

Chapter 1:
**Governing Without Commands or Controls:
The Emergence of Self-Regulation as Reform and Justification**

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“Command-and-control” is widely used short-hand in contemporary legal and policy communities for all the ills of the regulatory state. While the term purports to describe regulatory practices dating as far back as the Great Society (Cooter 1994), the New Deal (Estlund 2005; Stever 1994), or even World War I (Griffin 1999), it arrives quite late on the scene. The term does not appear in a law review article about regulation until 1980, right around the time regulatory reform bursts onto the national stage as a touchstone of Ronald Reagan’s presidential campaign and a top priority of his economic agenda.

It is around this same time that lawyers begin to enter the national conversation on regulation in greater numbers. The critique of regulation has been brewing for several decades, developed by post-War economists concerned with the cost of regulation and its coercive aspects and taken up by politicians in the 1970s in the face of economic and political crises. Lawyers engage these critiques from a unique vantage point and shape them in significant ways. While many make virulent critiques of regulation, members of the legal profession remain key agents and beneficiaries of the regulatory state. As regulatory critiques begin to erode time honored justifications for the administrative state, the legal critique of regulation becomes a site not only for criticism of regulation, but a struggle to articulate new and better reasons to regulate.

Since the inception of the U.S. regulatory state, administrative agencies have suffered from a legitimacy deficiency (Merrill 1996, Landis 1938). Staffed by unelected officials,

endowed with jurisdiction over myriad social and economic activities, and performing legislative, enforcement and adjudicative functions all under one roof, agencies are hybrids that fit uneasily into a government deeply rooted in notions of democratic accountability and separation of powers. As a result of their tenuous position in the U.S. political system, agencies have long labored been under an especially onerous burden to justify their existence. During the New Deal and for several decades afterwards, proponents of the regulatory state justified agencies on “public interest” grounds, namely, that they are uniquely situated to act in the public interest given their combination of expertise, professionalism and insulation from the vagaries of politics (Landis 1938, Stewart 1975, Merrill 1996, Niles 2002). From the mid-twentieth century onwards, however, a variety of different critiques begin to erode the public interest justification for agencies (Niles 2002). Taken to their logical conclusion, these critiques deprive the regulatory state of its basis for governing. This Chapter is about how the legal critique of “command-and-control” regulation fosters the concept of “self-regulation” as both a reform policy and a new justification for the regulatory state. By redefining the boundaries between public and private, regulator and regulated, self-regulation represents a renewed attempt at regulation in the “public interest.”

This Chapter proceeds as follows. Section I surveys the literature on justification as a social practice and an imperative for political action. It will argue that the critique of regulation represents both a crisis of justification for the regulatory state, as well as a site for working out new grounds for regulating. Section II describes and justifies the study’s methodology. Section III presents the Chapter’s argument, including a brief genealogy of the term that forms the basis of the study, a review of the arguments about regulation circulating in economic and political

circles when lawyers join the debate, and the findings of my research. The final Section elaborates these results and ties them to the larger Dissertation.

I. Literature Review: Justifications for Governing

As I discuss in the Introduction, this Chapter fits into a larger story about how government policy emerges from a process of translation – through the dialogues and exchanges that occur within and across networks of individuals, professionals and their ideas as they attempt to link themselves to one another in durable alliances (Bockman and Eyal 2002). The study presented in this Chapter focuses on one such dialogue: the legal critique of regulation. This is a pivotal dialogue, because it reflects both a crisis in the bases for the regulatory state and the struggle to find both new technologies and new justifications for governing.

The practice of “justification” is central to the sociology of Boltanski and Thévenot, who use this term to represent the arguments actors make in support of their actions and critiques and the evidence they enlist in support of their arguments. For Boltanski and Thévenot (2006), justification is central to understanding social and political action, for it enables actors to communicate, argue, negotiate and potentially agree with one another, while at the same time constraining the terms on which they might do so. In short, the “imperative to justify ... underlies the possibility of coordinating human behavior” (Boltanski and Thévenot 2006:37). In this way, justification can also be seen as a crucial mechanism of translation.

When actors seek to connect themselves with others, they draw on a dynamic (but limited) repertoire of arguments to transform their particular, localized issues into more generalized concerns that may enlist the support of a broader range of actors. Many of these justifications have a familiar ring, because they get rehearsed over and over again in different

contexts, by different actors, toward different ends. Boltanski and Thévenot (2006) articulate six distinct regimes of justification, which they argue account for the vast majority of arguments actors make to support their actions or critique the actions of others.¹ Each regime is governed by its own overarching conception of what is good or valuable, and actions conducted under the auspices of a given regime are evaluated against these measures.

Conflict arises when arguments or measures of worth from one regime are imported into the context of another. For instance, Boltanski and Thévenot observe a constant tension between justifications drawn from the public sphere, which values selfless devotion to the public interest, and those drawn from the private sphere, which values honor and loyalty based on personal ties.² Personal bonds and interests that are perfectly acceptable for justifying action in the private sphere are seen as disqualifying participation in the public sphere. They note, for example, that in public scandals, “critiques could always be reduced, schematically, to the exposing of personal bonds and consequently of interests that, from the civic standpoint, necessarily appeared to be selfish” (Boltanski and Thévenot 2006:10).

As this example suggests, critiques emerge when the standards and practices of one regime of justification are assessed by the values of another. Critique plays a pivotal role in the practice of justification, representing both a momentary crisis in justification and an opportunity

¹ These include the following: (1) inspired, which encompasses creative and religious activities; (2) domestic, which includes family and other private affairs; (3) fame; (4) civic, which includes public and governmental activities; (5) market, which includes trade and other activities measured by price; and (6) industrial, distinct from market, which encompasses activities of production judged by their efficacy and efficiency. I sometimes refer in this paper to the “civic” and “domestic” regimes as “public” and “private,” respectively.

² In Boltanski and Thévenot’s terminology, “public” and “private” are “civic” and “domestic,” respectively.

for change through the realignment of justifications (Boltanski and Thévenot 1999). When justification fails, social action fails. Consequently, when a critique succeeds in undermining the justification for longstanding political arrangements, a new justification must be found, or new arrangements must be made. I will argue here that the legal critique of regulation is a part of a broader effort by lawyers to articulate new and tenable justifications for regulation in the wake of a crisis of justification.

