Sheep In Wolf's Clothing

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By What Authority (Vol. 1, No. 1 - Fall 1998)
from the PROGRAM ON CORPORATIONS, LAW & DEMOCRACY

If you're having trouble getting to sleep, you can count sheep, or read a book about the history of regulatory agencies. It may turn out to be the same thing.

The nation's first federal regulatory agency, the Interstate Commerce Commission (ICC), was established in 1887. Concerned citizens, having failed to solve their difficulties in more traditional ways, sought the intervention and assistance of the federal government. Over the next three decades, these mavericks worked to defend the ICC's existence and increase its powers to regulate the railroad corporations.

Who were these pioneers who dared to go where no one had gone before, to urge the formation of and expand the powers of the first federal regulatory agency?

Prominent among them were the Director and General Counsel for several of Vanderbilt's railroad corporations, including the New York Central Railroad Company, Chauncey M. Depew; the President of the Union Pacific Railroad Company and former chairman of the Massachusetts Railroad Commission, Charles F. Adams; the President of the Minnesota and Northwestern Railroad Company, and President and Chairman of the Board of the Chicago and Great Western Railway Company, A. B. Stickney; the Vice President, General Manager, Director, and President of the Chicago, Burlington & Quincy Railroad Company and later, President of the Burlington & Missouri River Railroad Company, Charles E. Perkins; the Vice President, General Manager, Director, and President of the Pennsylvania Railroad Company, Alexander J. Cassatt; Andrew Carnegie (Man of Steel); the prominent J. P. Morgan, banker, associated with the rise of the International Harvester Company and U.S. Steel Corporation; and 1912 chairman of the national executive committee of the Progressive Party, George W. Perkins.

The role of these and other railroad corporation men has been explored by historians whose research into primary materials led them to things you'll never read on the back of a cereal box. One such historian, Gabriel Kolko, made use of letters, speeches, testimony before Congressional committees, and trade journal articles in his efforts to piece together the story of what amounts to a regulatory revolution in the U.S.

That such a revolution occurred is historical fact. After a slow start, an alphabet soup of regulatory agencies proliferated like lawyers on the national scene. But that the midwives of this revolution were railroad men and other corporate executives is a reality less widely appreciated, and at odds with current regulatory agency creation myths.

Late nineteenth century railroad companies were troubled by too much competition: waves of fierce rate cutting and rate wars, the use of discriminatory rebates (a form of discount -- actually a bribe -- used by rival companies to steal each other's customers), and major bankruptcies. This is hardly the scenario that would have existed had the railroad companies succeeded in fixing prices, establishing monopolies, and controlling the market. But they tried.

Corporate mergers, trusts, pools, and trade associations were all methods through which corporations sought to eliminate competition. Each ran into glitches, however.

Until the late 1880s, many mergers were effectively illegal because most states had laws prohibiting a corporation from owning stock in other corporations. Trusts, an effort to finesse this prohibition, were made technically illegal by the 1890 Sherman Antitrust Act (subject to spotty enforcement and soon rendered nearly useless by judicial monkeywrenching). Pools -- sometimes illegal, sometimes not -- ultimately failed to maintain price levels for their members because they lacked enforcement powers (to sanction a member that broke ranks and cut prices, for instance.) Trade associations tried to control the market by means of informal price agreements, standards, and licenses, but as with pools, such agreements lacked the force of law.

So, throughout the late nineteenth and early twentieth centuries, mergers, trusts, pools, and trade associations all failed to meet the needs of large corporations eager to crush competition in order to maintain price levels.

Railroad companies wanted to fix rates among themselves, and then enforce these rates. (That is, they wanted legally enforceable price-fixing). They wanted a shield against a tide of public activism that was showing itself in the form of tough state laws, increased populism, calls for government ownership of railroads and other public utilities, and a resurgence of socialist movements.

They wanted the public to pay the costs of coordinating an industry and maintaining quality control (standards, inspection, enforcement), while guaranteeing the railroad corporations a basic (and profitable) rate of return. Despite all of this government investment, however, profits were to go to corporate coffers and stockholder wallets.

Railroad executives wanted the ICC to enforce rates. But enforcing rates did not mean capping rates in order to protect the public. Enforcing rates meant prohibiting upstart companies from offering lower rates and thus undercutting the profits of the established railroad companies. Enforcing rates was a means of protecting large corporations from what John D. Rockefeller called "ruinous competition."

A. B. Stickney (Chicago & Great Western Railway Co.) explained about rates: "Let the law name the rates, and let the law maintain and protect their integrity." *The Railroad Gazette* expressed a hope that the ICC would "go ahead and catch every law-breaking rate-cutter in the country."

