

Book Reviews

The Personality Theory of Agency Regulation

Prophets of Regulation, by Thomas K. McCraw.* Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1984. 387 pages. \$20.00.

George L. Priest†

Prophets of Regulation by Thomas K. McCraw proposes a new theory of the origins of agency regulation. McCraw argues that the creation of regulatory agencies and the structure of regulatory policies derive from the ambitions, training, and personalities of specific individuals—the “prophets” of regulation. McCraw supports his hypothesis with the life stories of four men, each from a different era, each responsible for different regulatory efforts—Charles Francis Adams, appointed one of the first members of the Massachusetts Board of Railroad Commissioners in 1869; Louis D. Brandeis, a strong proponent of the Federal Trade Commission (FTC), created in 1914; James M. Landis, chief drafter of the 1933 and 1934 legislation regulating the securities industry and commissioner of the FTC, the Securities and Exchange Commission (SEC), and the Civil Aeronautics Board (CAB); and finally, Alfred E. Kahn, chairman of the CAB in the 1970’s and a leader of the deregulation movement.

According to McCraw, each of these men became an “independent social force” determining the structure of agency regulation.¹ *Prophets of Regulation* consists of a set of biographies, each showing how the origin of the respective regulatory agency, or, in the case of the CAB, its demise, was intertwined with the personal experience of the prophet.

* Professor of Business Administration, Graduate School of Business Administration, Harvard University.

† Professor of Law, Yale Law School.

1. T. McCRAW, *PROPHETS OF REGULATION* at viii (1984) [hereinafter cited by page number].

McCraw's book has two objectives. First, McCraw attempts to establish through the biographies the impossibility of assessing a regulatory agency without understanding the personality behind it. A second and more subtle objective is to rescue the tarnished reputation that agency regulation suffers on the modern public policy scene. McCraw complains that today agency regulation is commonly regarded as a failure. In contrast, each of McCraw's prophets is regarded as having led a largely successful life—Adams, Brandeis, and Kahn in particular. McCraw hopes that the demonstration of the necessary interconnection between the lives of these great men and the development of agency regulation will resuscitate the reputation of agency regulation.²

McCraw's effort is certainly worth considering. Alternative theories of regulation remain unconvincing. Decades of empirical demonstration of the harmful economic effects of regulation in individual industries give no hope of commitment to a public interest theory.³ Yet the conflicting special interest or cartel theory cannot explain ten years of movement toward deregulation, and the fledgling "economic" or political coalition theory of Stigler and Peltzman remains too subtle and complex to be either supported or refuted convincingly.⁴ Perhaps McCraw is on to something.

I. The Personality Theory Explained

McCraw certainly begins impressively. The career of Charles Francis Adams provides the best evidence for the personality theory of regulation. As McCraw tells the story, Charles Francis Adams is almost singly responsible for the founding of the first important independent regulatory agency, the Massachusetts Board of Railroad Commissioners. Adams conceived of the idea of an independent agency; created the intellectual justification for a commission to regulate railroads; agitated widely for the founding of the Massachusetts Board and convinced the Massachusetts legislature of its importance; manipulated his own appointment as one of its first three commissioners and later as its chairman; and then, over the succeeding ten years, set the Board's agenda, dictated its policies, wrote its influential *Annual Reports*, and proselytized for the founding of similar commissions in other states.⁵

According to McCraw, the relationship between Adams' personality

2. *Id.*

3. See, e.g., G. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975); Jordan, *Producer Protection, Prior Market Structure, and the Effects of Government Regulation*, 15 J.L. & ECON. 151 (1972).

4. G. STIGLER, *supra* note 3; Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

5. Pp. 4-44.

and the Massachusetts Railroad Board was far deeper than even Adams' active involvement might suggest. Railroad regulation was a medium through which Adams could salvage his failed career.⁶ Adams' distinguished family (John Quincy Adams was his grandfather and Henry his brother) generated substantial pressures for personal success. Charles, however, was never a brilliant student. Although he apprenticed for the bar in a prominent law firm, he disliked the practice of law, in large part because he could not retain clients.⁷ He was rescued from this occupational failure by the Civil War,⁸ but, of course, it too ended after some time.

