM* 201 (1962).

145. See generally BOLTANSKI & THÉVENOT, *supra* note 40.

146. *Id.* at 185–93.

147. HARRIS & MILKIS, *supra* note 10, at 25–31.

been invested in legitimizing the constitutionally suspect “headless fourth branch” of government.¹⁴⁸ Likewise, effectuating a change in regulatory regimes depends on their opponents’ ability to articulate a “criticism of the status quo on the level of ideas and institutions.”¹⁴⁹ Scholars of late twentieth-century regulatory reform have recognized that this movement “was energized for many years by academics”¹⁵⁰ who provided “scholarly support and theoretical justification”¹⁵¹ for its initiatives. These academic critiques and justifications generated, or at least articulated, a logic that shaped thinking about what kind of regulation was rational and acceptable. In this way, they were integral to the practice of regulatory reform.

Moreover, regulatory scholarship in the legal field provides a particularly fruitful context for this study. First, lawyers are key players in developing and implementing law and policy, especially in the regulatory field, and law review scholarship broadly represents the views of those who train lawyers, as well as of the many practitioners and students of law who publish in them.¹⁵² Second, unlike many academic journals, law reviews are broadly interdisciplinary. Legal scholars borrow ideas from a broad range of other academic disciplines and translate them for a legal audience. In this way, law reviews serve as a sort of intellectual bazaar, offering a taste not only of contemporary legal thought, but of intellectual currents more broadly. Finally, law professors, who produce the bulk of law review scholarship, occupy a unique position in the legal profession that has no parallel in other fields. Since the advent of modern legal education in the early twentieth century, legal scholars were seen not only as teachers and trainers, but as the great rationalizers of an increasingly complex and incoherent legal system. While legal authority ultimately rested with the courts, the bar looked to legal scholars to “work[] into comprehensive analytical systems”¹⁵³ the often confusing and conflicting opinions of the judiciary.

148. See, e.g., JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 4 (1938); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671 (1975).

149. HARRIS & MILKIS, *supra* note 10, at 49.

150. Cudahy, *supra* note 10, at 556.

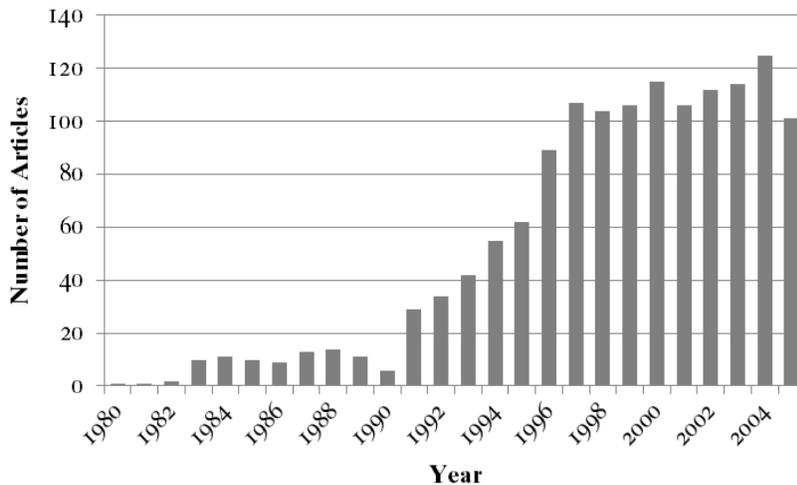
151. STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 2 (2008).

152. See generally FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981) (discussing judges interpreting and enforcing the laws and regulations that comprise the regulatory system); Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, 61 LAW & CONTEMP. PROB. 109 (1998) (discussing legal practitioners litigating cases that define their clients’ legal responsibilities); Robert L. Nelson et al., *Lawyers and the Structure of Influence in Washington*, 22 LAW & SOC’Y REV. 237 (1988) (explaining that lawyers occupy diverse roles in the regulatory and policymaking process, including staffers drafting legislation); John C. Yoo, *Lawyers in Congress*, 61 LAW & CONTEMP. PROB. 1 (1998) (discussing agency attorneys drafting and enforcing regulations).

153. WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE*

In other words, the role of law professors is to articulate the logics of the legal field.¹⁵⁴

FIGURE A: NUMBER OF ARTICLES PER YEAR DISCUSSING
COMMAND-AND-CONTROL REGULATION



“Command and control” is the central logic organizing an important strand of late twentieth-century legal discourse about regulatory reform. The term is deployed routinely in articles that criticize regulation, but it also is adopted by regulation’s proponents as they seek to respond to these critiques and by others who come to use it as shorthand for state-based regulation. As reflected in Figure A, above, over the last three decades “command and control” has become, quite simply, the way legal scholars talk about state-based regulation. While only 82 articles used it to describe regulation in the 1980s,¹⁵⁵ use skyrockets in the 1990s¹⁵⁶ to 634

GOVERNMENT 19 (1982).

154. See generally Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

155. My choice to begin my analysis in 1980 is largely an artifact of the LexisNexis database, which, when this research was conducted, archived law review articles only as far back as 1980. To ensure that my analysis did not miss any important literature before this date, I ran the same search in the more extensive HeinOnline database, which contains complete archives of most law reviews. This search turned up only seventeen articles on command-and-control regulation prior to 1980. Sixteen of these were published between 1977 and 1979. One article, on regulation in Norway, appeared in 1956. I have not included any of the pre-1980 articles in my analysis.

156. Note that the first significant uptick in discussion of command-and-control regulation occurs in 1991, the same year that significant amendments to the Clean Air Act were passed. The next significant uptick occurs in 1994, corresponding with the Republican Contract with America.

articles and continues a sharp upward trend through 2005, with 673 articles in the first five years of this century.¹⁵⁷

It is important to note that the articles deploying “command and control” terminology are penned by legal scholars coming from a range of different normative perspectives on regulation, and not predominantly by committed libertarians. The most influential scholars in the debate captured by my sample, as measured by their citation counts, are: Richard Stewart, Cass Sunstein, Bruce Ackerman, Stephen Breyer, Ian Ayers, John Braithwaite, Jody Freeman, and Charles Sabel. More than half of the articles in my sample express a neutral (47%) or explicitly positive (5%) view of the regulatory approach they characterize as “command and control.” This widespread use of the term, even by proponents of government regulation, suggests that it has become deeply institutionalized in the legal lexicon and ingrained in legal thinking about regulation. For this reason, it is important to ascertain what meanings attach to the ubiquitous term.¹⁵⁸

Although “command and control” has become widely used shorthand in contemporary legal circles, it is rarely defined and its meanings and functions have become either submerged or taken for granted. The term purports to describe regulatory practices dating as far back as the Great Society,¹⁵⁹ the New Deal,¹⁶⁰ or even World War I,¹⁶¹ but it does not begin to appear regularly in law review scholarship until the late 1970s. A 1980 article by James Krier and Richard Stewart provides an early definition of the term: “As the phrase perhaps implies, this regulatory approach typically proceeds by imposing rigid standards of conduct . . . backed up by sanctions designed to assure full compliance with such standards”¹⁶² Other articles that attempt an explicit definition likewise characterize command and control as a regulatory

157. It bears noting that the number of law reviews has increased significantly over this same time period. The Index of Legal Periodicals catalogues 360 U.S. legal periodicals in the 1979–1980 edition and that number rises to 675 in the 2004–2005 edition. However, this near-doubling of the available avenues for legal scholarship does not account for the documented rise in command-and-control discourse, which was six times greater in the 1990s than in the 1980s and, if the trend holds, will be more than ten times greater in the first decade of the 2000s than in the 1980s.

158. My sampling frame omits bodies of legal and other disciplinary literature on regulatory reform that do not so widely invoke the term “command and control.” These bodies of literature may frame the problem of regulation differently, and it would be useful for future research to examine this question.

159. Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 164 (1994).

160. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 321 (2005); Donald W. Stever, *Experience and Lessons of Twenty-Five Years of Environmental Law: Where We Have Been and Where We Are Headed*, 27 LOY. L.A. L. REV. 1105, 1109 n.7 (1994).

161. Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2131 (1999).

162. James E. Krier & Richard B. Stewart, *Using Economic Analysis in Teaching Environmental Law: The Example of Common Law Rules*, 1 UCLA J. ENVTL. L. & POL'Y 13, 15 n.3 (1980).

technique that is both coercive and punitive: “The essence of command-and-control . . . regulation is the exercise of influence by imposing standards backed by . . . sanctions.”¹⁶³

These definitions are unhelpful in defining the problem of command-and-control regulation because they simply affirm that command-and-control regulation is a type of law. Legal theory has long incorporated punishment and coercion into its understandings of law. In John Austin’s classic formulation, “[l]aws proper or properly so called, are commands”¹⁶⁴ to which obedience is secured by the threat of sanctions. Donald Black has influentially defined law as “governmental social control”¹⁶⁵ obtained through targeted application of punishments and rewards. Noah Feldman has more recently characterized “doing law” as “coercing and demanding compliance.”¹⁶⁶ Robert Cover famously highlighted the “violent domination” that underlies legal authority.¹⁶⁷ However, the critique of command-and-control regulation does not purport to be a broader critique of law per se. Consequently, explicit definitions of command-and-control regulation shed little light on what makes it so problematic.

The term’s genealogy similarly fails to illuminate what is so problematic about this style of regulation. The “command and control” idiom was widely used before legal scholars adopted it, and it continues to be deployed in a number of different fields,¹⁶⁸ where it serves different functions and takes on different meanings depending on the context. It tends to be used either structurally or descriptively. Structural uses refer nominally (and typically neutrally) to the internal architecture of organizations.¹⁶⁹ Descriptive uses typically (although not universally) pejoratively portray a management style characterized by hierarchy and compulsion.¹⁷⁰

In military parlance, “command and control” is a noun that designates (rather than an adjective that describes) organizational decisionmaking and implementation processes. It is a structural mechanism for achieving objectives within large and unwieldy organizations. “Command and Control is about focusing the efforts of a number of entities (individuals and organizations) and resources, including information, toward the achievement of some task, objective,

163. Robert Baldwin, *Regulation: After “Command and Control,”* in *THE HUMAN FACE OF LAW: ESSAYS IN HONOUR OF DONALD HARRIS* 65, 65 (Keith Hawkins ed., 1997).

164. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* vii (1832).

165. DONALD BLACK, *THE BEHAVIOR OF LAW* 2 (1976) (adopted by LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 17 (2d ed. 1998)).

166. Noah Feldman, *Cosmopolitan Law?*, 116 *YALE L.J.* 1022, 1062 (2007).

167. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1604 (1986).

168. *See infra* note 173.

169. *See infra* note 173.

170. *See infra* note 173.

or goal.”¹⁷¹ In this context, effective command and control is seen as absolutely essential to the successful completion of military missions. While hierarchy and coercion may be used as command-and-control techniques if appropriate to a particular situation, they are not by any means integral to the practice or the concept. In fact, flexible and fluid organizational arrangements are the current vogue in cutting-edge military work on command and control.¹⁷²

A number of academic disciplines have borrowed the military terminology of “command and control” and applied it in a similar sense to denote organizational structures or functions. Scholarship in development and globalization, for instance, discusses the spatial distribution of command-and-control functions in transnational corporations.¹⁷³ It is also used in the management literature to refer to the organizational structure of the late twentieth-century corporation, characterized by decentralized departments managed through layers of staff, budgets, and rules.¹⁷⁴

The term “command and control” is also used descriptively in the management literature on human resources. Here, it describes a rigid, hierarchical management style that is mostly maligned. Recent commentary by management consultants unfavorably contrasts command-and-control approaches, said to stifle creativity and lead to resentment and defiance, with preferred approaches like “lead[ing]”¹⁷⁵ or “coaching,”¹⁷⁶ designed to help employees and organizations reach their full potential. One commentator criticizes the command-and-control style in which managers attempt to “achieve better or faster results by holding a tight rein on those who work for us.”¹⁷⁷ Instead, he advises managers: “If you want results from people, you need to lead them, not control or manage them.”¹⁷⁸ Another consultant warns that “[i]ndividuals’ imagination and interest do not thrive in command-and-control structures.”¹⁷⁹ Instead, she urges clients to “[i]magine a work environment when everyone is committed to a common goal.”¹⁸⁰ Even in this literature, however, the command-and-control approach has its advocates. An article praising railroads for their effective response to Hurricane Katrina credits their command-and-control management style

171. DAVID S. ALBERTS & RICHARD E. HAYES, UNDERSTANDING COMMAND AND CONTROL 32 (2006).

172. *Id.* at 61.

173. *See, e.g.*, SASKIA SASSEN, THE GLOBAL CITY: NEW YORK, LONDON, TOKYO (1991).

174. *See* Peter F. Drucker, *The Coming of the New Organization*, 66 HARV. BUS. REV. 45, 47 (1988).

175. *See generally* Bart Bolton, *Control or Lead? It's Your Choice*, 22 INFO. SYS. MGMT. 81 (2005).

176. *See generally* Lisa Aldisert, *From Command and Control to Coaching*, 32 BANK MARKETING 36 (2000).

