Democracy and Industry Capture of the Executive

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Regulatory capture poses a significant risk to democratic institutions. Fundamentally, the problem is rooted in the discrepancy between corporate and regulatory obligations. Corporations have an obligation to create value for shareholders, while regulators have a duty to safeguard public welfare. These interests, however, often prove irreconcilable. As such, when executive bodies morph into increasingly pro-corporate instruments, regulators are unable to render their duty to the public. This paper will discuss the phenomenon of regulatory capture, the threat it poses to democracy, and prospective solutions for mitigating associated risks.

An Overview of Regulatory Capture

Regulatory capture is a phenomenon where regulators become unduly influenced by the industries they are tasked with regulating. The genesis of this theory is in George Stigler’s seminal 1971 article, “The Theory of Economic Regulation,” in which he observed that “the machinery and power of the state” serve as persistent coercive forces, posing a “potential resource or threat to every industry.”\(^1\) Private sector entities have accordingly developed sophisticated means to co-opt regulatory power.

Industry capture of regulatory bodies compromises regulators’ ability to safeguard the public good, in direct contravention of the democratic ideal of governance in the public interest. Industries, having much more at stake in regulatory decisions than the public, are more motivated to invest resources into influencing regulatory processes. Despite the significant collective interest of the public in favorable regulatory outcomes, industry efforts often go unchallenged due to a variant of the “collective action problem”—where constituents fail to coordinate as a collective to oppose detrimental policy measures due to interest diversity and a widespread diffusion of prospective negative effects.\(^2\) When industry interests lack coordinated opposition from the public, policymaking power is at a particularly high risk of industry capture.

Elmer Schattschneider detailed a similar scenario in *Semisovereign People: A Realist’s View of Democracy in America* with his theory of “scope of conflict.”\(^3\) The theory posits that the degree to which corporate interests influence a specific policy outcome is inversely correlated to the degree of public involvement. Viewed through the lens of scope of conflict theory, regulatory capture can be seen as a natural consequence of insufficient public involvement in policymaking.

Regulatory capture can alternatively be viewed as arising from some variation of the “principal–agent problem”—a scenario where (1) a principal (here, Congress) cannot perfectly monitor the actions of its agent (here, the regulatory agency to whom Congress has delegated power) and (2) the two have

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imperfectly aligned interests. Regulators have vastly different incentives from Congresspeople, and so routinely take actions unaligned with legislative branch incentives. Most importantly, Congresspeople, as a function of electoral democracy, have a strong interest in maintaining constituent support. In contrast, regulators are unelected and thus not directly bound to constituents. Instead, regulators' professional success can become dependent on whether and to what extent they appease industry. For example, the “reversing door” dynamic, the movement of industry insiders into regulatory jobs and regulators into industry positions, can encourage regulators to promulgate policies favorable to industry. The divergence of the private and public sector interests puts the executive branch at particular risk of industry capture.

Means of Capture

Industries can co-opt regulatory power through various means, including monopolies on technical expertise, information asymmetries, and cultural capital. Industry’s monopoly on technical expertise interferes with regulators’ ability to determine whether prospective solutions benefit the public. Information asymmetries enable industry to consciously shape policies to their benefit. Cultural capital, in the form of personal relationships and shared norms, can subtly push regulators to serve industry.

Monopolies on Expertise and Information

A monopoly on technical expertise, a scenario where most subject matter experts have ties to a corporation or the industry more broadly, can influence regulators’ decision-making. For instance, an agency tasked with regulating the market of a specific pharmaceutical product may be restricted to a highly limited pool of people on whom it can rely for relevant information. Outside of the corporation’s chemists and researchers, there are few others with sufficiently specialized and comprehensive subject matter expertise with whom to consult. This kind expertise monopoly forces regulators to rely on information from experts with industry-aligned interests, which can cause regulations to reflect selective or even misleading information.

Further, Industry-associated experts also often have insider understandings of the impacts of proposed regulatory schemes. Because regulators naturally lack access to this information, it can be difficult, if not impossible, for regulatory bodies to discern whether information is colored by private sector interests. This form of information asymmetry can contribute significantly to regulatory capture.