As with other kinds of actors, the state's ability to act depends on its ability to justify its actions – perhaps even more so, because democratic states are saddled with the imperative of legitimacy. As Nicolas Rose puts it, “[t]o govern, one could say, is to be condemned to seek an authority for one's authority” (1999:27). In Boltanski and Thévenot's (1999:364) terms, this means that the state must articulate widely accepted justifications for its actions. Administrative agencies have long been justified on “public interest” grounds typical of those invoked as the paramount virtue in Boltanski and Thévenot's public or “civic” regime. However, since the mid-twentieth century, several different critiques have undermined this long-standing justification. Agency capture theory and public choice theory, suggest that agencies are not “public spirited” at all, but rather infected by selfish, “private” interests. Economic theory goes further, questioning “public interest” as an appropriate measure of worth and suggesting that it be replaced by alternate yardsticks like price or efficiency. In these ways, the critique of regulation represents a classic crisis of justification. If the regulatory state is to continue to act, it must negotiate a consensus around new justifications that will allow it to govern legitimately.

I will demonstrate below how the legal critique of “command-and-control” regulation becomes an occasion for shoring up the justification for the broader project of regulation as it

searches for new ways to regulate. Rose (1999:61) observes that “the ethics of freedom have come to underpin our conceptions of how we should be ruled,” forming the dominant justification for governing in our age. I will argue that self-regulation emerges as a technology for governing through freedom by offering the promise of governing without commands or controls.

II. Methodology: Constructing the Database and Coding Procedures

This Chapter is based on a database of excerpts from all law review articles that discuss “command-and-control” regulation. I focus on law review articles for three reasons. First, this Dissertation is an account of the role lawyers play in constructing self-regulation as a viable legal and policy paradigm, and law reviews provide a comprehensive snapshot of prevailing views in the legal community. As discussed in the Introduction, lawyers are key players in developing and implementing law and policy, occupying diverse roles including: staffers drafting legislation (Yoo 1998), agency attorneys drafting and enforcing regulations (Macey 1998), legal practitioners litigating cases that define their clients’ legal responsibilities (Zemans and Rosenblum 1981), and judges interpreting and enforcing the laws and regulations that comprise the regulatory system. Law reviews are the primary vehicle for publishing legal scholarship, and they contain the writing not only of legal academics, but of a broad range of practitioners and law students as well.³

³ Another characteristic of law reviews that makes them a particularly valuable artifact of social trends is that they are student edited. This has two implications which distinguish them from most other scholarly journals. First, these law reviews have an extremely short institutional memory. Second, they do not have a centralized network of expert gatekeepers monitoring the flow of scholarship. If an idea catches fire in the legal community, journals will publish on the topic without regard to what other scholarship is out there. In this way, the format captures the

Second, law professors, who produce the bulk of law review scholarship, occupy a unique position in the legal profession that has no parallel in other professions. Since the advent of modern legal education in the early twentieth century, law 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” (Chase 1982:19) the often confusing and conflicting opinions of the judiciary. Chase (1982) suggests that the commentary of law professors shaped the direction of the administrative state, notably its independence from the judiciary, in the early twentieth century. While contemporary law professors may no longer enjoy such status in the profession, neither are they mere commentators. They continue to play a central role in the legal system, reconciling disparate legal decisions in a way that makes the body of law appear rationalized, coherent, and thus neutral and autonomous (Bourdieu 1987).

Finally, law reviews are critical agents of translation in linking different groups of actors and ideas to one another. First, unlike many academic journals, law reviews are broadly interdisciplinary. Legal scholars borrow ideas from a broad range of other academic disciplines (like history, economics and sociology) and translate them for a legal audience. Second, although law reviews publish academic work, they circulate widely among practitioners in ways that other academic journals rarely do. Practicing lawyers and judicial clerks researching new legal questions often turn to law reviews for an overview of the field, and judges sometimes cite them in legal opinions (see Panel Discussion 2000). In this way, they provide the opportunity for linking a whole range of different actors and ideas.

way ideas “snowball” within the legal community.

I constructed my database through a LEXIS-NEXIS search of all U.S. law review articles using a variety of search term combinations designed to retrieve as many relevant articles as possible, while minimizing the number of off-topic article hits.⁴ The search I ultimately ran sought all articles that used the term “command and control” within the same sentence as any form of the word “regulation.”⁵ After weeding out a small number of irrelevant articles by hand, this yielded a sample of 1,389 articles between 1980 and 2005.

In order to create a manageable database for coding purposes, 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 through the LEXIS “KWIC” function. 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.

I 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? 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

⁴ The biggest difficulty was eliminating articles arising from military tribunals discussing the structure of “command and control” in a particular unit.

⁵ The exact search, in LEXIS-NEXIS syntax: “command and control” w/s regulat!

described in more detail in the text below.

Arguments For and Against “Command-and-Control”

PRO (64 Articles)	CON (66 Articles)
<ul style="list-style-type: none"> • Effective • Moral • Necessary • Technology Forcing 	<ul style="list-style-type: none"> • Backlash • Bureaucracy • Coercive • Costly • End-of-Pipe • Ineffective • Inefficient • Information issues • Interest group • Legalistic • Passé • Uniform

Articles are coded “pro” if they explicitly advocate the use of “command-and-control” regulation or make only positive arguments about it. Similarly, articles are coded “con” if they explicitly argue against the use of “command-and-control” regulation or make only negative arguments about it.⁶ Articles are coded neutral if, overall, they neither advocate nor denigrate “command-and-control” regulation and if they make both positive and negative arguments about it. Also coded “neutral” are articles that simply use the term “command-and-control” without

⁶ There are a few exceptions to this rule. A handful of articles were coded “con” even though they stated that the use of “command-and-control” regulation was “necessary” (otherwise a positive code), because their admission of necessity was so grudging.

discussing it.