177. Bolton, *supra* note 175, at 81.

178. *Id.*

179. Aldisert, *supra* note 176, at 36.

180. *Id.*

for their ability “to achieve that mission quickly, efficiently and economically.”¹⁸¹ In this alternative characterization of “command and control”:

[P]olicies are adopted at the top of the organization and execution commands are communicated down through the management, with each succeeding layer applying its expertise until it gets to the point out on the railroad where a worker drives a spike.¹⁸²

From this perspective, “command and control” describes a management system with clear lines of “responsibility and accountability.”¹⁸³

Legal scholars might have taken up any one of these meanings in the quest for regulatory reform. One can imagine a regulatory reform debate that embraces “command and control” in the military sense, as essential to achieving goals and tasks in a large and complex society. Moreover, one can imagine a regulatory reform debate that advocates command and control to create clear channels of responsibility. In the next Part, I explore what “command and control” came to mean in the legal debate about regulation.

IV. EMPIRICAL STUDY: THE LEGAL CRITIQUE AND REFORM OF COMMAND-AND-CONTROL REGULATION

A. TAXONOMY OF THE CRITIQUES

In the law review articles that explicitly engage the term, “command and control” takes on strong negative connotations. It is a problem in need of reform. The puzzle for my analysis was to figure out precisely what kind of problem command-and-control regulation was thought to be. Across the range of articles analyzed, ten arguments against command-and-control regulation appear commonly enough to warrant coding them distinctly: bureaucracy, coercive, costly, end-of-pipe, ineffective, inefficient, information, interest group, legalistic, and uniform.¹⁸⁴ I describe the essence of each critique briefly in Table 1, below, and provide more detailed coding criteria and examples of articles coded as making these arguments in the Methodological Appendix to this Article.

181. Lawrence H. Kaufman, *Command and Control, and Accountability*, 19 J. COM. 14, 14 (2005).

182. *Id.*

183. *Id.*

184. I note here that some of the articles in my sample make arguments in favor of command-and-control regulation. The most common arguments are that command-and-control regulation is: necessary, effective, or morally required. I do not include these arguments in the text because my analysis sought primarily to identify the critiques of regulation. Moreover, positive arguments occurred infrequently as compared to the critiques. To give some sense of proportion, a given article was two-and-a-half times more likely to say that command-and-control regulation was coercive than to say that it was necessary.

TABLE I: CRITIQUES OF COMMAND-AND-CONTROL REGULATION (“CCR”)

Code	Summary of the Critique
bureaucracy	CCR is administered by a centralized bureaucracy, remote from the concerns of local constituencies and staffed by unaccountable bureaucrats.
coercive	CCR is an instrument of coercive state intrusions into private affairs.
costly	CCR imposes excessive costs on regulated entities or is more costly for the government to implement than some other alternative.
end-of-pipe	CCR addresses problems only after the fact and fails to deal with root causes.
ineffective	CCR does not work; it does not achieve regulators’ objectives.
inefficient	CCR is, itself, inefficient, or it causes inefficiencies or distortions in the operations of markets or regulated firms.
information	CCR requires regulators either to act based on incomplete or low quality information or to expend considerable resources gaining sufficient information to regulate effectively.
interest group	CCR lends itself to rent seeking and capture by private interests.
legalistic	CCR creates an increasingly complex legal scheme that subjugates regulated entities to the expertise of the bureaucrats who apply it and the lawyers who interpret it.
uniform	CCR applies identical standards to all regulated entities, failing to take into account particularities and unique circumstances that might warrant differential treatment.

These arguments are the discursive tools legal scholars use to elaborate precisely what kind of problem command-and-control regulation is. As Timothy Malloy recently demonstrated, regulation is not a problem per se, but rather comes to be defined as problem, in part through the academic discourses of law scholars.¹⁸⁵ It is important to understand how regulation gets constructed as a problem, because this construction drives scholars’ (and sometimes regulators’ and policymakers’) perceptions of regulation’s “defects and limitations, and consequently shapes . . . view[s] of the necessary reforms.”¹⁸⁶ Critique and reform are typically united by a common logic, or a set of values and assumptions about “the nature of the practice of government (who can

185. See Malloy, *supra* note 13, at 268.

186. *Id.*

govern; what governing is; what or who is governed).”¹⁸⁷ Although governance logics do not dictate policy outcomes, they serve as building blocks for thinking about and generating new policies and practices, and they circumscribe kinds of problems that can be identified and understood and the kinds of solutions that can be developed.¹⁸⁸ The next phase of my analysis documents the reforms that were proposed as alternatives to command-and-control regulation.

B. TAXONOMY OF THE PROPOSED REFORMS

Over 70% of the articles (983) discuss particular reforms, which fall into four broad categories: (1) deregulation, (2) liability-based regulation, (3) market-based regulation, and (4) self-regulation. There is a good deal of conceptual overlap among these categories, and many articles propose using them in combination with one another. Nonetheless, they represent distinct, identifiable approaches to solving the problem of command-and-control regulation, and they each operate based on a particular logic of regulation.

1. Deregulation

I use deregulation here in its narrow sense¹⁸⁹ to mean the repeal of laws and regulations or the withdrawal of legal authority from administrative agencies.¹⁹⁰ While relatively few reformers advocated pure deregulation, there was a strand of the regulatory reform movement that “looked at the problems associated with regulation and concluded that it should be gotten rid of entirely—that the problems it was trying to solve were better left to the market or to alternative methods of social control.”¹⁹¹

2. Liability-Based Regulation

Liability-based regulation is a reform that relies on the disciplinary effects of the tort system to regulate private conduct. Instead of directing

187. COLIN GORDON, *Governmental Rationality: An Introduction*, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 1, 3 (Graham Burchell et al. eds., 1991).

188. See generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

189. “Deregulation” sometimes is used much more loosely and expansively to encompass regulatory reform more generally. One article, for instance, suggests that deregulation entails the replacement of command-and-control approaches to regulation with “rules that use markets and market approaches as regulatory tools.” Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 10 IND. J. GLOBAL LEGAL STUD. 125, 127 (2003) (footnote omitted). However, because I place these “incentive” or “market-based” approaches to regulatory reform in their own distinct category, I reserve the “deregulation” code for deregulation only in its purest sense.

190. *Id.* at 126 (“Some forms of deregulation, such as those accomplished by legislation, result in the outright repeal of regulatory structures an agency-enabling acts . . .”).

191. EADS & FIX, *supra* note 16, at 8.

or prohibiting certain conduct, these approaches hold private parties legally liable for negative consequences of their conduct. The financial penalties attaching to liability are meant to compensate those harmed for their injuries and to deter damaging conduct in the future. Advocates argue that the incentives and disincentives created by the threat of liability shape behavior more fairly and effectively than does command-and-control regulation.¹⁹² So, for instance, one article in my sample argues that environmental-protection goals could have been realized more fully through the “removal of regulatory obstacles to public nuisance actions and greater local initiative, the evolution of common law doctrines to accommodate the needs of environmental litigation, or the adoption of measures designed to supplement and enhance traditional common law protections.”¹⁹³

3. *Market-Based Regulation*

While deregulation seeks to remove the state from markets, market-based regulation seeks to deploy markets as regulatory tools of the state. There is a great deal of market talk in the regulatory reform debate, with articles touting the “virtues of the free market,”¹⁹⁴ introducing “free market environmentalists,”¹⁹⁵ and arguing that agencies should “harness[] the power of the market”¹⁹⁶ to achieve their regulatory goals. Like deregulation, market-based reforms rely on price to coordinate behavior. However, in market-based regulation, government wields price as a tool to manipulate the behavior of regulated entities rather than stepping back to let private transactions set price.

Emissions-trading schemes in which regulators create and oversee a market in pollution credits that can be freely traded among regulated firms are paradigmatic of the market-based approach. “Under an emissions trading system, the government sets pollution standards that individual factories must meet, allocates appropriate permits, and then allows factories to trade any excess permits.... [This approach] decentralizes regulatory control, and thus allows the private sector to find cheaper and more effective solutions.”¹⁹⁷ Also encompassed in my market-based regulation code are regulatory taxes and other price-based

192. Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L. REV. 89, 144 (2002).

193. *Id.*

194. Kahn, *supra* note 10, at 330.

195. David M. Driesen, *What's Property Got to Do with It?*, 30 ECOLOGY L.Q. 1003, 1007–08 (2003) (reviewing DANIEL COLE, POLLUTION & PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION (2002)).

196. Jesse Ratcliffe, Comment, *Reenvisioning the Risk Bubble: Utilizing a System of Intra-Firm Risk Trading for Environmental Protection*, 92 CALIF. L. REV. 1779, 1793 (2004).

197. Brian C. Lewis, Note, *Prevention of Computer Crime Amidst International Anarchy*, 41 AM. CRIM. L. REV. 1353, 1370 (2004) (footnotes omitted).

schemes that attempt to influence the behavior of firms in existing markets by altering their incentive structure to take account of externalities. As one article explains, “one of the merits of taxation as opposed to command-and-control regulation is that it permits firms flexibility in how the external harm [that regulation seeks to ameliorate] is factored into production.”¹⁹⁸ In addition, to ensure that I captured the extensive influence of market-based regulation in my sample, I applied this code broadly to include articles that simply mention the use of “markets” or “incentives” as regulatory tools.¹⁹⁹

4. Self-Regulation

While self-regulation is sometimes characterized as a particular type of market-based regulation, it has its own defining characteristics that justify placing it in a separate category. Consequently, articles that discuss one of the specific forms of self-regulation I describe in this Part are categorized here, even if they also discuss “market” based approaches.

Specifically, self-regulation shifts responsibility for traditionally governmental functions like standard setting, monitoring, and enforcement to regulated entities and the broader community of regulatory beneficiaries. In their classic book *Responsive Regulation*, Ian Ayres and John Braithwaite define self-regulation as follows:

[S]elf-regulation envisions that in particular contexts it will be more efficacious for the regulated firms to take on some or all of the legislative, executive, and judicial regulatory functions. As self-regulating legislators, firms would devise their own regulatory rules; as self-regulating executives, firms would monitor themselves for noncompliance; and as self-regulating judges, firms would punish and correct episodes of noncompliance.²⁰⁰

198. Henry E. Smith, *Ambiguous Quality Changes from Taxes and Legal Rules*, 67 U. CHI. L. REV. 647, 682–83 (2000).

199. See Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 187 (1985); E. Donald Elliott, *Environmental Law at a Crossroad*, 20 N. KY. L. REV. 1, 10–12 (1992); Clark C. Havighurst, *Vicarious Liability: Relocating Responsibility for the Quality of Medical Care*, 26 AM. J.L. & MED. 7, 7–18 (2000); Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 849 (1993); Robert R. Nordhaus & Kyle W. Danish, *Assessing the Options for Designing a Mandatory U.S. Greenhouse Gas Reduction Program*, 32 B.C. ENVTL. AFF. L. REV. 97, 102–09 (2005); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 421; James Briggs, Comment, *Ski Resorts and National Forests: Rethinking Forest Service Management Practices for Recreational Use*, 28 B.C. ENVTL. AFF. L. REV. 79, 107 (2000); Kenneth M. Swenson, Note, *A Stūch in Time: The Continental Shelf, Environmental Ethics, and Federalism*, 60 S. CAL. L. REV. 851, 875–78 (1987); Jennifer Yelin-Kefer, Note, *Warming up to an International Greenhouse Gas Market: Lessons from the U.S. Acid Rain Experience*, 20 STAN. ENVTL. L.J. 221, 225–31 (2001).

200. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 103 (1992).

Instead of looking to economics or markets for regulatory technologies, self-regulation retains core legal institutions, but relocates them within private entities.

A number of regulatory programs and practices illustrate the kinds of techniques that fall into the self-regulation category. For example, firms operate as “self-regulating legislators” when they set standards for themselves through agency-sponsored programs²⁰¹ or private-sector initiatives.²⁰² Regulated firms act as “self-regulating executives” when they are given compliance-monitoring responsibilities under agency programs²⁰³ or when they adopt internal compliance-monitoring practices independently. Finally, some agency programs place firms in the role of “self-regulating judges” by inviting them to apply the law to themselves, determine whether it has been violated, and voluntarily report and remediate legal violations.²⁰⁴

In addition to efforts by firms to regulate themselves, self-regulation encompasses government initiatives that shift governance responsibilities to the citizen-beneficiaries of regulation. In other words, “[r]egulation is self-regulation when government shares with regulated entities and regulatory beneficiaries the power either to set the contents of regulations or to enforce regulations, or both at once.”²⁰⁵ Examples of this approach include programs that seek the input of citizen-stakeholders in developing regulatory standards,²⁰⁶ programs that enlist

201. For example, the Environmental Protection Agency’s Performance Track requires applicants and members to demonstrate a commitment to continuous environmental improvement by implementing policies and systems that go beyond regulatory compliance. See ENVIRONMENTAL PROT. AGENCY, PARTNERSHIP PROGRAMS MAY EXPAND EPA’S INFLUENCE 30–31 (2006). The FDA sponsors the National Shellfish Sanitation Program, a cooperative endeavor coordinating the efforts of state and federal regulators with industry representatives to ensure the safety and sanitation of mollusks and other shellfish. In this program, the shellfish industry is responsible for “obtaining shellfish from safe sources, provid[ing] plants that meet sanitary standards, maintain[ing] sanitary operating conditions as well as helping regulators develop the standards to which the industry will hold itself at the annual Interstate Shellfish Sanitation Conference.” FOOD AND DRUG ADMINISTRATION, NATIONAL SHELLFISH SANITATION PROGRAM MANUAL OF OPERATION (1995).