After the War, Adams considered the matter of vocation more carefully: "Surveying the whole field [of possible occupations]—instinctively recognizing my unfitness for the law—I fixed on the railroad system as the most developing force and largest field of the day, and determined to attach myself to it."⁹ Adams had no contacts in the railroad business, obviously no experience, and no particular expertise related to rail operations. So he decided to write about railroads. According to McCraw, Adams resolved to make war against the titans of the railroad industry with the thought that his writing would gain him some official position. Apparently, Adams hoped to become a form of "national ombudsman, [as] the public's representative-at-large in its manifold relationships with the railroad system."¹⁰

Between 1867 and 1871, Adams published a series of articles describing the modern railroad problems.¹¹ His most prominent pieces exposed the financial manipulations of the railroad magnates, portraying giants such as Fisk, Gould, Drew, and Vanderbilt clashing over railroad control with little regard for the law or for the interests of subordinate shareholders.¹²

According to McCraw, these articles brought Adams a reputation as an expert on railroad problems. Adams wrote editorials supporting the establishment of a commission to regulate railroads and was asked, under circumstances McCraw does not relate, to draft legislation creating such a commission. The Massachusetts Board of Railroad Commissioners was founded in 1869 with Adams as one of its first three commissioners. Adams was easily the driving force of the group and soon became the Board's chairman.¹³

6. Pp. 4-7.

7. Pp. 2-3.

8. Pp. 3-4.

9. Quoted at p. 4.

10. P. 6.

11. See p. 312, n.16.

12. E.g., Adams, *A Chapter of Erie*, 109 N. AM. REV. 30 (1869).

13. Pp. 15-22.

McCraw's second prophet, Louis D. Brandeis, possesses a somewhat more tangential link to regulation. Brandeis, despite his wide variety of public successes, never served on a regulatory commission nor, for that matter, seems to have taken much interest in regulation. McCraw names him a prophet because of his apparent influence over the domestic economic policies of Woodrow Wilson which led to Wilson's support for, and the subsequent enactment of, the Clayton Act and the Federal Trade Commission Act. According to McCraw, Brandeis' motivating concern was his abhorrence of big business¹⁴ and his support for the efforts of smaller wholesalers and retailers.¹⁵ Indeed, Brandeis was a major figure in the organized retailer opposition to the Supreme Court's *Dr. Miles* decision in 1911 prohibiting resale price maintenance.¹⁶ Brandeis also apparently advocated the creation of the Federal Trade Commission and the Clayton Act to regulate corporate behavior for the benefit of small wholesalers and retailers.¹⁷ In its early years, however, the Federal Trade Commission was consigned to a publicity role similar to that of the Massachusetts Railroad Board. McCraw emphasizes the link between the publicity objectives of these two agencies, but the similarity has no obvious significance, except perhaps as evidence of the political weakness of those who supported regulation.

McCraw's third prophet, James M. Landis, occupies a more central position in the regulatory experience. Landis, a brilliant Harvard Law School graduate and law clerk to Justice Brandeis, joined the early New Deal as the chief drafter of the Securities Act of 1933 and the Securities and Exchange Act of 1934. During his career, he served on three separate regulatory commissions—the FTC, which enforced the Securities Act until the creation of the SEC; the SEC (later as its chairman); and the CAB (also as its chairman). His principal academic contributions were in the field of administrative law—*The Administrative Process*, published in 1938, and his later *Report on the Regulatory Agencies to the President-elect* in 1960.