I identified which arguments to code for based on a review of research that is widely cited in the literature on “command-and-control” regulation (e.g. Ackerman 1981, Stewart 1981, Breyer 1982, Ackerman and Stewart 1985, Latin 1985, Ayres and Braithwaite 1992), 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.

III. Argument

Constructing “Command-and-Control”

The first law review article to use the term “command-and-control” in the regulatory context defines the term as follows:

“Command-and-control regulation” is a currently popular label for the traditional (and contemporary) mode of legislative intervention in environmental problems. As the phrase perhaps implies, this regulatory approach typically proceeds by imposing rigid standards of conduct on individual pollution sources (e.g., standards requiring that sources meet a specified emission ceiling, or that they use a specified control technology) backed up by sanctions designed to assure full compliance with such standards by each source. (Krier and Stewart 1980)

This definition arises in the context of environmental law, as much work on “command-and-control” does, but it is nearly identical to definitions in other fields. While the vast majority of articles that use the term make no attempt to define it, those that do uniformly stress that a “command-and-control” system is both coercive and punitive. This broad, vague definition tells us little about the regulatory practices it characterizes. Moreover, it fails to distinguish “command-and-control” regulation from other forms of law promulgated and backed by the coercive power of the state. Some legal scholars have questioned whether the term “command-

and-control” has any real substance and suggest that it simply serves as a foil for those disinclined toward the regulatory state (Driesen 1998, Sinclair 1997).

The term “command-and-control” itself does not inherently carry the pejorative meanings lawyers attach to it. As lawyers build a critique of regulation around it, they highlight particular usages and ignore others. Outside the regulation debate, the term “command-and-control” has been used in a variety of fields, with different functions and meanings. It originates as a military term: a noun that designates (rather than an adjective that describes) organizational decision-making and implementation processes. It is, in essence, a mechanism for achieving objectives within large and unwieldy organizations. Effective command and control is seen as absolutely essential to the successful completion of military missions. “

Command and Control is about focusing the efforts of a number of entities (individuals and organizations) and resources, including information, toward the achievement of some task, objective, or goal" (Alberts and Hayes 2006:32). 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 (Alberts and Hayes 2006).

A number of academic disciplines have borrowed the military terminology 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 (e.g. Sassen 1991). 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 hierarchical layers of staff, budgets and controls (Drucker 1988).

“Command-and-control” has become quite common across the broader range of management literature, where it takes on connotations similar to those in the legal context. Here, it describes a rigid, hierarchical management style that is mostly maligned. Recent commentary by management consultants unfavorably contrasts “command-and-control” approaches, said to stifle creativity and lead to resentment and defiance, with preferred approaches like “leading” (Bolton 2005) or “coaching” (Aldisert 2000), designed to help employees and organizations reach their full potential. Bolton (2005), for instance, 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” (Bolton 2005:81). Instead, he advises managers: “If you want results from people, you need to lead them, not control or manage them” (Bolton 2005:81). Another consultant warns that “[i]ndividuals’ imagination and interest do not thrive in command-and-control structures” (Aldisert and Helms 2000:36). Instead, she urges clients to “[i]magine a work environment when everyone is committed to a common goal” (Aldisert and Helms 2000:36).

Even in this literature, however, the “command-and-control” approach has its advocates. In an article praising railroads for their effective response to Hurricane Katrina, Kaufman (2005:14) credits their “command-and-control” management structure for their ability “to achieve that mission quickly, efficiently and economically.” In this alternative characterization of “command-and-control,”

policies 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. An

equally valid description would be that the railroad management system is one of responsibility and accountability. (Kaufman 2005:14)

“Command-and-control” loses many of these layers in the debate on regulation. Gone is the military sense that command and control are functions essential to accomplishing goals involving the coordination of large-scale organizations. Gone is the sense that clear channels of command and control make organizations nimble, responsible and accountable. As the critique of regulation develops, what remains is a concern about the “tight rein” of “command-and-control” restricting freedom.

Existing Economic and Political Critiques of Regulation: Cost vs. Coercion

This was not always the crux of regulatory critiques. The contemporary critique of regulation dates to the post-war Chicago School economic scholarship that formed the intellectual basis of the deregulation movement. This critique is grounded in two distinct strands of argument: one about cost and one about coercion. Although economic theory provides a basis on which to join the two, and some critiques explicitly attempt to do so (e.g. Stigler 1971), the different strands remain relatively discrete and identifiable in the literature, and they each have a distinct tenor and implications.

Cost-based arguments criticize regulation both its expense and for the way it interferes with market pricing structures. These critiques typically arise out of empirical economic subdisciplines, and they target the means of implementing regulatory goals rather than the goals themselves. Economists make a variety of different cost-based arguments about regulation, including that it: raises prices (Buchanan and Tullock 1975); generates aggregate costs in excess of its social benefits (Coase 1977); generates market inefficiencies (Dales 1968); and undermines

economic growth (Kneese and Schultze 1975).

For these critics, both the problem and the solution reside in price. In the environmental context, for instance, economists write:

The problem is not that the price system does not work – it works with marvelous efficiency, but in the wrong direction. When the signals it sends out indicate that air and water are free goods, thousands of firms and millions of consumers bend their efforts to use those cheap resources. (Kneese and Schultze 1975:5)

In this view, the solution is to devise market-like mechanisms that will “modify the incentives facing private decision makers so that in hard dollars and cents it pays them to reduce pollution and costs them dearly not to” (Kneese and Schultze 1975:2). In this vein, the cost strand of the economic critique generates an extensive literature on “market-based” regulatory alternatives to “command-and-control” regulation, such as regulatory taxes and fees (Kneese and Bower 1968) and property-based trading schemes (Dales 1968).

While the cost-based strand of the economic literature is highly critical of regulation, its concerns focus on the means of effectuating regulatory goals. By contrast, arguments about coercion seek to undermine the very legitimacy of those goals and the governmental institutions charged with achieving them. Coercion-based critiques argue that bureaucratic agencies are inherently corrupt and, worse, that regulation poses a threat to the freedom of all citizens. The first concern arises out of a public choice analysis that questions the ability of ostensibly democratic agencies to govern in the “public interest.” In his “Economic Theory of Regulation,” for instance, Stigler (1971:3) argues that administrative agencies are essentially pawns of the industries they regulate: “[R]egulation is acquired by the industry and is designed and operated primarily for its benefit.” Stigler pushes this argument further, drawing on the work of Austrian economist Friedrich Von Hayek to suggest that regulation threatens the freedom of all citizens:

"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" (Stigler 1975:5).

