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SLOUCHING TOWARD CHICAGO: REGULATORY REFORM AS REVEALED RELIGION

By R.G. Evans*

Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

And what rough beast, its hour come round at last,
Slouches towards Bethlehem to be born?
W.B. Yeats, The Second Coming

Economists have rather a guilty conscience about values. Many of them aspire to a “scientific” form of analysis, a discipline built solely on positive propositions about how economies function. Such a collection of descriptive, causal statements, “if $A$, then $B$,” would serve as the foundation of all policy analysis. Normative propositions,—one (society, the government) ought to do $A$,—would then follow from the choice of $B$ as a valued objective. Economists might recommend $A$ as policy, but strictly speaking their functions as scientific economists end once they have demonstrated the causal linkage from $A$ to $B$. Their values with respect to $B$ stand on the same footing as those of any other citizen. The role played by the “scientific” economist in policy formation is simply that of establishing the menu of possible choices, the framework of positive constraints, from which a society makes its selections.¹

The commitment to positive methodology is itself a value strongly held and advocated or preached by a number of economists, although it is interesting that those who profess positivism most loudly are often those who recommend particular policies most energetically.² But in fact the possibility of such a radical separation between “is” and “ought” in economics is illusory.

In the first place, as Schumpeter noted, ideology “enters on the very ground floor, into the preanalytical cognitive act.”³ What we choose to study,

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how we define the essential properties of the objects of analysis, and what we think are their significant, as opposed to incidental, inter-relationships, all depend on our value systems. We begin the positive analysis with a "model" in the broad sense, which establishes intellectual categories, defines boundaries between different phenomena, and in a world where everything depends on everything else in several ways, suggests which sets of dependencies are likely to be worth investigating and which are likely to be accidental correlations. Thus, unfortunately for "scientific" economics, the values are built in before the positive analysis begins. And these values are culturally conditioned, as is strikingly demonstrated by the major differences in underlying models and in research programmes followed in different countries in "the same" sub-disciplines of economics.  

But the impact of values on analysis extends well beyond the pre-analytic phase. The generation and testing of self-sustaining positive propositions, whose validity can be demonstrated either absolutely or probabilistically so as to command universal assent even among economists, turns out to be beyond our capacity. Despite advances in computational, statistical, or mathematical technique, there is no evidence that the situation is improving. We learn more about particular situations, but the "laws of motion" of society elude us. The central methodological problem appears to be that pointed out some years ago by Heracleitus, developed in more detail by Georgescu-Roegen. Positive analysis in practice always embodies a number of simplifying assumptions, empirical judgments, and often just plain guesses, to move it across the gaps in which empirical evidence is missing, or more commonly ambiguous. In this process, of course, value judgments play an inevitable role.  

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5 Heracleitus pointed out that any model which is sufficiently complex to replicate the behaviour of an economic system or of its sub-components will contain a large number of parameters, which in turn will require a large number of observations for their estimation. But this requires either a long time-period of stable structure or a large number of comparable regimes with similar structures. And since history or diversity are constantly changing all such parameters, the process of econometric estimation of a large and complex economic model embodies an "act of faith" that its parameters have been "stable enough" — or have varied only in measured ways, — so as to support estimation. But the parameters represent (measure) behaviour; which is inside history in a way the model itself can never be. Thus structure is constantly changing, and the more complex the model, the more implausible the stability assumptions. Or he may have. His views are summarized in the phrase, "panta rhei, oder menel," attributed to him by Aristotle. See also Georgescu-Roegen, *The Entropy Law and the Economic Process* (Cambridge: Harvard University Press, 1971).

6 Myrdal, *The Political Element in the Development of Economic Theory* (New York: Simon and Schuster, 1969). The problem is not unique to economics; Tuohy in *Regulation and Scientific Complexity: Decision Rules and Processes in the Occupational Health Hazard Arena* (1982), 20 Osgoode Hall L.J. 562, refers to "trans-scientific issues", namely, questions which can be posed as positive, "scientific" problems, but which cannot be resolved, at present or ever, scientifically. Wicksell, in commenting on the inability of economics to arrive at settled conclusions, drew the religious parallel; "like theology and for approximately the same reasons" economics has failed to arrive at generally accepted results (Inaugural Lecture, University of Lund, quoted by Myrdal, op. cit. at
One response to this difficulty, discussed by Archibald in the context of the "realism of assumptions" debate, is to moderate the positivist programme by explicit recognition that unambiguous testing of theory in economics is impossible. Instead one can strive for "realism" of both assumptions and conclusions by a process of observation of as wide a range of evidence as possible, and by highlighting the judgmental components and making the value judgments as explicit and open as possible.\(^7\)

An alternative, however, is to follow the sermon notes of the legendary Scottish preacher coping with the problem of the origin of evil—"This point very doubtful—Shout Loudly!!" In economic analysis this takes the form of assigning normative significance to positive propositions themselves. One ought to believe that \(A\) implies \(B\). And indeed the development of schools of thought in economic analysis seems to take place around particular sets of positive propositions that are held as items of belief. Free markets, or governments, are alleged to function in certain ways, and if the evidence for such propositions is ambiguous, then assent to the proposition becomes an article of faith.\(^8\)

The assignment of normative significance to positive propositions has great functional value. The individual or group that can set the menu or define the constraints for social choice in economic policy may wield enormous political power. If this set of constraints were as unambiguously established as an astronomical prediction about sunrise, then the analyst's power would be illusory; he would merely be a conduit transmitting the laws of nature. But there are few if any such "laws" in economics. (Astronomers do not argue bitterly over the expected time of tomorrow's sunrise.)

The "scientific" analyst, in claiming such neutral status, is usually supporting a set of normative judgments as well, which either underlie or interpenetrate the positive analysis. And these normative judgments are often of fundamental importance. Cost-benefit analysts, for example, frequently make "scientific" judgments about the value of a human life that are hidden in the footnotes or the technical appendix. (What is ironic is that...

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\(^7\) Refutation or Comparison? (1966), 17 Brit. J. Phil. Sci. See also Friedman, supra note 2; Nagel, Assumptions in Economic Theory (1963), 53 Amer. Econ. Rev. 211; Samuelson, Discussion (1963), 53 Amer. Econ. Rev. 231.

\(^8\) The development of this faith is, I think, the process which Salter, in The Value Debate in Regulation (1982), 20 Osgoode Hall L.J. 485, describes as a progression from theoretical, to ideological and finally to symbolic logic. Symbolic logic is characterized by "highlighting, that is lifting from theory or ideological discussion for that matter, some elements of the analysis and treating these elements as significant in and of themselves" [and by] "analogical reasoning...[without] a full empirical and theoretical referent," id. at 490. Myrdal, supra note 6, at 19 quotes Westergaard speaking of economics as "a science where expressions and metaphors readily engender supposed proofs." Economic analyses of regulation seem particularly prone to this weakness.
even on their own terms they get the measure wrong! But the status of the analyst, and his claim to a special role in policy-making, depends on the perception by the rest of the community that the process of analysis is scientific, and "value-free". The positivist claim is thus central to the advancement of the normative interests embedded in the analysis and to the maintenance of a social role for the analyst as something other than a "hired gun" or public relations agent for openly identified interests. Hence the normative significance attached by analysts to the acceptance of particular positive propositions, independent of the quality of the evidence for them.

Indeed the social importance of apparently positive propositions is such that they may be ultimately rendered immune to attack by being embedded in completely circular theories, whose intellectual content is thus nil but whose political appeal is very powerful. At this point, economic analysis meets religion. The faith of Pangloss in Divine Providence is held up to ridicule because it cannot be assailed in any other way. Once one assumes that the world is in fact ruled by Divine Providence, it follows that whatever happens is for the best and cannot be improved. No empirical evidence will serve as refutation, one can only laugh. The similarity to theories of fully informed rational consumers freely transacting in perfectly competitive markets is not accidental. Both are rooted in the same "natural law" tradition, whose foundations are theological, not empirical. More generally, however, one finds in (some) religions great normative importance attached to particular apparently positive propositions. Pagels analyses the conflict in the early Christian church between orthodox Catholics and various forms of Gnostics over such issues as whether Christ was crucified and died in the flesh, or

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9 The number of cost-benefit analyses that have used estimated values of livelihood streams as a value for lives is too large and too depressing to justify individual citation. If this were the appropriate measure, the social convention in catastrophe would be "women and children last", and euthanasia of the elderly would be by an overwhelming margin our most cost-effective public health program. But you cannot fool all of the people all of the time; see the discussion by Tuohy, supra note 6, of the declining credibility of cost-benefit analysis.

10 Economists have, until recently, been predominantly academics with aspirations to scholarship — no insignificant number may indeed be called scholars. The "hired gun" or public relations role is professionally offensive, being generally considered inconsistent with the pursuit of "truth" or at least of knowledge with some degree of objectivity. For those who come to economics from a legal background, however, adversarial proceedings are perceived more favourably as an investigative approach, and the "hired gun" role seems more comfortable. The analyst-as-advocate is not constrained by the same intellectual rules as the academic; he deliberately makes the best case that selected evidence and plausible analysis will support. The adversarial process itself is supposed to ensure that inconsistent argument and invalid or distorted evidence will be exposed. The tensions between the roles of lawyer-as-scholar and lawyer-as-advocate for whomever pays the fee may become more familiar to economists as the sources of support for analysis shift from universities to clients (public or increasingly private) whose interests are unambiguously adversarial, not intellectual.