McCraw sees Landis' contributions to regulation as chiefly procedural. Landis was a master of due process.¹⁸ Landis, along with others, believed

14. P. 108.

15. See, e.g., pp. 102, 141. McCraw implies—quite crudely—that Brandeis sympathized with wholesalers and retailers because they were his clients and that he identified with the interests of shippers (as opposed to those of the railroads) because his father and brother were merchants and active shippers. Pp. 87, 91.

16. *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

17. P. 111.

18. McCraw notes that Landis was primarily concerned with finding ways of "institutionalizing the linkages between ends and means, between legislation and administration . . ." P. 172. He seized upon procedural devices that used "incentives potentially inherent in the industry to give every person involved . . . a stake in helping to enforce the law." *Id.*

in the virtues of disclosure in the securities business (another link to Adams and Brandeis)¹⁹ and supported the standardization of business and accounting practices.²⁰ He favored shifting to private accountants the work of organizing data about a firm that might otherwise be the subject of the regulatory investigation.²¹ According to McCraw, "The most dramatic evidence of the nature of [Landis' and the SEC's] strategy has been the sharp increase in the number of professional accountants in America."²²

McCraw depicts Landis' career as disintegrating following his tenure as chairman of the SEC.²³ Landis left the SEC in 1937 to become dean of the Harvard Law School. As his personal problems increased, however, an escape from the deanship was arranged, with Truman appointing Landis chairman of the CAB.²⁴ He lasted at the CAB only a year and a half. Landis then became something of a staff member of the Kennedy family (having such menial duties as arranging the children's trips)²⁵ until he prepared his famous report to Kennedy in 1960 urging broad regulatory reform. Shortly thereafter, he was convicted of failing to file tax returns for much of the period that he worked with the Kennedy family and died, perhaps a suicide, in 1964.²⁶

Alfred E. Kahn, McCraw's final prophet, is surely well-known to readers of the *Yale Journal on Regulation*. Kahn, a Cornell economist, served on the New York Public Utility Commission and later led the deregulation movement at the CAB, where he was chairman. According to McCraw, Kahn's *Economics of Regulation* "is one of the most important books ever written on the subject."²⁷ Indeed, McCraw regards Kahn as the most successful of all prophets of regulation, ignoring that Kahn seems to be prophesying regulation's doom. McCraw very effectively portrays Kahn's work on the New York Public Utility Commission advocating marginal cost pricing for electric power and presents a stirring account of Kahn's role in the CAB's withdrawal from price and entry regulation.²⁸

19. Pp. 172-74.

20. Pp. 189-92.

21. P. 191.

22. Pp. 186-87.

23. P. 204.

24. P. 205.

25. P. 206. McCraw's account seems to misdescribe substantially Landis' role. Compare D. RITCHIE, JAMES M. LANDIS, DEAN OF THE REGULATORS (1980) (describing Landis' active law practice during the period).

26. P. 208.

27. P. 233.

28. Pp. 245-56, 275-99.

II. The Theory Evaluated

McCraw's accounts of his prophets are certainly interesting vignettes. To constitute a theory of regulation, however, or for that matter even a rigorous history, McCraw must provide something more than vignette. At best, McCraw aspires to contrast the personality theory to other theories of regulation. To do so, he must attempt to measure the influence of each of his prophets in comparison to the influence of consumers of the respective regulated service or to the influence of the regulated firms. Even if McCraw's ambitions are more modest, a history of individuals important to regulation must attempt to evaluate the influence of the individual among other influences at the time, whether economic or intellectual, that moved the society toward the adoption of regulation. Any rigorous history must strive to describe the influence of the individual in the context of his or her times.

Here McCraw fails. McCraw offers neither an adequate theory of regulation nor a satisfactory historical account. He does not describe the social or intellectual context of the work of any of his prophets nor does he rigorously attempt to unravel the forces leading toward the creation of any specific regulatory agency. McCraw's accounts might make interesting chapters in separate biographies of the prophets, but even at this level his history is insufficient. Although he provides some substantial discussion of the life of the respective prophet before and after his regulatory moment, McCraw does not provide an adequate account of any of the men. Because McCraw does not attempt to distinguish the influence of his prophets from other forces contributing to the direction of the regulatory effort, his histories ultimately tell us very little about regulation.

