The Paranoid Style in Regulatory Reform

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The U.S. administrative state has been involved in a decades-long regulatory reform project encompassing both 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 1,400 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 non-coercive ways of governing. After presenting my empirical analysis, I situate the coercive state rhetoric of late-twentieth-century regulatory reform in broader 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. I 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 policy, a case must be made for the state.

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. Four decades of regulatory reform has
produced a society that is neither significantly less regulated nor significantly less risky. And recent economic and environmental catastrophes have renewed calls for regulatory reform. As the United States opens a new conversation about regulation, this paper 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, and this hampers efforts to design, to implement, and even to 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 co-exists 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 administrative reform were framed at the time as a “righteous fight to defend democracy from dictatorship.”\(^4\) And 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.

\(^3\) The Federalist Papers, (Isaac Kramnick ed., 1987), p. 34 of “Editor’s Introduction.”
\(^6\) Id.
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 1,400 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 non-coercive ways of governing. I 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; those assessing its political and historical impact and import; and those analyzing and evaluating myriad particular reforms. I do not purport to reprise those stories here. This

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11 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 that is a part 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
article presents neither a history nor an evaluation of regulatory reform, but rather a genealogy\textsuperscript{12} 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. The article is based on a content analysis\textsuperscript{13} of the nearly 1,400 law review articles that form the core of the legal critique of regulation as it developed between 1980 and 2005. This methodology allows me to establish 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 non-coercive ways of governing. I argue that framing regulatory problems and solutions in this way has undermined rational consideration of

\textsuperscript{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, \textit{Nietzsche, Genealogy \& History, in Language, Counter-Memory, Practice} (D. Bouchard ed., 1977); Michel Foucault, \textit{The Discourse on Language, in The Archaeology of Knowledge} (M. Foucault ed., 1972).

\textsuperscript{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. Timothy F. Malloy, \textit{The Social Construction of Regulation: Lessons from the War Against Command and Control}, 58 BUFF. L. REV. 267 (2010).
the full range of regulatory alternatives, particularly those that entail an active role for the state, and that this has hobbled our ability to regulate effectively.

The article proceeds as follows. In Section I, I set forth the prevailing understanding of regulatory reform as the extension of economic rationality, and specifically the rationality of efficiency, to regulatory policy making. 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. Section 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.” Section 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 Section 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 Section 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 movement\(^{14}\) 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, like 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 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

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\(^{14}\) While the term “regulatory reform” has been used by some to describe the pro-regulatory 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 Section IV(C), infra.


\(^{19}\) Eads and Fix at 1.
prominent of which was EO 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 policy making. 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

24 MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 133 (1993).
that regulatory reform prompted agencies to adopt an economic approach to regulation, meaning that regulators now looked to economic concepts like marginal costs and efficiency to rationalize regulatory decision-making and to discipline the unruly “excesses of [their] early attempts to regulate.” Even the most recent and systematic analyses of the regulatory reform debate conclude that it was driven by concerns about economic efficiency.

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. Surveying his own efforts as a regulatory reformer, John Graham identifies CBA as the mechanism by which “reformers gained ground.” Thomas McGarity concurs that


CBA was the most fully realized of all the goals of the regulatory reform movement. Doug Kysar suggests that CBA now “provides our übernorm for public policy making.” And Cass Sunstein has pronounced that we live in a “Cost-Benefit State.” The association between CBA and regulatory reform has become so taken-for-granted that many scholars conflate the two or refer to them interchangeably. 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.

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. CBA created a framework that permitted consideration of quantifiable variables like the costs of implementation but marginalized consideration of unquantifiable variables like justice or fairness. It moved regulators away from broad considerations of whether a given policy served the public interest to

35 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 non-quantifiable variables, like quality of life or existence value. See, e.g., RICHARD L. REVESZ AND MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008) (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 (2005) (arguing that there is no basis in economic theory for precluding intangible harms from welfare calculations).
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 decision making as “logics.” A logic is a set of practices and ideas that supply the organizing principles for a given institution or social arrangement.36 Logics are “socially shared, deeply held assumptions and values that form a framework for reasoning [and] provide criteria for legitimacy[.]”37 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.38 Social spaces are typically governed by multiple, overlapping, and often conflicting logics.39 For instance, logics of the capitalist market, the bureaucratic state, democracy, the family, and Christianity all operate powerfully in the United States, 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.40

39 Friedland and Alford, supra note 30; LUC BOLTANSKI AND LAURENT THEVENOT, ON JUSTIFICATION: ECONOMIES OF WORTH, (translated by Catherine Porter 2006).
40 Id.
Robert Baldwin and Julia Black have argued that “regulatory logics” are an underappreciated problem in regulatory design.41 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.”

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 economic logic, it shapes how policy makers 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 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.42 The threat of tyranny was enshrined in the Declaration of Independence as the primary justification for the States’ “separation” from Britain.43 In the view of the founding generation, the American revolution was a “war in defense of liberty,”44 fought “to secure ourselves from despotism.”45 The revolutionary experience fostered a “tendency to counter-pose ‘government’ and ‘liberty’”46 and shaped the earliest 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”47 that was manifest in the dominance of state legislatures and an outsize enthusiasm for direct democracy. Despotic 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[.]”48

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42 Posner and Vermule
43 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.”).
45 Alexander Hamilton, speech to the NY ratifying convention: The Debate of the State Conventions on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787, II, 301 (Philadelphia, 1866).
47 Id. at 21.
48 Id. at 19.
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.” They condemned the proposed Senate as a “tyrannical aristocracy.” At the constitutional convention, Anti-Federalists “tended to see in every limited act of government a larger plan aiming to subvert popular liberty,” and in the ratification debates, they repeatedly likened the Federalists’ ambitions to those of Caesar, Cromwell and other prominent historical despots.