202. Examples of solely private-sector standard setting include Responsible Care, an initiative of the chemical industry, the ski industry’s Sustainable Slopes, and the Hotel Green Leaf Eco-Rating Program.

203. For example, the Department of Agriculture’s Hazard Analysis and Critical Control Point Program and OSHA’s Voluntary Protection Program.

204. For instance, the Environmental Protection Agency’s Audit Policy provides penalty reductions to firms that identify, voluntarily report, and correct environmental violations. Similarly, the Department of Health and Human Services has a Provider Self-Disclosure Protocol that offers leniency to health care providers who voluntarily report violations of their Medicare and Medicaid obligations.

205. Eric Bregman & Arthur Jacobson, *Environmental Performance Review: Self-Regulation in Environmental Law*, in ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY: THE CONCEPT AND PRACTICE OF ECOLOGICAL SELF-ORGANIZATION 207, 209 (Gunther Teubner et al. eds., 1994).

206. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 554 (2000) (describing the use of “formally structured multistakeholder processes” in habitat conservation

citizens to monitor the performance of regulated entities,²⁰⁷ as well as information-based regulatory schemes that seek to influence the behavior of regulated entities by “creat[ing] pressure from consumers, neighbors, and shareholders.”²⁰⁸

C. FINDINGS: COERCIVE-STATE ANXIETY AND THE RISE OF SELF-REGULATION

The five most common criticisms of command-and-control regulation are that it is: (1) coercive, (2) bureaucratic, (3) costly, (4) legalistic, and (5) ineffective.²⁰⁹ While the relative frequency of these arguments varies slightly from year to year, these fluctuations are infrequent and minor. The overall thrust of the critique remains consistent from 1980 to 2005: Regulation represents an unwarranted encroachment by the government—through its bureaucrats and its laws—on the freedom and autonomy of private individuals and businesses.

The single most common critique, raised in 39% (342) of the articles, is that regulation is coercive. Command-and-control regulations

planning); James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 64 (2001) (describing a program that elicits stakeholder participation in developing wetlands policy); A. Dan Tarlock, *A First Look at a Modern Legal Regime for a “Post-Modern” United States Army Corps of Engineers*, 52 U. KAN. L. REV. 1285, 1317 (2004) (“Stakeholder collaboration is an alternative to traditional command and control regulation . . .”); A. Dan Tarlock, *Putting Rivers Back in the Landscape: The Revival of Watershed Management in the United States*, 6 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 167, 187–89 (2000) (describing an approach that elicits stakeholder participation in developing watershed management standards).

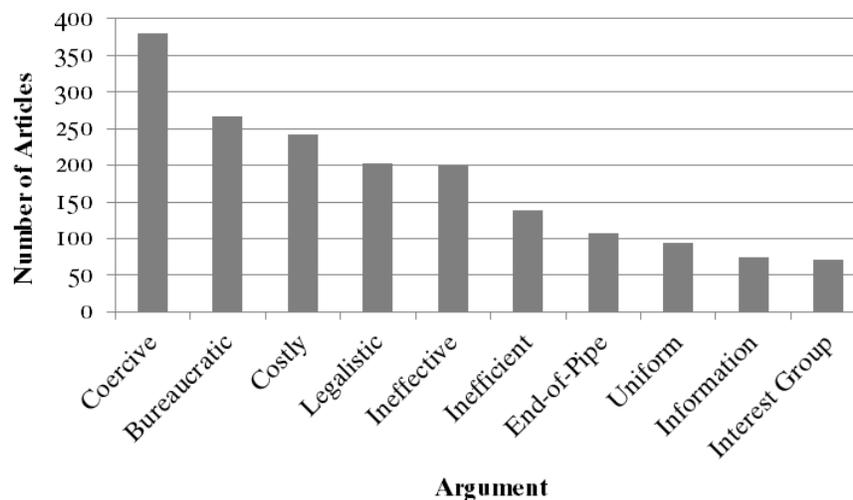
207. See Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China*, 19 BERKELEY J. INT’L L. 161, 260 (2001) (“[I]nterest groups could shoulder more of the responsibility for monitoring administrative behavior.”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 537–53 (2001) (describing a regulatory framework that relies on employees to monitor employment discrimination in their workplaces); Barbara Ann Clay, Note, *The EPA’s Proposed Phase-III Expansion of the Toxic Release Inventory (TRI) Reporting Requirements: Everything and the Kitchen Sink*, 15 PACE ENVTL. L. REV. 293, 303 (1997) (“[C]itizens play a critical role in supplementing the EPA’s enforcement.”).

208. Warren A. Braunig, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. REV. 1505, 1507 (2005) (“[T]he production and dissemination of information creates pressure from consumers, neighbors, and shareholders and thus prompts companies to reduce their pollution, in the absence of command-and-control regulation.”); see also David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 428 (2005) (“[M]arket incentives are an important ingredient, but not the sum total, of the overall equation of information-based regulatory strategies. Social and normative factors also play an important role.”); Errol E. Meidinger, *The New Environmental Law: Forest Certification*, 10 BUFF. ENVTL. L.J. 211, 270 (2003) (“State imposed disclosure requirements can thus be seen as valuable resources for civil society regulatory institutions.”); Cass R. Sunstein, *Informational Regulation and Informational Standing, Akins and Beyond*, 147 U. PA. L. REV. 613, 626 (1998) (“A primary virtue of informational regulation is that it triggers political safeguards and allows citizens a continuing oversight role, one that is, in the best cases, largely self-enforcing.”).

209. See *infra* Figure B.

are described as “wholly coercive instruments”²¹⁰ that tell regulated entities “exactly what to do and how to do it.”²¹¹ Authors argue that what’s wrong with command-and-control regulations is that they “limit [the regulated entity]’s choices in deciding how to reach the program objectives.”²¹² Some commentators push the coercion metaphor further, asserting variously that command-and-control regulation achieves its objectives through “brute force,”²¹³ that it elevates health and safety regulators to the status of “product gods,”²¹⁴ and that it has allowed environmental enforcement officials to act as a “manure Gestapo.”²¹⁵

FIGURE B: FREQUENCY OF ARGUMENTS AGAINST
COMMAND AND CONTROL



210. Daniel H. Cole, *Environmental Instrument Choice in a Second-Best World: A Comment on Professor Richards*, 10 DUKE ENVTL. L. & POL'Y F. 287, 293 (2000).

211. Camille V. Otero-Phillips, *What's in the Forecast? A Look at the EPA's Use of Computer Models in Emissions Trading*, 24 RUTGERS COMPUTER & TECH. L.J. 187, 193 (1998).

212. Ronald P. Jackson, *Extending the Success of the Acid Rain Provisions of the Clean Air Act: An Analysis of the Clear Skies Initiative and Other Proposed Legislative and Regulatory Schemes to Curb Multi-Pollutant Emissions from Fossil Fueled Electric Generating Plants*, 12 U. BALT. J. ENVTL. L. 91, 102 (2005).

213. Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 285, 372 (2004).

214. Thomas R. Mounteer, *The Inherent Worthiness of the Struggle: The Emergence of Mandatory Pollution Prevention Planning as an Environmental Regulatory Ethic*, 19 COLUM. J. ENVTL. L. 251, 297 n.298 (1994).

215. Terence J. Centner, *Concentrated Feeding Operations: An Examination of Current Regulations and Suggestions for Limiting Negative Externalities*, 25 COLUM. J. ENVTL. L. 219, 250 (2000).

As this last example suggests, arguments about state coercion often dovetail with its perceived instruments: namely, the bureaucratic structure of government and the legalistic way in which regulations are enacted and applied. The constraining power of bureaucracy is the second most common argument, discussed in 30% (267) of the articles. Critiques of bureaucracy range from structural concerns about the inability of a remote central authority to regulate far-flung constituencies,²¹⁶ to questions about the efficacy and integrity of bureaucrats.²¹⁷ While not always made explicit, many articles draw a direct analogy between command-and-control regulation and Soviet-era bureaucracies. For example:

Having the EPA determine the proper pollution control mechanisms for a steel mill in Pittsburgh, a sugar refinery in Hawaii, or a power plant in Mendocino is akin to having the Supreme Soviet determine how much cotton Farmer Tolstoy should plant in Uzbekistan—an experiment that was not wildly successful.²¹⁸

All of these arguments reflect “the longstanding fear that bureaucracy is a form of human domination.”²¹⁹

The fourth most common argument, made in 23% (204) of the articles, is that command-and-control regulation is rigidly legalistic. Like coercion and bureaucracy, legalism represents another infringement on individual autonomy. The sample articles critique legalism on several levels, beginning with the sheer volume of law generated by regulatory agencies: “Rules beget more rules in a seemingly inevitable process of regulatory expansion.”²²⁰ The morass of law compounds the sense of constraint felt by regulated entities, because it leaves them at the mercy

216. See Richard B. Stewart, *A New Generation of Environmental Regulation?* 29 *CAP. U. L. REV.* 21, 21 (2001) [hereinafter Stewart, *A New Generation*] (describing the federal bureaucracy as “remote” from local concerns); see also Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 *U. CHI. LEGAL F.* 199, 206 (arguing that the centralized command-and-control system cannot understand and respond to local variation).

217. See Jonathan Remy Nash, *Too Much Market? Conflict Between Tradable Pollution Allowances and the “Polluter Pays” Principle*, 24 *HARV. ENVTL. L. REV.* 465, 528 (2000) (citing bureaucrats’ “limited familiarity” with the business practices they regulate); see also Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1, 76 (1988) (describing bureaucrats as “pesky”); Cymie Payne, *Local Regulation of Natural Resources: Efficiency, Effectiveness, and Fairness of Wetlands Permitting in Massachusetts*, 28 *ENVTL. L.* 519, 522 (1998) (suggesting that agency officials seek their self-interest rather than the public interest); Cymie Payne, *Reforming Environmental Law*, 37 *STAN. L. REV.* 1333, 1343 (1985) (describing bureaucrats as ill-informed).

218. Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 *RUTGERS L.J.* 395, 414 (1995).

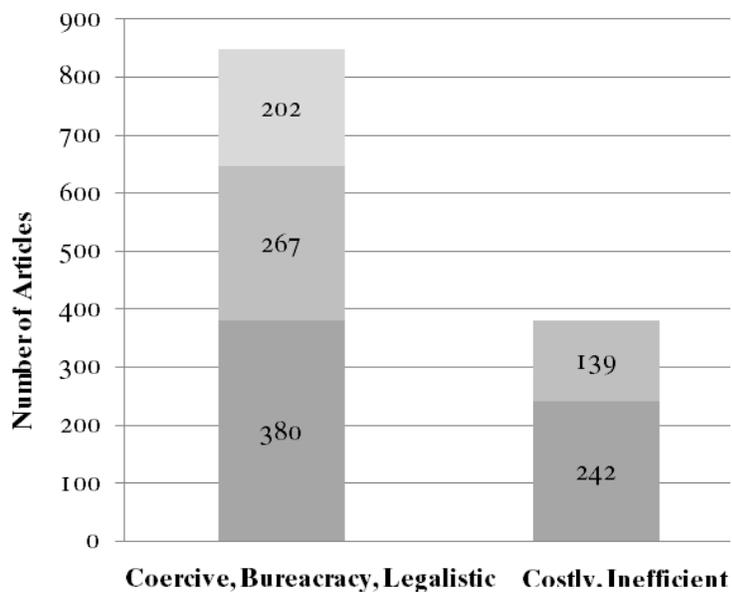
219. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1276, 1277–78 (1984). It is worth noting that this anxiety about bureaucracy, so prevalent in the legal literature, is quite at odds with the classic Weberian view of bureaucracy as the most benign form of human domination.

220. Daniel J. Fiorino, *Toward a New System of Environmental Regulation: The Case for an Industry Sector Approach*, 26 *ENVTL. L.* 457, 463 (1996).

of regulators, who are accused of applying standards rigidly and irrationally in a cycle of “mindless rule worship.”²²¹ In addition, the highly legalized environment renders regulated entities dependent on the expertise of lawyers, and thus unable to act autonomously: “When a body of law becomes so complex, it may be rendered virtually incomprehensible in parts of the country where specialists are rare.”²²² These arguments about legalism ironically amount to a charge of arbitrary lawlessness, the touchstone of tyrannical government.

Cost-based critiques are hardly absent from the legal debate, representing the third most commonly made argument against command-and-control regulation. But as Figure B makes clear, they do not in any way dominate the debate. Even when aggregated with efficiency critiques, which by themselves do not break the top five, these classic economic concerns are overshadowed by anxieties about the coercive state’s restrictions on freedom.²²³

FIGURE C: EFFICIENCY VS. ANTI-COERCION LOGICS



221. Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 *IND. L. REV.* 57, 74 (2003).

