

Public interest regulation reconsidered

From capture to credible commitment

Jørgen Grønnegaard Christensen

Department of Political Science

Aarhus University

Contact information: jgc@ps.au.dk

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Abstract

Two questions remain central in the study of regulation. First, what is the role of affected interests in regulatory policy and administration? Second, to what extent does regulatory administration balance the public interest against the regulated interests within the private sector? The paper here compares three different theories and the research based on them. These theories are classical public interest theory, capture theory, and the modern theory of credible commitment. Their underlying logic and assumptions are identified and the empirical scope of each of the theories is set out. Finally, it is discussed, on the basis of existing research whether there is supporting evidence for them. The conclusion is that they all cope with highly relevant issues but also points to the persistence of a highly politicized environment. The interesting observation is that this politicization has not excluded change and reform but the pattern of change has not followed the patterns proposed by capture and credible commitment theory. To the contrary the paper contributes to the rehabilitation of classical public interest theory, although in a modest and refined form. Rather than upholding the less realistic idea of an administration that pursues a clearly defined public interest, focus is changed to procedures ensuring the wide inclusion of both regulated and third party interests as well as open information on case procedures, invoked information and final decisions together with options for challenging these decisions in other administrative authorities and eventually the courts.

Regulation and the state

Regulation is one of the state's core functions. It is also one of its classical functions. In a historical perspective the state engaged in regulation long before government also took upon it to provide welfare services to its citizens. Regulation defines the border between state and society, government and market. Therefore, regulation represents government's attempt to set limits to the scope of private activities. As broad as this conception is it has one important implication: If the government produces a good or service under its own auspices, for example by a state-owned enterprise or a public hospital it is not reasonable to speak of regulation. But if a private firm provides the same service, say railroad transportation or hospital treatment within confines defined by legislation, we have to do with regulation. In other words the importance of regulation as an instrument of public policy is highly variable. It depends on the national context, implying very different conceptions in American society and continental Europe. It is also amenable to change when the role of government is reconceived as has happened with privatizations and pro-market reforms on the one hand, and a dedicated effort to protect the environment on the other. Such paradigmatic change is a historical fact. The parallel enactment of these changes is modern illustrations of such epochal change in the conception of the state.

One of the most fruitful definitions of regulation was phrased by Barry Mitnick: 'Regulation is the public administrative policing of a private activity with respect to a rule prescribed in the public interest' (Mitnick 1980, 7). The definition points to three central ideas: Regulation is restrictive and directed towards private activities; it rests on administrative controls undertaken on the basis of general rules; and these rules and their implementation are by implication conducive to the public interest. The definition also raises two questions that have been at the core of political science research in governmental regulation since the early 1980s:

1. What is the role of affected interests in regulatory policy and administration?
2. To what extent does regulatory administration balance the public interest against regulated interests within the private sector?

These questions are central because they focus on the relationship between affected interests and regulatory policy. The assumption behind governmental regulation is the possibility of protecting the public interest against private, especially business, interests. Yet the risk is that the relationship is turned around as private interests use governmental regulation for rent seeking, typically to protect their business against competition. They are equally central because they distinguish between regulatory legislation and the administration responsible for its implementation. One possibility is that regulation has been designed to effectively protect the public interest in the form of third party interests against the adverse consequences of private activity; another is that legislators have given in to private interests and made regulatory policy a shield, protecting them against competition and consumers. In either case the administration may be neutral in its effort to carry out official policy as any distortion is the result of decisions made at the stage of law making.

Then assume for a moment that administrative neutrality is not given, and two other possibilities arise. The first is that regulatory administration is captured by regulated interests. As a consequence the administration operates in a way that is systematically biased to the advantage of regulated interests; again the presumption is that they represent private business. The second possibility is that regulatory administration is transformed into the guardian of the public interest. On this presumption law makers have given the administration the mandate to see to it that private interests do not displace the public interest, typically in the form of third party interests hit by negative externalities.

The ideas sketched above are quite simple. Still, a considerable research agenda has developed around them, which has changed over time. Early research and theory span over

both law making and regulatory administration. More recent research places regulatory administration at center stage and asks for its role when it comes to government's willingness and ability to balance particularistic interests against what is conceived of as long-term societal concerns. This chapter sets out the main theoretical models that have been developed in recent decades and then reviews the empirical support for each of them. The review concentrates on three principal claims, namely the classical public interest model, the regulatory capture model and the credible commitment model. Their common focus is the role of bureaucracy in regulatory policy and its implementation. What is more, all of them have developed absolutely plausible arguments in support of their positions, 'but what is plausible in the abstract may prove false in fact' (Croley 2008, 160).

The administrative predicament

In democratic politics law makers interpret the public interest. When they make their decisions, often in the form of general rules, they are supposed to act on a mandate from the voters. In a representative perspective these decisions are the best approximation to the public interest as law makers are accountable to the electorate. This gives them a strong incentive to balance their own ideological convictions against the information that is brought to bear on them from particularistic interests, always knowing that they will again have to ask the electorate for their votes in the not so distant future.

Even in this idealized image of representative democracy law makers do not operate in their own capacity. They are dependent on a bureaucracy. The civil service comes into play when new regulatory policy is prepared and again when it is executed and implemented. As law makers' informational and organizational capacity is severely constrained it is hardly possible to overestimate the importance of regulatory administration. Even in the classic conception of public administration as the neutral transmitter of political intention into law and administrative practice, bureaucracy is indispensable. It contributes organizational

capacity together with policy expertise and due process to governmental regulation of the private sector. However, it is important to note that in this conception regulatory administration neither adds to nor subtracts from the policy decided by law makers. The public interest may be served, but it is served exactly as interpreted by law makers. Bureaucracy does not usurp the public interest, nor does it protect against its usurpation by particularistic interests seeing regulation as a vehicle for their own concerns.