11 Becker, The Heavenly City of the Eighteenth Century Philosophers (New Haven: Yale University Press, 1979); see also Dobb, supra note 4, at 41. Nor is the linkage from theology to natural law to economic policy of historical interest only; Gordon, The Political Economy of F.A. Hayek (1981), 14 Can. J. Econ. 470 at 476-479.
whether the whole transaction was a spiritual shadow play.\textsuperscript{12} What was required of the orthodox was neither a positive view (I think, on the basis of the evidence that a physical death occurred) nor a normative one (it is a good thing for us, that Christ died . . . etc.), but rather belief—certain propositions must be accepted as fact if one is to go to heaven. The Apostles’ Creed contains a mixture of testable and non-testable propositions, but the whole must be accepted on faith as literally true, and this, rather than the acceptance of normative principles of good and bad conduct, separates sheep from goats. Moral uprightness by itself does not lead to heaven; religion (or at least Christianity) was not and is not now simply a code of conduct.

But the attachment of normative significance to positive propositions is consistent with social and organizational objectives. The Creed was of central importance to the interests of the church as an organizational entity as well as serving to advance the values that Christianity embodied. In the same way, assent to various positive propositions about how economies function serves to maintain the organizational coherence and social status of economists—for a time at least—as well as advancing the values and interests that are smuggled into the positivist analysis. From this perspective it ceases to be surprising that the most ardent advocates of a positivist programme of methodology in economic research are also among the most strident and self-confident proponents of radical policy change. When the issue is doubtful, speak loudly.

The mix of value and fact, of ought and is, is inevitable in all economic analysis. Purely formal, mathematical exercises may appear immune, but these only become economic analysis when they are superimposed upon some actual economy and that superposition cannot be value-free. The mathematical entities must be assigned real-life “objective corollaries”—a discretionary and judgmental process. It would thus be rather naïve to imagine that the application of economic analysis to issues in the public regulation of economic activity, or any other field of policy, would permit objective “scientific” discussion and the generation of value-free conclusions as to appropriate action. Economics does not transcend Hume; or in Archibald’s paraphrase, “No Ethics In, No Ethics Out.”\textsuperscript{13}

In fact, the very identification of “regulation” as a separate area of public economic policy itself rests on certain implicit value judgments about the proper or “normal” role of the state in economic life. It presupposes a system of private market institutions which under normal circumstances governs the economic processes of production, distribution, and exchange. The state intervenes in particular situations with authoritative, and ultimately coercive, “regulations” which compel people or organizations to behave in ways they would otherwise not choose to do. Such regulatory intervention may be justified in particular circumstances; what those circumstances might be forms a large part of the economics of regulation. But given an under-

\textsuperscript{13} University of British Columbia, oral tradition. See also Dobb, supra note 4.
lying system of values which include individualism and freedom from
compulsion, there is an implicit bias, a prior presumption, that places the
burden of justification on the proponents of the regulatory intervention, not
the free market alternative.

Yet the distinction between the regulatory activities of the state, and
economic policy in general, is far from clear. Most people would recognize
as regulation the passage of a law or regulation by a duly constituted
governing body, or its delegates, mandating or prohibiting specific actions.
But specific taxes, tariffs, or subsidies can achieve similar results. The
delegation of “self-regulatory” powers to occupations or supply-managing
groups of producers (agricultural marketing boards, taxi-cabs) is clearly
public regulation at one remove, as is the formation of public corporations
—Air Canada, Petrocan, provincial liquor boards. General macro-economic
policy, monetary and fiscal, is not usually referred to as economic regulation,
yet all sorts of industry or group specific benefits and burdens are implicit
in such policy, and many are explicit.

If we focus on the fact that regulations, by changing the opportunities
faced by individuals, serve to redistribute wealth or property rights, then it
is undeniable that regulation is a form of taxation; it is equally a form of
expenditure or transfer payment. But then so is every other form of public
economic policy, the tax-transfer effects of an anti-inflationary policy of
high interest rates being an obvious example.

It does not follow, of course, that since all forms of public economic
policy redistribute property rights, therefore “each . . . is . . . a close substitute
for each of the others.” Coal, oil, natural gas, wood, and lard are all forms
of energy, yet one cannot put lumps of coal in the gas tank of a car, or
gasoline in a home furnace. Economic instruments have different com-
parative advantages, as well as side effects. But the separation of government
“regulation” from economic policy in general seems to presuppose some
definition of public economic activity that is not regulatory, not interven-

14 “For regulation, in its broadest sense, is the essential function of government.
Indeed taxation and expenditures, the other two principal instrumentalities, can be
thought of as special cases of regulation.” Hartle, Public Policy Decision Making and
Regulation (Montreal: Institute for Research on Public Policy, 1979) at 1. Posner,
to taxation in redistributing property rights; Hartle’s perspective is broader.

The allegation of “close” substitutability permits a verbal transition from regulation as
being like taxation, i.e. taking “property”, to “confiscation”, described as a “prima facie
wrong” (pp. 436 — and finally to “illegitimate tax regulation” (449)). But of course regu-
lation redistributes property rights, rather than “confiscating” them, and the “illegality”
refers to processes which are in accordance with law. The “prima facie wrong” is
apparently relative to some natural law standard, while illegal means not counter to
law as it is, but counter to law as the author feels it should be. Such personal pre-
ferences presumably refer to natural law again, that “diseased and meretricious old
drab” (Gordon, supra note 11, at 479) which serves so readily as a device to “smuggle
authoritarianism in under the cloak of ‘nature’.” Epstein recognizes as valid authority
neither duly elected legislatures nor courts; he appears willing, like Hayek, to sacri-
fice democratic process to an ideal of freedom — as defined by . . . ? Quis custodiet?
remains unanswered. (As, for that matter, does Cui Bono?)
tionist, a "natural" level to which "deregulation" would return us. How that level might be determined is obscure.

Regulation is clearly not everything beyond "anarchy plus a constable"—quite apart from who employs and directs the constable. The idea that the adjudication of property rights and enforcement of contract is somehow non-regulatory, or that one pattern of tax policy or money supply determination represents "regulation" and another does not, requires some concept of a pattern of economic intercourse prior to, or separate from, any form of public regulatory policy. This is certainly fallacious history, and bad, though common, economics—I believe it is also bad law. It would seem that the examination of values in the regulatory process cannot proceed independently of their more general role in economic policy.

And indeed we do find a substantial correlation of attitudes toward macro-economic policies—fiscal, monetary, trade,—with views on "regulatory" policy more narrowly defined. Particularly among the more outspoken universal "deregulationists," it is apparent that the analysis of any particular market or industry is dominated by a more general set of value judgments about the "natural," usually minimal, role of the public sector in economic, or any other, activity. Whatever the state does in the economic sphere (or out of it) will reassign property rights and influence patterns of economic behaviour, and any debate over what the state should or should not do in this regard, whether or not conducted in the rhetoric peculiar to any particular discipline, will involve such conflicting value propositions.

In such debates economic rhetoric has been particularly prominent, because economists have worked out a very detailed set of formal theoretical propositions about how transactors interact with each other in the economic sphere in the absence of formal direction. Their insights as to how systems of prices can in theory, and often do in practice, serve as decentralized co-ordinating mechanisms, providing "solutions" to otherwise hideously complex social problems of resource allocation and distribution, suggest that broad areas of activity can be carried on not only adequately, but, indeed on fairly general criteria, more satisfactorily, independent of detailed state planning and intervention. Under specific circumstances, the price system both conveys information and generates incentives to govern the behaviour of transactors in a detailed and sensitive way. The appeal of such decentralized systems is both functional and, to their students, aesthetic. They also provide powerful support for pre-existing political or philosophical value judgments about the nature of man and the proper forms of social interaction.

In fact, however, theoretical economics does not in itself provide support for either regulation or deregulation. The famous two "fundamental theorems" of welfare economics demonstrate only that, under fairly restrictive conditions, all competitive equilibria are Pareto-optimal and, under even more restrictive conditions, all Pareto-optima are competitive equilibria.

In other words, in a society in which all resource allocation is determined by the behaviour of atomistic, self-interested, perfectly competitive, and fully informed transactors who take prices as parametric, and in which prices adjust freely, and where prices and markets exist for all present and
future commodities, specific to any uncertain state of nature, then a competitive equilibrium if it exists will be such that no one can be made better off without making someone else worse off (the first theorem). Whether such an equilibrium will in fact be reached is another matter. If it is, however, it is optimal in the limited sense that no improvement is possible without sacrificing someone's interests to someone else's. If an economic outcome is not Pareto-optimal, there exists some other outcome that everyone would prefer.

Secondly, if in addition, household preferences and firm technologies satisfy convexity conditions, then any such Pareto-optimal position can be reached by competitive processes in free markets from some specific initial allocation of resource endowments or property rights (the second theorem). If costless, lump-sum transfers of property rights can be carried out under full information, then any desired Pareto point can, if technically feasible, be reached from any initial rights allocation by a combination of lump-sum transfers and competitive market processes.

While interesting, these results by themselves generate no policy implications whatever ("No ethics in, no ethics out" again). There are many "Pareto-optimal" equilibria, including income/wealth/welfare distributions across the members of a society ranging from completely egalitarian to as unequal as one's index will allow. It is stressed in general equilibrium theory that the pattern of resource allocation and distribution represented by an arbitrarily chosen Pareto-optimal point is not in general "better" than an arbitrary non-Pareto point on whatever criterion is employed for ranking different outcomes. What is true is that, under stringent assumptions as to how individual and group preferences are formed, there will for any non-Pareto pattern of prices and distribution be some Pareto point(s) which is superior in the sense that some agent(s) has been made better off while no one has been made worse off; but it is simply an error to assume that if one is at a non-Pareto point, perfectly competitive prices and markets will lead to a better Pareto point. They will get to some Pareto point, but not necessarily a better one. The second theorem does say that any desired outcome can be achieved through competitive markets, but only if the initial property rights distribution is such as to yield that outcome. This in turn suggests that if one could flexibly re-allocate property rights ab initio, and if the other conditions held, then there would be a strong case for unregulated, freely competitive markets as a set of institutions for allocating resources. But if not, such a case would not exist.16

But economic analysis itself does not, and cannot, say anything about the appropriate distribution of either property rights or final outcomes. These are value questions pure and simple. Nor does economic theory say anything about the relative political feasibility of ex ante redistribution of property rights versus ex post re-allocation of output through interference in private markets. It is important to stress this fact, because occasionally claims are made that "scientific" economic analysis can provide a basis, other than

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16 Of course, in order to reallocate rights in the first place, one would need to know the entire relationship between initial endowments and final distribution, which raises the question as to what purpose is served by the intermediate market game?
social value judgments, for particular patterns of income or wealth distribution.