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, Madison wrote, “the chief threat to liberty came from the ‘legislative power’ and ‘legislative usurpation.’” 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, or elective, may justly be pronounced the very definition of

49 Id. at 34.
50 Id. at 64.
51 “Tyrannophobia” at 7. See also The Antifederalist No. 3, No. 25, No. 70 (Morton Borden ed. 1965).
52 Id. See also The Federalist Papers, ed. Isaac Kramnick (1987), “Editor’s Introduction,” at 76.
tyranny.”\textsuperscript{54} Thomas Jefferson similarly remarked that “[a]n elective despotism was not the
government we fought for.”\textsuperscript{55} 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.”\textsuperscript{56} It
was in this way that the Federalists marshaled the fear of tyranny to justify the expansion of
federal executive and judicial authority.

\textbf{B. New Deal}

“The Founding generation bequeathed to its descendants a ‘chronic antagonism to the
state’”\textsuperscript{57} 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 Tocqueville called “centralized administration.”\textsuperscript{58} The
U.S. federal government “established the general principals of government,” but it rarely
“descended to the details of their application.” It “regulated the great interests of the country,”
but did not “descend to the circle of individual interests.”\textsuperscript{59} Instead, administration in the young
republic was left largely to local authorities. Tocqueville argued that this distinction between

\textsuperscript{55} \textit{Notes on the State of Virginia}, ed. W. Peden (1955) at 240.
\textsuperscript{56} \textit{The Debate of the State Conventions on the Adoption of the Federal Constitution, As Recommended by the
\textsuperscript{57} Aaron L. Friedberg at p. 12.
\textsuperscript{58} \textsc{Alexis de Tocqueville}, \textit{Democracy in America}, 346 (Henry Reeve trans.,1862) . \textit{But see} Jerry L. Mashaw,
\textit{Federal Administration and Administrative Law in the Gilded Age}, 119 Yale L.J. 1362 (2010) (arguing that
administration played a more central role in pre-Progressive-era governance than conventional accounts typically
recognize).
\textsuperscript{59} \textit{Id.} (all quotes from Tocqueville 346).
centralized governance and centralized administration was what preserved citizens’ freedoms in the American democracy and protected them from “the puerilities of administrative tyranny.”60

The New Deal marked the federal government’s most significant peace time expansion into the realm of centralized administration. While debates about New Deal programs and policies implicated a broad range 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.61

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.”62 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.”63 Initiatives like the National Industrial Recovery Act (“NIRA”), the Agricultural Adjustment Act (“AAA”), and the Tennessee Valley Authority (“TVA”), raised the specter of economic “planning” and fueled “the charges of dictatorship, of conflicting claims of fascism and socialism leveled at the New Deal.”64 According to conservative opponents of the

60 Id. I have omitted from this section 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, dealing specifically with the expansion of the federal government’s administrative capacity.


63 Arthur M. Schlesinger, Jr. The Age of Roosevelt: The Coming of the New Deal 473 (1958)

New Deal, NIRA was an attempt to “sovietize America;”\textsuperscript{65} the AAA would “place[] in the hands of a dictator supreme control of the wealth of America;”\textsuperscript{66} and the TVA was “another step on the road to Moscow.”\textsuperscript{67} Using similar rhetoric, Roosevelt’s critics on the left “damned the NRA as a ‘fascist slave program’” and charged that it was “the same as Hitler’s program.”\textsuperscript{68}

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.\textsuperscript{69} The Liberty League published pamphlets on topics including: “The President Wants More Power,” “Will it Be Ave Caesar?” and “The Way Dictatorships Start.”\textsuperscript{70} In the 1934 mid-term election campaigns, “New Deal socialism, communism, and dictatorship were all some Republicans could find to talk about[.]”\textsuperscript{71} 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.’”\textsuperscript{72} 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

\textsuperscript{65} Wolfskill and Hudson, \textit{supra} note __, at 213.  
\textsuperscript{66} Wolfskill and Hudson, \textit{supra} note __, at 209.  
\textsuperscript{67} Wolfskill and Hudson, \textit{supra} note __, at 210.  
\textsuperscript{70} \textit{Id.}  
\textsuperscript{71} Wolfskill and Hudson, \textit{supra} note __, at 217.  
\textsuperscript{72} \textit{Id.}
bureaucracy must manage for them.”

Although the Republicans lost seats with this strategy, partisans of Roosevelt’s opponents in the 1936 presidential election continued to “rage[] about the dictatorship in Washington” and Roosevelt’s “damnable tyranny.” 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 United States and portrayed Roosevelt and his Brain Trust as Reds.”

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.”

Arcane debates about administrative reform also took a tyrannaphobic turn in the late New Deal period. The usually staid ABA Special Committee on Administrative Law, chaired by

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74 Democrats picked up nine seats in the Senate and thirteen seats in the house, adding to their already-overwhelming majorities in Congress. Id. at 13.
75 Wolfskill and Hudson, supra note __, at 107.
76 Wolfskill and Hudson, supra note __, at 181.
Roscoe Pound, issued a report in 1938 condemning “administrative absolutism” and accusing administrators of autocracy in their pursuit of efficiency. 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.” 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.” 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.” Floor debate raised fears that the U.S. government had become “a government of men and not of laws.”