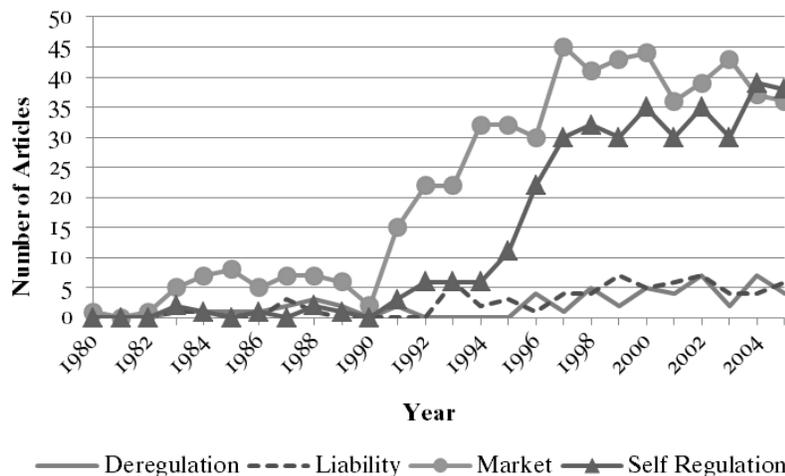
222. Anderson, *supra* note 218, at 413–14.

223. I do not include end-of-pipe, uniform, information, or interest-group arguments here, in part because relatively fewer articles made them, and in part because articles used them to support broader points about both efficiency and coercion. My coding scheme was not fine-grained enough to distinguish which overarching concern was driving these arguments.

Finally, it is worth noting that although many articles argue that command-and-control regulation is ineffective, concerns about the efficacy of regulation are swamped by concerns about both the cost and the coerciveness of regulation. This disparity captures a fundamental ambivalence about regulation: We are not entirely sure that we want effective regulation if it would require costly government coercion of private companies or citizens.

While the nature of the command-and-control critique remains relatively constant over time, the priority of suggested reforms undergoes a significant change, with self-regulation catching and overtaking market-based regulation in the later years of the sample.²²⁴ Articles advocating deregulation or liability-based regulation schemes are exceedingly scarce. Despite the critique's roots in the deregulation movement, only 4% (54) of the articles mention this solution. Though deregulation is uniquely responsive to the problem of state coercion, legal academics do not widely embrace it as a reform.²²⁵

FIGURE D: TRAJECTORY OF ALTERNATIVES TO
COMMAND AND CONTROL



The legal critique similarly eschews the classic legal ordering of tort and tort-like remedies, mentioning them in only 5% (65) of the articles. Although these alternatives are grounded in the notion of private

224. See Figure D.

225. As one staunch deregulation advocate at the University of Chicago observed, “[F]ew people, indeed, believe that almost all regulation is bad, and by a singular coincidence a significant fraction of the academic part of this group resides within a radius of one mile of my university.” STIGLER, *supra* note 9, at 167.

ordering, they fail to abandon the coercive state tools so troubling to legal critics of regulation—and arguably apply them even more haphazardly. Consequently, liability-based remedies fail to address the coercion concerns of the legal critique.²²⁶

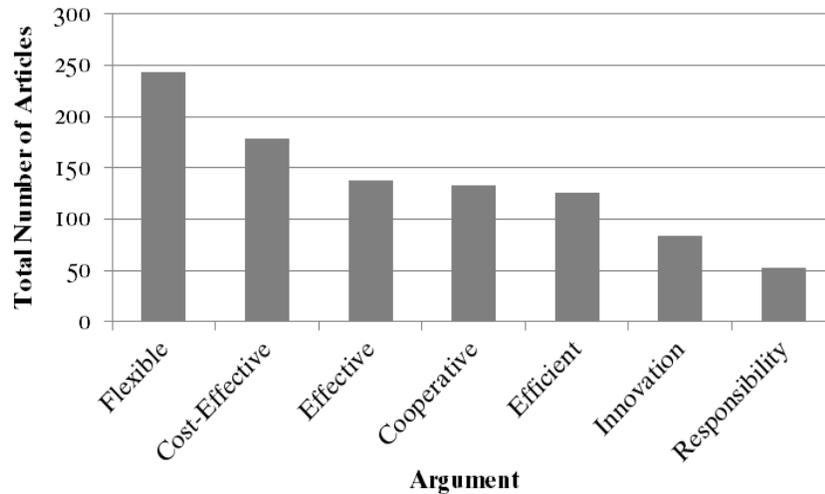
Market-based regulation has been the dominant reform paradigm for more than two decades. A panoply of price-based instruments, including emissions trading and other property-based regimes, regulatory taxes, and “incentive” schemes, are discussed in 725 different articles. Notably, that discussion of market-based regulation increases sharply around 1991, the year that significant amendments to the Clean Air Act were passed, including a sulfur dioxide emissions-trading program designed to reduce acid rain.²²⁷ While these types of market-based alternatives enjoy the most attention from commentators overall, self-regulation achieves the most significant rise over the course of the sample, catching and surpassing market-based reforms in 2004. Note that its ascent does not begin until 1996, but it continues to rise precipitously after that. To be sure, it is a subtle shift that I have identified. Market-based reforms have hardly been dethroned—they remain major players in regulatory policy debates, especially in recent debates about regulating carbon emissions.²²⁸ And, as discussed above, there is an affinity between these two categories. Nevertheless, what I’ve documented here represents an important shift in the way legal commentators conceptualize regulation, its problems, and its solutions. Self-regulation is an approach to governance that appears to be intimately bound up with a critique that seeks noncoercive ways of governing.

226. It bears noting that tort liability runs counter to economic logics of regulation as well, making it an unattractive alternative on multiple grounds. See, e.g., A. Mitchell Polinsky and Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010).

227. Clean Air Act, 42 U.S.C. § 7401 (2011).

228. See generally Gary Bryner, *Reducing Greenhouse Gases Through Carbon Market*, 85 DENV. U. L. REV. 961 (2008) (advocating carbon trading as a way to internalize the costs of greenhouse gas emissions); Jonas Monast, *Integrating State, Regional, and Federal Greenhouse Gas Markets: Options and Tradeoffs*, 18 DUKE ENVTL. L. & POL’Y F. 329 (2008) (comparing regional/state carbon-market initiatives and different alternatives for addressing greenhouse gas emissions through a federal cap-and-trade system); Carol M. Rose, *From H₂O to CO₂: Lessons of Water Rights for Carbon Trading*, 50 ARIZ. L. REV. 91 (2008) (using lessons from water-rights trading to analogize to cap-and-trade proposals); Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293 (2008) (proposing a cap-and-trade system for the U.S. to reduce its contributions of greenhouse gas emissions and responding to common objections regarding a cap-and-trade system).

FIGURE E: ARGUMENTS FOR ALTERNATIVES, 1980–2005



The arguments made in support of various reforms strongly reflect a desire to address the coercion concerns that emerge from the critique.²²⁹ By far the most common argument supporting alternatives to command and control is that they are flexible (244 articles), meaning that they adopt a “respect for individual autonomy and initiative, and productive potential.”²³⁰ Flexibility is an even more important driver of legal reform than is cost-effectiveness, which appears in 179 articles as an argument supporting a particular reform (27% less than flexibility). Self-regulation was seen not only as a tool for flexibility, but as a way to repair the damage that coercive government had done to relationships between agencies and citizens. As a typical article supporting self-regulation suggests, the approach offers a way to build “a constructive new relationship with regulators and the public based on cooperation and partnership rather than coercion and mistrust.”²³¹

Finally, my data demonstrate that in this literature there is a direct relationship between self-regulation and concerns about coercion. Self-regulation alternatives are statistically correlated with arguments about

229. See Figure E.

230. Martha T. McClusky, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 876 (2003) (quoting CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 271, 386 (1997)).

231. Stepan Wood, *Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance*, 10 BUFF. ENVTL. L.J. 129, 203–04 (2002–2003).

coercion, while there is no correlation between coercion and market-based alternatives.²³² This is true of all three coercion-related codes: direct arguments about the coercive state, as well as arguments about bureaucracy and legalism, are all highly correlated with self-regulatory solutions. Market-based reforms, by contrast, do not appear to respond to this set of concerns. While there is much talk about markets and freedom, the practical reality of market-based reforms, like administering trading markets or imposing regulatory taxes, is that they require a great deal of government initiative, planning, and management. It is difficult to reconcile these tools with a deep-seated fear of state coercion because, at base, they are designed to help government manipulate regulated entities more effectively. Taken together, these findings suggest that, over the life of the sample, legal scholarship “beg[ins] to converge on the concept of self-regulation”²³³ as a tool for regulating without coercion.

TABLE 2: CORRELATIONS

		Market	Self-Reg.	Coercion	Bureauc.	Legal
Market-Based	Pearson Correlation	1	-.491**	-.023	.016	-.051
	Sig. (2-tailed)		.000	.392	.561	.058
	N	1389	1389	1389	1389	1389
Self-Reg.	Pearson Correlation	-.491**	1	.088**	.078**	.119**
	Sig. (2-tailed)	.000		.001	.003	.000
	N	1389	1389	1389	1389	1389
Coercion	Pearson Correlation	-0.23	.088**	1	.280**	.292**
	Sig. (2-tailed)	.392	.001		.000	.000
	N	1389	1389	1389	1389	1389
Bureauc.	Pearson Correlation	.016	.078**	.280**	1	.300**
	Sig. (2-tailed)	.561	.003	.000		.000
	N	1389	1389	1389	1389	1389
Legalistic	Pearson Correlation	-.051	.119**	.292**	.300**	1
	Sig. (2-tailed)	.058	.000	.000	.000	
	N	1389	1389	1389	1389	1389

**Correlation is significant at the 0.01 level (2-tailed).

D. LATE TWENTIETH-CENTURY REGULATORY REFORM IN HISTORICAL CONTEXT

These findings suggest the need to reevaluate conventional wisdom about the stakes and meaning of regulatory reform. While economic logics about cost and efficiency are clearly important strands of the debate about regulation, they compete with anti-coercion logics that are

232. See Table 2.

233. Estlund, *supra* note 160, at 321.

fundamentally incompatible with the project of regulating more efficiently and effectively. Rather than breaking with the past, late twentieth-century regulatory reform discourse remained continuous with Americans' understandings about federal government regulation and coercion.

While it is important to recognize these continuities, I also want to highlight the significant distinctions between contemporary and historical tyrannophobic rhetoric. First, historical invocations of coercive-state arguments were associated with tangible, even if not entirely credible, fears that the U.S. government actually might assume tyrannical powers. The Founders' own experience with monarchy made concrete the possibility that some group or individual might seize and exploit consolidated state power. The rise of fascism in Europe during the 1930s, coupled with its apparent success at resuscitating decimated European economies, made it seem a viable political alternative to some during the New Deal period.²³⁴ "As Hitler and Mussolini gained power and solved their countries' economic problems more successfully than did democratic governments, talk of American dictatorship or communism was not irrelevant chatter."²³⁵ Similarly, during the Cold War, totalitarianism was seen as an "extraordinarily virulent"²³⁶ force, and many feared that "democracy, at least as it was currently practiced in America, might not be capable of withstanding totalitarian pressures from within and without."²³⁷

Second, those deploying anti-statist rhetoric in earlier historical debates explicitly articulated the connection between their tyrannophobia and specific exercises of the government's regulatory powers. At the Founding, for instance, Anti-Federalists argued that centralized governmental institutions like the Presidency and the Senate would become vehicles for elites to seize power and wield it tyrannically over the majority of citizens.²³⁸ During the New Deal, opponents of the newly created administrative apparatus charged that it was already being used as an instrument of tyranny, issuing lawless decisions grounded in nothing more than the administrators' whims²³⁹ and engaging in shameless political patronage to consolidate the president's power.²⁴⁰

234. ALPERS, *supra* note 89, at 15 (recounting how Studebaker successfully marketed a car called "The Dictator," which it advertised as "a brilliant example of excess power," from 1927 to 1937); CIEPLEY, *supra* note 87, at 88 ("[W]hat was so disturbing about [the rise of fascism]—as disturbing as the fact that dictators had been able to grab power in the first place—was that dictatorship evidently worked.").

235. CIEPLEY, *supra* note 87, at 88; Shepherd, *supra* note 4, at 1590.

236. ALPERS, *supra* note 89.

237. *Id.*

238. *See supra* notes 44–58.

239. In an influential report to the American Bar Association, Roscoe Pound charged that administrative law in the 1930s was "whatever is done administratively by administrative officials."

In totalitarian governments edicts and orders are issued by the heads of the government, and they have the force and effect of law. There is no appeal. The dictator is the law. When we allow Government bureaus to make rules that are tantamount to laws, and then permit no appeal from them, we are rapidly approaching the totalitarian state.²⁴¹

There was, in other words, a rational and explicitly articulated connection (however remote) between the government's actions and the expressed fears of state tyranny in these debates.

This rationally and explicitly articulated connection begins to become more attenuated in the postwar period, as "slippery slope" logic comes to replace more concrete articulations of the relationship between state power and tyranny. Under this axiomatic logic, "[a]ny economic planning by the state must and has led to political tyranny and implies the end of civilization."²⁴² By the time we arrive at the late twentieth-century regulatory reform debate, both the plausibility of a tyrannical government seizing power in the U.S. and the explanations underlying the anxieties are gone. In their comparative study of tyrannophobia, Eric Posner and Adrian Vermeule conclude that "current tyrannophobia can only be of the irrational variety," both because the establishment of a dictatorship in the U.S. is so implausible and because harboring the fear of one serves no prophylactic function.²⁴³ Perhaps because it has become so unmoored from empirical reality, contemporary discourses of state coercion also have become disconnected from any explicit elucidation of what precisely is so coercive about state-based regulation.