The perspective appears naïve. It questions neither the role of law makers as guardians of the public interest nor the good will of regulatory administration. Similar naivety is foreign to the theory of regulatory capture. Public interest theory is developed from classical conceptions of representative democracy and the role of government; capture theory can be seen as a critical reaction against it. It echoes neo-classical economics and has found its way into political science analysis of regulation through rational choice theory. Depending on individual temper its basic tenets may appear cynical or just realistic. Capture theory rests on the claim that particularistic interests see governmental regulation as a protective shield and that on the whole the state meets their demands. But it does not stop here. It has also developed a set of propositions that questions the neutrality of regulatory administration. For capture theory regulatory administration operates as the willing extension for rent-seeking business. Central is here that self-interested bureaucrats have strong rewards in view not only by giving in to pressure groups, but also by expanding regulation. A corollary is the rejection of any idea of regulation in the service of the public interest. Even regulation devised to correct negative externalities like environmental protection, drug and food safety regulation and consumer protection in this view is easily thwarted to serve particularistic interests (Stigler 1971; Posner 1974; Peltzman 1976). Thus any idea of 'good regulation' is futile, or to quote William Niskanen: 'Good regulation is no regulation.'¹ So, if politicians are not held up by private interests, self-serving bureaucrats are captured by them.

Credible commitment theory is equally skeptical about classical public interest theory. Still, it moves in another direction than the theory of regulatory capture. The reason is that it differentiates sharply between politicians' behavior when deciding on regulatory policy issues and the behavior of professional regulators within the bureaucracy (Levy and Spiller 1996; Jordana and Levi-Faur 2004). It hypothesizes that politicians will be tempted to give in to short-term concerns if sound regulatory policy runs against their electoral interests. The theory argues that this is particularly relevant when private entrepreneurs invest in long-term projects; if they cannot trust politicians to keep the regulatory regime in force at the time of the investment decision, they run the political risk that the value of their investment is eroded by politicians acting opportunistically. However, credible commitment theory sees a solution to such time inconsistency in the proper design of regulatory administration. The idea is that politicians widely acknowledge their own frailty and therefore engage in self-binding institutional designs that make it impossible or at least difficult to renege on their initial policy promises. The solution is to delegate decision making authority to independent regulators or autonomous agencies. They are entitled to both decide on individual cases and issue rules lying within the mandate of the agency. This way of thinking is adopted unconditionally by economists (see e.g. di Mauro 2009 and Die Welt am Sonntag 2009).

Credible commitment theory places itself between classic public interest theory and capture theory. With capture theory it shares utter skepticism towards the predispositions of politicians; like public interest theory it has considerable confidence in the civil service. Yet there are subtle and important differences between credible commitment theory and either of the established theories of governmental regulation. True to its name the theory of regulatory capture mistrusts politicians as regulatory policy makers. It sees them as easily caught up by private interests that expect concentrated benefits from regulation or fear concentrated costs

from restrictions imposed on them, thus having very strong incentives to lobby law makers as compared to those groups that face either dispersed costs or dispersed benefits of regulation.

But according to credible commitment theory the threat to regulation in the public interest comes from voters rather than from affected interests. It is vote maximizing politicians' frailty to short-term political loss that induces them to modify regulatory policies that in the long-term promote the public interest. Their concern even expands to cover private business risking their property to be expropriated by vote seeking politicians (Sened 1997). Similarly, the relationship to classical public interest theory is subtle. The regulatory bureaucrat of the naïve theory is an ideal type lawyer dedicated to the subsumption of individual cases under general and precisely phrased individual laws. He does not engage in policy making on his own. Conversely, the regulatory bureaucrat of credible commitment theory is a technocrat, ideally an economist, who applies her analytic insights to the device of solutions furthering the public interest in terms of economic efficiency. The idea is that these analytical skills are applicable both in decisions on individual cases and in the making of general policy. As is seen, credible commitment theory does not see the motivation of bureaucrats as a potential problem for regulation in the public interest. Here it is in perfect accordance with classical public interest theory.

The three theories cover a long period. The theory of public interest regulation prevailed up to the 1960s until public choice theory launched its critical attack on established theory. Similarly, the apparent realism and critical stance of the theory of regulatory capture paved the way for its dominance up through the latter part of the 20th century. Finally, the theory of credible commitment is closely related to the regulatory reforms that followed from market opening and privatization of public service utilities that took off in the 1990s and has persisted since 2000. Common to the three sets of theories are their consistent focus on regulatory administration, being its tasks, its organization, and its performance. A further common trait of

the theories is that they operate with the concept of the public interest. Yet for any of the three theories the concept remains elusive, easy to invoke in political discourse but difficult to maintain in operational terms (Levine and Forrence 1990; Mitnick 1980, 242-282; Scharpf 1997, 163-165). A solution to this challenge is to distinguish between the interests of regulated business and citizens and those third parties that have a stake in regulatory policy and administration because the regulated activity affects their interests negatively.

Competing models

The three theories represent competing models. Their claims differ markedly from each other as set out above. Table 1 compares the basic traits of the models.

This difference stems mainly from their differing behavioral assumptions even if they are often tacit in the respective literatures. So, the theory of public interest regulation shares assumptions with the classical theory of bureaucracy. According to Max Weber civil servants are office carriers dedicated to carry out the duties that constitute their particular role or task within a strictly ordered and specialized hierarchy (Weber 1921, 124-130; 552-553). The combination of merit and tenure with unambiguous norms of impartiality support rational decision making based on administrative decision making where individual decisions are attributed to 'either the subsumption under norms or the balancing of means and ends' (Weber 1921, 565).