C. Postwar Period

If the New Deal’s expansion of administrative governance raised the specter of state tyranny, 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.” The clash between free society and totalitarian rule became the defining struggle of

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78 Report of the Special Committee on Administrative Law, 63 A.B.A. 331, 343 (1938).
80 Id. at 341
81 Id. at 347.
the postwar period. 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.” There was a sense, during this period, that “American democracy should strive first and foremost to avoid becoming like” the European dictatorships.

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. 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” in order to foster “conditions in which we and other nations will be able to work out a way of life free from coercion.”

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86 Brinkley at 54. See also King and Stears, at p. 123 (“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-centered plans at this time[.]”)
interests and responsibilities “forged a powerful link between anticomunism abroad and anticomunism 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!”91 The anxiety about this link lead to a postwar domestic policy focused on avoiding conquest by Soviet tyrants or subversion by their agents within U.S. borders.92 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.”93 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 that was] haunting America.”94

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,95 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 three together,96 each

91 Paul S. Boyer, By the Bomb’s Early Light: American Thought and Culture at the Dawn of the Atomic Age 103 (1994).
95 King, Desmond and Marc Stears,.The Missing State in Postwar American Political Thought,” in The Unsustainable American State, ed. Lawrence Jacobs and Desmond King. (2009).
96 George J. Stigler, The Citizen and the State: Essays on Regulation, (1975)
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 Ronald Coase’s seminal article on “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." 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. He made a plea for both to better understand and address the costs of government regulation. Specifically, he argued that legal institutions should consider the economic implications of the rules they promulgate, and economists should consider the impact of legal rules and institutions on their models. Legal decision-makers, 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.”

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. Instead, he argued for a better understanding of the economic consequences of legal rules and the circumstances under which they were warranted. In Coase’s model, state intervention was unnecessary to correct for externalities where parties could bargain with one another to reach

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98 Id. at 19.
efficient outcomes. 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. In his view, there was no inherent reason why, “on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency.” After all, “government has powers which might enable it to get some things done at a lower cost than could a private organization.” 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.

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.”

Conventional accounts of regulatory reform typically see it as 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

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99 Id. at 18 (emphasis supplied).
100 Id. at 17.
101 Id. at 18.
102 Id. at 44.
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.
However, like their intellectual contemporaries, postwar economists had their own dark visions
of state power.

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 policy making
process. 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.” The rational pursuit 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. Regulators are, in this sense, “captured” by the
industries it is charged with regulating. In his “Economic Theory of Regulation,” for instance,
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.” Buchanan and Tullock argued that industry prefers (and can secure) “command-and-
control”-type regulatory schemes over other more efficient regulatory tools that would provide a

103 Daniel A. Farber and Anne Joseph O’Connell, RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW
(2010)
105 James M. Buchanan & Gordon, Tullock, Polluters’ Profits and Political Response: Direct Controls Versus
Taxes, 65 AM. ECON. REV. 139 (1975).
106 E.g. Noll, supra note 18; Buchanan and Tullock, supra note 43.
107 Stigler, supra note 33, at 3.
greater public benefit, because direct regulation has the effect of imposing quotas that raise the prices and profits of regulated firms.\(^\text{108}\) Similarly, Noll attributed the Food and Drug Administration’s (FDA) laxity in drug regulation to the desire of FDA staffers for employment with pharmaceutical companies.\(^\text{109}\)

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’.”\(^\text{110}\) 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”\(^\text{111}\) and to “treat all social actors as inherently self-seeking”\(^\text{112}\) 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.\(^\text{113}\)

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

\(^{108}\) Buchanan & Tullock, * supra* note 43.

\(^{109}\) Noll, * supra* note 18.


\(^{111}\) Ciepley at 180.

\(^{112}\) Ciepley at 180.

corrosive effects of private power with layers of new statutory prescriptions and procedures.\textsuperscript{114} At the other, libertarians like F. A. Hayek, deployed them to support their position that the regulatory state should be significantly circumscribed.

3. The Cognitively Impaired State

The “cognitively impaired state” is most closely associated with F.A. 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.”\textsuperscript{115} 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.”\textsuperscript{116} 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.\textsuperscript{117} According to Hayek, these limitations are an inherent function of human cognition and, thus, they cannot be overcome simply by getting more knowledge.\textsuperscript{118}

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

\textsuperscript{114} MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION (1993).
\textsuperscript{115} F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: VOLUME I, RULES AND ORDER 12 (1973)
\textsuperscript{116} F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: VOLUME I, RULES AND ORDER 14 (1973)
\textsuperscript{117} Amy J. Cohen, Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law, 2010 Wis. L. Rev. 357 (2010).
what we can say or do about them.”119 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.”120 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 government regulation because they function without any intentionality or design from imperfect human actors. Markets move social action “in the right direction”121 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.”122 This, according to Hayek, is the “marvel” of the market and its source of superiority over state-based regulation.123

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

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123 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. Richard A. Posner, Hayek, Law and Cognition, 1 NYU J.L. & Liberty 147 (2005).
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.”

Like the public choice theorists, Hayek saw no empirical or theoretical basis for the concept of 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.” 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.”

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.” As one late twentieth century economist articulated it: “Freedom is not divisible. You cannot deny basic rights to one segment of the society, without denying them

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125 *Id.* at 2.
126 *Id.* at 72.
127 JOHN JEWKES, ORDEAL BY PLANNING 195 (New York: Macmillan 1948).
to every segment, right down to the individual. 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.”