Taken together, these strands of the coercion argument suggest that "the democratic sphere is, at its core, an arena of theft, an unmitigated disaster that should be limited carefully, tolerated only if fundamentally powerless" (Kelman 1988:202). The reform that best satisfies these concerns is a withdrawal of the state from economic life, and for this group of critics that means deregulation. As one legal commentator put it, "George Stigler wanted to repeal most regulations and Charles Schultze wanted to improve them" (Cooter 1994:136).

Both the cost and coercion strands of the economic critique survive importation into the political discourse of the 1970s and 1980s. Newly created think tanks like the The Heritage Foundation ("Heritage") and the American Enterprise Institute ("AEI") played a crucial role as translators, connecting academics and their ideas with politicians and the public (Campbell 1998:388). In the 1970s and 1980s these organizations focused squarely on the costs of regulation. Books, articles and lectures coming out of Heritage and AEI sought to estimate the actual costs of regulation to business and government, as well as its ancillary, macroeconomic consequences for growth, productivity, employment and inflation. In *The Cost of Federal Regulation of Economic Activity* (Weidenbaum and DeFina 1978), for instance, two AEI economists estimated that the administrative and compliance costs of federal regulation in 1979 would be roughly \$100 billion, a number that became widely cited as an example of regulatory excess (Derthick and Quirk 1985).⁷ Well into the 1990s, cost remained the paramount concern

⁷ See Heinzerling (1998) for a critique of these kinds of calculations.

of the think tanks, which criticized the Reagan and Bush I administrations for failing to pursue a sufficiently deregulatory agenda. “This new regulatory build-up is taking an increasing toll on the economy. It is like a hidden tax. And just like a tax, regulation raises the prices paid by consumers” (Laffer, III 1992:1). It is not until the 1990s that the thinks tanks begin to produce more discourse on “how regulations, in fact, undermine this country’s tradition of freedom” (Hudgins 1992:2).

Presidential rhetoric of the 1970s and 1980s likewise reflects concerns about both the costs and the coercive aspects of regulation. In his 1979 memoir, President Ford recalls the regulatory issues he faced as president:

Rules and regulations... were costing taxpayers an estimated \$62.9 billion per year, ... were increasing the cost of doing business ... and thus contributing to inflation, ... were perpetuating huge bureaucracies ... stifling American productivity, promoting inefficiency, eliminating competition, and even invading personal privacy. (Gerald R. Ford, *A Time to Heal*, Harper & Row 1979:271, cited in Derthick and Quirk 1985:30)

And President Reagan elevates regulatory reform to the pinnacle of the national agenda by making it a touchstone of his campaign and his administration.

Government regulation, like fire, makes a good servant but a bad master. No one can argue with the intent of this regulation--to improve health and safety and to give us cleaner air and water-but too often regulations work against rather than for the interests of the people. When the real take-home pay of the average American worker is declining steadily, and 8 million Americans are out of work, we must carefully re-examine our regulatory structure to assess to what degree regulations have contributed to this situation. In my administration there should and will be a thorough and systematic review of the thousands of Federal regulations that affect the economy. (Reagan Speech 1980)

As regulation gains an increasingly high profile on the national political stage, lawyers begin to join the debate in greater numbers.⁸ When they do, they join an ongoing economic and

⁸ To be sure, there were prominent legal participants in this debate prior to 1980 (e.g. Posner 1969, Calabresi 1975, Breyer 1979, Stewart 1975). However, lawyers do not join the debate in substantial numbers until much later. And their views are not reflected in law review

political critique that has managed to retain its dual concerns about costs and coercion. In the Sections that follow, I will show how lawyers translate the existing critiques in a way that privileges arguments about coercion, but links them to the practices of “command-and-control” rather than using them to undermine the authority of the regulatory state.

The Anatomy of the Legal Critique

There are five different types of arguments made against “command-and-control” regulation: economic, pragmatic, normative, structural and temporal. Economic arguments include *cost* and *inefficiency*. Articles coded *cost* state that “command-and-control” regulation is too expensive or that it is not cost-effective, and articles coded *inefficiency* make the economic argument that “command-and-control” regulation is inefficient or causes inefficiencies in the operation of regulated businesses or markets. Articles also raise pragmatic arguments that are not specifically economic. Articles coded *ineffective* argue that “command-and-control” regulation simply does not work. Commentators also criticize “command-and-control” for its *end-of-pipe* approach to policy. This metaphor invokes pollution discharge out the end of a pipe, and describes a regulatory approach that attends to problems only after the fact and fails to address root causes.

While economic and pragmatic arguments question “command-and-control” as a means of implementing policy, normative arguments more broadly question the legitimacy of that policy and of implementing agencies structured by “command-and-control.” Normative

scholarship on “command-and-control” regulation until 1980. Chapter 2 discusses in greater detail the cross-fertilization of legal and economic ideas, including the Law and Economics movement, of which these lawyers were pioneers.

arguments include: regulation is *coercive*, causes *backlash*, and is the product of *interest group* pressure. Articles coded *coercive* criticize “command-and-control” regulation for the way it limits the freedom of regulated entities. Articles coded *backlash* take this argument a step further, suggesting that because “command-and-control” regulation is so stringent, defiance of regulatory authorities is understandable, if not justified. Finally, articles coded *interest group* make public choice theory critiques of legislative and administrative processes, arguing that agencies are especially vulnerable to pressure from rent-seeking industry incumbents and highly organized non-governmental organizations that lobby agencies in their own interests. When agencies become mere tools of these interests, they allocate resources unfairly and relinquish their claim to act in the public interest.