These attempts form part of a historical sequence. The Norman baron replied to Edward's commissioners of Quo Warranto that he held his land from his grandfather, who had carried his sword with William the Bastard. As the dynamic instability of this source of rights was fairly clear, the justification for a particular distribution began to shift from might of king to Will of God. Stations in life became divinely ordained. As God's Will became less clear, "natural" rights emerged instead. The appeal to economics as a source of such natural right was based a century or so ago on marginal productivity theory, until it was recognized that marginal products in value terms are dependent on relative prices, which in turn depend on the initial rights distribution. Prices, and therefore marginal productivities, are endogenous.\(^1\)

There is limited ethical appeal to a system in which the distribution of welfare depends critically on unpredictable factors beyond the control of individuals; not merely endowments—heredity and inheritance—but more importantly the effects of shifts in demand, supply, and technology. Services and resources that had a high marginal productivity yesterday may have none tomorrow. And while the investor in physical capital can diversify the portfolio to achieve a desired risk level, the investor in human capital is required to bet most of his net worth on the assumption that the marginal productivity of that human capital will be maintained. It is obviously to the economic advantage of society generally that resource allocation adapt quickly and smoothly to changes in resource availability, tastes, and technology, but transitional costs are inevitable. Resource suppliers may have to take decisions with very long term consequences, at a point when a reasonable man could not have been expected to make a better judgment. The decision to enter an occupation with a long training period and specialized skills is an important example. Subsequent technological or market shifts may dramatically reduce the value of that investment. But to argue that all the costs of such adjustments should be borne by those who guessed wrong, and that such a redistribution, involving a large part of an individual's livelihood, is ethically attractive, seems to confuse a sin with a mistake.

More recently, a rather peculiar allegation has been made that a property lights distribution can be derived from considerations of transactions costs. An attempt to substantiate the claim turns out to apply, however, only to property rights in one's own person and powers, leaving all other forms of rights to property unassigned, and in fact fails even there to do more than assert a "natural" distribution—a predictable result because economics possesses no settled theory of transactions costs.\(^2\) Even if it did,

\(^1\)This recognition is general, but not universal; there are still some who appear to believe that marginal productivity creates some ethical claim to output; see discussion in Friedman, *Price Theory: A Provisional Text* (Chicago: Aldine, 1968) at 196-198.

\(^2\)Posner, *Utilitarianism, Economics, and Legal Theory* (1979), 8 Legal Studies 103, the attempt to foist responsibility for the initial rights distribution onto "the economist" (p. 125), is certainly novel.
those costs would still be defined in terms of relative prices that are endogenously dependent on the rights distribution itself. Economic theory will not exorcise Hume; the white coats of “science” may cover value judgments but cannot substitute for them.

A formal framework may, however, serve to display clearly the range of different value judgments that must be made prior to or during the discussion of economic policy. The concept of the social welfare function (SWF), hypothesized as some form of aggregator across the individual interests in a society, is useful in this regard. “Ought” statements about economic policy can then be interpreted as judgments about actions that will increase the social welfare function; “optimal” policy is defined as that which maximizes such a function.

But formalism introduces no new information. Indeed, the SWF as aggregator of individual interests is a restrictive sub-class of more general SWFs, under the assumption that society’s welfare, insofar as it can be thought of at all, is some function of that of its component individuals, rather than being specified by the ruling Deity or Party. There is no a priori reason why a society should hold such individual-respecting views—but ours appears to do so. Thus we write: \[ W = F(U_1(X_1 \ldots X_{i-1} \ldots X_{i} \ldots X_{i+1} \ldots X_n) \ldots U_n(X_{n-1} \ldots X_{n} \ldots X_n)), \]
which means simply that the overall society is composed of “n” individuals, each of whom has preferences defined over the amounts received, used, owned, perceived by him of “in” different entities. Thus \( X_i \) is the amount entity \( X \) that is somehow assigned to person \( i \), and \( U_i \) is the welfare level of person \( i \) conditional on the pattern \( X_i \). When \( X_j \) is a “good”, then more \( X_j \) increases \( U_i \)—more goods are good—but \( X_j \) can equally be a “bad” to \( i \)—acid rain on his cottage. Then the function \( F \) somehow aggregates all the \( U_i \) into a global social welfare level \( W \), and “good” economic policy is that which maximizes \( F \). The maximization takes place, however, under a global production constraint linking the various \( X_j \); the resources available to society limit output and impose tradeoffs. More \( X_j \) implies less \( X_k \), once a technical efficiency frontier has been reached.\(^{19}\)

This structure highlights two different levels of value judgments that are implicit or explicit in any discussion of economic policy, regulation included. The first is the structure of \( F \), which includes the range of \( i \). Who is included in \( n \), and with what weights are they aggregated in \( F \)? (Non-inclusion implies zero weight.)

Economic analysis generally ignores the issue of the range of \( i \), taking for granted that it is defined by and across some social or political unit. Market processes implicitly count people according to their wealth, that is, their initial resource endowments valued at equilibrium prices. Recently there has been a suggestion that weights based on wealth have ethical content as well, which yields the result that persons with insufficient wealth to

\(^{19}\) I am here abstracting from externalities in production, either positive or negative, which would simply complicate the discussion without affecting the argument.
sustain life should be dropped out of the SWF except insofar as their well-being enters some other, wealthier, person's utility function—\textsuperscript{20}—which Archibald and Donaldson call the "Dog and Master" approach to income distribution.\textsuperscript{21} The notion can be stretched further, inheritance may be "justified" as respecting the wishes of the dead. This then implies that the set \(i\) includes dead persons, so long as they "possess" wealth, as well as excluding those of the living who do not.\textsuperscript{22} It is hard to imagine a wide appeal for such a set of value judgments, once made explicit. In any case the basis for them cannot be found in economic analysis, which takes the boundaries of \(i\) and the structure of \(F\) as predetermined. Markets were made to serve man, not man to serve markets. Perhaps support for such ethical judgments could be found in some Plutonian theology, but it would certainly not be congruent with any of the major religions. "Natural" morality of course stretches to fit the values of the proposer.\textsuperscript{23}

Second, and at least as important, is the judgment as to what should be included in the sets \(X_j^i\). This in turn includes two types of decisions: (1) what shall \(j\) span? and (ii) which elements of \(j\) enter particular \(U_i(\cdot)\)? The second issue, in the form of externalities in consumption or interactive utility functions, has received considerable study—one individual's welfare may depend on that of others, \([U_i(U_k)]\) (non-paternalistic altruism) or on others' specific consumption patterns, \([U_i(X_k^j)]\). This last could be because \(k\)'s stereo keeps \(i\) awake, or because \(i\) regrets \(k\)'s use of cigarettes and the consequent damage to \(k\)'s health (paternalistic altruism).

Such interactions, whatever their form, are positive questions, people's preferences either do or do not display these characteristics. But it blends

\textsuperscript{20} Posner, \textit{supra} note 18, at 128. Posner, however, rejects the Paretian framework in favour of a SWF that maximizes "wealth", a formulation which is somewhat obscure since it cannot be done. His approach involves a confusion between general and partial equilibrium. It is possible to maximize an expression \(W = P^*X\) where \(P\) is an \textit{exogenous} price vector, \(X\) a vector of resource/output allocations, and \(W\) a global wealth measure; it is then also possible to make individual \(Xi\) and \(Xj\) allocations so as to increase or decrease \(W\). And one can postulate shadow \(P_i\)' where market \(P_i\) are lacking. But one cannot maximize \(P^*X\) in general, since the essence of general equilibrium theory is that the \(P\) and \(X\) vectors are simultaneously determined and interdependent, and that \textit{absolute} \(P^*\) have no meaning. All one can define is an \(N-1\) vector of price \textit{ratios} for an arbitrary \textit{numéraire}. The error may arise from a faulty legal analogy — the common law grows by the accretion of precedent, the whole is the sum of the partial decisions of individual courts. But general equilibrium is \textit{not} the sum of its parts; it is an interdependent and simultaneous system. The postulate that wealth maximization can, let alone should, be an objective is a falacy of composition.


\textsuperscript{22} Posner, \textit{supra} note 18, at 135.

\textsuperscript{23} See note 16, \textit{supra}. But divine inspiration helps. Dobb, \textit{supra} note 4 at 23 quotes Longfield, in 1833, "the laws according to which wealth is created, distributed, and consumed, have been framed by the Great Author of our being, with the same regard to our happiness which is manifested by the laws that govern the material world." Longfield, an Irish judge who had turned to Political Economy, was reacting to the threat to Property implicit in Ricardian theory. The phenomenon of lawyer/economists clothing in economic language a transcendental argument for the \textit{status quo} is not new.
into the first issue, the range of $j$, when we think about what counts. So long as $X_j$ are identifiable economic commodities—shoes and ships and sealing wax—that are consumed in identifiable amounts by identifiable people or groups, the situation is clear. But the things that matter to people go far beyond this. One might have—people do have—strong tastes for living in certain types of society. Some value egalitarianism, others prefer inequality. Values are placed on collective perceptions—military strength, athletic fitness, godliness. At the micro level, your church-going behaviour may affect my well-being. The Moral Majority in the U.S. is a dramatic example of a group with very complex utility function interactions, who allege that their welfare is affected by all sorts of activities by others which have no discernable direct impact on them, and who argue that the state, that is, the SWF, should respond to their preferences with regulations to control such behaviour. This seems typical of most religions, and highlights the importance of political processes in determining what shall count in the SWF and what preferences are illegitimate or irrelevant to policy.