The 1906 Hepburn Act (augmenting ICC powers) has frequently been cited as a victory for "reformers." However, *Railway World* stated, ". . . we can see nothing in the measure threatening the interests of the railroads." In *Railway and Engineering Review*, G. J. Grammar of the New York Central Railroad Company concurred: "The enforcement of the new rate law will, I believe, be of the greatest benefit to all the railroads."

One such benefit was protection from what historian Lawrence Goodwyn called "the largest democratic mass movement in American history." A railroad man wrote to the ICC in 1897, "Oh Lord pity us in Nebraska and preserve us from the results of a populist legislature and State government." Richard Olney, President Cleveland’s Attorney General, explained to railroad corporation executives that the ICC was to be "a sort of barrier between the railroad corporations and the people . . ."

From the early days of the ICC, Charles F. Adams (later President of the Union Pacific Railroad Co.) saw what was needed to solve the railroad corporations’ problems. "What is desired . . ." Adams wrote, "is something having a good sound, but quite harmless, which will impress the popular mind with the idea that a great deal is being done, when, in reality, very little is intended to be done."

The public was to be pacified with laws that sounded tough but placed much discretion in the hands of regulators. As Charles E. Perkins (Chicago, Burlington & Quincy Railroad Company) said succinctly in 1888, "Let us ask the [ICC] Commissioners to enforce the law when its violation by others hurts us."

In this context, federal regulatory agencies emerged like the Promised Land from a wilderness torn by rate wars, strewn with the carcasses of bankrupt corporations, clouded over with competition and uncertainty, and ringed by the howls of an outraged public.

Regulatory agencies like the ICC transformed activities once illegal (such as price-fixing and market control) into practices that were now not only legal but mandatory -- with the government doing the enforcing and taxpayers bearing the infrastructure costs, while business corporations, investors and speculators reaped the profits.

By 1920 railroad corporations pretty much had it all, courtesy of the U.S. government and the ICC. The Transportation Act of 1920 gave the railroads what they had dreamed of since the 1890s if not before: legalized pooling (i.e., price-fixing), guaranteed prices, exemption from antitrust laws and an assured rate of return.

Thus emerged the ICC over its first decades as coordinator and guarantor of a government-enforced, regulated monopoly. The ICC had been exceedingly flexible in using its discretionary powers; its commissioners had been exceedingly sensitive to the views of railroad corporation officials. In short, it had been a good sheep, in wolf’s clothing. Its actions had become so vital to railroad corporations’ well-being that others could not help but notice. And so -- you guessed it -- this sheep was cloned. The ICC, considered to be a successful model commission, became a template for the next dozen or so regulatory agencies, effectively establishing the U.S. regulatory system pattern.

The argument will be made that the ICC is only one regulatory agency, that the railroad industry is different from other industries, and that the railroads are, well, a special case. With due respect to the railroads (which went into decline because corporation executives decided they could make more money from steel, rubber, and oil transformed into the polluting profit-makers known as automobiles), and to the ICC (abolished by an act of Congress in 1995), all industries are "special."

Kolko describes how regulation came to corporations in a host of industries in the decades around the turn of the century --including insurance, meat packing, food, banking, and communications (telephone and telegraph). The parallels to the railroad industry are striking. The big corporate players in various industries sought an escape from the rigors of competition through control of markets, government-borne costs of infrastructure and quality control, and direct or indirect price maintenance or guaranteed rates of return. Special, indeed.

No sooner had a flock of regulatory agencies been established than critiques began to appear. Every generation or so, there arises a great hue and cry about how corrupt and/or ineffective they are. Soon after World War II one wave of criticism receded and left behind the Administrative Procedures Act (1946), which outlined measures that would supposedly make regulatory agencies less arbitrary by making them more like courts. Marver Bernstein followed up in 1955 with a classic critique (*Regulating Business By Independent Commission* , Princeton University Press, Princeton, 1955) that concluded, "Because [the regulatory agency idea] is based upon a mistaken concept of the political process which undermines the political theory of democracy, [it] has significant anti-democratic implications." In 1960 James Landis, a regulatory agency veteran, made a "Report on Regulatory Agencies" to President-elect John F. Kennedy . Landis, a supporter of the regulatory agency concept, nevertheless conceded that regulatory agencies were mired in "Alice in Wonderland" procedures; the costs were "staggering;" the delays "inordinate;" and the failures sometimes "spectacular." Then in 1975, Christopher D. Stone’s *Where the Law Ends: The Social Control of Corporate Behavior* delivered an updated and still devastating analysis, this one encompassing the newer 1970s crop of regulatory agencies, many of them concerned with the environment.

It is difficult to say which is more discouraging: that the criticisms have changed very little over time, or, that the suggested changes are clearly unequal to the task.