The strongest example for the personality theory offered by McCraw is Charles Francis Adams. Far more than any other of McCraw's prophets, Adams appears personally to have altered the direction of the regulatory effort through his influence over the creation and the work of the Massachusetts Board of Railroad Commissioners. There is, however, a very curious feature to McCraw's account of Adams—although it seems clear that Adams dominated the Board itself, the work of the Commission corresponded only loosely to Adams' own ideas about railroad regulation. The Massachusetts Board is the prototypical example of a "weak" regulatory agency.²⁹ It possessed an extremely limited jurisdiction over substantive rail policies—none, for example, over rate-making. Instead, its principal mission was to provide the supposedly cleansing light of publicity to the inner workings of the railroad industry. McCraw depicts, however,

29. W. JONES, *CASES AND MATERIALS ON REGULATED INDUSTRIES* 31-33 (2d ed. 1976).

Adams as possessing extremely strong views about the substantive role a regulatory agency could play in the railroad business. Adams, like many others at the time, thought that the concentration of industry was an inevitable evolutionary trend and that the railroads, in particular, were destined to evolve toward monopoly.³⁰ Indeed, he felt that a regulatory commission should aid that end by encouraging all railroad efforts to combine to make their operations more efficient.³¹ Adams wanted to employ the Board's authority, not to control or regulate monopoly, but to advance what he viewed to be an inevitable evolution toward monopoly. The Massachusetts Board, however, had very little influence over railroad consolidation. The chief issues of Adams' tenure on the Board were railroad safety (Adams pressed for the voluntary adoption of safety standards),³² labor relations (Adams was instrumental in strike-breaking),³³ and Adams' proposal of a state-owned rail line managed for tariff and equipment experimentation (the idea seems never to have been taken seriously).³⁴ Adams' ideas about the role of the regulatory Board thus do not correspond even loosely to the legislature's ambitions for the Board.

Adams' subsequent career is also inconsistent with McCraw's personality theory as well as the common account of railroad regulation. Adams left the Massachusetts Board in 1879 after ten years service. According to McCraw, Adams decided to move on from Massachusetts to a position of importance on a regulatory body that would set "a national railroad policy."³⁵ The job Adams took, however—this was nine years before the founding of the Interstate Commerce Commission—was with the Eastern Trunk Line Association, a tariff-pooling cartel that was a predecessor of the cartels struck down under the Sherman Act a decade and a half later. For McCraw to equate a price-fixing cartel with a regulatory commission is extremely curious.³⁶ There are bits of evidence in the book that suggest that Adams saw these efforts as complementary³⁷—a tantalizing thought but suggestive that Adams' ideas about "regulation" are less precedential of modern views than McCraw might think. Paul MacAvoy has shown brilliantly that the Trunk Line cartel was never very effective.³⁸ In fact, Adams resigned from his position disappointed. Although he was then

30. Pp. 7-10.

31. P. 10.

32. Pp. 25-31.

33. Pp. 40-43.

34. P. 37.

35. Pp. 45, 50.

36. A cartel is a group that tries to approximate monopoly pricing in a competitive context; most regulatory agencies try to approximate competitive pricing in a monopoly context.

37. Pp. 49-52.

38. P. MACAVOY, *THE ECONOMIC EFFECTS OF REGULATION* 50-62 (1965).

appointed a public director of the Union Pacific Railroad and was its president from 1884 to 1890, Adams' influence over the process of regulation and over the railroad industry had ended.

Perhaps McCraw has misinterpreted Adams. If not, McCraw's account suggests that there is very interesting work to be done trying to sort out what the early history of regulation was all about. These issues, however, would likely have been resolved if McCraw had attempted to place Adams' views in the context of other contemporary justifications for regulation. In its current form, McCraw's account of Adams is bizarre.