What is ironic is the political alliance between those who explicitly adopt such an extended and complex view of the SWF with economic libertarians who at least claim to believe in (or hold as a value) a very simple SWF of a type that makes direct regulation both unnecessary and harmful. If there are no cross-utility function interactions, $X_j$ does not affect $U_i$ either directly or through $U_k$, no public goods exist, and all commodities are well-defined and can be traded in markets with well-defined prices (these are the only $X_j$ that do, or should matter to people), and if the various behavioural and technical conditions outlined above are satisfied, then the two theorems of welfare economics hold and the SWF can be maximized by private market transactions; but only if the initial property rights distribution is the one that will yield that maximum. If not, of course, the best that markets can do is to yield a set of $U$ such that no $U_i$ can be increased without decreasing some $U_j$; a Pareto point that will not, however, maximize $W$. There will be feasible non-Pareto sets $U$ that lead to a greater SWF.

In practice, insistence on the Pareto criterion, or of non-comparability of utilities across persons, (the "moral monstrousness" of sacrificing one person's interests for others') amounts to denial of the legitimacy of any economic policy at all. And the advocacy of free markets independent of

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24 “[T]he Pareto principle offers an approach to public policy likely to find favour with those concerned to maintain the status quo,” Peacock and Rowley, Pareto-Optimality and the Political Economy of Liberalism (1972), 80 J. of Pol. Econ. 476 at 479. Posner (supra note 18 at 116) is appalled by the “moral monstrousness associated with utilitarianism” insofar as it will “sacrifice the innocent individual on the altar of social need” as well as refusing “to make moral distinctions among types of pleasures.” (Of course market-based systems make no such distinctions either, you may pull the wings off as many flies as you can afford.) Put less rhetorically, utilitarianism permits inter-personal utility comparisons, and the trading off of one person’s utility against another’s. As, in practice, does any form of economic policy, or any ethical system which attempts to justify such policy. Posner’s position appears to be that public activity of any feasible sort is morally monstrous — except presumably that of adjudicating and defending pre-existing private property rights.
any form of regulation without simultaneous advocacy of wealth redistribution logically implies acceptance, as a value premise, of whatever the current (deregulated) distribution happens to be. (Hegel’s children live on; only now the market is the march of God through the world?)

Even then, however, the question of what constitutes economic commodities remains open. By assumption one may rule out such “fuzzy” $X_i$ as egalitarianism, or safe streets, or the nature of interpersonal relationships (the reply to Titmuss’ question, “Who is my stranger?” is “Everybody”).

This can be either a positive assumption (people do not really care about such things, or a normative one (society should not respond to such preferences any more than it should respond to those of sadists). But in analysis it frequently takes on the positive-normative or creedal character mentioned initially—despite counter-evidence one should accept the positive proposition that people do not really care about non-marketable things, and, in any event market-like interactions can be dreamed up to explain away any form of evidence (such as families) that appears inconsistent with it. So one should use only analytic tools that apply to commodity $X_i$ and yield conclusions consistent with an all-commodity world. But what is a commodity?

Some reply, “anything that can be bought and sold,” and claim support from economics. But the claim is false. Economics does not say that a market in babies would contribute to social welfare. Babies could be treated as one of the $X_i$ (means) or the $U_i$ (ends), as transactor or transacted object, depending on the value judgments of the society in question.

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25 Gordon, supra note 11, at 483 makes the same point about Hayek: “If it is meaningless to apply the concept of justice to the market order, then the market order is neither just nor unjust. But the practical import, as far as policy is concerned, is that the distribution generated by the market must be accepted, which is equivalent to regarding it as just.” Whatever is, is right. Here Gordon is referring to distribution as a market outcome, not an initial property rights distribution, implicitly assuming away hypothetical costless wealth transfers. Hayek’s ultimate value of freedom, spontaneous social order, is the march through the world not of God, but of some social evolutionary process, but it comes to the same thing (as discussed in Gordon, supra note 11, at 479).


27 A critical discussion of the universal self-interest approach is provided in Collard, Altruism and Economy: A Study in Non-Selfish Economics (Oxford: Martin Robertson, 1978). The market-like interactions, super-games, and incomplete insurance contracts necessary to rationalize altruistic behaviours and institutions are sufficiently complex as well as implausible that one can no longer defend the self-interest postulate by wielding Occam’s Razor. Its appeal must lie elsewhere.

28 Posner asserts (supra note 18, at 139) that “the economist” would regard a free market in babies as “much to be preferred to the present system.” And so he may — one can find some economist who will support anything. But not on the basis of economic theory, because that will not sustain the weight unless buttressed with philosophic or political value judgments, with which other economists would violently disagree. “The economist” appears to be a stalking horse for Posner’s personal values, which indeed he has to be, as his “morality is derived from the economic principle itself” (i.e. wealth maximization). But that principle is simply a fallacy of composition (supra note 18, at 135) and even if it were not empty, it would still lack any moral content. Posner’s “economist” is not a moral monster, but a moral midget — or less.
society that treats babies as ends not means, however, will have to display paternalistic (maternalistic) structures in part, at least, of its SWF. An erroneous judgment that “Economics” supports baby-trading may thus stem from the assignment of normative significance to the positive question of SWF structure—SWFs ought not to be paternalistic, economists ought not to use paternalistic SWFs in analysis, and so babies ought to be objects, not subjects.

Nor does object status necessarily imply commodity status. Societies have prohibited market trading, directly or indirectly, in human blood or organs, sexual favours, or land. And such judgments are neither right nor wrong on economic grounds. The economist may point out that ethical values involve tradeoffs too, and that refusal to treat an entity as a commodity may require the giving up of other valued things, but he cannot judge the tradeoff itself.

But a tradeoff is not inevitable, Titmuss has demonstrated that in the case of human blood, societies that treat it as a commodity to be allocated in private markets show inferior performance on narrow economic criteria of cost and quality to those in which it is not a commodity. Indeed, it appears that in health care generally (though not universally), full commodity status and private market allocation leads to inferior results on cost, effectiveness, and access dimensions relative to societies in which commodity status is more problematic.

Even more generally, quite apart from the peculiarities of particular commodities, it is simply a theoretical error to suggest that assignment of commodity status to an object necessarily improves overall well-being. Suppose that the production structure of an economy and the preference structure of its participants meet all the requirements for private market transactions to yield a Pareto-optimal point, except that trading is only permitted in M—1 commodities. Markets in commodity M are, for some reason, forbidden, even though M embodies no special ethical considerations. If markets in M are then opened, it follows that those previously constrained by the absence of markets will only transact in such new markets if the transactions make them better off. Ceteris paribus, the opportunity to trade would thus improve their welfare, without hurting others. But ceteris paribus here does not hold. The critical assumption that trades between “i” and “j” do not affect “k” is false, the new market in M will affect prices and quantities transacted in all other M—1 markets, and thereby the value of wealth (for any given initial endowment) of all “n” transactors. Hence the Pareto-point reached after market M is opened need not be superior to that reached in M—1 markets, even if commodity M has none of the special characteristics of blood or health care. Indeed, the transactors in M themselves may be worse

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29 Titmuss, supra note 26.
off. Free markets (and full information, and absence of externalities, and perfect competition and ...) ensure that transactors in $M$ are better off after transacting than before, given that an $M$ market exists, but not that they are better off than before the market was opened. The overall impact of the new market on other prices and quantities may make them worse off. Thus it is not \textit{a priori} against the interests of individuals that they are prevented from selling organs, or working in unsafe environments for higher pay, even apart from informational or externality issues. Partial equilibrium analysis may yield invalid answers in a general equilibrium world.\textsuperscript{31}

Regulation, then, may be seen as part of the set of social processes which respond to values embedded in the social welfare function but unattainable by, or unrecognized in, or even directly inimical to, the process of arm's length commodity trading in unregulated markets. This is simply a restatement of the traditional view, public regulation of economic activity serves to remedy failures in markets as resource allocation mechanisms, with the rider that the prior assumption that markets are the "normal" mechanism and regulation is merely remedial is itself a pre-analytic value judgement.

More recent critiques of the regulatory process have pointed out that this "traditional" view rests on two contestable assumptions, that markets do indeed "fail" relative to the optimization of some plausible SWF, and that the political process is capable of remedying such failures.

In contrast, the "deregulationist" school argues that although the stringent conditions—technical, behavioural, or informational—for optimal market performance would seem to be widely violated in the real world, yet for a variety of reasons markets do not in fact "fail", or at least not often and not by much. Simultaneously, there have developed economic theories of the political process that characterize it in such a way that it is incapable of responding positively to market failure. In the limit some appear to argue, on essentially \textit{a priori} grounds, that markets cannot in fact be improved upon, there are really no market failures except those \textit{induced} by public intervention, and even if there were, regulation is by its nature unable to do anything but make the situation worse.\textsuperscript{32} Pangloss and anti-Pangloss.

The "regulate everything" and "regulate nothing" schools represent polar cases; there is of course an intellectual and policy middle ground that recognizes that social mechanisms for resource allocation do not in fact split neatly into "private" and "public", but rather lie along a continuum from totally unregulated private firms (if there are such) to public institutions totally immune from market forces (if there are such) and a great deal, probably most, of any society's work gets done between these poles. Furthermore all human institutions have characteristic virtues and vices, and

\textsuperscript{31} I am indebted to D. Donaldson for this point, among others.