Structural arguments highlight the inherent limitations of a “command-and-control” approach to regulation. *Bureaucracy* reflects concerns about the ability of a centralized authority to govern a large and diverse constituency and about the kinds of incentives motivating bureaucratic staff. Several more specific concerns flow from bureaucratic structure. First, central authorities remote from the day-to-day operations they govern have trouble collecting the *information* they need to promulgate detailed standards. This forces them to enact *uniform* standards that apply across the board, irrespective of individual circumstances and exigencies. It also creates incentives for agency staff to apply these standards in rigid, *legalistic* fashion.

Finally, many articles make the temporal argument that “command-and-control” regulation is *passé*. These articles situate “command-and-control” as an historical relic, describing it as “traditional” or using evolutionary language locating “command-and-control” in a past generation.

The arguments made in favor of “command-and-control” are more straightforward and, for the most part, less highly theorized. They articulate long-standing justifications for regulation, but they do little to engage and counter arguments made in the critique. Articles coded *effective* argue that “command-and-control” regulation works or, at least, that it has accomplished the particular goals it was designed to achieve. Articles coded *moral* make normative arguments about the government’s obligation to regulate certain matters through “command-and-control” regulation. Many articles argue that, irrespective of the criticisms, “command-and-control” regulation is *necessary*, either because it is the only effective way to address a particular problem, or because it will continue to form the basis of the regulatory system even as alternatives are layered on top of it. Finally, articles argue that “command-and-control” is *technology-forcing*, encouraging companies to develop new technologies to meet legal requirements.

The discourse on “command-and-control” is a reform project as well as a critique, so many articles suggest alternative regulatory policies. However, these reforms are more than simply policy proposals. The discussion of reforms is also both implicitly and explicitly an exploration of alternative bases on which to regulate. The proposed reforms fall into four 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 the reform and justification of regulation.

Alternatives and Justifications

ALTERNATIVE	PRACTICES	JUSTIFICATION FOR STATE ACTION
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Deregulation	<ul style="list-style-type: none"> • Repeal laws • Withdraw agency jurisdiction 	No justification
Liability-Based Regulation	<ul style="list-style-type: none"> • Tort remedies 	Legitimate if grounded in private prerogatives
Market-Based Regulation	<ul style="list-style-type: none"> • Incentives • Markets • Regulatory Taxes • Trading • Subsidies 	Change values to make state commensurate with market: price and efficiency instead of “public interest”
Self-Regulation	<ul style="list-style-type: none"> • Voluntary programs • “Beyond Compliance” • Self-policing • Auditing • Information Disclosure • Contractual Regulation • Stakeholder Participation 	Redefines boundaries of public and private, giving regulator and regulated identity of interest, to rescue “public interest” justification for regulation

Deregulation envisions the repeal of laws and regulations and the withdrawal of legal authority from administrative agencies. Deregulation advocates argue that private affairs should be ordered and disciplined not by government, but by the forces of supply and demand in existing markets and the contractual arrangements of private parties. Of all the proposed alternatives, deregulation represents the most complete retreat of the state from what its advocates envision as a separate, private market sphere. It is the alternative that cannot imagine a justification for state regulation.

Liability-based regulatory schemes use the tort system to regulate private conduct. Instead of directing or prohibiting certain conduct, these approaches hold private parties legally liable for the 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. The tort system, like “command-and-control” regulation, can be quite punitive and relies

ultimately on the coercive power of the state. However, it is not coordinated by the state, relying instead on private citizens to recognize injuries and enforce norms on one another. In response to critiques that question the state's ability to regulate in the public interest, liability-based schemes justify state action by grounding it in private prerogatives.

While deregulation seeks to remove the state from markets, *market-based regulation* seeks to deploy the market as a regulatory tool of the state. The paradigmatic example of this approach is emissions trading, which requires regulators to create and oversee a market in pollution credits that can be freely traded among regulated firms. Also in this category 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. With these approaches, regulators attempt to “harness[] the power of the market” (Ratliffe 2004:1793) to achieve regulatory goals. These kinds of schemes attempt to salvage grounds for regulation by replacing “public interest” as the paramount virtue of government with market values like efficiency and price.

While *self-regulation* is not entirely distinct from market-based regulation, and is sometimes characterized as a particular type of market-based regulation, it has its own defining characteristics. Specifically, it shifts to private parties traditionally governmental responsibilities like standard-setting, monitoring and enforcement. Under this definition, self regulation includes voluntary programs that invite companies to go “beyond compliance” with existing laws, voluntary policing and reporting schemes, internal management systems, auditing, information-based approaches, and schemes to increase the involvement of community stakeholders in the regulatory process. At base, what these kinds of programs attempt to do is internalize key

aspects of the rule of law within regulated organizations. In this way, self-regulation provides a different kind of justification for regulation. By collapsing the distinction between regulator and regulated, ostensibly aligning their interests, it redefines and potentially salvages a sort of “public interest” justification for regulation.

In their discussion of these alternatives, the articles articulate a number of different justifications for them: they promote *cooperation* between the regulators and the regulated; they are *cost-effective*, or less costly than “command-and-control;” they are *effective*; they are *efficient*, or they help regulated firms to operate with greater efficiency; they are *flexible*, providing the consuming public and “individual regulated entities more opportunity to choose” (Aman 2000:1494); they promote *innovation*, spurring regulated industry to create innovative technological solutions to problems “command-and-control” has not successfully regulated; they are *new* policy instruments, often described as “innovative” or “next generation;” finally, they promote *responsibility* among regulated entities.