Table 1 about here

The theory of regulatory capture takes a very different view, be it cynical or just sufficiently realistic. The main assumption is that public servants, in this case regulatory officials, are self-interest motivated. The negative implication is that they are not bound by norms and official roles. The positive implication is that they pursue strategies that according to an individual cost-benefit analysis are beneficial to first of all themselves, but in a narrow sense also the agency for which they work. As the case is with the theory of public interest regulation this

behavioral assumption is derived from more general theory as exemplified by William Niskanen's theory of budget maximizing bureaucracy (Niskanen 1971). When applied to regulatory administration there is an additional assumption, namely that regulated business controls benefits that are so valuable to the bureaucracy and its individual staff that it systematically accommodates business demands. In the case of law making politicians and political executives these benefits are related to the chances of reelection (Horn 1996); in the case of regulatory bureaucrats the benefits are the prospect of shifts to more lucrative careers outside government or to post-office employment within the regulated industry (Levine and Forrence 1990; Mitnick 1980, 206-214).

Both public interest theory and capture theory derive their underlying assumptions and ensuing empirical predictions from standard political science theory. This is hardly the case with the more modern theory of credible commitment. Its behavioral assumptions are rarely made explicit and they must therefore be construed on the basis of the literature. Given the idea of delegating regulatory authority to an agency removed from the executive hierarchy the implicit assumption must be that the agency is led and staffed by experts who abide to professional norms when applying their specialized insights to the handling of regulatory issues (see e.g. Majone 2001). Compared to first the public interest theory it is conspicuous that these expert regulators are equally motivated by other-regarding interests, even though the basis for their decisions is not rule application and rule-abiding behavior. Second, in contrast to capture theory, expert regulators are modeled as benevolent practitioners of their profession who pursue best policy solutions even in the absence of clear guidance from the law. This presumes their arms' length relationship to both the political executive and the legislature.

There is some uncertainty as to the empirical scope of any of the three theories. Mostly they direct attention towards economic regulation, e.g. entry regulation and competition law. But one reason may be purely historical as both public interest and capture theory developed

at a time when social regulation, e.g. environmental protection, food safety and consumer protection figured less prominently on the political agenda. However, there are three important caveats to this.

First, when the distinction between economic and social regulation was introduced application of rational choice theory led to the prediction that social regulation would be of minor importance as compared to economic regulation because law makers were facing opposition from concentrated business interests. The supporters of regulatory intervention on their side faced severe difficulties in mobilizing support from a public whose members could only expect marginal and widely dispersed benefits (Wilson 1980). Second, when in particular capture theorists realized the appearance of a new regulatory trend their impulse was to interpret it as a refined form of creating entry barriers (Peltzman 1998, 334-336). Third, research inspired by credible commitment theory has to a very large extent analyzed the regulation of public service utilities at the stage when market competition was introduced and former SOEs privatized, and much of the theoretical reasoning behind it is narrowly focused on utility regulation. As a result few have asked whether the logic could be extended beyond utility and economic regulation (Levi-Faur 2003). Hence it is an open question whether from a political science perspective it makes sense to uphold the distinction between economic and social regulation.

Plausible logic, questionable validity

The basic rationale by each of the competing models rests on venerable political science theory. Each theory makes sense in as far as they identify plausible political and institutional mechanisms. They even point at phenomena belonging to real world politics and administration. This leaves the question to what extent propositions derived from these rival theories find empirical support and also whether one of them has a better grasp of regulatory administration than its two competitors. Table 2 summarizes the types of evidence that can be

invoked either in support of empirical claims or to disprove the claims made in any of the three models.

So, the theory of public interest regulation presumes the existence of a merit bureaucracy, operating within the strict constraints of public and administrative law. Its principles and procedures rest on the non-acceptance of discrimination among regulatees and other affected interests, and it assumes the respect for procedures that allow clients first to be heard and second to have their case tried by another instance, ultimately in the courts. Even if the model takes the integration of the regulatory authority into the executive hierarchy for granted it assumes the politics-administration dichotomy to describe a behavioral fact.

Insert table 2 about here

The theory of public interest regulation seems easy to refute. Simple indicators such as the interference from the political executive, parliament or legislative committees raise doubt not only about its validity but also its relevance as any other thing as a lofty but inherently naïve ideal of law-based administration and implementation in a democratic state. Equally notable it is constitutionally acknowledged that much administrative decision making and implementation involves issues to be settled with considerable political discretion exercised by a departmental minister or on his behalf by a civil servant. Similarly, many regulatory issues are technically complex while remaining politically sensitive because law makers neither can nor will specify the rules in any detail needed to reduce them to administrative decisions subsuming individual cases under a legal rule. This opens for a combination of political discretion and bargaining or dialogue with regulatees and other external interests.

The implication is that few see public interest theory as offering a presentation that can be upheld with support from empirical evidence. Rather it represents a normative ideal. Hence, the theory has for decades been open to an alternative that questions the existence of data lending support to its propositions and at the same time presents a logic that turns the

indicators of disproving evidence into positive propositions. For these reasons capture theory has concentrated on three types of evidence, namely patterns of close, even institutionalized cooperation between regulatory authorities and regulated business and the simultaneous exclusion of third party interests from consultation and bargaining. Finally, it has also pointed to the possibility of revolving doors careers where initial employment with a regulatory authority is followed by a later and more lucrative career in the private sector and where regulatory executives get post-career appointments in regulated industries.

For the capture theory speaks that the indicators for supporting evidence relatively easily are transformed into operational measures, particularly if focus is concentrated on institutional and structural phenomena. However, just as with public interest theory it is much more difficult to set up behavioral indicators that can inform us more precisely on the prevalence of effective rent seeking by regulated business. Still, in the literature on neo-corporatism, sectorization, QUANGOs and networks in the European context and in the parallel study of iron triangles and pressure group politics in the US there is sufficient evidence to conclude that regulated interests have often had a strong say in their interaction with regulatory administration. What is more, there is also considerable evidence that structural choice often involves organizational designs and institutional provisions embedding regulatory authorities in a wider environment that thus give priority to some interests at the expense of others.