\textsuperscript{32} An exception to this general position appears in the analysis of common property resources. The most enthusiastic deregulators seem to recognize this form of market failure, and though some would argue for a reallocation of property rights to "enclose the commons", with or without compensation, others admit that such rights may not be enforceably exclusive, at least with present technology or institutions.
policy-making is a continual struggle for improvement in institutional design under ever-changing circumstances. Thus one can simultaneously advocate more regulation in one area, less in a second, and different in a third. But in any case such advocacy will be built on a blend of positive propositions (believed, more or less well established, positive judgments based on an often unconscious blend of fact, experience, guess, and wish, and normative assumptions about the good society or the SWF. And intellectual honesty, if not adversarial efficacy, would seem to require continual and diligent effort to separate and identify these different components of any position.

But the attitudinal poles are of considerable interest with respect to their mix of positive and normative bases. The "deregulation" school seems to enjoy the liveliest intellectual life at present, and alleges most energetically its positive foundations and its freedom from arbitrary value judgments. Since these claims cannot be true, the extent to which its policy recommendations serve as stalking horses for particular values is of interest. At the other pole, the extensive regulatory structures that are in place in all developed economies are all proposed and defended as remedies for market failures and responses to a general or widespread social interest; that is, as tending to increase the value of the SWF. Since this too is highly doubtful on the evidence, it is again of interest to inquire what values or interests are served in particular cases.33

And finally, a point that appears to have been almost totally neglected, the two poles may, in a perverse way, meet. If, as seems likely, complete deregulation is not politically feasible, and if certain types of regulation—"self-regulation", for example, or those that serve particularly powerful constituencies—are much more resistant to removal, the net effect of a blind drive to deregulate everything may be a much less conspicuous, and perhaps reduced, level of regulation with substantially more harmful net effects.34 That this concern is serious may be indicated by the enthusiasm with which particular self-regulating occupations in the U.S. greeted the new Reagan administration in 1981, despite its rhetoric of deregulation and "free" competition which would appear to be a very serious threat to their economic status.

This is a particular application of the general problem of the "Second Best." Even if an economy meets all the conditions necessary for private competitive markets to optimize the SWF, it does not follow that a partial move toward more competition is an improvement. Half a loaf may be worse than none, and the whole loaf is rarely attainable in this life at least.


34 This important point is made by Hartle and Trebilcock, Regulatory Reform and the Political Process (1982), 20 Osgoode Hall L.J. (forthcoming).
The value foundations of theories and policy recommendations about regulation are most clearly displayed when one considers it as a mechanism of income/wealth redistribution. Economists in particular have long stressed the importance of regulation as a way of suppressing competition and thereby holding up the incomes of suppliers; they have given rather less attention to its role in holding down particular incomes. Advocates of regulation in general attempt either to ignore or to minimize redistributive effects, or else to argue that such redistribution as occurs is justified—the beneficiaries are “deserving”, and society benefits as a result. On the other hand, vulgar Marxists such as Stigler and his followers argue that redistribution is the primary purpose of regulation, and is demanded by the regulated for that purpose. The most extreme deregulationists go further and argue, in accordance with the two points above, not only that the wealth transfer is unjustified, but that in fact it does not occur. The apparent benefits are all eaten up in dead weight costs of acquiring regulation, which is thus a policy making no one better off and some worse off.

The vulgar Marxist position has the virtue of being testable; one can look to see if in fact regulation was initiated by the regulated and if they appear to benefit. The answer appears to be yes to both, in many cases, but some very obvious “no’s” appear as well. The most strident opponent of food and drug legislation in the U.S. is the drug industry—and they draw energetic academic support from the Stiglerian school. But the argument that regulatory redistribution in fact meets social objectives is rather more difficult to deal with. Middle-ground, wishy-washy regulatory reformers (of whom I think I am one) can reply in several ways. First, the costs of redistribution via market distortion are greater than via direct subsidy, and take the form of both allocative distortions (consumer surplus triangles) and, in a number of cases sheer technical inefficiency or waste (operation of the production

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35 Public intervention in the health insurance market in Canada has quite clearly held down physicians’ fees and incomes in a way in which private insurance in the U.S. cannot, Evans, supra note 30.

36 Stigler, The Theory of Economic Regulation (1971), 2 Bell J. of Eco. Mgmt. Sci. 3. Marx described the (capitalist) state as the executive committee of the bourgeoisie, a collective relationship, while Stigler and his followers treat it as a sort of Mafia contracting with private organizations to sell favourable “regulations” to the highest bidder. Posner, Theories of Economic Regulation (1974) 5 Bell J. of Eco. Mgmt. Sci. 335, notes the “odd mixture of welfare state liberals, muckrakers, Marxists and free market economists” supporting capture theories of regulation. He suggests that a carefully articulated neoclassical market analysis of regulation as a commodity which is competitively demanded and (despite appearances) supplied is superior to “interest groups” theory of political scientists which is, he argues, “devoid of theory” (at 341), or presumably to the class-based Marxist analysis. Since he confesses that “the economic theory is still so spongy that virtually any observations can be reconciled with it” (at 348), the superiority is not of performance. The advantage appears rather to be its commitment “to the strong assumptions of economic theory generally” (at 343) — i.e., conformity to a creed. Values attach to the choice of assumptions themselves, regardless of the theory’s predictive power.


function). If redistribution really is an objective, we could all be better off if subsidies were paid instead. Second, the benefits of regulation become capitalized (taxicab medallions, milk quotas) and go not to the apparent beneficiaries (current suppliers) but to those who received the initial distribution of regulatory assets, who were issued medallions or milk quota rights, without charge, when the regulation was introduced. Third, it is not in fact true that society is aware of the redistributitional effects; regulation is a way of hiding transfers in a world of imperfect information.

To these, pro-regulationists may validly reply that the first response is mistaken, it assumes that the SWF is defined only over commodities, not processes. In fact, recipients of transfers strongly prefer them to be tied to productive activity. Their welfare is lowered by direct transfers. Given this structure, regulation may well be the optimal redistributive device. One can counter this rebuttal in the positive domain, claiming that recipients do not care, but casual empiricism suggests that this is wrong. Or one can move to the domain of values—recipients' preferences should not count—and outside that of positive analysis.

On the second point, it is true that some regulatory gains appear to be fully capitalized, but not all are, and in any case, what of it? Society's objective might not be to help farmers in general, for example, but to cushion one generation during a period of rapid technical change that would otherwise lower their incomes sharply. If the desired adjustment is not continuous, but in response to one particular set of events, then a capitalized regulatory asset (production quota) is the appropriate form of wealth redistribution. In any case, deregulation would certainly redistribute away from rights holders, who may have bought these rights at market prices—what is the justification for that?

The would-be deregulator seems to have two possible responses. He could accept the capitalized redistributive effects of regulation as given, and advocate a combination of deregulation plus buy-outs of quota or regulatory rights. This removes the allocative distortions resulting from regulation, legitimizes the capital transfer, and avoids penalizing those who bought quotas at market rates. The buy-out approach ought to be acceptable in principle but as Hartle and Trebilcock point out it has in practice serious disadvantages as explicit policy.

The second alternative, then, is to fall back on the information argument. Imperfectly informed citizen voters have accepted a form of redistribution (wealth plus utility from mode) plus associated costs of allocative

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39 The argument for deregulation without any compensation seems difficult to justify. When made by those who simultaneously advocate compensation for all who lose from any positive act of government it seems wholly without ethical or intellectual merit. One can imagine alternating governments of different political stripe first regulating some process with compensation, then deregulating without, indefinitely, until all wealth lay with the "victims" of regulation! But what is regulation and what is deregulation? Again a prior assignment of rights (natural, presumably) is being assumed external to the political process.

40 Hartle and Trebilcock, supra note 34.
distortions that they did not in fact want. As Hartle and Trebilcock point out, this does not imply imperfectly informed *policy-makers*; they are likely to be very well informed indeed. But their calculations must be based on election probabilities as well as, or instead of, their perception of the public interest. Thus the imperfect information argument forces on the policy analyst/advocate the task, not of advising the politician, but of educating the voter.\(^{41}\)

For the absolute deregulator, however, there are at least two dilemmas. First, if he accepts the imperfect information argument, it is difficult to argue simultaneously that transactors have all the information necessary to make markets work. Fully informed (or very informed) economic man and ill informed (or stupid) political man have somehow to be crammed into the same physical body. Once widespread ignorance about the effects of particular regulated markets is accepted, perfection of unregulated markets looks a bit schizoid. It looks more like a postulate based on faith—normative-positive—than an empirical conclusion of judgment. Of course it is always possible to argue that redistribution in general or of various types *should* not occur.

Secondly, however, the capitalization of redistributive gains exposes a serious weakness in the argument that all redistribution is eaten up in efforts to acquire the regulatory “assets.” In the case of production quotas, it is necessary to assume that lobbying efforts use up resources just equal to the capitalized value of the quotas, or that bribes (of the same value) are competed for by politicians who in total invest real resources in seeking election just equal to the value of bribes expected. All rents get dissipated.

Similarly in the case of non-marketable assets such as access to a profession, the capitalized value of above market earnings due to restricted access is assumed to be dissipated in efforts to secure access. If access is free and prices are regulated, entry dissipates the rents.