While tyrannophobia in contemporary regulatory reform debates defies reasoned argument, it invokes deeply ingrained schema or cognitive scripts. Cognitive psychologists have demonstrated how schema and scripts shape our understandings of the world and the possibilities for action in it.²⁴⁴ Ronald Chen and John Hanson recently outlined what they call the dominant "meta script" guiding U.S. policymaking since the 1980s: "markets good; regulation bad."²⁴⁵ They argue that this simple formulation offered a foundational principle that could be applied to almost any policy issue, and U.S. policymakers began to see almost every

Pound, *supra* note 81, at 339.

240. Ernst, *supra* note 82, at 331.

241. Shepherd, *supra* note 4, at 1610 (quoting 86 CONG. REC. H4534 (daily ed. Apr. 15, 1940) (statement of Rep. Michener)).

242. JUDITH N. SHKLAR, *AFTER UTOPIA: THE DECLINE OF POLITICAL FAITH* 248-49 (1957).

243. See Posner & Vermeule, *supra* note 2, at 17.

244. See, e.g., PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1977); DOUGLAS, *supra* note 39; SUSAN T. FISKE & SHELLY E. TAYLOR, *SOCIAL COGNITION* 98 (1991) (describing a "schema" as "a cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes"); WILLIAM F. SEWELL, *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOC. 1 (1992).

245. Chen & Hanson, *supra* note 8, at 11.

issue through this lens.²⁴⁶ They suggest that the “most compelling reason offered for preferring markets to regulation is the idea that the former sets people free, while the latter coerces them.”²⁴⁷ The key to the success of the “regulation is bad” script is its ability to invoke threats to freedom.²⁴⁸ These threats, and this metascript, pervade the discourse of command-and-control regulation.

The repeated invocation of deeply ingrained cognitive scripts about state-coercion and the failure to rationally articulate the precise nature of the state-coercion problem creates a number of gaps in the logic of regulatory reform. First, contemporary anti-coercion discourse does not address why regulatory coercion is worse than other types of coercion by the state. As discussed above, all forms of law have coercive elements. Yet few, if any, of the legal critiques of regulation take issue with the broader legal system backed by the state’s coercive power. The question that regulatory reform discourse begs but never answers is: what makes regulation distinctive, what makes it a particularly problematic exercise of the state’s coercive power? Second, the contemporary discourse of state coercion fails to address why government coercion in the form of regulation is worse than private coercion. There is, of course, a highly developed debate on this question that I will not reproduce here.²⁴⁹ The point is that, unless qualified or elaborated somehow, the suggestion that coercion is per se bad logically applies to the coercion that happens in markets as well as to coercion by the state. Finally, contemporary incantations of tyrannophobic rhetoric fail to follow arguments about state coercion to their logical conclusion. Legal academics parrot the Hayekian discourse of state tyranny and adopt its anti-coercion premises, but they do not follow the discourse to its logical conclusion that every state action is unwarranted authoritarianism. They do not abandon the project of governance. Taken together, this makes for a highly incoherent and debilitating discourse of regulatory reform.

V. DISCUSSION AND CONCLUSION

My analysis of the nearly 1400 law review articles that form the basis of the legal critique of regulation from 1980 to 2005 demonstrates that this discourse is structured by the fear of a coercive state and that this fear is associated with the recent embrace of self-regulatory governance

246. *Id.* at 28.

247. *Id.* at 99.

248. *Id.* at 105 (“The ‘regulation is bad’ [script] is fueled largely by its conscious and subconscious associations with freedom-reducing institutions—from fascism to communism and from socialism to serfdom.”).

249. See, e.g., Richard Epstein, *Imitations of Libertarian Thought*, 15 *SOC. PHIL. & POL’Y* 412 (1998); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923).

models. The legal critique of command-and-control regulation is as much an artifact of the U.S. “encounter with totalitarianism”²⁵⁰ as it is of the legal academy’s encounter with economics, and this has consequences for how we think about the possibilities and limitations of reform.

These findings are an important corrective to conventional understandings of regulatory reform. Coercive-state anxiety has gone largely unaddressed and sometimes explicitly denied by contemporary legal scholars. Advocates of regulation see their task primarily as overcoming arguments about the costs, benefits, and efficiency of regulation rather than justifying the role of the state in it. This has left coercive-state anxieties largely dismissed or ignored in serious scholarship about regulation, allowing them to circulate freely. Moreover, some have explicitly rejected the suggestion that totalitarian anxieties play a significant role in legal thinking. Carl Landauer, for instance, contends that while postwar social and political thought was “driven by fear”²⁵¹ of totalitarianism, legal scholars largely avoided this trope.²⁵² He argues, by contrast, that legal academic culture was “characterized by an often internalized attachment to government”²⁵³ that made tyrannophobic rhetoric distinctly unappealing to legal scholars, and he suggests that this identification with the state was evident not only in the immediate postwar period, but at least through the end of the twentieth century.²⁵⁴ Lawyers’ presumed attachment to government has masked the ongoing salience of coercive-state anxiety in legal literature and thinking about regulation.

My analysis holds important insights for ongoing and future regulatory reform debates. First, U.S. discourse about state regulation—even among experts and elites—has been historically and remains a discourse about the coercive power of the state. Proponents of new or expanded administration cannot make a durable, compelling case for government regulation without recognizing and addressing these fears. This entails, first, demanding that those who invoke coercive state anxieties in opposition to particular regulatory initiatives articulate the precise nature of state coercion they fear so that these concerns can be engaged openly and honestly. As Stigler once admonished, the onus should be on those opposed to the exercise of state power to provide concrete answers to the question whether “government controls [have] diminished our liberties, and if so, which ones and how much?”²⁵⁵

250. CIEPLEY, *supra* note 87, at 2 (2006).

251. Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 YALE J.L. & HUMAN. 171, 181 (2000).

252. *Id.*

253. *Id.* at 174.

254. *Id.*

255. STIGLER, *supra* note 9, at 6.

Second, addressing the fear of tyranny means opening a broader dialogue about the role of the state in contemporary social and economic life. Dialogue pitched solely at the level of costs and benefits or policy advantages and disadvantages fails to address fundamental concerns about how the state uses its coercive power. A case must be made for the state before a case can be made for regulation.

New Deal discourse provides a useful model for this project. New Dealers recognized a significant part of their challenge as defining (or redefining) what a state is and what a state does. Roosevelt often publicly articulated his vision that “governmental power was not automatically evil. Power and evil were not the same thing; power could be used for good as readily as for evil; power could only be judged in its specific applications.”²⁵⁶

What the New Dealers were getting at was that there could never be in modern society a moratorium on the use of power. Power existed, it was; if it were not held in one place it would be held in another. There could not be a power vacuum. If government refused to exercise its power, particularly in economic matters, there were those who would exercise it privately, as New Dealers believed had been the case for years.²⁵⁷

Contemporary proponents of regulation must understand their project as including a similar imperative to articulate an account of and justification for the state. While its substance may differ from that offered by the New Dealers, the imperative is no less pressing today.

This suggests the need for alternative narratives about the state’s role in regulation. Kysar’s recent analysis of the precautionary principle is one such effort to reconstitute the state as a regulatory actor.²⁵⁸ Economic scholarship can also contribute to the resuscitation of the state with research that highlights the conditions under which government’s role in markets creates efficiencies. Coase clearly contemplates the possibility of efficient state regulation in *The Problem of Social Cost*,²⁵⁹ but this has not been the focus of regulatory reform scholarship to date. It is urgent to create a conception of the “efficient state” or the “effective state” that is as robust as the more critical conceptions of the state that pervade the existing literature.

The third key insight as we move into the next big round of discussion about regulatory reform is that the way regulation gets framed as a problem shapes the solutions that get conceived and adopted, as well as their prospects for success. The discourses and metaphors we use reveal a great deal about how we perceive reality: “The unconscious

256. Wolfskill, *supra* note 67, at 60.

257. *Id.*

258. See generally KYSAR, *supra* note 10.

259. See generally Coase, *supra* note 7.

choice of symbols bares the bedrock of its beliefs. Moreover, the words people use are not neutral artifacts; they shape ideas and behavior.”²⁶⁰ Advocates of new regulatory initiatives should think carefully about how to frame the problem of regulation and whether the reforms proposed are responsive to the problems identified.

Many adverse consequences flow from the coercive-state framing of the regulatory problem. First, it can lead reformers “to champion misdirected or incomplete reforms and to ignore other viable approaches for improving regulatory outcomes.”²⁶¹ Most obviously, it devalues state-directed regulatory tools that might be useful, effective, or even efficient. The discourse of coercion structures the dialogue of reform in a way that privileges private over public regulatory tools and channels thinking away from what government can do. For instance, some of the articles in my sample conflate deterrence-based regulatory strategies with the coercive-state problem even though empirical research has resoundingly demonstrated the efficacy of many deterrence-based enforcement practices.²⁶² Approaching reform through the coercive-state lens “short-circuits rational consideration”²⁶³ of the entire range of regulatory alternatives and has resulted in the application of what might be characterized as a reverse-precautionary principle, or a presumption against the use of state power for regulatory purposes, even where state power might be the best tool for the job.

Second, coercive-state discourse has woven an untenable “regulatory logic” about the nature of regulated entities, their behavior, and their motivations. The logic of coercive-state discourse sees regulated entities as well-intentioned victims preyed upon by an overbearing government. This is a questionable (or, at least, wildly incomplete) account of regulatory behavior, and the inaccuracy of these

260. WILLIAM E. LEUCHTENBURG, *The New Deal and the Analogue of War*, in CHANGE AND CONTINUITY IN TWENTIETH-CENTURY AMERICA 81, 81 (J. Braeman et al. eds., 1964).

261. Malloy, *supra* note 13, at 268.

262. For a selection of empirical work demonstrating that deterrence measures improve regulatory compliance, see, for example, John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 LAW & SOC'Y REV. 7 (1991); Wayne B. Gray & John T. Scholz, *Analyzing the Equity and Efficiency of OSHA Enforcement*, 13 LAW & POL'Y 185 (1991); Wayne B. Gray & John T. Scholz, *Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement*, 27 LAW & SOC'Y REV. 177 (1993); Wayne B. Gray & Ronald Shadbegian, *When and Why Do Plants Comply? Paper Mills in the 1980s*, 27 LAW & POL'Y 238 (2005); Neil Gunningham, Dorothy Thornton & Robert A. Kagan, *Motivating Management: Corporate Compliance in Environmental Protection*, 27 LAW & POL'Y 289 (2005); K. Kuperan & Jon G. Sutinen, *Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries*, 32 LAW & SOC'Y REV. 309 (1998); Wesley A. Magat & W. Kip Viscusi, *Effectiveness of the EPA's Regulatory Enforcement: The Case of Industrial Effluent Standards*, 33 J.L. ECON. 331 (1990); Jay P. Shimshack & Michael B. Ward, *Regulator Reputation, Enforcement, and Environmental Compliance*, 50 J. ENVTL. ECON. & MGMT. 519 (2005); Jodi Short & Michael W. Toffel, *Coerced Confessions: Self-Policing in the Shadow of the Regulator*, 24 J.L. ECON. & ORG. 45 (2008).

263. Posner & Vermeule, *supra* note 2, at 3.

assumptions may account for some of the recent regulatory misfires attributed to voluntary regulation.

Third, to the extent that it has helped curtail deterrence-based activities by regulators, coercive-state discourse not only circumscribes regulatory options in the ways I have described, but it also hampers the efficacy of the very “self-regulatory” tools it has spawned. While voluntary and cooperative approaches to regulation can be useful techniques, recent empirical work demonstrates that they work best when embedded within a more coercive, deterrence-based enforcement scheme.²⁶⁴ A simultaneous move toward self-regulation and away from more coercive forms of state-based regulation risks undermining and discrediting both regulatory approaches.

Finally, perhaps the most troubling implication of pervasive coercive-state discourse in the regulatory field is that it may have the effect of masking or diminishing coercive exercises of state power in other arenas. While anxiety about the coercive state is not necessarily unfounded, its deep entrenchment in the regulatory field may be, at best, misplaced. To borrow Richard Epstein’s objection to Robert Hale’s characterization of routine market transactions as “coercive,” treating state actions such as regulatory rulemaking and enforcement as coercive “deprives that term of its necessary and proper sting in cases of aggression and force.”²⁶⁵ In an historical era marked by extraordinary renditions, secret wiretapping of U.S. citizens, torture, indefinite detentions, and mass incarceration, there is ample and urgent reason to be vigilant about coercive exercises of state power. It is not clear, however, that regulation represents a pressing locus of this concern. What is needed is an open and explicit conversation about what state coercion is, where it exists, and under what circumstances it might and might not be justifiable. If it turns out that social and economic regulation raise genuine state-coercion concerns, they should be addressed directly. If these concerns turn out to be ill-placed, we should radically rework the way we think and talk about regulation and its reform.