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.” 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.” George 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.

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.” Milton Friedman adapted these arguments to reflect Cold War

129 JOHN JEWKES, ORDEAL BY PLANNING 9 (1948).
130 Teles at p. 91.
132 STIGLER, supra note 22, at 17.
133 Id. at 5.
anxieties in *Democracy and Capitalism*, 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.”

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

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135 Boltanski and Thevenot, *supra* note 33.
136 Id.
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.\(^{137}\) This has been nowhere more evident than in the U.S. administrative state, where significant intellectual capital has been invested in legitimizing the constitutionally suspect “headless fourth branch” of government.\(^{138}\) 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.”\(^{139}\) Scholars of late-twentieth-century regulatory reform have recognized that this movement “was energized for many years by academics”\(^{140}\) who provided “scholarly support and theoretical justification”\(^{141}\) 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 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


\(^{139}\) Id.


them. 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” the often confusing and conflicting opinions of the judiciary. In other words, the role of law professors is to articulate the logics of the legal field.

“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 off-handed shorthand for state-

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143 WILLIAM C. CHASE, **THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT** 19 (1982).

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, use skysrocks in the 1990s (634 articles) and continues a sharp upward trend through 2005, with 673 articles in the first five years of this century.

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

145 My choice to begin my analysis in 1980 is largely an artifact of the LEXIS-NEXIS database, which archived law review articles only back to 1980 when this research was conducted. To ensure that my analysis did not miss any important literature before this date, I ran the same search in the more extensive Hein-Online database, containing complete archives of most law reviews. This search turned up only seventeen (17) 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 these articles in my analysis.

146 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.

147 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 1979-80 edition and that number rises to 675 in the 2004-2005 edition. However, this near-doubling of the available fora 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.
regulation. For this reason, it is important to ascertain what meanings attach to the ubiquitous term.\textsuperscript{148}

Although “command-and-control” has become widely used short-hand 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,\textsuperscript{149} the New Deal,\textsuperscript{150} or even World War I,\textsuperscript{151} 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.”\textsuperscript{152} Other articles that attempt an explicit definition likewise characterize “command-and-control” as a regulatory 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.”\textsuperscript{153}

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

\textsuperscript{148} 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.
\textsuperscript{149} Cooter, supra note 60.
John Austin’s classic formulation, “[l]aws proper or properly so called, are *commands*”\(^{154}\) to which obedience is secured by the threat of sanctions. Donald Black has influentially defined law as “governmental social control”\(^{155}\) obtained through targeted application of punishments and rewards. Noah Feldman has more recently characterized “doing law” as “coercing and demanding compliance.”\(^{156}\) And Robert Cover famously highlighted the violent domination that underlies legal authority.\(^{157}\) 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 it. 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, 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. Descriptive uses typically (although not universally) pejoratively portray a management style characterized by hierarchy and compulsion.

“Command-and-control” originates as a military term, where its use is primarily structural: it is a noun that designates (rather than an adjective that describes) organizational decision-making and implementation processes. In military parlance, “command-and-control” is a 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

\(^ {154}\) John Austin, The Province of Jurisprudence Determined VII (1832).
resources, including information, toward the achievement of some task, objective, or goal.” 158 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. 159

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. 160 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. 161

Descriptive uses of “command-and-control” are common 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


159 Id. at 61.


preferred approaches like “leading”\textsuperscript{162} or “coaching,”\textsuperscript{163} 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.”\textsuperscript{164} Instead, he advises managers: “If you want results from people, you need to lead them, not control or manage them.”\textsuperscript{165} Another consultant warns that “[i]ndividuals’ imagination and interest do not thrive in command-and-control structures.”\textsuperscript{166} Instead, she urges clients to “[i]magine a work environment when everyone is committed to a common goal.”\textsuperscript{167} 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 for their ability “to achieve that mission quickly, efficiently and economically.”\textsuperscript{168} In this alternative characterization of “command-and-control:”

\begin{quote}
[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.\textsuperscript{169}
\end{quote}

From this perspective, “command-and-control” describes a management system with clear lines of “responsibility and accountability.”\textsuperscript{170}

\textsuperscript{162} Bart Bolton, \textit{Control or Lead? It’s Your Choice}, 22 INFO. SYS. MGMT. 81 (2005).
\textsuperscript{163} Lisa Aldisert & Marilyn M. Helms, \textit{From Command and Control to Coaching}, 32 BANK MARKETING 36 (2000).
\textsuperscript{164} Bolton, supra note 81, at 88.
\textsuperscript{165} \textit{Id}.
\textsuperscript{166} Aldisert & Helms, supra note 36, at 89.
\textsuperscript{167} \textit{Id}.
\textsuperscript{169} \textit{Id}.
\textsuperscript{170} \textit{Id}. 
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. One can imagine a regulatory reform debate that advocates “command-and-control” to create clear channels of responsibility. In the next section, 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.¹⁷¹ 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.

| Table 1: Critiques of “Command-and-Control” Regulation (“CCR”) |

¹⁷¹ 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 it 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.
CODE | SUMMARY OF THE CRITIQUE
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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 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.172 It is important to understand how regulation gets constructed as a problem, because this construction drives scholars’ (and sometimes regulators’

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and policymakers’) perceptions of regulation’s “defects and limitations, and consequently shapes 
[ ] view[s] of the necessary reforms.” 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 govern; what governing is; what or who is governed).” 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. 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 seventy percent 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 sense, to mean the repeal of laws and regulations 
or the withdrawal of legal authority from administrative agencies. While relatively few

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173 Id. at 268.
176 The term 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
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.”178 Deregulation advocates argue that private affairs should be ordered and disciplined not by government but by price, as determined in existing markets and by the contractual arrangements of private parties.