The problem is that such behaviour again depends on a peculiar assumption about the structure of information. Aspiring professional entrants are assumed to have excellent information on future product/service supply and demand conditions, so as to predict discounted rental streams, but not about present conditions in the “regulation” market—perfect farsightedness and near term blindness. For if all applicants were *fully* informed, about the market for “regulation” as well, they would know each other’s probabilities

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\(^{41}\) “(B)y influencing voter knowledge and understanding, and hence voter decisions, the insights of economic research (and social science research generally) can be brought to bear on the ultimate decision making process. Indeed these direct effects of new information may be much more effective than direct information provision to bureaucrats and politicians.” *Id.* at 48. Unfortunately, as Keynes pointed out, “the ideas of economists and political philosophers, both when they are right and when they are wrong (my emphasis), are more powerful than is commonly understood.” *General Theory of Employment Interest and Money* (London: MacMillan, 1971) at 383. One would indeed be an optimist to claim that the pamphleteering efforts of economists, taken in total, have made a positive contribution to economic policy in the 1970’s, at least in the English-speaking world. But there may be no alternative.
(conditional upon effort) of securing entrance. They could then calculate who the winners would be, and once everyone knew this, no one would go to any extra effort. The same holds for lobbyists and bribable politicians, except that to be seen by others to be bribable, or to be lobbying energetically, can lower one's effectiveness. “Economic” theories of the political process are not compatible with perfectly informed voters!

Of course information is very far from perfect, which is why people do study hard to get into medical school. But quite apart from whether this activity is a dead weight loss (surely another value judgment, education is not built on consumer sovereignty!), once one admits imperfect information as a critical component of the “rent-seeking” process then the dead weight loss is no longer determined by the value of the discounted rental stream. It can be higher or lower depending on particular conditions.42

If regulatory benefits, such as entry to restricted markets, were distributed by lottery, and tickets were auctioned off on the basis of otherwise unproductive effort, then one might expect ticket prices and dead weight costs to reflect buyers' estimates of the expected value of the discounted rental stream. But no real-life examples of such a mechanism come to mind. This is not to say that regulation will not generate dead weight losses, obviously it can and does. But the argument that these dissipate all positive redistributational effects rests on implicit informational and structural assumptions about the regulatory process that have no obvious face validity and seem rather to be imposed in order to yield a conclusion desired on other grounds.

The ostensible justification of almost all regulation, however, is not wealth redistribution per se but general improvements in well-being, serving the public interest, however loosely defined. The regulatory activity is proposed as increasing the value of the SWF, quite apart from any incidental redistributational effects it may have. Such increases may result either from the remedy of explicit market failures that constrain private unregulated transactions to sub-optimal results, or from the pursuit of more general social goals, forms of Xj that are valued but cannot be treated as commodities and traded in markets.

In the process, of course, there will usually be some redistribution of income or wealth as regulation creates and destroys property rights. But such redistribution is considered as a side effect, if at all, with some implicit or explicit assumption that, since the overall SWF is to be increased, gainers could afford to compensate losers (though they probably won't). And though common, redistributational side effects do not necessarily follow. Schelling

42 The problem is not merely that the relation becomes imprecise or subject to error. Rents may be systematically above the dead-weight cost of their acquisition, depending on the characteristics of the activity or regulation in question, and may remain so more or less indefinitely. They may also be systematically below, if there are continuing biases in entrants' forecasts, as Adam Smith suggested was the case for would-be barristers. In the professions, each would-be entrant is a new individual (there's one born every minute) so the experience of others cannot be assumed to correct expectations.
analyses a number of social processes involving interactive decision-making (such as "prisoners' dilemmas") in which regulatory constraints can make everyone involved better off. Universal compulsory insurance programs in the presence of adverse selection are a prominent example.

There are several forms of market failure that give rise to arguments for regulatory intervention. External effects, natural monopoly (or, more generally, structurally imperfect competition), asymmetry of information between transactors, and the more shadowy "destructive competition" are usually included in such a list. In each of these situations, we find the dual problem that "vulnerable interests," as the Professional Organizations Committee described them, may be unable to protect themselves in private, arms' length market transactions, and that the outcome of such transactions can be shown to be inefficient in the Paretoian sense as well. Those interests benefiting from the outcomes of the allegedly imperfect, unregulated market, who would suffer from regulation, could be compensated (although they probably won’t be), and the vulnerable interests would still be better off.

The analysis of such situations could, and does, fill many books. As in the redistribution case, however, assumptions about information and pre-analytic value judgments about process and about wealth distributions seem to play a critical role in determining the outcome of such analysis.

The "deregulationist" school denies either the existence of market failure, or its remediability by public regulation. And their arguments seem to turn on judgments about information. Debates over consumer protection, or occupational health and safety, for instance, usually find the deregulationists assuming, openly or hidden in the equations, fully informed consumers/workers who knowingly accept hazards and are compensated, through competitive market processes, for doing so. No effort is made to determine if transactors really are fully informed. Instead they represent an apparently positive but really, I think, normative assumption about how people ought to behave.

In some cases learning processes of one form or another are tacked onto the model to argue that market interactions will lead to transactor learning and thus full information in the "long run", but this occurs only in a world of stable parameters and arbitrarily long-lived transactors. Both Heraclitus and Keynes are relevant in rebuttal, there are several levels of meaning to: "In the long run we are all dead." In fact what such arguments boil down to is a judgment that transactors are likely to be adequately, if not perfectly,

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45 Trebilcock, Waverman and Pritchard, supra note 33.
informed, and in any case better informed than a regulator could be. This may be true in particular cases, but is obviously false in others—unless consumers' interests are assumed to be revealed only by their actions, a version of the Pangloss gambit. People undergo (and in the U.S. pay for) "unnecessary" removal of healthy organs because of the peace of mind this brings? . . . 47 The assumption of full transactor information as a general postulate by deregulationists marks it as a normative-positive postulate, an article of a creed.

The analysis of imperfect competition and natural monopoly similarly depends on informational assumptions. It has been pointed out that the case for regulating natural monopolies disappears if perfect information is taken to its logical limit, because spot contracts can be negotiated between consumers and producers specifying all the preset and future behaviour of the monopolist. Moreover, since all relevant information is universally shared, there will be no difficulty in assembling large numbers of transactors on both sides of the market. One can auction off rights to control a natural monopoly for example, or the constraining features of a structurally imperfectly competitive market, and there will be large numbers of bidders in such an auction because no person or group has inside information. 48

This argument is useful in turning attention from production structures to information structures, and demonstrating how powerful (and implausible) is perfect information. Counter-arguments are then framed in terms of incomplete rationality/calculability, incomplete foresight, first-mover advantages which lead to small-numbers problems of negotiation and long-term administered contracts, and the public oversight of private "regulation." 49 Arguments against regulation of monopoly, as against anti-combines activity, rest inter alia on the assumption that all markets are effectively spot markets with large numbers of potential buyers and sellers, even though at any point they are supplied by one, a handful, or even one. All supply curves are elastic at or above the present price—if not immediately, then soon; and the hypothetical entrant, implied by perfect information, is always there to make apparently imperfect markets competitive. But the hypothetical entrant is seen clearly only with the eye of faith; lacking such faith one becomes concerned with grubby details of entry barriers, negotiating costs, pre-commitment, and the dynamics of market structure. Some imperfect markets, left alone, may generate self-correcting tendencies, others may not. And the costs of unregulated imperfection vary dramatically, from the cosmetologist to the neurosurgeon, or from monopolies in paper clips to monopolies in oil.

It may seem paradoxical, and is certainly ironic, that among the most

47 Pauly, What is Unnecessary Surgery? (1979), 57 Milbank Memorial Fund Quarterly 95.
energetic advocates of deregulation and reliance on private markets, we also find considerable apparent concern for problems of imperfect information. This would appear inconsistent with the statement that the absolute deregulationist position rests on very strong and implausible information assumptions.

But the conflict is more apparent than real. Perfect information, of the sort possessed by LePlace's Demon, is inaccessible to human actors at least. Recast in relative terms, the relevant questions are what sorts of information are generated by different institutional frameworks, and how will transactors behave in the presence of imperfect information? The deregulationist assumptions appear to be two-fold: that private markets will in fact generate information which, if not perfect, is the best available given its cost, and that transactors will act on the best available information as if it were perfect. The recognition that information is not perfect in an absolute sense then becomes a way of dealing with empirical evidence suggesting market failure. Observations of price dispersion, or failures of markets to clear (unemployment) are no longer prima facie evidence of failure; they may be consistent with the smooth functioning of markets in all goods, including information. It is also a weapon against public regulation, in that public agencies may be alleged not to have adequate information to regulate effectively.

Of course neither of the above two assumptions holds in general. In conditions of extreme information imperfection, transactors do not act as if they were fully informed, they enter into various forms of non-arm's length and non-market arrangements. Moreover, information is not a commodity, or if we choose to call it one, it is not a commodity with the characteristics that give private markets an advantage in its efficient allocation. Markets are quite good at producing efficient amounts of some kinds of information; they are very bad at producing others. One can point to numerous examples, many discussed elsewhere in this volume, of the failure of private markets in the production of information.

If one ignores these difficulties, however, and assumes, in the absence of theoretical support and in the face of counter-evidence, that private markets always do yield optimal, if not perfect, information levels, this is equivalent to the assumption of perfect information. Imperfect information is costly, but private unregulated markets minimize these costs—by assumption. A more plausible approach is surely to recognize that imperfect information is a problem under any system of institutions for resource allocation. Better information is costly, but no one set of institutions can be assumed a priori to have informational advantages in all settings.

Of course the pro-regulationist, in particular industries, is not concerned with general cases. He usually has a lively appreciation for the private, as

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60 Arrow, *Uncertainty and the Welfare Economics of Medical Care.* (1963), 53 Am. Econ. Rev. 941, explains the formation of the professional agency role in these terms.
well as the public, benefits that flow from regulation. The Stiglerian Marxist is frequently right. The contrast is particularly striking between directly regulated and “self”-regulating occupations, in terms of the balance of public and private interests served. Self-regulators take care to suppress competitive behaviour within the occupation, and strive to prevent the development of other competitive occupations. Directly regulated occupations show a much richer role structure. Self-regulators see “continuing competence” as a combination of service quality, public relations, and tax-free holidays; the directly regulated have to pass periodic re-examination. Detailed examination of the regulations imposed by self-regulating occupations provides numerous examples of measures promoting the interests of the occupation or its members, independently of or frequently in conflict with the interests of consumers or the wider society.\textsuperscript{51} The surrounding rhetoric frequently alleges or takes for granted that whatever is good for the self-regulating group is by definition good for everyone else—the doctrine of Engine Charlie Wilson, or General Bullmoose.