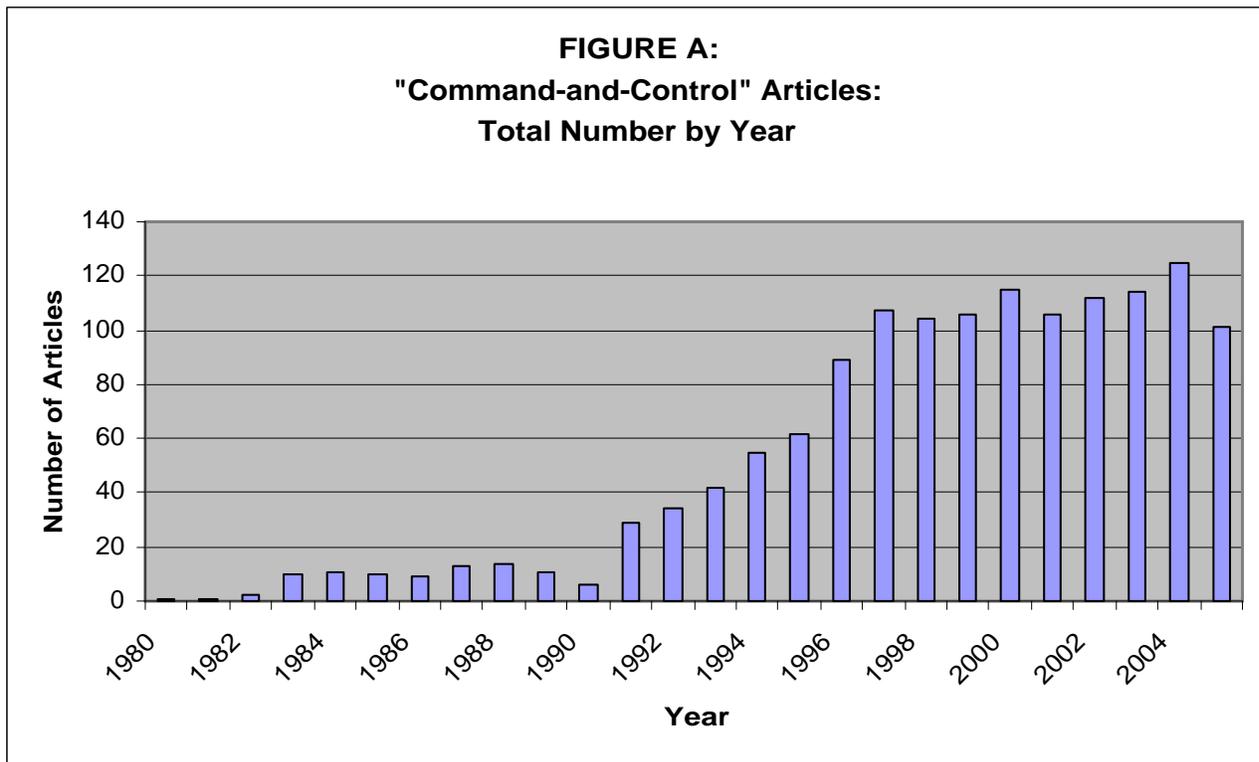
The remainder of this Chapter describes how legal scholarship deploys these arguments, alternatives and justifications toward critiquing and reforming “command-and-control” regulation.

Empirical Findings: How Lawyers Shape the Debate

The term “command-and-control” first appears in a law review article to describe regulation in 1980. For the next decade, it remains relatively obscure – there are only 82 articles that use it to describe regulation in the 1980s. Use skyrockets in the 1990s (634 articles) and continues a sharp upward trend to the present, with 673 articles in the first five years of this

century.⁹ A large proportion of these later articles simply use the term without defining or discussing it, suggesting that it has become institutionalized in the legal lexicon.

Early discussion of “command-and-control” regulation by legal scholars occurs largely in the context of administrative law and general regulatory issues. However, the term quickly



becomes inextricably associated with environmental law. Overall, 58% of all articles (803) in my sample are on environmental law. 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, are all but negligible, with none representing more

⁹ Unless otherwise indicated, the numbers in the text refer to counts or percentages drawn from the entire sample.

than 2% of the sample.¹⁰ So it is not an exaggeration to say that the critique of “command-and-control” develops in the crucible of environmental law.

The articles take fairly consistent positions on “command-and-control” regulation over time. Overall, there are 64 pro articles, 666 con articles and 659 neutral articles in the sample.¹¹ Looking at the data in five-year increments, there is little outright support for “command-and-control” in any time period. Positive articles reach a peak of 7% from 1985-1989, just as the debate is gearing up, but they hover at 4% during every other period until 2000-2005, when they climb to 5%. The critique begins in measured fashion, with more than half of the articles from 1980-1984 articulating negative arguments but maintaining an ostensibly neutral stance (52%). However, neutrality soon loses ground to a more negative tone. Con articles represent the greatest proportion of the sample from 1985-1999. The most sustained opposition to “command-and-control” occurs in 1990-1994, with con articles accounting for 54% of the articles in those years. While the same criticisms persist into the next century, the articles return to a more neutral tone. From 2000-2005, neutral articles predominate (49%), and many of these articles recognize the necessity of some command-and-control regulation even as they criticize it.

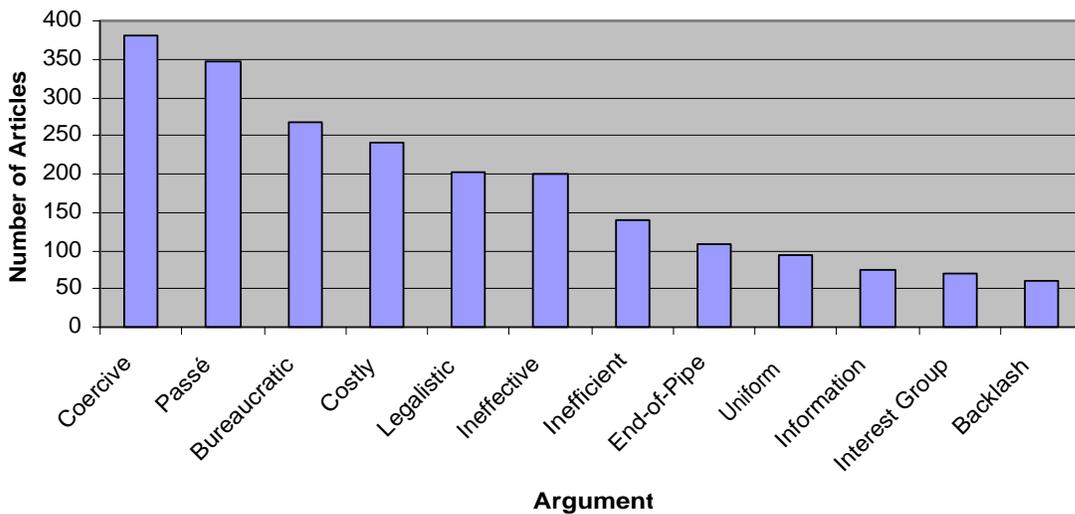
As use of the term skyrockets, the contour of the arguments against “command-and-control” remains relatively constant over time. The only significant change is a rise in frequency, as more and more articles rehearse the same arguments in a swelling chorus of

¹⁰ International topics become much more important in the 1990s-2000s, but most are about global environmental issues.