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 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 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 “command-and-control” regulation. 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
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). However, because I place these “incentive” or “market-based” approaches to regulatory reform in their own distinct category, I reserve this code for deregulation only in its purest sense.


doctrines to accommodate the needs of environmental litigation, or the adoption of measures
designed to supplement and enhance traditional common law protections.”\textsuperscript{179}

3. Market-based Regulation

While deregulation seeks to remove the state from markets, \textit{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”\textsuperscript{180}, introducing
“free market environmentalists,”\textsuperscript{181} and arguing that agencies should “harness[] the power of the
market”\textsuperscript{182} to achieve their regulatory goals. Like \textit{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.”\textsuperscript{183} Also encompassed in my

\textsuperscript{181} David M. Dreisen, \textit{What’s Property Got to Do with It?} 30 ECOLOGY L.Q. 1003, 1007 (2003) (reviewing DANIEL COLE, POLLUTION & PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION (2002)).
**market-based regulation** code are regulatory taxes and other price-based 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[.]”184 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.185

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 section 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 on *Responsive Regulation*, Ayres and 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.\(^{186}\)

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 programs\(^ {187}\) or private-sector initiatives.\(^ {188}\) Regulated firms act as “self-regulating executives” when they are given compliance monitoring responsibilities under agency programs\(^ {189}\) or when they adopt internal compliance monitoring practices independently. Finally, some agency programs place firms in

\(^{186}\) *Ayres & Braithwaite, supra* note 72.

\(^{187}\) For example, EPA'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." (EPA, *PERFORMANCE TRACK MEMBER ENVIRONMENTAL COMMITMENTS* (2006), http://www.epa.gov/oig/reports/2007/20061114-2007-P-00003.pdf). The Food and Drug Administration (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. (FDA, *NATIONAL SHELLFISH SANITATION PROGRAM MANUAL OF OPERATION* (1995)).

\(^{188}\) 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*.

\(^{189}\) For example, United States Department of Agriculture’s *Hazard Analysis and Critical Control Point Program* (HACCP) and OSHA’s *Voluntary Protection Program* (VPP).
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.\textsuperscript{190}

In addition to efforts by firms to regulate themselves, \textit{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."\textsuperscript{191} Examples of this approach include programs that seek the input of citizen-stakeholders in developing regulatory standards,\textsuperscript{192} programs that enlist citizens to monitor the performance of regulated entities,\textsuperscript{193} 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[.]”\textsuperscript{194}

\textsuperscript{190} For instance, the EPA \textit{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 \textit{Provider Self-Disclosure Protocol} that offers leniency to health care providers who voluntarily report violations of their Medicare and Medicaid obligations.


\textsuperscript{194} Warren A Brauning, \textit{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.”); Errol E.
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 (See Figure B). While the order shifts slightly from year to year, these fluctuations are infrequent and minor. The overall thrust of the critique remains consistent from 1980-2005: 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 342 (39%) of the articles, is that regulation is coercive. “Command-and-control” regulations are described as “wholly coercive instruments” that tell regulated entities “exactly what to do and how to do it.” 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[.]” Some commentators push the coercion metaphor further, asserting variously that “command-and-control” regulation achieves its objectives through “brute force” that it elevates health and

Medinger, The New Environmental Law: Forest Certification, 10 BUFF. ENVT'L. L.J. 211, 270 (2003) (“State imposed disclosure requirements can thus be seen as valuable resources for civil society regulatory institutions.”); Sunstein, supra note 128, at 535 (“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.”); David W. Case, Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective, 76 U. COLO. L. REV. 379, 428 (2005) (“market 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.”).

195 Cole, supra note 119, at 293.


safety regulators to the status of “product gods”\textsuperscript{199}, and that it has allowed environmental enforcement officials to act as a “manure Gestapo.”\textsuperscript{200}

[Figure B about here]

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 267 (30\%) of the articles. Critiques of bureaucracy range from structural concerns about the inability of a remote central authority to regulate far-flung constituencies, to questions about the efficacy and integrity of bureaucrats. 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.\textsuperscript{201}

All of these arguments reflect “the longstanding fear that bureaucracy is a form of human domination.”\textsuperscript{202}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{199} Thomas R. Mounteer, \textit{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).
\item \textsuperscript{201} Jerry L. Anderson, \textit{The Environmental Revolution at Twenty-Five}, 26 RUTGERS L.J. 395, 413 (1995).
\item \textsuperscript{202} Gerald E. Frug, \textit{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.
\end{itemize}
\end{footnotesize}
The fourth most common argument, made in 204 articles (23%) 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.”\(^{203}\) The morass of law compounds the sense of constraint felt by regulated entities, because it leaves them at the mercy of regulators, who are accused of applying standards rigidly and irrationally in a cycle of “mindless rule worship.”\(^{204}\) 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.”\(^{205}\) 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 (See Figure C).\(^{206}\)

\(^{203}\) Fiorino, supra note 119, at 463.
\(^{205}\) Anderson, supra note 127, at 413-414.
\(^{206}\) 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 (See Figure D). Articles advocating deregulation or liability-based regulation schemes are exceedingly scarce. Despite the critique’s roots in the deregulation movement, only four percent of the articles (54) mention this solution. Though deregulation is uniquely responsive to the problem of state coercion, legal academics do not widely embrace it as a reform.207

[Figure D about Here]

The legal critique similarly eschews the classic legal ordering of tort and tort-like remedies, mentioning them in only five percent (65) of the articles. Although these alternatives are grounded in the notion of private ordering, they fail to abandon the coercive state tools so troubling to legal critics of regulation – and arguably apply them even more haphazardly.