But though regulation frequently serves the interests of the regulated, it does not follow either that it always does so or that it only does so. The irony of the more articulate deregulators in the United States assisting the pharmaceutical industry in its attack on Food and Drug Administration regulations was noted above, to say nothing of the Canadian oil industry’s attitude to the National Energy Programme! And arguments for deregulation of physicians fall on deaf ears, because the public at large feels that it benefits from such regulation. It is probably right; deregulationists in this field tend to ignore quality issues or to offer pie-in-the-sky alternatives.\textsuperscript{52} Similarly the argument that airline safety can be assured by the travelling public’s learning to avoid unsafe lines appeals only to those who take the train. In this case, as in medicine, information is costly to have as well as to get, and non-compensable irreversibilities enter in a non-trivial way.

The scope for discussion of particular regulatory cases, and consideration of the balance of positive and normative judgments involved, seems almost endless. But behind myriad specific judgements of fact and value that inform (or cloud) debates over regulation there do seem to be


\textsuperscript{52} Few non-economists have been comfortable with Friedman’s argument, propounded in \textit{Capitalism and Freedom} (Chicago: University of Chicago Press, 1962), that unregulated health professions would have evolved, under market pressures, alternative and at least as effective forms of quality control and consumer protection. His argument rests on \textit{a priori} propositions about how perfect markets might function, linked by assertion to actual markets, without supporting evidence of any sort. The discussion of the “quality” problem in professional services in Muzondo and Pazderka, \textit{Professional Licensing and Competition Policy: Effects of Licensing on Earnings and Rates-of-Return Differentials} (Ottawa: Consumer and Corporate Affairs Canada, 1979), similarly rests on assertion and wishful thinking. The contrast with the careful approach to this central problem in Trebilcock, Tuohy and Wolfson, \textit{Professional Regulation} [a Staff Study prepared for the Professional Organizations Committee] (Toronto: Ministry of the Attorney-General, 1979), is striking.
certain abiding values. Articles of a creed can be discerned, even if the whole creed is still unclear. The hypothetical entrants, the generality of transactor information if not now then soon, the peculiar mix of “perfect information” with specific forms of blindness, the limited cost and reversibility of error, the commodity-like status of all relevant utility function arguments, the absence of utility function interaction among transactors, all represent positive propositions that are accepted on normative grounds, which have limited, or no, empirical support but which ought to be believed.

Behind these, presumably, are more fundamental values, of which a central one may be a peculiarly asymmetric attitude toward coercion. The deregulationist school, or the Plutonian heresy, seem to have a horror of coercion by force. Regulation, the authority of the state resting ultimately on the public sword, is thus at root immoral, with one monumental exception. As pointed out by Steineer, the libertarian quandry is precisely that all property rights themselves rely on this same sword, not on the consent of those constrained to respect such rights.53

But to those who do not possess sufficient property rights to sustain life independently, the negotiations surrounding transactions may become indistinguishable from force. This point seems to be passed over in silence, or dealt with implicitly by the assumption that all markets are competitive— or will become so before starvation sets in. The final solution, of simply dropping such unfortunates from the SWF, is one that only a few have been willing to recognize. Posner faces up to this.54 But he, like the pro-market school generally, seems not to realize that exchange relationships are non-coercive only if one can choose not to participate. In technical terms, the initial pre-trade resource endowment must sustain the transactor. All participants must, like independent peasant proprietors, be able to live off their own. When this is not true, and some must trade to live while others need not, “free” exchange may, depending on market structure, be powerfully coercive. Marx stressed this point, as did Adam Smith.55 But it has apparently been missed by those who call on his name without reading him.

At this point, the morality of the process whereby a particular structure of property rights has emerged becomes crucial. It appears that insofar as particular current public regulations can be identified as a source of such rights, then they are not legitimate — deregulate regardless of the distributional consequences. But there seems no corresponding moral obligation to investigate the historical roots of current property rights, particularly ownership of physical capital. Marx’s interest in “primary accumulation” would seem to be critical also to deregulationists, but in fact the sources of present rights are either passed over in silence or dealt with by assertions

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53 *A Libertarian Quandary* (1980), 90 Ethics 257.

54 Posner, *supra* note 18, at 135. Actually Posner drops those whose post-trade resources do not sustain life. For those whose endowment (such as labour but no capital or land) requires them to trade, the outcome of that trade becomes a life or death matter. Whether they are in or out of the SWF depends on market outcomes.

lacking any historical support. This is a serious omission, since the position, "Regulate only with compensation, deregulate without," must imply a distinction between legitimate and illegitimate property rights. By definition, those acquired as a result of regulation are illegitimate—all the rest are legitimate. Such wholesale ethical ratification of a historical process with some distinctly unsavoury components cannot be the result of mere ignorance.

Moreover, the morality or immorality of the process of rights allocation, its basis in consent or coercion, does not depend only on whether it occurred today or yesterday. Coercion by (public) force is immoral, coercion by fraud or private force is apparently not. Of course extortion or fraud as defined by the law is presumably immoral, since it is at least illegal—if it can be proven and redressed, not in some ideal judicial world but in the reality of imperfect information and constrained litigious and judicial resources. But the redistribution that occurs when there is systematic informational asymmetry in a transaction is apparently moral—caveat emptor (or in some cases vendor). The stress placed in the creed on assumptions about learning processes or institutional evolution to redress such situations suggests a certain unease at this point, or at least a concern that this value may not be widely shared. But it seems apparent that as an underlying value premise, redistribution via deceit is at worst a venial sin compared with the mortal sin of regulation.

These asymmetric attitudes toward public and private coercion, force and deceit, find expression in what Archibald and Donaldson call the "Junior Chamber of Commerce Social Welfare Function." Any activity carried out in the private sector (for which no one is convicted) increases the SWF; any carried out in the public sector (possibly excepting those that increase the security of private property rights) reduces the SWF. The task of the analyst in any particular case is merely to explain how.

It is less clear whether the distribution of income and wealth is itself a value, or whether the value judgments cover only the process of rights allocation. Clearly egalitarianism is not a value, but is inequality valued for

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66 Several references in Posner, supra note 18, suggest that he is aware of the problem, but his responses are trivial: "lawfully obtained wealth is created only by doing things for other people... in a well-regulated market economy" (at 132.) There is a fine confusion between what would happen in an ideal world and what did happen historically. Similarly "lawfully" may mean in accordance with a moral law, or simply that no one was convicted. Elsewhere (at 123) the market's response to a buyer's offer for a necklace is given ethical significance because "the buyer's $10,000 was in all likelihood accumulated through productive activity." (my emphasis) Likely to whom? It is rather a shaky foundation for an ethical system! One does not have to assume that all primary accumulation is the result of force and fraud, or that property is theft, in order to recognize that such activities played a prominent part in the historical process of rights accumulation. (e.g. Myers, A History of Canadian Wealth (reissued Toronto: James Lorimer, 1972, originally Chicago, 1914.) And to assert that present accumulation proceeds solely by "understanding and appealing to the needs and wants of others" (at 136), one must be either naive, or worse.

67 Epstein, supra note 15.

68 U.B.C. oral tradition. This seems in fact to be the core of Epstein's argument (id.) and of Posner's (supra note 18).
itself, or only as the result of a valued process? Most of the deregulation rhetoric is over process, but the fundamental blind spots as to the role of coercion in primary accumulation, in defense of current patterns, or when carried on via informational differentials, strongly suggests that inequality \textit{per se} is an objective. This in turn could be a Rawlsian value, a preference for inequality even when one is behind the veil of ignorance, but it seems more plausible, given the above, that a particular pattern, the \textit{status quo ante regulation}, is favoured. Such a doctrine has marketable features, as did the Apostles' Creed. There are always enthusiastic and generous benefactors of a doctrine that supports the \textit{status quo}—the Christian case was a bit more complex.

Whether positivism, objectivity, "science", is also a value in itself is also obscure. Again the rhetoric of positivism suggests that it is, but the normative significance of the creed suggests otherwise. The white coat may be an independent object of veneration, but its application indicates that it is rather more of a cloak.

The usefulness of this cloak, however, depends on the specific values to be defended. Myrdal, for example, argues:

Quasi-scientific rationalization of a political endeavour may be an effective propaganda weapon; yet its effect at the crucial time, when the ideal has acquired enough political backing to be transformed into practical action, is in a democratic setting almost always inhibiting and disintegrating. I make an exception for completely conservative strivings which seek no more than the preservation of the status quo; from such a political standpoint doctrinaire thinking may be less dangerous.\(^5\)

It is ironic that while the content of science may be revolutionary, the methodology is highly conservative. Nor is this effect confined to theorizing; Tuohy observes that insistence on the most rigorous scientific standards in cost-benefit evaluations of proposed public policy may so tie up the process that nothing can be done.\(^6\)

In any case non-paternalism is clearly a value—one ought not to interfere with others' behaviour even if one does feel affected by it. This links both to force—one should not impose one’s preferences on others, and such preferences are illegitimate (Richard Posner, meet the Moral Majority)—and to wealth—one may distribute charity but there exists no obligation, no \textit{noblesse oblige} to look after others. Paternalism implies both right to interfere and obligation to help—both are denied.

Insofar as a particular wealth distribution \textit{is} a value, and the strong interest of deregulationists in terminating transfer programmes suggests that it is, the Plutonian deregulationist closes the circle with the special interest regulationist. Both pursue redistributional goals under a public interest cover story. Both may serve other personal values as well. Neither are wholly detached from the "public interest". There appear to be identifiable situations in which regulation serves interests beyond or other than those of the regulated, general enough to be called public, and other situations in which only

\(^5\) Myrdal, \textit{supra} note 6, p. xii [preface to 1929 edition].
\(^6\) Tuohy, \textit{supra} note 9.
the regulated are served. In some of these, again, dead weight losses may eat up all the gains, so everyone loses.