264. See, e.g., Eric Helland, *The Enforcement of Pollution Control Laws: Inspections, Violations, and Self-Reporting*, 80 REV. ECON. & STAT. 141 (1998); Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry’s Responsible Care Program*, 43 ACAD. MGMT. J. 698 (2000); Short & Toffel, *supra* note 262; Jodi Short & Michael W. Toffel, *Making Self-Regulation More than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361 (2010); Paul B. Stretesky & Jackie Gabriel, *Self-Policing and the Environment: Predicting Self-Disclosure of Clean Air Act Violations Under the U.S. Environmental Protection Agency’s Audit Policy*, 18 SOC. & NAT. RESOURCES 871 (2005).

265. Epstein, *supra* note 249, at 434.

METHODOLOGICAL APPENDIX

A. CONTENT ANALYSIS AS A METHODOLOGICAL APPROACH

Content analysis is the empirical study of discourse. This methodology is widely used in the social sciences and humanities,²⁶⁶ and it is gaining popularity among legal scholars for what it can add to traditional interpretive techniques.²⁶⁷ First, it combines the depth of interpretive methods with the critical distance and rigor of empirical methods. This marriage allows latent themes in a discourse to emerge, unclouded by taken-for-granted understandings and conventional narratives about its meaning. As one recent survey and synthesis of legal content analyses put it, the method has “considerable power for the discovery of anomalies which may escape the naked eye.”²⁶⁸ Second, content analysis permits a sweeping inquiry of a large body of texts that simply is not possible using conventional interpretive methods.²⁶⁹ Here, it allows me to assess the broad spectrum of legal literature on regulatory reform as opposed to isolated debates within this literature. Finally, the systematic coding technique produces a data set that can be analyzed quantitatively. This enables me to “describe patterns and associations”²⁷⁰ over time that might not be visible through more traditional interpretive methods.

266. See, e.g., Russell J. Dalton et al., *Partisan Cues and the Media: Information Flows in the 1992 Presidential Election*, 92 AM. POL. SCI. REV. 111 (1998) (using content analysis to establish the nature of information flows in the news coverage of the 1992 presidential campaign); William A. Gamson, *Coalition Formation at Presidential Nominating Conventions*, 68 AM. J. SOC. 157 (1965) (using content analysis of newspaper articles to determine the attitudes of different groups toward political candidates); Herman R. Lantz et al., *The Preindustrial Family in America: A Further Examination of Early Magazines*, 79 AM. J. SOC. 566 (1973) (using content analysis of popular periodicals to investigate preindustrial American family patterns); James W. Prothro, *Verbal Shifts in the American Presidency: A Content Analysis*, 50 AM. POL. SCI. REV. 726 (1956) (using content analysis to identify shifts toward conservative discourse in presidential speeches); Abigail J. Steward et al., *Coding Categories for the Study of Child-Rearing from Historical Sources*, 5 J. INTERDISC. HIST. 687 (1975) (coding English child-rearing journals to analyze shifts in women’s authority in the family).

267. See, e.g., Catherine T. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC’Y REV. 11 (2005) (using content analysis techniques and coding software to analyze interview data); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC’Y REV. 113 (2002) (coding the text of legal briefs to test whether textual arguments drove the constitutional interpretation decisions of Supreme Court justices); Malloy, *supra* note 13 (conducting content analysis and analyzing the citation patterns of articles on environmental regulatory reform); Roberta Romano, *Does the Sarbanes-Oxley Act Have a Future?*, 26 YALE J. ON REG. 229 (2009) (using content analysis of major newspapers’ critiques of Sarbanes-Oxley to try to explain the politics of revising the legislation).

268. Mark A. Hall & Ronald F. Wright, *Systematic Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 65 (2008) (quoting Alan L. Tyree, *Fact Content Analysis of Case Law: Methods and Limitations*, 22 JURIMETRICS J. 1, 23 (1981)).

269. *Id.*

270. *Id.* at 81.

B. CONSTRUCTING THE SAMPLE

To identify the arguments that formed the core of the legal critique of regulation, I constructed a database of all law review articles archived in the LexisNexis database that discuss regulation using the term “command and control.” The exact search I performed, in LexisNexis syntax, was: (“command and control” w/s regulat!). The search was designed, after much experimentation with similar search-term combinations, to retrieve as many relevant articles as possible while minimizing the number of off-topic article hits.²⁷¹ This yielded a sample of 1389 articles between 1980 and 2005. To identify the relevant portions of the included articles, I captured excerpts of the articles comprised of 100 words on either side of the search terms each time they appeared in the article.²⁷²

My sample encompasses articles from the entire range of legal topics and regulatory fields. Early discussion of command-and-control regulation by legal scholars occurs largely in the context of administrative law and general regulatory issues. However, environmental law quickly comes to dominate the discussion about regulation and its reform. Overall, 58% (803) of the articles in my sample are in the environmental field. The only other truly significant topic area is administrative law and general regulatory topics, with 147 articles, or 11% of the total. Communications and health care each represent around 5% of the sample. Other topics, including energy and workplace regulation, represent only about 2% of the sample each. International topics become much more important in the 1990s and 2000s, but most of these articles are about global environmental issues and thus are encompassed by that field.

A number of factors may contribute to the prominence of environmental law in this debate. The high costs of compliance with environmental regulation galvanized political support in the business community for environmental regulatory reform. Advocates of environmental regulation were mobilized and well-funded, arguably insulating the Environmental Protection Agency from capture to a greater degree than other agencies. Environmental regulation’s focus on production processes might have made it appear to infringe more

271. The biggest difficulty was eliminating articles arising from military tribunals discussing the structure of “command and control” in particular units.

272. In order to create a manageable database for coding, I excerpted the portions of these articles that actually discuss command-and-control regulation by capturing fifty words on either side of my search terms. I experimented with several “KWIC” lengths and settled on fifty words as the one that best captured the arguments each article was making specifically about command-and-control regulation, with the least extraneous material present. Of course, such a method risks omitting some relevant material. However, to the extent this has occurred, omitted material would be distributed equally among the articles and thus should not bias my results.

significantly on private prerogatives than did regulation targeting outcomes. Finally, prominent scholars who were early leaders in the regulatory reform debate happened to be writing in the environmental field.²⁷³ While it is interesting to contemplate the significance and distinctiveness of environmental law in the regulatory reform debate, the prevalence of environmental law articles does not distort my overall findings and conclusions. Statistical tests found no significant difference between the composition of the arguments and the recommendations for reform in environmental law articles and articles in other fields. Nonetheless, it is important to consider how the implications of my analysis may vary across different areas of law.

C. CODING THE ARTICLES

I hand-coded each article excerpt along four dimensions: (1) What is the article's stance on command-and-control regulation (pro, con, or neutral)? (2) What arguments does it make in support of this stance? (Or, in the case of neutral articles, what arguments does it make on both sides?) (3) What reforms, if any, does it propose? (4) What arguments does it make about those reforms? I identified the key arguments to code for based on a close reading of articles that are widely cited in the literature on command-and-control regulation,²⁷⁴ as well as through the emergent process of coding. I added codes and went back through previous documents to recode as the importance of new arguments emerged.²⁷⁵ I coded each argument only once per document. I coded for proposed reforms in any article excerpt that discusses one of these reforms, regardless of whether the excerpt advocates, denigrates, or simply acknowledges that the reform exists. I use this coding approach both to minimize interpretive difficulties and to reflect the universe of viable reforms that existed at any given time. In this way, my methodology is designed to capture the appearance and salience of ideas in the debate. I used electronic coding software to record the codes and tally their frequency.

An article was considered "pro" if it explicitly stated its support for command-and-control regulation or if it had only positive things to say about it. Similarly, articles were coded "con" if they explicitly stated their

273. *E.g.*, BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981); Ackerman & Stewart, *supra* note 9; Krier & Stewart, *supra* note 162. Richard Stewart is the most widely cited author in the legal regulatory reform debate, cited in 452 of the articles in my sample; Bruce Ackerman is cited in 313 articles. Cass Sunstein is the only other author cited with such frequency (389 times).

274. *E.g.*, ACKERMAN & HASSLER, *supra* note 273; AYRES & BRAITHWAITE, *supra* note 200; BREYER, *supra* note 9; Ackerman & Stewart, *supra* note 9; Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 *STAN. L. REV.* 1267 (1985); Richard B. Stewart, *Regulation, Innovation, and Administrative Law*, 69 *CALIF. L. REV.* 437 (1981).

275. All coding is binary, coded "1" if a particular attribute is present and "0" otherwise.

opposition to command-and-control regulation or if they made only negative statements about it. Articles were coded “neutral” if they made both pro and con arguments about command-and-control regulation but did not explicitly express support for or opposition to it or if they used the term “command and control” without commenting on it.

In addition to these broad categories, I hand-coded the article excerpts in my sample for the arguments made against command-and-control regulation and the recommended reforms. The ten most common arguments made against command-and-control regulation were: cost, inefficient, coercive, bureaucracy, legalistic, end-of-pipe, uniform, information, interest group, and ineffective. Below, I discuss the coding criteria for each and provide examples of articles falling under each code. To bolster the reliability of my findings, I coded against my conclusions. For instance, as described below, I coded the non-coercion categories, like cost and efficiency, using extremely broad criteria, and I coded the coercion categories based on more narrow, specific criteria.

*Cost:*²⁷⁶ My coding of cost, for instance, is highly inclusive, encompassing all articles that modify “command and control” with adjectives like “costly” or “expensive.” Also included in this code are articles that discuss the marginal costs of regulation.

*Inefficient:*²⁷⁷ Articles are included in this code if they argue that command-and-control regulation is itself inefficient or that it causes

276. Representative examples from my database of the kinds of articles coded “cost” include: John W. Bagby et al., *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225, 228 (1995) (noting that “soaring compliance costs” have prompted regulatory reform experiments); E. Donald Elliott, *Environmental Markets and Beyond: Three Modest Proposals for the Future of Environmental Law*, 29 CAP. U. L. REV. 245, 253 (2001) (arguing that command-and-control environmental regulations “waste industry’s money”); Jesse Ratcliffe, *Reenvisioning the Risk Bubble: Utilizing a System of Intra-Firm Risk Trading for Environmental Protection*, 92 CALIF. L. REV. 1779, 1823 (2004) (arguing that the command-and-control approach to environmental regulation is “not cost effective”); Richard B. Stewart, *The Administrative Process: The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 660 (discussing the “high social and economic costs” of regulation); W. Kip Viscusi, *Reply, Structuring an Effective Occupational Disease Policy: Victim Compensation and Risk Regulation*, 2 YALE J. ON REG. 53, 61 (1984) (arguing that command-and-control regulation of occupational disease compensation would “reduce employers’ flexibility to meet health goals in the most cost-effective manner”); Bruce Yandle, *Mr. Lomborg and the Common Law*, 53 CASE W. RES. L. REV. 285, 290 (2002) (stating that we are only beginning to recognize the “real cost of implementing and living with a multitude of environmental regulations”); Mark Emery, Note, *Regulating Televised News: A New Season for the Public Interest Standard*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 737, 784 (2005) (suggesting that command-and-control regulation of television news content “could raise expenses for outlets such that it will drive them out of the news business”); Lori May Peters, Comment, *Reloading the Arsenal in the Information War About Pollution—Citizens as Soldiers in the Fight and How a Lack of “Actionable” Legs on Which to Stand Nearly Forced a Cease-Fire*, 10 VILL. ENVTL. L.J. 127, 162 (1999) (criticizing “expensive command and control techniques”).

277. Representative examples from my database of the kinds of articles coded “inefficient” include: Ackerman & Stewart, *supra* note 9, at 1339 (discussing “the serious inefficiency of traditional forms of command-and-control regulation”); Elliott, *supra* note 276, at 253 (“[W]e should condemn

inefficiencies or distortions in the operations of markets or regulated firms. I also include in this code articles that discuss inefficiency as a concept without using the term, such as those arguing, for example, that “attempts at command and control regulation of the labor market will lead to distortions of both the labor market and of the legal system. Markets require winners and losers to operate.”²⁷⁸

*Coercive:*²⁷⁹ Articles categorized under this code make arguments about the coercive nature of state intrusions into private affairs. Specifically, articles coded as “coercive” either: (1) describe command-and-control regulation or the agencies that administer it as “coercive” or in comparable terms such as “threatening,” “imposing,” or “controlling,” or (2) state that command-and-control regulation restricts the freedom of regulated entities in some way.

the overuse of inefficient command-and-control systems.”); Neil Gunningham & Darren Sinclair, *Integrative Regulation: A Principle-Based Approach to Environmental Policy*, 24 *LAW & SOC. INQUIRY* 853, 859 (1999) (arguing that command-and-control regulation “commonly proves to be inflexible and inefficient”); Harold J. Krent & Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 *VAND. L. REV.* 1703, 1754 (1999) (“Command and control regulation, even if motivated by the public interest, was inefficient . . .”); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 *TEX. L. REV.* 1901, 1934 (1996) (“[A]ttempts at command and control regulation of the labor market will lead to distortions of both the labor market and of the legal system. Markets require winners and losers to operate.”); Stewart, *A New Generation*, *supra* note 216, at 28 (discussing the “inherent inefficiencies of the command system” of regulation); Cass R. Sunstein, *Television and the Public Interest*, 88 *CALIF. L. REV.* 499, 563 (2000) (discussing the inefficiencies of command-and-control regulation).