This kind of evidence hardly amounts to a confirmation of the capture hypothesis. For one thing in its most rigorous form it presumes the administration's accommodation of rent-seeking business to be the result of self-seeking bureaucrats' strategy to spur their own careers. Logically, the question has been raised whether this leads to a revolving doors situation, but appropriate empirical indicators are quite demanding (Mitnick 1980, 8), and the evidence mounted in support of a widespread revolving doors practice is at best mixed

(Mitnick 1980, 214-241). A parallel empirical study came to a similar conclusion for a number of American regulatory agencies (Quirk 1981). A contemporary study displays similar skepticism but without presenting new data to disprove the hypothesis (Croley 2008, 48-50). If this is the American picture it is even less likely for the European closed career civil service systems. The personnel policy in American administration to some extent relies on subsequent career shifts between the federal government and the private sector. This is far from the European pattern as confirmed by studies of Danish top civil servants. Even if their mobility has increased markedly since the 1980s they rarely leave the central government for careers in the private sector. However, they are quite often preferred as executives or board of director chairs in government corporations that are approaching the market (Christensen 2004; Christensen and Pallesen 2001). In France where a markedly statist tradition prevails, career shifts from the public to the private sector have been and are frequent in the form of 'pantouflage', but this is widely interpreted as the government's interference into the business sphere as much as the capture of the administration by business interests (Peters 2010, 94-102).

Other broader indicators undermining the claim of capture theory involve the inclusion of broader and more diverse interests in hearings and bargaining as well as formal procedures regulating administrative decision making in a way that guarantees access to information on both substance and applied procedure. Such procedures are, for example, well developed in American federal government due to the administrative procedures act (Croley 2008). Legal provisions guaranteeing open files together with norms ensuring equality before the law that are enforced by the courts are an integral part of European public law. Below these problems will be dealt with more extensively.

Research based on credible commitment theory is heavily inspired by the huge literature on independent central banks. The indicators it uses to uncover the extent of delegation to

independent regulators are parallel to those developed in central bank studies (Cukierman 1992; Gilardi 2008). In the absence of an operational definition, the distinctive mark of an independent regulator becomes the creation of authorities with regulatory tasks that in the American checks and balances system are removed from the executive hierarchy with the president as the key office and in the European parliamentary systems agencies that are separate from ministerial departments. In more operational terms indicators such as appointment procedures, terms of office, financial status enter into the construction of indices that allow for systematic cross-national and across time comparisons. Other indicators are by implication staffing of independent regulators with policy experts and exclusion of affected interests from decision making bodies and from bargaining over rules and individual decisions.

A sizable literature working on the basis of credible commitment theory reports general support for the theory's claims. It adds that delegation to independent regulators represents a consistent trend that has spread with remarkable speed. It has, the claim is, spearheaded a general movement where law makers delegate administrative implementation to specialized agencies rather than to executive departments. Occasionally there is even talk of an agency revolution having changed the basic organization of central administration.² Interestingly, in this line of research, just as in public interest or capture theory, few studies have moved beyond the structural analysis to uncover decision making behavior by the purported independent regulators.

However, some types of evidence are necessary to include in the analysis because they tend to qualify and even disprove the conclusions reached in the credible commitment, the independent regulator and agency studies. Some involve deeper behavioral analysis while others include other structural indicators than those relied on in mainstream agency analysis. If here we define bureaucratic autonomy as the formal exemption of an agency head from full political supervision by the political executive, i.e. in Europe departmental ministers, in the US

the White House, logical next steps in the operationalization is to look for the possible insertion of an alternative or competing level of political supervision; here it is of particular interest to see whether affected interests are integrated in the supervision and control of the agency, maybe even in a way that implies delegation of decision-making authority to them. Another important indicator is whether the agency head in spite of the agency's operation as a non-departmental unit reports to the minister or another political executive or whether regulatory legislation has specified competences for the agency head in his own right, thus carving out a field of authority from which the minister in charge is kept out.

Existing empirical studies are far from clear on these points. Similarly there are several indications of a world of regulatory administration that is much more politically infected than imagined. Politicians in government and parliament have not withdrawn from the regulation of economy and society creating a sphere of non-politics (cf. Lohmann 2006). This is taken up below for a more extensive discussion. Here it suffices to remind about three facts that question the validity of a general trend towards regulatory administration and policy conducted by independent regulators. First, the American use of independent regulatory commissions is often invoked as an example of how American law makers have for long acknowledged the credibility-enhancing effect of delegation to independent regulators (Majone 1994). Nonetheless it is ignored how much both independent regulatory commissions and other non-executive agencies are subject to political concern, a fact that is even mirrored in the composition of the commissions and in their political responsiveness (Cushman 1941; Weingast and Moran 1983; Shapiro 1997; Ingraham 2006). Second, even if Britain is rightly seen as pioneering market-opening reforms since the 1980s, among other things implying the creation of specialized regulatory offices, the precise organization and legal authority of these offices and other agencies have only rarely been subject to close analysis.³ Third, the delegation of administrative authority to non-departmental agencies is strongly ingrained into

the institutional tradition of continental Europe. Such delegation has been based on a mixture of credible commitment rationale (witnessed by the Swedish agency tradition going back to the 17th century) and efficiency-concerned attempts to free ministerial departments from routine implementation delegated to agencies in very flexible forms, allowing the call-in of both specific cases for consideration by the minister and his departmental staff (witnessed by the Danish (Binderkrantz and Christensen 2009), German (Brecht and Glaser 1940, 10) and Norwegian (Læg Reid, Roness and Rubecksen 2006) agency traditions of the 19th and in particular 20th century.