207 As one staunch deregulation advocate at the University of Chicago observed, “few 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.” GEORGE JOSEPH STIGLER, THE CITIZEN AND THE STATE 167 (1975).
Consequently, liability-based remedies fail to address the coercion concerns of the legal critique.\textsuperscript{208}

\textit{Market-based regulation} is 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. Note 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. While these types of market-based alternatives enjoy the most attention from commentators overall, \textit{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.\textsuperscript{209} And, as discussed above, there is an affinity between these two categories. Nevertheless, what I’ve documented here represents an important

\textsuperscript{208} It bears noting that tort liability runs counter to economic logics of regulation as well, making it an unattractive alternative on multiple grounds. Moreover, apart from the affinity of liability-based regulation with any particular logic, many political supporters of regulatory reform also supported tort reform, by which they meant a scaling back of liability for the various harms produced by industrial and professional activities.

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 non-coercive ways of governing.

[Figure E about Here]

The arguments made in support of various reforms strongly reflect a desire to address the coercion concerns that emerge from the critique (see Figure E, above). 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.” Flexibility is an even more important driver of legal reform than cost-effectiveness, which appears in 179 articles as an argument supporting a particular reform (26% fewer 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.”

Finally, my data demonstrate that there is a direct relationship between self-regulation and concerns about coercion in the literature. Self-regulation alternatives are statistically correlated with arguments about coercion, while there is no correlation between coercion and market-based alternatives (See Table 2, below). This is true of all three coercion-related codes: direct arguments about the coercive state, as well as arguments about bureaucracy and legalism.

211 Wood, supra note 119, at 203-04.
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 “begin[s] to converge on the concept of self-regulation”\textsuperscript{212} as a tool for regulating without coercion.

\textbf{Table 2: Correlations}

<table>
<thead>
<tr>
<th>MARKET-BASED</th>
<th>MARKET</th>
<th>SELF-REG</th>
<th>COERCION</th>
<th>BUREAUC.</th>
<th>LEGAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pearson Correlation</td>
<td>1</td>
<td>-.491**</td>
<td>-.023</td>
<td>.016</td>
<td>-.051</td>
</tr>
<tr>
<td>Sig. (2-tailed)</td>
<td>1389</td>
<td>1389</td>
<td>1389</td>
<td>1389</td>
<td>1389</td>
</tr>
<tr>
<td>SELF-REG</td>
<td>Pearson Correlation</td>
<td>-.491**</td>
<td>1</td>
<td>.088**</td>
<td>.078**</td>
</tr>
<tr>
<td>Sig. (2-tailed)</td>
<td>.000</td>
<td>1389</td>
<td>1389</td>
<td>1389</td>
<td>1389</td>
</tr>
<tr>
<td>COERCION</td>
<td>Pearson Correlation</td>
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<td>.088**</td>
<td>1</td>
<td>.280**</td>
</tr>
<tr>
<td>Sig. (2-tailed)</td>
<td>.392</td>
<td>.001</td>
<td>1389</td>
<td>1389</td>
<td>1389</td>
</tr>
<tr>
<td>BUREAUCRACY</td>
<td>Pearson Correlation</td>
<td>.016</td>
<td>.078**</td>
<td>.280**</td>
<td>1</td>
</tr>
<tr>
<td>Sig. (2-tailed)</td>
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<td>.003</td>
<td>.000</td>
<td>1389</td>
<td>1389</td>
</tr>
<tr>
<td>LEGALISTIC</td>
<td>Pearson Correlation</td>
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<td>.119**</td>
<td>.292**</td>
<td>.300**</td>
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<td>.000</td>
<td>.000</td>
<td>.000</td>
<td>1389</td>
</tr>
</tbody>
</table>

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

\textit{D. Late-Twentieth-Century Regulatory Reform in Historical Context}

\textsuperscript{212} Estlund, supra note 51, at 321.
These findings suggest the need to re-evaluate 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 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 the possibility that some group or individual might seize and exploit consolidated state power concrete. 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.213 “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.”214 Similarly, during the Cold War, totalitarianism was seen as an

213 Ciepley 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.”); BENJAMIN L. ALPERS, DICTATORS, DEMOCRACY, AND AMERICAN PUBLIC CULTURE: ENVISIONING THE TOTALITARIAN ENEMY, 1920S-1950S, at 15 (2003) (recounting how Studebaker successfully marketed a car called “The Dictator,” which it advertised as “a brilliant example of excess power,” from 1927 to 1937).

214 Shepherd, George B. “Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics,” 90 Northwestern University Law Review 1557, 1590 (1996). Ciepley 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.”)
“extraordinarily virulent”215 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.”216

Second, those deploying anti-statist rhetoric in earlier historical debates explicitly articulated a 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. 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’ whims217 and engaging in shameless political patronage to consolidate the president’s power.218

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.219

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.