278. Morriss, *supra* note 277, at 1934.

279. Representative examples from my database of the kinds of articles coded “coercive” include: Robert B. Adhieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 *EMORY L.J.* 691, 761 (2004) (suggesting that “mandate and coercion” are the central mechanisms of command-and-control regulation); Marshall J. Berger, *Regulatory Flexibility and the Administrative State*, 32 *TULSA L.J.* 325, 353 n.9 (1996) (“Our regulatory system has become an instructional manual. It tells us and bureaucrats exactly what to do and how to do it. Detailed rule after detailed rule addresses every eventuality, or at least every situation lawmakers and bureaucrats can think of.” (quoting PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* 10–11 (1996))); Gary C. Bryner, *Policy Devolution and Environmental Law: Exploring the Transition to Sustainable Development*, 26 *ENVIRONS ENVTL. L. & POL’Y J.* 1, 5 (2003) (criticizing command-and-control regulation for “the restraints on freedom it imposes”); Cole, *supra* note 210, at 293 (2000) (describing command-and-control regulations as “wholly coercive instruments”); E. Donald Elliott, *Environmental TQM: Anatomy of a Pollution Control Program that Works!*, 92 *MICH. L. REV.* 1840, 1849 (1994) (reviewing *QUALITY ENVTL. MGMT. SUBCOMM., PRESIDENT’S COMMISSION ON ENVTL. QUALITY, TOTAL QUALITY MANAGEMENT: A FRAMEWORK FOR POLLUTION PREVENTION* (1993)) (describing command-and-control regulation as a system based on “governmental threat, ‘backed ultimately by the U.S. Army.’”); Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 *HARV. ENVTL. L. REV.* 441, 448 (1999) (describing “[t]he heavy hand of regulation, which aims to control behavior directly”); Jon D. Hanson et al., *Smokers’ Compensation: Toward a Blueprint for Federal Regulation of Cigarette Manufacturers*, 22 *S. ILL. U. L.J.* 519, 524 (1998) (“Under command-and-control regulation . . . [t]he regulator in effect tells the regulated firm how specifically to run some aspect of its business” (emphasis omitted)); John V. Jacobi, *Competition Law’s Role in Health Care Quality*, 11 *ANNALS HEALTH L.* 45, 49 (2002) (“[I]n a command and control regulatory system], governmental judgment replaces that of the industry with regulators making direct instrumental decisions about how care should be delivered.”); Marshall B. Kapp, *Enhancing*

Autonomy and Choice in Selecting and Directing Long-Term Care Services, 4 ELDER L.J. 55, 70 (1996) (arguing that command-and-control regulation of health care acts “as an inflexible barrier to appropriate client choice”); Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 865 (describing a system of “heavy-handed command and control regulations that would mandate the airing of particular amounts of politically favored programming”); Timothy F. Malloy, *Disclosure Stories*, 32 FLA. ST. U. L. REV. 617, 672 (2005) (noting that command-and-control disclosure regulations “may be viewed as an offensive intrusion into the firm’s internal decisionmaking routines”); Owen, *supra* note 11, at 690 (2003) (arguing that command-and-control regulation “limits the ability of potential spectrum users to obtain [spectrum] access”); Richard H. Pildes, *Forward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 95 (2004) (“Like all command-and-control legislation, the Act did not allow regulated actors latitude to make decisions about how most effectively, in their own diverse contexts, to realize the aims of the Act.”); Nicholas A. Robinson, *Legal Systems, Decisionmaking, and the Science of Earth’s Systems: Procedural Missing Links*, 27 ECOLOGY L.Q. 1077, 1126 (2001) (noting that some believe that command-and-control environmental regulation “threatens today’s lifestyles and the progress that produced contemporary prosperity”); Adam Rose, *Greenhouse Gas Mitigation Action Planning: An Overview*, 12 PENN ST. ENVT. L. REV. 153, 161 (2004) (arguing that command and control is “a strict regulatory approach” that “limits freedom of choice”); J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 625 (1995) (describing the command-and-control approach of the Endangered Species Act and the Clean Water Act the “‘Coercion’ model”); J.B. Ruhl, *Endangered Species Act Innovations in the Post-Babbitonian Era—Are There Any?*, 14 DUKE ENVT. L. & POL’Y F. 419, 427 (2004) (criticizing command-and-control regulation as a “prescriptive regulation approach”); James Salzman, *Creating Markets for Ecosystem Services: Notes From the Field*, 80 N.Y.U. L. REV. 870, 884 (2005) (“Through prescription, the government relies on command-and-control regulation, mandating certain behaviors, proscribing others, and imposing penalties for noncompliance. ‘Thou shalt do this; thou shalt not do that, or else’”); Sargentich, *supra* note 199, at 421 (“[C]ommand-and-control regulat[i]ons . . . restrict considerably the options of the industry being regulated” (internal quotation marks omitted)); Richard B. Stewart, *United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585, 589 (1996) (discussing the “coercive logic of the command paradigm”); Barton H. Thompson, Jr., *What Good Is Economics?*, 27 ENVIRONS ENVT. L. & POL’Y J. 175, 199 (2003) (“Indeed, regulation may eliminate self-determination even more completely than incentive payments, since regulation requires compliance while incentive payments still permit individual choice.”); Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT’L L.J. 471, 475 (2005) (stating that in command-and-control regulation, the state is a “dominant” actor); Wood, *supra* note 231, at 204 (arguing that command-and-control regulation is based on “coercion and mistrust”); David Zlotlow, 30 ECOLOGY L.Q. 213, 213 (2003) (reviewing REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS? (Cary Coglianese and Jennifer Nash eds., 2001)) (stating that command-and-control regulation “imposes unwanted obligations on businesses”); Kelli L. Dutrow, Note and Comment, *Working at Home at Your Own Risk: Employer Liability for Teleworkers Under the Occupational Safety and Health Act of 1970*, 18 GA. ST. U. L. REV. 955, 995 n.280 (2002) (arguing that command-and-control regulations “treat Americans like children in need of the protection of ‘big brother’ government” (quoting *OSHA Home Office Regulations: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Educ. and the Workplace*, 106th Cong. (2000) (statement of Rep. Ron Paul))); John F. Temple, Comment, *The Kyoto Protocol: Will It Sneak Up on the U.S.?*, 28 BROOK. J. INT’L L. 213, 218 (2002) (“The traditional command-and-control model, in the environmental sense, refers to regulations that require entities to adopt certain procedures and technologies in order to meet their reduction standards set by the government.”); Mary Ann King, Comment, *Getting Our Feet Wet: An Introduction to Water Trusts*, 28 HARV. ENVT. L. REV. 495, 511 (2004) (describing command and control as a more “threatening” option than other regulatory alternatives); Stacy Laira Lozner, Note, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768, 772 (2004) (explaining that the command-and-control approach addresses

*Bureaucracy:*²⁸⁰ Articles are coded as making bureaucracy critiques if they: (1) deploy the adjective “bureaucratic” as an epithet, (2) criticize the centralized or top-down structure of regulatory government, (3) draw analogies between U.S. regulatory agencies and Soviet bureaucracies, or (4) criticize the efficacy or integrity of bureaucrats.

*Legalistic:*²⁸¹ Articles fall under this code if they: (1) critique the volume of law generated by regulatory agencies, (2) the “rigid” or legalistic ways in which regulators apply these rules to regulated entities, or (3) the demand for and dependence on the expertise of lawyers generated by such a system.

social problems by “imposing and enforcing, in top-down fashion, tough binding rules”).

280. Representative examples from my database of the kinds of articles coded “bureaucracy” include: Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CALIF. L. REV. 643, 650 (2003) (criticizing command-and-control regulation for its reliance on “bureaucrats in determining which candidates get public funding and how much they get”); Michael C. Dorf, *After Bureaucracy*, 71 U. CHI. L. REV. 1245, 1251 (2004) (“[T]here remains little faith in what people regard as the characteristic institutional form of the New Deal-Great Society constitutional order: bureaucracy, understood as regulation by centralized command and control.”); C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1077 (2000) (describing a “system of centralized ‘command and control’ regulation”); Michael S. Greve, *Friends of the Earth, Foes of Federalism*, 12 DUKE ENVTL. L. & POL’Y F. 167, 181 (2001) (“Environmental regulation in particular rests on the premise that an infinitely complex, fragile, and precious environment can be protected only through a centralized, ‘Soviet-style’ command-and-control scheme.”); Jacobi, *supra* note 279, at 69 (describing command-and-control regulation as a tool enabling government to act as a “micromanager of health systems”); Stanley G. Long, *Transport at the Millennium: Preface to the Millennium*, 553 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 16 n.7 (questioning the location of transportation regulation entirely within the “public sector, where rigidities are apt to occur and where management on average is less effective”); Peter M. Manus, *The Owl, the Indian, the Feminist, and the Brother: Environmentalism Encounters the Social Justice Movements*, 23 B.C. ENVTL. AFF. L. REV. 249, 290 (1996) (criticizing command-and-control regulation for its reliance on the “top-down, government mandate method”); Peerenboom, *supra* note 207, at 253 (describing command-and-control regulation as “hierarchical, top-down, overly centralized”); David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century*, 20 COLUM. J. ENVTL. L. 145, 175 (1995) (characterizing command and control as a “Leviathan-type solution”); Stewart, *supra* note 276, at 670 (describing the distortions that occur when command-and-control regulation is “highly centralized at the federal level”); Stewart, *A New Generation*, *supra* note 216, at 21 (describing the command-and-control system as one that “relies on a remote centralized bureaucratic apparatus”).

281. Representative examples from my database of the kinds of articles coded “legalistic” include: Estlund, *supra* note 160, at 341 (describing “regulators’ excessive zeal, rigidity, and adversarialism” in applying command-and-control regulations); Neil A. Gunningham, *Towards Effective and Efficient Enforcement of Occupational Health and Safety Regulation: Two Paths to Enlightenment*, 19 COMP. LAB. L. & POL’Y J. 547, 558 (1998) (arguing that we should move away from a command-and-control system of occupational health and safety regulation that entails “direct intervention of the legal system itself through its agencies, highly detailed statutes, or delegation of great powers to the courts”); Lozner, *supra* note 279, at 772 (describing command-and-control regulation as the “characteristically rule-based and rule-bound regulatory model”); Kenneth M. Murchison, *Environmental Law in Australia and the United States: A Comparative Overview*, 22 B.C. ENVTL. AFF. L. REV. 503, 548 (1995) (arguing that courts will become increasingly involved in regulatory disputes as the amount of regulation increases); Daniel P. Selmi, *Experimentation and the “New” Environmental Law*, 27 LOY. L.A. L. REV. 1061, 1074 (1994) (criticizing the “rigid procedural uniformity” of command-and-control

End-of-Pipe:²⁸² This code describes an approach to regulation that addresses problems only after the fact and fails to deal with their root causes or to incentivize harm prevention.

Uniform:²⁸³ Articles categorized under this code argue that command-and-control regulation unwisely applies identical standards to a broad range of disparate circumstances. Uniformity is said to make such regulation a “clumsy,” “one-shoe-fits-all”²⁸⁴ approach that “fails to take into account the unique quality of the industry being regulated, and the pollution generated by that industry.”²⁸⁵

environmental law); Paulette L. Stenzel, *Can the ISO 14000 Series Environmental Management Standards Provide a Viable Alternative to Government Regulation?*, 37 AM. BUS. L.J. 237, 256 (2000) (“Federal environmental regulations fill more than 20,000 pages of the Federal Register alone, with thousands of additional regulations at the state and local levels.”); Kurt A. Strasser, *Pollution Control in an Era of Economic Redevelopment*, 8 CONN. J. INT’L L. 425, 432 (1993) (“[R]egulations have become increasingly complex, even though gains in environmental protection have slowed.”); Sunstein, *supra* note 277, at 534 (describing the “rigid mandates” of command-and-control telecommunications regulation); Zlotow, *supra* note 279 (describing command and control’s reliance on “rigid process-based standards”).

282. Representative examples from my database of the kinds of articles coded “end-of-pipe” include: Stuart L. Deutsch, *Environmental Law: Setting Priorities: Principles to Improve Environmental Policy*, 68 CHI.-KENT L. REV. 43, 46 (1992) (“The programs emphasize the use of technology at the end of the pipe to control the pollution which is generated by industrial processes, motor vehicles, and other sources. However, remarkably little effort has been expended to prevent the generation of pollution.”); Alana M. Fuierer, *The Anti-Chlorine Campaign in the Great Lakes: Should Chlorinated Compounds Be Guilty Until Proven Innocent?*, 43 BUFF. L. REV. 181, 228 n.111 (1995) (“‘End of the pipe’ regulation, or command and control regulation, involves the management and control of pollution discharges after they have been produced.”); Krier & Stewart, *supra* note 162, at 28 (arguing that command-and-control regulation “fails to accommodate and stimulate innovation in resource-efficient means of pollution prevention”); Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1326 (1998) (“[Marketing] restrictions [on cigarettes] may prevent manufacturers from effectively marketing healthier cigarettes, thereby reducing the companies’ incentives to develop such cigarettes.”); Paula C. Murray, *Inching Toward Environmental Regulatory Reform—ISO 14000: Much Ado About Nothing or a Reinvention Tool?*, 37 AM. BUS. L.J. 35, 44 (1999) (“[S]trict command-and-control regulation leaves little room for continual improvement.”); Ralph R. Peterson, *Government, the Private Sector, and NGO Roles in the Next Generation of U.S. Environmental Policy*, 13 COLO. J. INT’L ENVTL. L. & POL’Y 87, 92 (2002) (arguing that we should look for a system that is “more focused on resource efficiency (pollution prevention and waste minimization) and life-cycle consequences than on end-of-pipe or stack controls”); Stenzel, *supra* note 281, at 256 (2000) (“Businesses want to move away from command and control regulations that focus on ‘end of the pipe,’ single-medium pollution control.”); Lisa Mazzie Vela, *State of Wisconsin v. Chrysler Outboard Corp.: How Long a Reach for Environmental Laws?*, 6 WIS. ENVTL. L.J. 65, 100 (1999) (contending that the command-and-control approach can regulate “how much oozy green stuff can come out of the end of the pipe into the river or how much thick chemical-laden smoke can belch out of the stack” but cannot address more complex environmental problems).