Cultural Capital

Besides information asymmetries and the principal-agent problem, James Kwak posits in Cultural Capital and the Financial Crisis that an oft-overlooked, yet significant, source of regulatory capture is “cultural capital”—what some alternatively call “cognitive capture.” Through in-group identification,
deference to status, and relationship networks, Kwak argues that industry interests subtly influence regulators to promulgate policies favorable to industry.

In-group identification, when regulators and industry members see themselves as part of the same social or professional group, leads to a set of shared norms and biases—what Kwak terms “in-group conformity.” These shared norms can lead to an overly cooperative regulator-industry dynamic and increase the risk of regulatory capture.

Further, since industry members typically possess higher levels of education and are paid significantly more than regulators, regulators may view industry members as possessing higher levels of expertise or social status. This can lead regulators to exhibit a (perhaps undue) degree of deference to industry representatives. The practical effect of this deference is that regulators are more likely to view industry input as commands.

Relationship networks can also influence regulator’s thinking through creating bonds of trust, reciprocity, and mutual understanding between regulators and industry members. This dynamic can clash with the regulators’ directive to protect the public interest. Rather than viewing industry as a set of corporate interests and considering potential threats to public wellbeing, regulators often come to see industry through the lens of the personal and professional relationships they have developed with industry representatives.

Kwak contends that cultural capital can influence even those with the sincerest of intentions. He observes how, as a general matter, people more often adapt their beliefs to their actions than vice versa. Kwak provides the example of a regulator who “sees her job as protecting ordinary people” adopting the position that “free markets are good for ordinary people” so as to be able to side with industry without experiencing cognitive dissonance. Rather than siding with industry in lieu of siding with ordinary people, a regulator might rationalize that pro-industry actions also benefit the public.

**Regulatory Capture and Democracy**

When the executive becomes captured, the interests of the populace are insufficiently reflected in regulatory decision-making. When regulations insufficiently reflect the interests of those they should be structured to benefit, democracy does not function as intended. In *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, Martin Gilens and Benjamin Page argue that the collective political influence of the populace over the executive is trivial, if not zero. Instead, they posit, “economic elites” and “organized interests” have what amounts to a monopoly on regulatory power.10

Through statistical modeling, Gilens and Page approximate the respective impacts of popular, economic elite, interest group, and industry support for policies. Their findings indicate that nearly all policy outcomes in line with popular will also had broad support among industry, interest groups, and the economic elite—a phenomenon they term “democracy by coincidence.”11 When popular interests were at odds with those of industry, interest groups, and the economic elite, popular interests

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9 Kwak, p. 94.


11 Gilens and Page, p. 573.
prevailed in a statistically insignificant number of instances.

Accordingly, Gilens and Page argue there is no meaningful causal relationship between (1) popular support for prospective policies and (2) regulatory outcomes. If accurate, this poses serious questions for the future of democracy. While even the least cynical among us are aware that legislative and regulatory priorities are affected to one degree or another by private sector interests, most of us like to believe that the populace ultimately mans the levers of power. Gilens and Page’s research persuasively demonstrates that such an assumption is flawed, if not false.

Gilens and Page do not address, however, what would seem to be an important counter-consideration—that industry and interest group preferences may evolve to reflect those of the public. An example of such is the institution of gay marriage. Throughout much of the 20th century, Americans were firmly opposed to the right of same-sex couples to marry. But when public sentiment firmly swung in favor of marriage equality in the 2000s, corporations began to lobby for gay marriage rights.12 When considering this shift in the context of the history of public opinion, the alignment of corporate and public support was far from democracy by coincidence, but public preferences informing corporate preferences.

Another such example is in lobbying efforts for environmental deregulation. As public support for climate change interventions grew in the early 21st century, some industries began to advocate much less frequently and forcefully for environmental deregulation. Some automobile manufacturers began to support lobbying efforts for stricter air pollution standards and emission requirements.13 Indeed, ExxonMobil even advocated for rejoining the Paris Agreement.14 These and like initiatives almost certainly would not have had shareholder support were it not determined that the public good will engendered by these efforts justified the cost.

While none of this nullifies the concerns for democracy that Gilens and Page raise, it does call into question their argument that public preference has a totally acausal relationship with regulatory outcomes. That is, if corporate support can be a product of public support, then the fruits of some corporate lobbying efforts (or cessations thereof) are, by proxy, the public’s fruits. Even so, Gilens and Page’s research highlights both that (1) the executive is captured by industry interests to a significant degree and (2) this capture results in a certain amount of disenfranchisement of the populace.