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217 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” “Report of the Special Committee on Administrative Law,” 63 A.B.A 340 (1938).
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.”220 By the time we arrive at the late-twentieth-century regulatory reform debate, both the plausibility of a tyrannical government seizing power in the United States and the explanations underlying the anxieties are gone. In their comparative study of tyrannophobia, Posner and 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. Perhaps because it has become so unmoored from empirical reality, contemporary discourses of state coercion have also 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.221 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.”222 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 issue through this

221 See, e.g., MARY DOUGLAS, HOW INSTITUTIONS THINK (1986); PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (1977); William F. Sewell, A THEORY OF STRUCTURE: DUALITY, AGENCY, AND TRANSFORMATION, 98 Am. J. Soc. 1 (1992); SUSAN T. FISKE & SHELLEY 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.”).
222 Chen and Hanson at p. 11.
lens. 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.” The key to the success of the “regulation is bad” script is its ability to invoke threats to freedom. These threats, and this meta script, pervade the discourse of “command-and-control” regulation.

This 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. The point is that, unless qualified or elaborated somehow, the suggestion that coercion is bad per se logically applies to the coercion that happens in markets as well as 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

223 Chen and Hanson at p. 28.
224 Chen and Hanson at p. 99.
225 Chen and Hanson at p. 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.”).
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 1,400 law review articles that form the basis of the legal critique of regulation from 1980-2005 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 models. The legal critique of “command-and-control” regulation is as much an artifact of the U.S. “encounter with totalitarianism”\(^{227}\) 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”\(^{228}\) of totalitarianism, legal scholars largely avoided this trope.\(^{229}\) He argues, by contrast, that legal academic culture was “characterized by an often internalized attachment to

\(^{227}\) DAVID CIEPLEY, LIBERALISM IN THE SHADOW OF TOTALITARIANISM 2 (2006).


government” 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 post-war period, but at least through the end of the twentieth century. 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 to the present a discourse about the coercive power of the state. Proponents of new or expanded administration cannot make a durable, compelling case for state 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?” 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.

230 Id. at 174.
231 Id. at 174.
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.”

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.

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. Doug Kysar’s recent analysis of the precautionary principle is one such effort to reconstitute the state as a regulatory actor. 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*, 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.

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235 KYSAR, REGULATING FROM NOWHERE (2010)
The second 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 choice of symbols bares the bedrock of its beliefs. Moreover, the words people use are not neutral artifacts; they shape ideas and behavior.” Advocates of new regulatory initiatives should think carefully about how to frame the problem of regulation and whether the reforms proposed are responsive 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.” 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, many 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 deterrence-based enforcement practices. Approaching reform through the

237 Malloy, supra note __, at 268.
coercive-state lens “short-circuits rational consideration” 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 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. A simultaneous move toward self-regulation and away from more coercive forms of state-based regulation risks undermining and discrediting both regulatory approaches.


239 Posner and Vermeule, supra note 2, at 3.
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 like regulatory rulemaking and enforcement as coercive “deprives that term of its necessary and proper sting in cases of aggression and force.”241 In an historical era marked by extraordinary renditions, secret wiretapping of U.S. citizens, torture, and indefinite detentions, 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.

FIGURE A:
Number of Articles per Year Discussing "Command-and-Control" Regulation
Figure B

**FIGURE B:**
Frequency of Arguments Against Command-and-Control
Figure C

Efficiency vs. Anti-Coercion Logics

Number of Articles

Coercive, Bureacracy, Legalistic

380

267

202

Costiv. Inefficient

139

242
FIGURE D:
Trajectory of Alternatives to "Command-and-Control"

- Deregulation
- Liability
- Market
- Self-Regulation
Arguments For Alternatives
1980-2005

Figure E
Methodological Appendix

A. Content Analysis as a Methodological Approach

I conduct a content analysis of law review articles critiquing regulation. Content analysis is the empirical study of discourse. This methodology is widely used in the social sciences and humanities, and it is gaining popularity among legal scholars for what it can add to traditional interpretive techniques. 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."

Second, content analysis permits a sweeping inquiry of a large body of texts that simply is not

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242 See, e.g., 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, Raymond L. Schmitt & Richard Herman, 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 pre-industrial 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); Russell J. Dalton, Paul A. Beck & Robert Huckfeldt, 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); Abigail J. Steward, David G. Winter & A. David Jones, Coding Categories for the Study of Child-Rearing from Historical Sources, J. INTERDISCIPLINARY HIST. 687 (1975) (coding English child-rearing journals to analyze shifts in women’s authority in the family), and it is gaining popularity among legal scholars for what it can add to traditional interpretive techniques.

243 See, e.g., 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 SOX to try to explain the politics of revising the legislation); Timothy F. Malloy, The Social Construction of Regulation: Lessons from the War Against Command and Control, 58 BUFF. L. REV. 267 (2010) (conducting content analysis and analyzing the citation patterns of articles on environmental regulatory reform); 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).

244 Hall & Wright, supra note 28, at 65 (citing Alan L. Tyree, Fact Content Analysis of Case Law: Methods and Limitations, 22 Jurimetrics J. 1, 23 (1981)).
possible using conventional interpretive methods.\footnote{245} 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”\footnote{246} over time that might not be visible through more traditional interpretive methods.

B. \textit{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.”\footnote{247} 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.\footnote{248} This yielded a sample of 1,389 articles between 1980 and 2005.\footnote{249} The LexisNexis database archives most law reviews only beginning in or around 1980. To ensure that my searches did not leave out any important material before then, I ran the same search in the more extensive Hein-Online

\begin{footnotesize}
\begin{enumerate}
\item \footnote{245}{\textit{Id.} at 65.}
\item \footnote{246}{\textit{Id.} at 81.}
\item \footnote{247}{The biggest difficulty was eliminating articles arising from military tribunals discussing the structure of “command and control” in particular units.}
\item \footnote{248}{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 50 words on either side of my search terms. I experimented with several “KWIC” lengths and settled on 50 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.}
\end{enumerate}
\end{footnotesize}
database, containing law review archives dating to 1950. This search turned up only seventeen (17) 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 do not include these articles in my analysis. To identify the relevant portions of these 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.