A first balance

Both the theory of regulatory capture and credible commitment theory offer plausible accounts of how regulatory administration is organized and how its stronger or weaker embeddedness into the political and economic environment may influence its operation. Their problem is that studies based on more rigorous tests of their theoretical claims have hardly produced convincing support. It is also that proponents of the respective theories have widely neglected to subject their propositions to more critical tests using indicators that might raise doubt about the validity of their claims. For the classical public interest theory things appear much easier as the theory's claims quite generally are rejected as resting on naïve assumptions. Still, some recent studies take a different perspective (Croley 2008; Huber 2007). Contrary to the original theory they have given up any ambition of defining an abstract public interest, serving as guideline or ultimate standard for good regulation. Their approach is rather to include in their empirical analysis indicators and measures that might provide evidence that questions the validity of capture theory and credible commitment theory in their bolder versions. Therefore, they focus on the inclusion of broader interests than affected business in regulatory decision making, e.g. environmental and consumer groups. Similarly, they look at the application of formal procedures regulating due administrative process in American federal

administration as the observance of such procedures might limit the scope for pro-regulatee bias in agency decision making.

Their approach has two immediate implications. One is the much broader basis for a critical evaluation of established theory and the empirical research resting on its claims. This is most directly seen in the case of capture theory. To the extent that other interests than those directly affected in private business are heard by regulatory authorities and actually contribute actively to their decisions, the validity of capture theory is brought into doubt. However, such critical evidence also undermines the claims of credible commitment theory. Its principal claim, it should be remembered, is law makers' delegation of regulatory authority to agencies that base their decisions on scientific and professional analysis without inviting any interests, be it regulatees or third parties, to contribute to decision making. The other implication is that contrary to the original, normatively oriented public interest theory the new approach abstains from formulating any substantive criteria for the realization of the public interest. Neither economic efficiency nor criteria of environmental sustainability and distributional justice are invoked; rather the criteria advanced focus on political participation and transactions. The ultimate criterion for the realization of the public interest therefore becomes whether regulatory administration makes decisions that involve a broad spectrum of insights and interests and whether it adheres to procedures ensuring openness and a second review. These are very political criteria where the concern is not to reach just or optimal decisions but to obtain political sustainability and legitimacy also in administrative decision making (Dixit 1996).

These recent contributions to the study of regulatory administration have one serious limitation. It is difficult to generalize the insights provided by them as they are based on a few case studies, all conducted within American federal administration. In Steven Croley's 2008 study it is the EPA, FDA and the US Forest Service; in Gregory Huber's 2007 study it is OSHA. There is some, although limited, basis for expanding the comparative scope of their

conclusions; particularly the question of excluding others besides regulatees from participation (capture theory) and the question of an increasing propensity to delegate decision making authority to independent regulators placed at arms' length from the governmental hierarchy and operating without participation from affected interests (credible commitment theory). In either case, the theories' claim of particular relevance for economic regulation is open for challenge. A similar reservation applies to credible commitment theory as being of particular relevance for utility regulation.

The European experience

In the parliamentary democracies of Western Europe there are normally three types of central government organizations. This is also the case with regulatory administration. Departmental ministries are organized with a department serving as secretariat and adviser to the minister. In this capacity it has a combination of policy and implementation related tasks. Depending on the country some tasks are delegated to agencies and collegiate boards. An agency is a sub-departmental unit responsible for policy execution within a more or less narrow field of the department's portfolio; it has its own management, its own staff as well as its own budget. It may to varying extents contribute to policy making within its own specialized portfolio. Such agencies are widespread within both regulatory and non-regulatory policy areas, but it varies how much countries use them. Up to the British Next Steps reform they were next to unknown in the UK while they have been part and parcel of the continental tradition all over North Western Europe. Collegiate boards are another type of central government unit where a combination of advisory and decision making responsibilities has been delegated to a body consisting of mostly non-ministerial representatives. Again the use of such boards varies from country to country, but they are frequently resorted to in regulatory policy. They are apparently a pan-European phenomenon.

These basic forms of administrative organization shed light on some of the issues addressed by especially capture and credible commitment theory. First, one question is to which extent regulatory agencies are integrated into the departmental hierarchy. If the agency head reports to the minister through the ministerial department it indicates a strong degree of integration. One implication is that the minister (or the government) appoints and dismisses the agency head, sets its budget, and can decide its internal organization; another implication is that the minister and his department can intervene into administrative decision making, be it in questions of general policy or individual cases. In contrast the degree of integration is low if a board of directors has been inserted so that the agency head reports to it rather than to the minister through the department and with the board of directors assuming the executive tasks of the departmental minister. Table 3 shows a diverging practice in this respect between the four countries. In Denmark and Norway agency integration into the departmental hierarchy is the dominant model. Any difference between agencies responsible for economic, respectively social regulation has been leveled out over time. In the Netherlands and Sweden, integration into the hierarchy is much lower. In Sweden it follows from the century-old constitutional order that made agencies independent to protect the interests of the nobility against the king's expropriation of their property; in the Netherlands it is equally part of a pattern with strong roots in Dutch consociational governance. But in neither country has the degree of integration decreased, and the original difference between agencies with economic and agencies with social regulation as their dominant field had disappeared in 2000.