Between these two poles, the special interest regulationist as he exists in the mind of Stigler and the absolute deregulationist or Chicago Plutonian, the advocate of wishy-washy regulatory reform has few fixed points for guidance. And yet the inhabitants of this large middle ground do routinely terminate their analyses with proposals for improvement and reform. Very few students of regulation, or of economics generally, are motivated solely by intellectual curiosity. Since the impossibility of deriving policy recommendations from analytic economics, of “ought” from “is”, applies to such reformers no less than to the Plutonians, one might well ask about the source and content of their (our) values and objectives that are expressed through economic analysis.

The question is not easy to answer. The values expressed through policy recommendations must inevitably be diverse, overlapping, and to some extent contradictory or confused. Following Gordon’s criticism of “moral monism,” each analyst/advocate will generally have a number of values in mind, consciously or subconsciously; and the relative weights on each, as well as the range of values admitted, will vary across analysts. In attempting to describe the value bases of non-Plutonian regulatory reform, one runs a significant risk of isolating at best a confused and partial description of the values of one analyst.

Since virtually all regulation redistributes property rights, any policy recommendation implies the existence of values defined over this distribution. The Paretian forbids any redistribution, effectively forbidding policy and freezing the status quo. The cost-benefit analyst usually adds up benefits “to whomsoever accruing,” implying indifference to distribution. Explicit distributive weights can be inserted into the analysis, but usually are not. The Plutonian values the status quo ante regulation, or the status quo post deregulation, distributions (which need not be the same). The reformer generally has a mild egalitarian bent, agreeing with Simons’ description of extreme inequality as “evil or unlovely.” This is reinforced by concern for the political and social consequences of inequality; like Peacock and Rowley, the reformer is concerned about the “threat to individual freedom... from concentrations of political and economic power, whether in the hands of private citizens, of bureaucrats, or of the state.... [L]iberals are for the most part committed to a more equal distribution of wealth than that which exists, even in countries,... which operate a progressive tax system.” The Plutonian, or Chicago liberal, rules out a priori the possibility of private oppression. In their hearts, however, I suspect most regulatory reformers also believe in the diminishing marginal utility of income, despite its analytic problems.

Egalitarianism is, however, tempered by considerations of “transactions costs” in a broad sense. Stability and predictability of individual wealth

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81 Gordon, supra note 11, at 474.
82 Supra note 24, at 480, 482. [emphasis added].
positions is itself a value, though a value with interesting implications. If unpredictable redistribution is a source of disutility when practiced by the state, is it not equally so when it occurs through the market? The suggestion that I have somehow “consented” when my private pension plan is wiped out in the stock market, but not when my taxes are raised, strains the meaning of consent out of recognition. And stability is a frequent and presumably legitimate objective of regulation. Redistributinal objectives must be balanced against the costs of change as well as incentive considerations.

Moreover there is usually some implicit judgment of “deservingness”—inherited wealth is less deserved than earned wealth. Senior’s initial justification of property income against the Ricardian attack made this distinction clearly, and few have been prepared to follow the Plutonians in treating the use of inherited wealth as being consumption or investment on behalf of a dead testator whose interests have as good a claim to protection as those of any living member of society. Some societies engage in ancestor-worship, and allocate resources to the satisfaction of the dead; ours does not.

This indicates the perceived social convention that underlies the analyst’s egalitarianism. The reformer bases recommendations, not just on his own values but on a perception of social values. All developed countries have progressive income tax systems, on paper at least, indicating a general consensus in favour of moderating inequality. And attacks on the progressive tax system have generally focused, not on this objective itself, but on its alleged side effects with respect to efficiency and growth. Few have been willing to undertake a direct argument in favour of inequality as a value. Apparently progressive tax systems may be more or less so in fact; a system may have relatively few loopholes (Canada) or be so shot through as to have little progressiveness left (the United States)—but its form reflects what the society wants and believes it has. Ultimately the reformer must rest his values on a perceived social consensus, though he may be distinctly uneasy about what a democracy may do. The Plutonian may in effect reject democracy altogether, in favour of divine will, natural law, or socio-biological evolution, but the wishy-washy reformer is squarely caught on the potential conflict between process and outcome values and can only educate—or preach.

The regulatory reformer is thus likely to be more sympathetic to regulation which rather protects the poor than further fattens the rich, though bitter experience teaches that the latter frequently masquerades as the former. It is a common critique of agricultural price stabilization or supply management that it favours the wealthy agribusiness, not the marginal farmer, or of occupational regulation that it protects from competition the highest-

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63 To choose A over B when no other options are permitted does not give A any special ethical significance. If I demand “your money or your life,” you do not “consent” in giving up your purse.

64 Dobb, supra note 4, at 104.

65 Peacock and Rowley, supra note 24, at 481 and Gordon, supra note 11, at 476-478.
earning occupations in the economy, at the expense of their less wealthy customers or potential competitors.

Apart from regulation as redistribution, however, the reformer, like the Plutonian, is concerned with efficiency considerations. Traditionally, this concern has focused on allocative distortions of the "welfare triangle" type, arising from the effects of regulation in constraining supply and elevating price. Increasingly, however, reformer and Plutonian are focusing on real resource costs, technical inefficiency, associated with regulation. The triangles do not appear to be very large, indeed in imperfectly informed and regulated markets they may well not exist. But detailed study of regulated industries indicates extensive resource mis-allocation in a technical sense. Transport regulation leads to deadheading empty trucks and half-empty aircraft competing by advertising. Professional regulation leads to pharmacists "counting and pouring" and dentists filling teeth. The "high priced help" uses the regulatory power to hold less costly competitors out of the market. Farmers destroy large quantities of food. The most severe costs of economic regulation turn out, on examination, to be sheer inefficiency and waste. The perverse incentives that are frequently created by regulation lead either to production off the production function, or to production on that function that is non-optimal at current (or any plausible alternative) prices.

The problem is not so much, as the Plutonian analysis has it, that dead weight losses are incurred in gaining access to rental streams created by regulation, but that regulation distorts the production process itself. This possibility is discounted on a priori grounds by the Plutonians; the simple refutation is to go and look.

This brings out an important methodological distinction between the reformer and the Plutonian deregulationist. The reformer places great weight on specific information, on detailed investigation of what is actually happening in a particular industry. He is prepared to go down on the "shop floor", into the grubby details of whether best practice technique is being used, and if not why not, what are the actual incentives and constraints faced by the key transactors, what sorts of information are in practice available or unavailable, and how do people behave as a result. The deregulationist rises above all this, preferring a priori analysis and indirect evidence, and minimizing the use of specific information.

Reliance on indirect information

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67 Stigler, in his remarks to the AEI Conference on Occupational Regulation, 1979 (see Rottenberg, supra note 66, at 348-354) specifically criticized economists who as amateur technologists tried to understand the technical details of the industries or occupations they studied. Such a criticism might carry more weight if one could demonstrate, as Stigler did not, that economists were incapable of working with, or learning from, people who do have specific technological information about the objects of analysis. But of course they can and do. Stigler's position appears to be a plea for ignorance, and for the disregard of all direct evidence. ("Don't confuse me with facts ...") In a similar vein, the Reagan administration has slashed public funding for
is presumably based on the assumption that all (relevant) direct information, or at least all that is worth acquiring at current costs, is already optimally embodied in the behaviour of the transactors being studied. But this assumption, when formulated as other than a tautology, has neither theoretical nor empirical support.

Detailed investigation of particular industries or markets will often lead to the conclusion that much current regulation is harmful either absolutely, or on balance, or relative to some conceivable alternative. But it requires one to take seriously the issues and problems to which regulation responds.

Whether such a case-by-case, detailed investigation approach is likely to be more effective in achieving change than a doctrinaire anti-public sector stance based on a priori hypotheses is questionable; it may be true that ignorance is strength. But the logical limit of the deregulationist approach is pure quietism—if there is a “market” in public regulation then presumably that “market” works as perfectly as any other, so whatever is is right in the public sector as well. Reformers hold as a value, or certainly a creedal assumption, that people of good will can in fact respond to public values that to some extent transcend pure self-interest, and can work collectively in public as well as in private to secure general social ends. Conscious amelioration, not just the spontaneous working out of social evolution, is possible. And while there is no lack of examples or regulatory activity that is short-sighted, harmful, or merely a cloak for private interests; there are also examples of regulation that is widely considered successful, or at least necessary, and with good reason.

Finally, most wishy-washy reformers appear to hold as a value a certain conception of intellectual honesty that demands that insofar as possible values be brought out in the open, not hidden in the analysis. Purely value-free analysis may be impossible, but one can comment on the degree of mixture rather than pretend to a spurious objectivity. And one can strive towards objectivity; the impossibility of truly value free analysis does not obliterate all distinction nor qualify strongly felt emotions as the equivalent of careful intellectual effort. Nor should one apologize if the values thus expressed are a bit vague and frequently in conflict; if they were not so, one could not claim them as representative of the wider society.

Moreover, if the ethical scene is cloudy, there is a silver lining. If regulatory reform must proceed as a series of special cases, with detailed review of the facts and values involved in each, there appears to be a good market for the services of analysts. Given the importance of the field, and the acknowledged wide variation in the quality of work of practitioners, some consideration of licensure seems an obvious priority.

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68 The distinction between levels of interest, which re-establishes the possibility of a public interest, is discussed by Sen, *Rational Fools: A Critique of the Behavioural Foundations of Economic Theory* (1977), 6 Phil. and Public Aff. 317.