McCraw's account of James Landis suffers a similar problem. Landis may have been the principal drafter of the 1933 and 1934 Securities Acts, but it is difficult to regard Landis as having much of an influence on the decision within the Roosevelt Administration to regulate the securities industry. Landis was a thirty-three-year-old academic when invited to work on the legislation, and regulation of the securities industry had certainly occasioned some comment prior to Landis' arrival in Washington in 1933.

Similarly, all would agree that Alfred Kahn was an important and effective spark plug in the deregulation effort, but twenty years of scholarship challenging the effects of regulation preceded him. Kahn invoked this scholarship very cleverly, and his lively personality undoubtedly contributed to his effectiveness. The question that McCraw should be raising, however, is not whether Kahn had a role in the deregulation effort, but rather how that effort would have fared without him.

McCraw's weakest example of the influence of personality on regulation is Louis D. Brandeis. Although he supported recommendations in favor of the Clayton Act and the FTC Act in a rather general way, Brandeis had almost no interest in regulation. McCraw finally admits that Brandeis abdicated any political involvement in the legislation creating the Federal Trade Commission.³⁹ McCraw identifies the individual most involved with the creation of the Federal Trade Commission—its prophet: George Rublee, a lawyer who drafted the bill, lobbied valiantly for it, and was appointed one of the first commissioners by Wilson, although the Senate refused to confirm him. Rublee's role at the Federal Trade Commission is analogous to the roles played by Adams, Landis, and Kahn, but it is obvious that Rublee had no independent ideas about the regulatory method and served instead as a functionary for other interests.⁴⁰ That a functionary like Rublee could be simultaneously so

39. Pp. 122-24. McCraw does describe one meeting on the subject between Brandeis and Wilson in the Rose Garden.

40. McCraw suggests that Rublee was a functionary for Brandeis, but Rublee's link to Brandeis was quite weak.

institutionally prominent and historically unmemorable is devastating to McCraw's theory of the link between personality and agency regulation.

McCraw's reluctance to investigate the broader conceptual and institutional backdrop for his prophets derives ultimately, in my view, from his halting understanding of the substantive economic effects of regulation. *Prophets of Regulation* is littered with economic conclusions that range from the simplistic to the inane.⁴¹ McCraw, of course, is an historian, and very useful histories have been written by individuals who are not yet Nobel Economics Prize winners. Nevertheless, it is impossible to write sensibly about regulation without some idea of the effects of price and entry constraints in monopolistic and competitive industries. Even a routine appreciation of these effects would suggest a strong distinction among the substantive effects of Kahn's deregulation efforts in the airline industry, the disclosure requirements of the Securities Acts or other sunshine laws, and the diffuse efforts of the Federal Trade Commission.

McCraw links these disparate initiatives together under the single rubric of "regulation." Although he attempts to distinguish between allocative and distributive effects, McCraw employs interchangeably comparisons between efficiency and equity and efficiency and due process.⁴² The disclosure requirements of the SEC and the information processing of the early FTC and the Massachusetts Railroad Board are to McCraw all examples of equity.⁴³ To McCraw, these forms of equity are indistinguishable from the legalistic process focus of James Landis or of other lawyers with whom the efficiency-based economists of the book must so often deal. A legalistic dedication to process, however, implies no clearly coherent conception of the distribution of resources; nor does a desire for equity imply the process by which the result is to be achieved. The net effect of this conceptual confusion is to reduce McCraw's biographical approach from a personality theory of regulation to a collection of interesting vignettes.

41. See, e.g., pp. 69-74.

42. See, e.g., Pp. 6-8 (discussion of natural monopoly), 70-71 (discussion of efficiency and vertical integration), 231 (discussion of effect of antitrust laws).

43. Pp. 282-83.