Insert table 3 here

The second question is how collegiate boards are organized. Delegation of decision making authority to them is common in all four countries both in a historical and a contemporary perspective. They thus allow law makers to limit the authority of departmental ministers and the executive hierarchy in a way that is less ambiguous than delegation to agencies staffed

with civil servants and policy specialists. Still, it is difficult to say whether such delegation lends support to the capture or the credible commitment theory. Table 3 also here gives relevant, although partial information. It shows whether among the members there are representatives of interest organizations, representatives appointed by parties in parliament or finally members of the judiciary. The diverging national patterns are striking. Once more Denmark and Norway are quite similar in their reliance on extensive inclusion of interest organizations and minimal and decreasing involvement of board members appointed by parties in parliament. The Netherlands has decreased interest representation while in Sweden it remains stable and moderate. However, in Sweden parties in parliament to a considerable extent appoint board members; this practice has even been strengthened in the case of social regulation. Again, there is no clear difference between boards dealing with economic and social regulation. Finally, it is obvious that boards, in particular in the Scandinavian countries, often have judges as chairmen or members, a pattern that with some variation applies to economic and social regulation alike.

What does this tell us about the relative strength of capture versus credible commitment theory? Certainly it does not allow any definitive conclusions. Still, even this simple analysis of regulatory administration in four European countries with parliamentary democracy shows no signs of a movement from political executive dominance towards its depoliticization. Equally, there is no difference in the administrative set-ups for economic and social regulation. If something has happened here over time it is the gradual adaptation of social regulation to the patterns characterizing economic regulation, which is actually a relatively modern phenomenon. Finally, the strong presence of interest organizations questions central elements in credible commitment theory. This is further emphasized by parliament's appointment of board members in the Swedish case.

Thus, there is no unconditional support for the theory of regulatory capture; nor is it possible to reject it. There is, at least for these four countries, clear evidence that organized interests are strongly involved in regulatory administration. But it is no universal pattern as there is considerable variation from country to country. The data used here do not allow an analysis of the types of interest organizations represented on regulatory boards. Still, other research indicates that representation has been broadened to include other than economic and business organizations as to an increasing extent organizations working on e.g. environmental and consumers' issues are either in active contact with central government or represented on collegiate boards.⁴

One of the remarkable changes in regulatory policy in recent decades is the transformation of public utility services. The traditional solution gave them monopoly status in exchange for obligations to serve the entire economy and all citizens; in Europe utility status was also synonymous with government ownership, either in the form of an SOE, municipal ownership or intergovernmental corporations. Since the 1980s this has changed as the markets for utility services, in particular telecommunications, electricity and other energy, have been opened to competition but also as a result of large-scale privatizations. Credible commitment theory has paid strong attention to this paradigmatic change and the literature speaks with a well-chosen phrase of the advent of regulatory capitalism. Even though credible commitment theory generalizes to any form of economic regulation it has paid special attention to utilities operating on regulated markets. Hence, a logical possibility is that its theoretical claims are valid within this narrower field (see Table 4).

Table 4 about here

Table 4 shows that utility regulation has undergone dramatic change in the Scandinavian countries. It shows also that the preferred form of regulation is delegation to a collegiate board with decision making authority rather than regulatory agencies. There is even some

support to propositions derived from credible commitment theory as interest organizations, strongly represented on regulatory boards in 1980, by 2000 have been squeezed out in both Denmark and Norway; by doing so they come close to the American practice of independent regulatory commissions that often have no direct representation from regulated business, even if some of their members carry with them prior experience from within the particular branches. However, the Swedish move in the directly opposite direction demonstrates that this is not a universal trend as both interest organizations and parliamentary appointees are strongly present in also contemporary boards responsible for utility regulation. Similarly, the stability of Dutch administration mirrors the fact that some countries have stuck to their traditional solutions despite radical changes in the framework defined by among others the EU.

There are clear limits to any general conclusions drawn from data covering only four European countries. With this caveat the above discussion still demonstrates that if more rigorous definitions of agency independence are applied and if the analysis opens for the use of other organizational forms than the regulatory agency, namely the collegiate board, then it is difficult to find support for credit commitment theory. This is even more so as there is no institutional differentiation between economic and social regulation. The implication is not unconditional acceptance of the theory of regulatory capture, although interest group representation is a persistent fact considering the composition of regulatory boards. However, even here caution is appropriate given the remarkable national variation.

The invocation of data from just four, quite similar parliamentary democracies in North Western Europe naturally raises the question whether these findings are representative to other European countries. Given the lack of studies using comparable data there is no clear answer to this. But a number of studies on especially British, French, and German practices indicate the existence and persistence of distinct national models. They also indicate the

institutionalized involvement of organized interests in even contemporary regulatory policy and administration. Further generalization is not allowed as the basis is a series of comparative case studies (see e.g. Black, Lodge and Thatcher 2005; Coen and Héritier 2005; Pedersen 2006; Thatcher 2007; Busch 2009).

Rehabilitating public interest theory?

The argument so far leads to considerable skepticism towards the validity of credible commitment theory and to reservations as to the full validity of capture theory. So, regulatory administration is clearly not delegated to a sphere far removed from and even superior to politics; nor is it tantamount to institutional choices placing implementation under the formal control of regulated business.

This brings us back to classical public interest theory. It has been dismissed and even ridiculed as a naïve manifestation of a sublime normative ideal. Still, it was shown that the rationale behind credible commitment theory is in clear debt to it. Further, it was argued that its main problem is the operationalization of the public interest; this turns out to be a problem both when it is conceptualized in e.g. economic efficiency, environmental sustainability or distributional justice terms. From a political science perspective another option is to conceive of it in process and procedural terms (Croley 2008; Huber 2007). Then focus is not on the results but on the broadness of the interests involved in decision making, the procedures used before conclusions are drawn, and openness as to the information on which decisions are based and as to their specific content.