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% of the articles (803) 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 healthcare 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-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 significantly on private prerogatives than regulation targeting outcomes. Finally, prominent scholars who were early
leaders in the regulatory reform debate happened to be writing in the environmental field.250

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 alternatives, if any, does it propose? (4) What arguments does it make about those alternatives? 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,251 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. I coded each argument only once per document. I coded for proposed alternatives in any article excerpt that discusses one of these reforms, regardless 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 opposition to “command-and-control” regulation or if they only made 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: bureaucracy, coercive, costly, end-of-pipe, ineffective, inefficient, information, interest group, legalistic, and uniform. 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

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252 All coding is binary, coded “1” if a particular attribute is present and “0” otherwise. The charts below reflect the overall structure of the coding system, and the codes are described in more detail in the text below. A codebook is on file with the author.
efficiency using extremely broad criteria, and I coded the coercion categories based on more narrow, specific criteria.

Cost. 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. Articles are included in this code if they argue that “command-and-control” regulation is itself inefficient or that it causes inefficiencies or distortions in the

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operations of markets or regulated firms. I also include in this code articles that discuss inefficiency as a concept without using the term, 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.”

Coercive. Articles categorized under this code make arguments about the coercive labor market and of the legal system. Markets require winners and losers to operate”); 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[.]”); Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 37 STAN. L. REV. 1333, 1339 (1985) (talking about “the serious inefficiency of traditional forms of command-and-control regulation”).

255 Morriss, supra note 102, at 1934.

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.

**Bureaucracy.** 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.

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**Legalistic.** 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.

**End-of-pipe.** 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.

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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” approach that (“strict command-and-control regulation leaves little room for continual improvement”); 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.); 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.”); 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) (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); 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”).


Dana, supra note 108, at 37.

Id.
“fails to take into account the unique quality of the industry being regulated, and the pollution generated by that industry.”\textsuperscript{263}

\textbf{Information.}\textsuperscript{264} 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.”\textsuperscript{265}

\textsuperscript{263} White, supra note 108, at 158.


\textsuperscript{265} Barrett, Jr., supra note 114, at 836-37.
**Interest group.** 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,” and that “command-and-control” programs exploit “groups’ dependency on federal monies to convert them into supporters of federal measures.”

**Ineffective.** Finally, the legal critique adds a layer of concern about the efficacy of regulation. These articles argue that “command-and-control” regulation simply does not work, or, worse, that it may be “futile and self-defeating.”

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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).

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 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.

To ensure that this approach has not unwittingly masked a groundswell of critique of self-regulatory approaches, I reviewed each of these articles individually for their normative valence. Of the 263 articles that discuss self-regulation, 131 (50%) explicitly support self-regulatory programs, 119 (45%) mention self-regulation descriptively without arguing for or against it, and only 13 (5%) 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, or self-regulation. Below, I
provide the taxonomy of reforms included in each category and examples of articles discussing each reform.

The **deregulation** code is synonymous with the **deregulation** category. Articles are coded **deregulation**\(^{271}\) 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.

**Liability-based regulation**\(^{272}\) similarly represents both a reform proposal as well as a distinct category of reform that looks to the tort system to regulate private conduct.

**Market-based regulation** encompasses a number of specific kinds of reforms, including: trading schemes\(^{273}\) in which regulators create and oversee a market in pollution credits that can

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be freely traded among regulated firms; regulatory taxes,\textsuperscript{274} articles that mention the use of "markets" or "incentives" as regulatory tools.\textsuperscript{275}

Finally, \textit{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\textsuperscript{276} or by private-sector groups;\textsuperscript{277} self-


\textsuperscript{276} For example, EPA’s \textit{Performance Track} * requires applicants and members to demonstrate a commitment to continuous environmental improvement by implementing policies and systems that go beyond regulatory compliance." (EPA, \textit{PERFORMANCE TRACK MEMBER ENVIRONMENTAL COMMITMENTS} (2006), http://www.epa.gov/oig/reports/2007/20061114-2007-P-00003.pdf). The Food and Drug Administration (FDA) sponsors the \textit{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. (FDA, \textit{NATIONAL SHELLFISH SANITATION PROGRAM MANUAL OF OPERATION} (1995)).

\textsuperscript{277} Examples of solely private sector standard-setting include \textit{Responsible Care}, an initiative of the chemical industry, the ski industry' \textit{Sustainable Slopes}, and the \textit{Hotel Green Leaf Eco-Rating Program}. 
policing or internal compliance monitoring; information-based regulatory schemes that seek to mobilize private citizens to enforce standards of conduct on regulated entities; and stakeholder participation programs that shift standard-setting or enforcement responsibilities to private citizens.

278 For example, United States Department of Agriculture’s Hazard Analysis and Critical Control Point Program (HACCP) and OSHA’s Voluntary Protection Program (VPP).

279 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.”); Errol E. Medinger, 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.”); Sunstein, supra note 128, at 535 (“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.”); David W. Case, Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective, 76 U. COLO. L. REV. 379, 428 (2005) (“market 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.”).