The Future of Regulatory Capture Reform

Among forms of corporate influence, regulatory capture is uniquely difficult to address. It is almost impossible after the fact to prove that a given policy was “clearly not in the public interest”15 at the

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15 Kwak, p. 73.
time of its inception. This is true because of the probabilistic nature of policy outcomes—that is, “bad outcomes are not proof of bad policy.” Further, even policies promulgated based on weighty private sector influence can fall “within the range of plausible disagreement about the public interest.” Uncovering capture can itself be difficult and challenging it even more so.

One promising set of solutions, consumer empowerment programs, would increase the representation of consumer interests in regulatory decision-making, either by establishing executive organizations to advocate for consumers (proxy advocacy) or by elevating the status of public interest groups (tripartism). Proxy advocacy involves establishing executive organizations that represent the interests of consumers in regulatory decision-making processes. Such entities would advocate on behalf of consumer interests: voicing their concerns, defending their rights, and ensuring their needs are given due consideration. Tripartism could be used to split industry lobbying resources between regulators and public interest groups, thereby lessening industry influence over regulations.

Proxy advocacy as a prospective solution for regulatory capture has been extrapolated from small proxy advocate systems already in place. An example of such is OPIC, an independent agency in Texas that represents insurance consumers. Though it lacks formal regulatory authority, OPIC has measurably impacted policy outcomes. For instance, OPIC was the driving force behind “a rule change that reduced the time within which health plans [were required to] respond to requests for verification.”

Scholars argue that the success of a proxy advocate is largely contingent on the number of procedural rights it is granted—for instance, to participate in notice-and-comment rulemaking, hearings, and appealing decisions. Without such rights, proxy advocates “lack leverage with which to negotiate.” With sufficient leverage, proxy advocates hold significant promise as a tool for representing consumer needs in sectors where consumers lack the requisite expertise, resources, or time to meaningfully engage in regulatory decision-making.

Tripartism empowers public interest groups to participate in negotiating regulations and to serve as a non-governmental, quasi-regulatory check on industry behavior. Empowering special interest groups would reduce regulatory capture by requiring “industry to expend resources to capture two separate groups” (regulators and public interest groups) and by promoting “a spirit of ‘regulatory communitarianism’ among regulators, industry, and empowered [public interest groups].” In conjunction with proxy advocacy, tripartism could serve as a useful tool to counteract disproportionate industry influence in regulatory decision-making.

Some prospective solutions address the causes of regulatory capture, such as the revolving door dynamic and cultural capital. For example, to limit the impact of the revolving door dynamic,

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16 Kwak, p. 73.
17 Kwak, p. 74.
18 Kwak, p. 73-74.
20 Schwarcz, p. 15.
21 Schwarcz, p. 35.
22 Schwarcz, p. 35.
23 Schwarcz, p. 7.
24 Schwarcz, p. 7.
25 Schwarcz, p. 7.
agencies could offer salaries “similar to those paid by the regulated entities.”26 Because industry framing is especially likely to persist where there are “policy voids,”27 reframing policy discussions to emphasize the advancement of the public interest could limit the influence of industry cultural capital.

Conclusion

Regulatory capture, a phenomenon where executive bodies become unduly influenced by the industries they are tasked with overseeing, poses a substantial threat to the democratic ideal of governance in the public interest. The phenomenon highlights the inherent tension between corporate obligations to shareholders and regulators’ duty to safeguard the public welfare. Capture can take several forms, ranging from industry monopolies on technical expertise to subtler cultural influences, each contributing to the current compromised state of the executive—the arm of government arguably most susceptible to the influence of the private sector.

Regulatory capture is one of the more difficult forms of corporate-political distortion to address. Successfully combating regulatory capture requires innovative solutions that target the phenomenon from multiple angles. Proxy advocate and tripartite consumer empowerment models offer a promising way of ensuring sufficient representation of consumer interests in the regulatory process. Other approaches that address the “revolving door” dynamic and prioritize reframing policy discussions around the public interest could also mitigate capture. Ultimately, though, the executive branch has a culture of industry participation that has shown itself to be persistent in the face of change.

26 Scott Hempling, “Regulatory Capture”: Sources and Solutions, 1 Emory Corp. Governance & Accountability Rev. 23, p. 34 (2014).
27 Hempling, p. 33.