The brief analysis of four European countries together with recent studies of American regulatory administration indicates that the public interest conceived in procedural rather than substantial terms is not treated so badly. One indication is the broad and over time apparently broader inclusion of organized interests; another is the in some countries rather frequent use of judges as mediators and umpires as well as procedural guardians, cf. table 3 above. Other

indications of which we lack systematic studies are the presumed strengthening of procedures demanding information of affected groups, access to information, formal complaints procedures. These are prescriptions of a general nature, often laid down in administrative procedures acts and open government acts; they are increasingly and systematically supervised by ombudsman institutions. This procedural approach is at the core of empirical political science. It is first of all an expansion of the argument advanced by McCubbins, Noll and Weingast (1987) arguing that administrative procedures present a flexible and effective strategy for policy makers wanting to install ex ante controls over implementation delegated to the administration. Second, to the extent that long-term changes have taken place opening regulatory administration to the effective consideration of other than the most narrowly affected economic interests it demonstrates elected politicians' responsiveness to changes in moods and attitudes both in the business community and the general electorate (Peltzman 1998). Finally, it echoes administrative science classics arguing for the relative superiority of procedural rationality as compared to substantive optimality. For Herbert Simon this was a matter of practical concern given the severe cognitive bounds placed on decision makers (Simon 1955); for Max Weber this was a matter of moral concern, given the manipulability of any general standards for appropriate policies (Weber 1919, 549-553).

From formal structure to administrative behavior

The three competing theories reviewed suffer from a common deficiency: They rely exclusively on structural and organizational characteristics, the assumption being that formal structure determines behavior. Consequently, the empirical research testing their principal claims suffers from the same limitations. However, a well-established finding within organizational research is the lack of a perfect match between formal prescriptions and actual behavior. It is in other words possible that formally independent authorities are subject to and responsive to political interventions when it comes to the implementation of regulatory policy. Similarly it is

possible that authorities formally integrated into the executive hierarchy display considerable autonomy in their policy administration.

The few studies dealing with these problems show that either of these deviations from formal prescriptions occurs. First, it is well established that the Swedish agencies that are constitutionally separated from the ministerial departments are in close interaction with and responsive to signals from departmental ministries (Jacobsson 1984). Moreover, through a combination of political appointments and the insertion of boards of directors on which parties are represented, formal agency structure increasingly links the independent agencies to the government and the parliamentary chain of delegation (Christensen and Yesilkagit 2006). Second, in two comparative studies Maggetti has found that formally independent agencies are involved in both policy making with ministerial departments and subject to political intervention non-regarding their formal status (Maggetti 2007; 2009). This conclusion is identical with those reached in studies of both financial supervisors and independent judicial boards (Barth 2003; Busch 2009; Wittrup 2008). Similarly, a comparative study of national financial regulation has demonstrated the importance of bureaucratic quality for the development of financial markets (Nee and Opper 2009). Third, Gregory Huber has forcefully shown that American civil servants be they political appointees or career staff, often work quite independently from their political principals in their administration of regulatory policy (Huber 2007). This is parallel to Busch's observation that financial supervisors show considerable de facto autonomy as long as an issue is kept at a low level of political saliency and that such autonomy can exist alongside quite closely knit industry networks (Busch 2009, 214-223; see also Quaglia 2008). Finally, a 'no-surprises-rule' may also apply outside Whitehall (Flinders 2008, 54 and 147-165). If this is so it has two implications: One is that whatever the formal arrangement departmental ministers and their departments may be drawn into operational matters, be it because they are held politically accountable or because they want

to anticipate political critique in a specific case. Another is that political saliency may be a key variable when it comes to analyzing the precise relationship between formal delegation to agencies and actual interaction between political executives and agencies.

Public interest regulation reconsidered

This review took three competing perspectives on government regulation as its point of departure. Each has had its time and each has addressed issues that remain central to our understanding of regulatory policy and administration. A comparison reveals that they to a high extent struggle with the same issue of how regulatory policy, and in the specific context of this chapter regulatory administration, can transcend the narrow interests of regulatees; this is, in the literature, for all practical purposes synonymous with regulated business – even though it is completely imaginable that similar problems may exist with regard to other types of interests.

Nobody is able to defend classical theory of public interest regulation on a sound empirical basis. For one thing the concept of the public interest as a substantial standard remains elusive. This is the case for typical conceptualizations that have been tried out in terms of economic efficiency, environmental sustainability, and distributional justice. For another thing such conceptualizations have rarely come to grips with the fact that politics primarily are concerned with balancing competing and conflicting claims against each other and that this balancing extends to the stage of administrative implementation. Finally, the invocation of the public interest in regulatory policy discourses remains a persistent trait whatever the cost-benefit distribution.

Both successors to public interest theory have clear empirical ambitions and both have pointed at very cogent problems. Capture theory asked: Can regulated business effectively use government regulation as a rent-seeking and protective strategy? Subsequent research answered the question with an unconditional yes. More recently, credible commitment theory

has asked: Does time inconsistency create a commitment problem for policy makers and can this problem be solved by policy makers' credible delegation of authority to independent regulators? Here the affirmative answer has been followed by the claim that regulatory law makers have actually acknowledged this and behaved accordingly. As seen in the review, public interest theory has to a very large extent survived in disguise of credible commitment theory.

Both capture theory and credible commitment theory face considerable problems when their claims are confronted with empirical data. Neither finds much support in their more strict forms. This is today uncontroversial for capture theory, which is routinely written off as an aberration of neo-classical economics and public choice theory. But credible commitment theory still experiences its high noon. Yet there are strong reasons to reset the agenda drawing on the knowledge that has accumulated from decades of research within any of the three competing theories and combining them with other political and administrative research. This must certainly also involve a more dynamic research strategy as a nagging suspicion is that any of the claims may have been more valid at one early point of time than later on.

Let us first take the theory of regulatory capture. Even if capture in the precisely defined form applied above is difficult to prove conclusively there is a strong, but varying involvement of both regulated and other-regarding interests in regulatory administration. The question remains whether this is a recent development and then how it came about. It is also how integration of regulated interests into administrative decision making allows for the correction of representative democracy for the varying intensity or affectedness of interests (Lewin 1992).