¹¹ This distribution of arguments makes clear that my sample reflects the critique of regulation and not a broader debate about regulation. Most pro-regulation advocates during this time period were not legal scholars, but activist lawyers directly affiliated with or inspired by Ralph Nader and his legal reform projects.

criticism. Overall, the six most common criticisms of “command-and-control” regulation are: (1) *coercive*; (2) *passé*; (3) *bureaucratic*; (4) *costly*; (5) *legalistic*; and (6) *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 relentlessly consistent from 1980-2005: regulation represents an unwarranted encroachment of the government (through its bureaucrats and its laws) on the freedom and autonomy of private individuals and businesses.

FIGURE B:
Frequency of Arguments Against Command-and-Control



Coercive, *bureaucracy* and *legalistic* are all highly correlated with one another, yet they each articulate separate concerns about governmental power. Articles coded *coercive* make the general objection that “command-and-control” regulations “[tell] polluters exactly what to do and how to do it” (Otero-Phillips 1998:193) and thus “limit [the regulated entity]’s choices in deciding how to reach the program objectives” (Jackson 2005:102). This code also encompasses more strenuous objections, like one commentator’s characterization of the US Environmental

Protection Agency as the “manure Gestapo” (Centner 2000:250).

As this 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. Arguments about bureaucracy range from structural concerns about the ability of a remote central authority to regulate far-flung constituencies, to 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. (Anderson 1995:413)

These arguments reflect “the longstanding fear that bureaucracy is a form of human domination.” (Frug 1984:1277-78).

In addition, lawyers critique their own role in “command-and-control” regulation. The critique of legalism has a number of layers, beginning with the sheer volume of law generated by regulatory agencies: “Rules beget more rules in a seemingly inevitable process of regulatory expansion” (Fiorino 1996:463). The morass of law compounds the regulated community’s sense of constraint 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” (Cox 2003:74). As a result, regulated entities are highly dependent on the expertise of lawyers to interpret their obligations: “When a body of law becomes so complex, it may be rendered virtually incomprehensible in parts of the country where specialists are rare” (Anderson 1995:413-414).

Amidst these deep political critiques, the second most commonly made argument is that

“command-and-control” regulation is *passé*. To be sure, this argument was generously coded, encompassing all articles that describe “command-and-control” regulation as “traditional.” But this language has significant connotations, and many articles go much further in situating “command-and-control” as part of a past era. Cass Sunstein (2000:501), for instance, speaks of “anachronistic command-and-control regulation,” and another article explains that “[c]ommand and control regulation is conventionally understood as the ‘old’ way” (Levi-Faur 2005:32). Capital University Law Review sponsors *The National Symposium on Second Generation Environmental Policy and the Law*, where prominent commentators characterize “command-and-control” as “old-fashioned” (Elliott 2001:248), belonging to a past generation (Stewart 2001:21), and appropriate only at the “early stages of development” of the regulatory system (Esty 2001:184). Such language roots “command-and-control” regulation in a distant past that has no place in modern governance. This is one mechanism by which these articles establish their arguments as the truth about regulation. They suggest that certain understandings of regulation are simply no longer cognizable in the debate. In this day and age, it does not make sense to think about regulation in other ways.

The critique is also supported by the more pragmatic concerns that it generates unnecessary costs, and it simply does not work. However, as Figure B makes clear, although the critique of “command-and-control” grows out of economic theory, classic economic concerns rank relatively low. Cost cracks the top five each year, but it is far from the most pressing concern. And inefficiency, the cornerstone of price-based economic critiques, is well outside the realm of predominant concerns.

By contrast, the arguments made in favor of “command-and-control” regulation are few

and almost entirely pragmatic. The most common argument is that it is necessary (137 articles), although this is often admitted grudgingly. The only other commonly appearing argument in favor of “command-and-control” regulation is that it works – or at least that it works in certain situations or that it worked for awhile (126 articles). A few articles make more highly theorized arguments about the moral imperative for “command-and-control” regulation, but they represent a very small minority of the sample (38 articles). Finally, only six articles tout the technology-forcing benefits of “command-and-control.”

Reform and Justification

As the articles construct a consensus around the problems presented by “command-and-control” regulation, they also demand reform. Over seventy percent of the articles (983) discuss some alternative regulatory mechanism to supplement or supplant “command-and-control.” The reform technologies proposed each respond to the critique in different ways, and each are grounded in a different justification for regulation. As described above, the alternatives fall into four broad categories: (1) deregulation; (2) liability-based regulation; (3) market-based regulation; and (4) self-regulation. 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 C). I suggest that this occurs because self-regulation provides a technology for “governing through freedom” and thus the best justification for governing at all.