Some of the recurring criticisms are that 1) regulatory agencies have too much discretionary authority, which is almost invariably abused; 2) they combine legislative, executive, and judicial power in one place; 3) their personnel and outlook reflect the views of the corporations they are supposed to be regulating; 4) since individuals and small businesses can’t afford the time and expense to fully participate, large corporations dominate; and 5) procedural considerations are so intricate and demanding that matters of fairness, justice, and overall policy questions, not to mention common sense, are ruled irrelevant if they come up at all.

Any one of these five would present a serious obstacle to democratic control. Together, they are so formidably anti-democratic that it's a wonder we can keep a straight face while claiming that by tinkering with regulatory agencies, we might "reform" them. There is nothing new about these problems, of course: they are why federal regulatory agencies were established.

Regulatory agencies are the corporations' response to people's calls for democracy and self-governance. Corporate officials who once hired Pinkerton's goons to do their dirty work and protect them from an activist public can now rest assured that much of that burden has been assumed by regulatory agencies. They work as the barriers they were designed to be.

Over the last century the regulatory regime did something else, something that receives too little of our attention. It replaced, and seemingly erased from memory, a myriad of imperfect but promising democratic measures that defined the corporation at the outset as a subordinate entity chartered to serve the public good. Many of these measures were straightforward, effective, and even clever, and did not require arcane administrative structures for their implementation and enforcement.

In contrast, our current system heaps huge helpings of powers, privileges, property protections, grants, exemptions, subsidies, and favors upon the corporate form, and then, as if in an afterthought, adds: And, by the way, now we'll go through the motions of regulating you.

And what great targets these regulatory agencies make. Corporate public relations teams blame them for economic ills, and the public blames them for "not doing their jobs." Attention is deflected away from corporations as the source of problems, and toward efforts to "reform" regulatory agencies. *The idea that the concept of the regulatory agency is inherently flawed doesn't even make it onto the table.*

Moving this idea to the center of our debates opens up new strategies, more democratic goals, and opportunities for activism that have long been obscured by regulatory minutiae.

What would it take for us to discuss this possibility openly?

We have heard the howl of the regulatory agencies: a resounding "Baa-a-a, baa-a-a."

We've had a century to watch them fail to work for the public interest. Corporate lawyers might as well have put up billboards: "Do people think your factory stinks? Hire an expert to prove they're wrong!" "State legislature too democratic? Escape to a federal regulatory agency. And then to the courts!"

Why is so much of today's activism confined to what *Harper's* editor Lewis Lapham calls "clean and well-lit regulatory agencies"? What lies outside the regulatory realm?

Some of what lies beyond that realm can be found in the lore of labor struggles and the nineteenth century populist movement. Some is between the lines in the convoluted prose of state corporation laws. Much lies dormant but frustrated, drowned out by the clanking machinery of our current democracy theme park. But we won't see or use any of it until we step out of the glare of the "Alice in Wonderland" regulatory realm, and let our eyes adjust to the unfamiliar light of democratic conversations and actions.

A sheep is a sheep is a sheep. Pulling the wool over our eyes won't change that.

Bibliographic note. The bulk of background materials for this article, including quotations, can be found in Gabriel Kolko's excellent books, *Railroads and Regulation* (2001), and *The Triumph of Conservatism: A Re-Interpretation of American History, 1900-1916* (1967). Both are readable and widely available. Lawrence Goodwyn's [PDF format] *The Populist Moment: A Short History of the Agrarian Revolt in America* (1978) and R. Jeffrey Lustig's *Corporate Liberalism: The Origins of American Political Theory* (1966) are also indispensable in providing background on this critical period of U.S. history. The Bernstein, Landis, and Stone critiques are all classics in the regulatory agency genre.

The interested reader can obtain a complete bibliography and list of references by sending a self-addressed, stamped envelope to the Program on Corporations, Law and Democracy, P.O. Box 246, South Yarmouth, MA 02664.

By What Authority, the name of our publication, is English for *quo warranto*. *Quo warranto* is the sovereign's command to halt continuing exercise of illegitimate privileges and authority. Evolved over the last millennium by people organizing to perfect a fair and just common law tradition, the spirit of *By What Authority* animates people's movements today.

We the people and our federal and state officials have long been giving giant business corporations illegitimate authority. As a result, a minority directing giant corporations privileged by illegitimate authority and backed by police, courts and the military, define the public good, deny people our human and constitutional rights, dictate to our communities, and govern the Earth. *By What Authority* is an unabashed assertion of the right of the sovereign people to govern themselves. A publication of the Program on Corporations, Law and Democracy.

POCLAD is a project of the nonprofit Council on International and Public Affairs.

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