283. Representative examples from my database of the kinds of articles coded “uniform” include: William A. Anderson, II & Eric P. Gotting, *Taken In over Intake Structures? Section 316(b) of the Clean Water Act*, 26 COLUM. J. ENVTL. L. 1, 73 (2001) (explaining that command-and-control approaches “apply uniformly to all industries”); Daryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1304 (2001) (arguing that environmental command-and-control regulation “ignore[d] the enormous differences among plants and industries and . . . require[d] the same technology in diverse areas—regardless of whether they

*Information:*²⁸⁶ Information critiques argue against command-and-control regulation on the ground that regulators lack information held by regulated entities that is essential to effectively dispatching their jobs. This makes regulation both costly and ill-informed, or, as one article put it, “the government is constantly expending resources refining its standards while virtually always remaining several steps behind current developments.”²⁸⁷

*Interest Group:*²⁸⁸ This code identifies articles arguing that agencies are captured by private interests. So, for instance, typical articles make arguments along the lines that command-and-control regulation is particularly susceptible to “capture by special interests,”²⁸⁹ and that command-and-control programs exploit “groups’ dependency on federal monies to convert them into supporters of federal measures.”²⁹⁰

[we]re polluted or clean, populated or empty, or expensive or cheap to clean up” (alteration in original) (quoting CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 87 (1990)); David A. Dana, *Innovations in Environmental Policy: The New “Contractarian” Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 37 (arguing that command-and-control approaches are “clumsy,” “one-shoe-fits-all solutions”); Ruth A. Moore, *Controlling Agricultural Nonpoint Source Pollution: The New York Experience*, 45 DRAKE L. REV. 103, 114 (1997) (arguing that we need regulatory “flexibility rather than a one-size-fits-all prescription”); Nicholas M. White, Note, *Industry-Based Solutions to Industry-Specific Pollution: Finding Sustainable Solutions to Pollution from Livestock Waste*, 15 COLO. J. INT’L ENVTL. L. & POL’Y 153, 158 (2004) (“The main problem with the regulatory models that have emerged worldwide is that they rely on a single-medium command-and-control model that fails to take into account the unique quality of the industry being regulated, and the pollution generated by that industry.”).

284. Dana, *supra* note 283, at 37.

285. White, *supra* note 283, at 158.

286. Representative examples from my database of the kinds of articles coded “information” include: John A. Barrett, Jr., *The Global Environment and Free Trade: A Vexing Problem and a Taxing Solution*, 76 IND. L.J. 829, 836–37 (2001) (“[Under a command and control system], the government is constantly expending resources refining its standards while virtually always remaining several steps behind current developments.”); Cohen & Rubin, *supra* note 199, at 187 (explaining that the command-and-control system of auto safety regulation requires an “enormous volume of technical and economic data”); Sonya Dewan, *Emissions Trading: A Cost-Effective Approach to Reducing Nonpoint Source Pollution*, 15 FORDHAM ENVTL. L. REV. 233, 241 (2004) (“Obtaining the information needed to regulate nonpoint sources is usually more costly under a command and control system than in a trading program.”); Joel F. Handler, *Community Care for the Frail Elderly: A Theory of Empowerment*, 50 OHIO ST. L.J. 541, 543 (1989) (suggesting that it has been difficult to protect nursing home residents through command-and-control regulation because “nursing home regulatory agencies have the full burden of generating all of the information on quality of care issues”); Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 WASH. & LEE L. REV. 111, 112 (1999) (arguing that command-and-control regulation “imposes unreasonable information-gathering burdens” on regulators); Thomas O. McGarity & Karl O. Bayer, *Federal Regulation of Emerging Genetic Technologies*, 36 VAND. L. REV. 461, 483 (1983) (“The command and control approach requires the standard-setter to be very familiar with the operations and vocabulary of the regulated enterprise and the nature of its unwanted effects so that the standards can proscribe ‘bad’ conduct without unduly inhibiting ‘good’ conduct.”); Nash, *supra* note 217, at 528 (arguing that command-and-control regulation is ineffective because regulators have “limited familiarity with the relevant production processes and technologies”).

287. Barrett, *supra* note 286, at 836–37.

288. A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen Suit Provisions of*

Ineffective:²⁹¹ Finally, articles designated by this code address the efficacy of regulation. These articles argue that command-and-control regulation simply does not work or, worse, that it may be “futile or self-defeating.”²⁹²

In addition, I coded the articles for the twelve most common reforms they proposed, including: deregulation, liability-based regulation, markets, incentives, regulatory taxes, trading schemes, subsidies, voluntary or “beyond compliance” programs, self-policing or internal compliance monitoring, information disclosure, contractual regulation, and stakeholder participation. Under my coding protocol, I included in a given code any article excerpt that discussed one of these reforms, regardless of whether the excerpt advocated, denigrated, or simply acknowledged the reform as a possibility. I use this coding approach both to minimize interpretive difficulties and to reflect the universe of viable reforms that was a part of the dialogue at any given time. In this way, my methodology is designed to capture the appearance and overall salience of ideas in the debate.

Environmental Legislation, 12 DUKE ENVTL. L. & POL'Y F. 1, 21 (2001) (“Command and control, technology-based regulation is thus a cartelizing influence on industry, resulting in economic rents for the regulated.”); Peerenboom, *supra* note 207, at 170 (“[P]ublic choice proponents demonstrated that agencies at times put their own institutional interests ahead of the public interest and were susceptible to influence by special interests.”); Jeffrey M. Hirsch, Comment, *Emissions Allowance Trading Under the Clean Air Act: A Model for Future Environmental Regulations?*, 7 N.Y.U. ENVTL. L.J. 352, 357 (1999) (“Existing polluters, their trade groups, and organized labor may all favor a command-and-control regulation that serves to favor or disfavor certain pollution sources because strategic lobbying can provide competitive advantages that tradable permits may obviate.”).

289. Valerie Watnick, *Risk Assessment: Obfuscation of Policy Decisions in Pesticide Regulation and the EPA's Dismantling of the Food Quality Protection Act's Safeguards for Children*, 31 ARIZ. ST. L.J. 1315, 1361 (1999).

290. Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 341 (1990).

291. Representative examples from my database of the kinds of articles coded “ineffective” include: Kenneth Forton, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating Its Subsidy Requirement*, 28 B.C. ENVTL. AFF. L. REV. 651, 681 (2001) (arguing that efforts to produce affordable housing through command-and-control regulation instead produced “poorly maintained, crime ridden high-rise housing projects”); Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1243 (1996) (contending that command-and-control regulation of children's television programming is “unlikely to succeed in a larger sense”); Peerenboom, *supra* note 207, at 253 (concluding that command-and-control regulation “produced poor results”); Alison Rieser, *Prescriptions for the Commons: Environmental Scholarship and the Fishing Quotas Debate*, 23 HARV. ENVTL. L. REV. 393, 399 (1999) (referring to the “relentless and futile cycle” command-and-control regulation has created in fisheries management); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 418 (1990) (“Command and control regulation of new pollution sources creates incentives to use existing facilities longer, with harmful consequences for the environment.”); Wood, *supra* note 231, at 151 (arguing that command-and-control approaches to environmental regulation “have failed to deliver the hoped-for environmental and social improvements”).

292. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1411 (1994).

To ensure that this approach has not unwittingly masked a groundswell of critique of self-regulatory approaches, I reviewed each of the articles coded “self-regulation” individually for their normative valence. Of the 263 articles that discuss self-regulation, 50% (131) explicitly support self-regulatory programs, 45% (119) mention self-regulation descriptively without arguing for or against it, and only 5% (13) explicitly criticize self-regulation. As with the arguments described above, I code reforms conservatively, or “against” my ultimate conclusions. As I discuss below, the coding of “market-based regulation,” in particular, is extremely generous, including all articles that merely mention the term “markets” or “incentives” as a tool of regulation. Accordingly, to the extent my coding protocol is overbroad in the other areas, this would only strengthen my findings about the predominance of self-regulation in the regulatory reform debate.

As I discuss in the text of the Article, I categorized these reforms into four categories: deregulation, liability-based regulation, market-based regulation, and self-regulation.

The deregulation code is synonymous with the deregulation category. Articles are coded “deregulation” if they discuss deregulation by name, or if they talk about the repeal of laws and regulations or the withdrawal of legal authority from administrative agencies.²⁹³

Liability-based regulation similarly represents both a reform proposal as well as a distinct category of reform that looks to the tort system to regulate private conduct.²⁹⁴

293. Examples of articles coded “deregulation” include: Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101 (1989); John R.E. Bliese, *Conservative Principles and Environmental Policies*, 7 KAN. J.L. & PUB. POL’Y, 1, 1 (1998); Theodore M. Hagelin & Kurt A. Wimmer, *Broadcast Deregulation and the Administrative Responsibility to Monitor Policy Change: An Empirical Study of the Elimination of Logging Requirements*, 38 FED. COMM. L.J. 201 (1986); Joel I. Klein, *Antitrust Enforcement in the Twenty-First Century*, 32 CONN. L. REV. 1065 (2000); Arnold J. Reitze, Jr., *State and Federal Command-and-Control Regulation of Emissions from Fossil-Fuel Electric Power Generating Plants*, 32 ENVTL. L. 369 (2002); Richard B. Stewart, *Evaluating the New Deal*, 22 HARV. J.L. & PUB. POL’Y 239 (1998); Michael A. de Gennaro, Note, *Oil Pollution Liability and Control Under International Maritime Law: Market Incentives as an Alternative to Government Regulation*, 37 VAND. J. TRANSNAT’L L. 265 (2004).

294. Examples of articles coded “liability-based regulation” include: J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOY. L.A. L. REV. 825 (1994); Jeremy Nathan Jungreis, *“Permit” Me Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East*, 29 HARV. ENVTL. L. REV. 369 (2005); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184 (1987); Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123 (2001); Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999).

Market-based regulation encompasses a number of specific kinds of reforms, including: trading schemes in which regulators create and oversee a market in pollution credits that can be freely traded among regulated firms,²⁹⁵ regulatory taxes,²⁹⁶ and articles that mention the use of “markets” or “incentives” as regulatory tools.²⁹⁷

Finally, self-regulation encompasses programs that shift responsibility for traditionally governmental functions like standard setting, monitoring, and enforcement to regulated entities or to the broader community of regulatory beneficiaries. This category includes voluntary or “beyond compliance” programs sponsored by agencies or by private-sector groups;²⁹⁸ self-policing or internal compliance monitoring;²⁹⁹ information-based regulatory schemes that seek to mobilize private citizens to enforce standards of conduct on regulated entities;³⁰⁰ and stakeholder participation programs that shift standard-setting or enforcement³⁰¹ responsibilities to private citizens.

295. Examples of articles in my sample that discuss trading as a regulatory tool include: Gary E. Marchant, *Global Warming: Freezing Carbon Dioxide Emissions: An Offset Policy for Slowing Global Warming*, 22 ENVTL. L. 623 (1992); William F. Pedersen, *Using Federal Environmental Regulations to Bargain for Private Land Use Control*, 21 YALE J. ON REG. 1 (2004); Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199; Brennan Van Dyke, Note, *Emissions Trading to Reduce Acid Deposition*, 100 YALE L.J. 2707 (1991).

296. Examples of articles in my sample that discuss tax as a regulatory tool include: E. Donald Elliott, *Goal Analysis Versus Institutional Analysis of Toxic Compensation Systems*, 73 GEO. L.J. 1357 (1985); Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313 (1998); Stewart, *A New Generation*, *supra* note 216; Swenson, *supra* note 199; Robert R.M. Verchick, *Feathers or Gold?: A Civic Economics for Environmental Law*, 25 HARV. ENVTL. L. REV. 95 (2001); Edith Brown Weiss, *AGORA: Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700 (1992); Bruce Yandle, *Creative Destruction and Environmental Law*, 10 PENN ST. ENVTL. L. REV. 155 (2002).

297. Examples of articles in my sample that discuss markets or incentives as regulatory tools include: Cohen & Rubin, *supra* note 199; Elliott, *supra* note 199; Havighurst, *supra* note 199; Lazarus, *supra* note 199; Nordhaus & Danish, *supra* note 199; Sargentich, *supra* note 199; Briggs, *supra* note 199; Swenson, *supra* note 199; Yelin-Kefer, *supra* note 199.

298. *See supra* notes 201, 202.

299. *See supra* note 203.

300. *See supra* note 208.

301. *See supra* notes 205, 207.