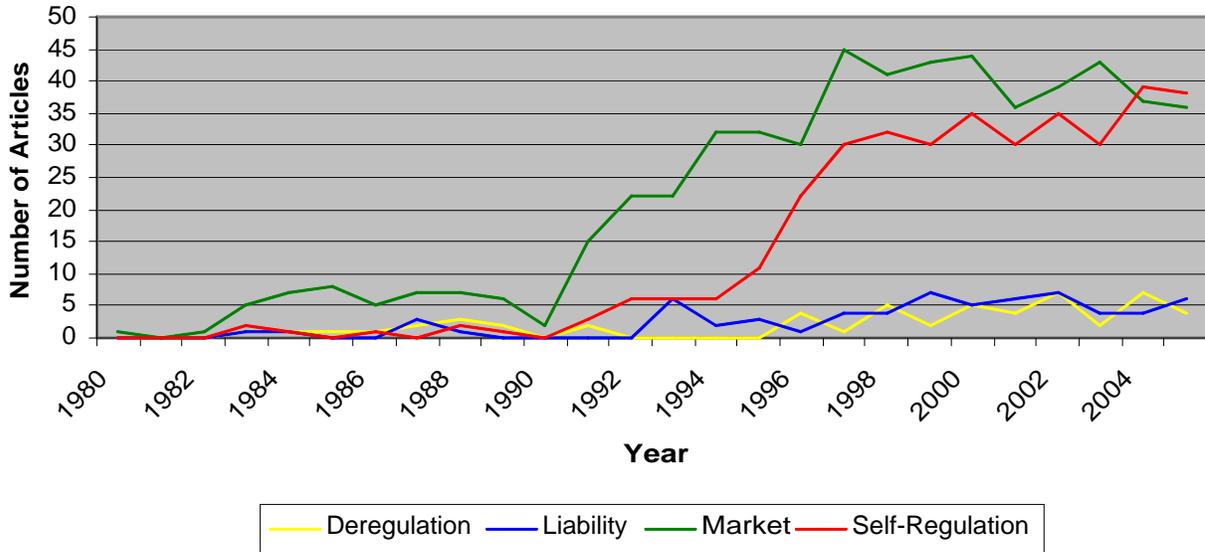
Articles advocating *deregulation* or *liability-based regulation* schemes are exceedingly scarce. Despite the critique’s roots in the deregulation movement, only four percent of the

articles (54) mention this solution. *Deregulation* is the appropriate reform only if there is no justification to be found for regulation. Rather than a way of governing, it is a way of declining to govern, an option that apparently is not as appealing to lawyers as to economists.

Lawyers similarly eschew 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 tools so troubling to legal critics of regulation – and arguably apply them even more haphazardly. Consequently, *liability-based remedies* fail to address the fundamental concerns of the legal critique.

Market-based regulation is the dominant reform paradigm for more than two decades. Even though economic critiques are eclipsed by freedom-based concerns, price-based reform mechanisms are far and away the most popular alternative over the course of the sample. A panoply of market-based instruments, including emissions trading and other property-based regimes, regulatory taxes, and unspecified “incentive” schemes, are discussed in 725 different articles. Many articles simply talk in broad terms about using “the market” instead of “command-and-control” regulation.

**FIGURE C:
Trajectory of Alternatives to
"Command-and-Control"**



While these types of market-based alternatives enjoy the most attention from commentators overall, *self-regulation* achieves the most significant rise over the course of the sample, catching and surpassing market-based reforms in 2004. 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. And, as discussed above, the relationship between these two categories is quite close. However, it is an important shift nonetheless in the way commentators conceptualize regulation, its problems, its solutions and its justifications. Self-regulation reaffirms faith in traditional regulatory tools like standard-setting, monitoring and enforcement, but it seeks to locate them within regulated entities.

It is important to note that self-regulatory practices like standard-setting, public-private partnerships, monitoring and information exchange, have always been a part of the U.S.

regulatory landscape. But “self-regulation” emerges as a programmatic approach to governance only in the 1990s, as the legal critique of regulation gathers steam. This approach to governance appears to be intimately bound up with a critique that seeks non-coercive ways of governing. As one article suggests, self-regulation is a way to build “a constructive new relationship with regulators and the public based on cooperation and partnership rather than coercion and mistrust” (Wood 2002:203-204). In fact, concerns about coercion predict advocacy of self-regulation in the literature. Self-regulation alternatives are statistically correlated with arguments about coercion (coefficient = .105, significant at the 0.01 level), while there is no correlation between coercion and market-based alternatives. Moreover, by far the most common argument supporting alternatives to “command-and-control” is that they are *flexible*,¹² or that they evince a “respect for individual autonomy and initiative, and productive potential” (McClusky 2002:876, quoting Cass Sunstein, Free Markets and Social Justice, 1997:271). These kinds of arguments “begin to converge on the concept of self-regulation” (Estlund 2005:321) as a tool for regulating without coercion.

By contrast, market-based alternatives provide neither such a technology, nor a satisfactory justification for state regulation. First, they require a great deal of initiative, management and oversight by government. Creating a regulatory market is no small task, involving a great deal of active intervention by government to set up, monitor and police these constructed exchanges. And surely regulatory taxes and other such charges or subsidies raise the specter of governmental overreaching. These alternatives, tailored as they are to correcting pricing failures in economic markets, do not respond as well to concerns about state coercion. In

¹² The total number of articles citing flexibility as an attribute of alternatives is 244. The next most commonly cited attribute, cost-effectiveness, appears in 179 articles.

addition, market-based alternatives seek to completely replace the longstanding “public interest” justification for governing with values like price and efficiency. This substitution ostensibly deprives the state a means of distinguishing itself from the market and represents perhaps too radical a reconfiguration. Self-regulation, on the other hand, implicitly preserves the promise of regulation in the “public interest” by making the public its own regulator.

IV. Discussion and Conclusion

This Chapter has shown how lawyers develop a critique of regulation around the notion of “command-and-control,” that highlights the coercive aspects of regulation over concerns about cost and efficiency. “Command-and-control” encapsulates a critique that is primarily concerned with the way regulation impinges on freedom. Yet, unlike other coercion critiques, the legal critique focuses on mutable regulatory practices rather than the fundamental legitimacy of the regulatory state. In this way, it makes legitimacy a practical concern that can be achieved through the right governance technology. Self-regulation emerges from the critique as that technology and a tentative new justification for the U.S. regulatory state.

The key to self-regulation’s appeal is that it is a model for governing without commands or controls. In this way, it represents an advance over other alternatives. As discussed above, market-based solutions demand an expert and highly involved state to create and administer new markets, and they displace “public interest” as a value animating government action and distinguishing it from the market. On the other hand, a solution like deregulation envisions a state that withdraws entirely from private affairs and declines to govern. While the legal critique of “command-and-control” regulation is concerned about the state coercion, it seeks a solution

that does not abandon governance. Instead, it seeks to govern in ways that make the governed more free.

This Chapter has traced how lawyers construct self-regulation as a viable regulatory strategy through their translation of economic ideas and arguments in the critique of “command-and-control” regulation. The next Chapter will describe how they develop the practices that make it possible to govern in this way.

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