Next there is credible commitment theory that rightly points at a problem facing regulatory law makers and political executives but run into the problem that these policy makers – unsurprisingly it must be said – rarely overcome their incentive to keep a cat flap for

ad hoc interference. This is not only the result of short-term opportunism but also mirrors the fact that it is their role to balance a broad range of highly variable concerns that can neither be phrased in precise legal terms nor left to an independent regulator whose expertise is rather narrow.

This brings back public interest theory, but now in a more modest and refined form. Rather than upholding the less realistic idea of an administration that pursues a clearly defined public interest, focus is changed to procedures ensuring the wide inclusion of both regulated and third party interests as well as open information on case procedures, invoked information and final decisions together with options for challenging these decisions in other administrative authorities and eventually the courts. We do not know whether a change in this direction has taken place but there are indications of it. However, existing research also tells us to expect variations not only between countries but within countries also from sector to sector.

The implication is that future studies should focus on such factors as varying political saliency and path dependencies. They do not preclude change and reform but rather pave the way for changes that respond to identical pressures but where policy makers choose different directions accommodating local concerns (Levi-Faur 1999; Jordana, Levi-Faur and Puig 2006; Busch 2009). Similarly, there may be reasons to redefine the credible commitment thesis. As shown above it is most often conceived of in technocratic terms with the ideal regulator being an economist, 'the implicit belief' being 'that policy failures can be avoided through good management, namely by giving power to make and implement economic policy to an economist' (Dixit 1996, 10). The alternative approach is to reinvent the classical civil servant (Miller 2000; Frey and Osterloh 2005; Ingraham 2006; Nee and Opper 2009). This bureaucrat combines relevant training with a clear conception of her role as the neutral carrier of an office

exposed to political guidance and control, but constrained by a combination of legal and interest accommodating procedures.

Notes

1. Quote by memory from interview on C-SPAN during the 1996 presidential campaign.
2. Representative studies are Christensen and Lægreid (2006); Gilardi (2008); Jordana and Levi-Faur (2004); Levi-Faur and Jordana (2005); Thatcher and Sweet (2002).
3. Compare for example James (2003) with Hogwood, Judge and McVicar (2001), Spiller and Vogelsang (1996) and Flinders (2008).
4. Christiansen and Nørgaard (2003, 88-120) for Denmark; data kindly provided by Gunnar Thesen for Norway; an analysis of Sweden from 1989 shows a similar pattern with marked differentiation between types of interests, but no diachronic data (Petersson 1989).

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TABLES

Table 1. Competing models of regulatory administration

	Public interest regulation	Regulatory capture	Credible commitment
Basic claim	Civil servants act according to general law set out to further the public interest	Civil servants biased in favor of regulated business	Civil servants apply scientific knowledge to further good regulation
Behavioral assumption	Civil servants as office carriers	Civil servants self-interest motivated	Civil servants as professional norm abiders
Field of relevance	Economic and social regulation	Economic and social regulation	Economic regulation

Table 2. Validating evidence for the models of regulatory administration

	Public interest regulation	Regulatory capture	Credible commitment
Supporting evidence	Merit bureaucracy Strict public law regulation of procedures Integration into ministerial hierarchy applying strict politics-administration dichotomy	Close cooperation with regulated business Exclusion of third party interests Revolving doors careers	Delegation to independent regulators Staffing with relevant professionals Exclusion of affected interests Evidence-based decision making
Disproving evidence	Interference from political executive Bargaining with external interests Institutional integration of external interests	Career transfers rare Broad inclusion of affected interests Strict regulation of decision making procedures Decisions against regulated business	Regulatory authorities integrated into executive hierarchy Institutional integration of affected interests Political interference into decision making De facto bargaining with affected interests

Table 3. Basic structure of regulatory administration in four European countries 1980-2000. Percent. N in parentheses.

	Denmark				The Netherlands				Norway				Sweden			
	1980		2000		1980		2000		1980		2000		1980		2000	
	Eco reg.	Soc reg.	Eco reg.	Soc reg.	Eco reg.	Soc reg.	Eco reg.	Soc reg.	Eco reg.	Soc reg.	Eco reg.	Soc reg.	Eco reg.	Soc reg.	Eco reg.	Soc reg.
Agency head reports to ministerial department	88 (33)	94 (17)	89 (18)	92 (13)	19 (72)	85 (26)	8 (63)	28 (39)	42 (24)	59 (17)	68 (24)	69 (13)	15 (27)	9 (11)	14 (28)	27 (22)
Representation on regulatory boards																
Interest organizations	82	85	76	91	56	35	44	60	50	82	38	95	26	58	27	53
Parliamentary appointees	9	7	3	5	0	0	0	0	14	6	0	0	19	13	13	33
Judges	33	44	27	48	11	6	11	20	25	35	31	40	30	33	80	33
N	55	27	62	44	18	17	9	5	28	17	16	20	27	40	15	15

Note: The data were collected jointly with Kutsal Yesilkagit, see Christensen and Yesilkagit (2006) and Yesilkagit and Christensen (2010).

Table 4. The administrative organization utility regulation in four European countries. Percentages. N in parentheses.

	Denmark		The Netherlands		Norway		Sweden	
	1980	2000	1980	2000	1980	2000	1980	2000
Agency head reports to ministerial department	100 (4)	100 (3)	100 (1)	100 (1)	0 (4)	83 (6)	33 (3)	17 (6)
Representation on regulatory boards								
Interest organizations	100	14	0	50	71	33	17	55
Parliamentary appointees	14	14	0	0	29	0	50	46
Judges	0	14	0	0	14	17	33	18
N	7	7	3	2	14	6	6	11

Note: The data were collected jointly with Kutsal Yesilkagit, see Christensen and Yesilkagit (2006) and Yesilkagit and Christensen (2009).