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PUNCTUATED EQUILIBRIUM: A MODEL FOR ADMINISTRATIVE EVOLUTION

MARK C. NILES*

I. INTRODUCTION

In 1972, paleontologists Niles Eldredge and Stephen Jay Gould published a paper that challenged the conventional understanding of the nature and rate of biological evolution.¹ Addressing the absence of support in the fossil record for the accepted model of species change, the scholars observed that significant genetic development within a single species did not appear to follow the kind of gradual path that Charles Darwin had postulated.² Instead, they concluded that “the great majority of species appear with geological abruptness in the fossil record and then persist in stasis until their extinction.”³ They observed that species evolution is much more often the product of dramatic quantum shifts over relatively short periods of time, than the kind of gradualism envisioned by Darwin.⁴ Eldredge and Gould referred to the evolutionary structure produced by this phenomenon as a “punctuated equilibrium”⁵—long periods of relative stasis (“equilibrium”) interrupted and re-defined (“punctuated”) by rare but dramatic instances of evolutionary change.⁶ They referred to

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1. N. Eldredge & Stephen J. Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in *MODELS IN PALEOBIOLOGY* 82-115 (Thomas J.M. Schopf ed., Freeman, Cooper & Co. 1972).

2. The theory of Evolution, proposed first by Charles Darwin in the mid-nineteenth century revolutionized the study of the origin and development of humans and other species on this planet. The theory rested on three facts that Darwin observed as irrefutable: overproduction of offspring, variation, and heritability, and one inference from these facts “that organisms, enjoying differential reproductive success will, on average, be those variants that are fortuitously better adapted to changing local environments, and that these variant will then pass their favored traits to offspring by inheritance.” STEPHEN JAY GOULD, *THE STRUCTURE OF EVOLUTIONARY THEORY* 13 (The Belknap Press of Harvard Univ. Press 2002); STEPHEN JAY GOULD, *DINOSAUR IN A HAYSTACK: REFLECTIONS IN NATURAL HISTORY* 320 (Three Rivers Press 1995).

3. GOULD, *THE STRUCTURE OF EVOLUTIONARY THEORY*, *supra* note 2, at 749.

4. *See id.* at 148 (discussing Darwin’s “gradualist” theory).

5. *Id.* at 774.

6. *Id.* at 752.

the relatively brief (in geological terms) periods where the normal stasis in species development is interrupted by dramatic species developments as “unresolvable geological moments.”⁷ This theory, more fully developed in Gould’s later work, was controversial from its inception,⁸ but nonetheless, has revolutionized the study of biological evolution, and remains a central topic of debate to this day.⁹

In their synthesis of the public discourse concerning the punctuated equilibrium theory, editors Albert Somit and Steven Peterson argued that the model, “[b]y providing a different metaphor for explaining social phenomena . . . may assist us in better understanding human behavior in all of its manifestations.”¹⁰ Aware of similar assessments of the efficacy of his theory, Gould did not “question the widespread invocation or the extensive utility of the metaphorical linkage,”¹¹ but confessed to being “more interested in exploring ways in which the theory might supply truly causal insights about other scales and styles of change.”¹²

One field outside the natural sciences where causal insights can be gleaned from the basic logic of the punctuated equilibrium theory¹³ is the study of administrative regulation. Specifically, the

7. *Id.* at 779.

8. For a discussion of the decades of debate that the punctuated equilibrium theory has fostered, see *THE DYNAMICS OF EVOLUTION: THE PUNCTUATED EQUILIBRIUM DEBATE IN THE NATURAL AND SOCIAL SCIENCES* (Albert Somit & Steven A. Peterson eds., Cornell Univ. Press 1989).

9. The death of Stephen Jay Gould in 2002 prompted a spate of articles discussing the efficacy of the punctuated equilibrium theory. *See, e.g.*, David B. Wake, *On the Scientific Legacy of Stephen Jay Gould*, 56 *EVOLUTION* 2346 (2002); Stephen C. Stearns, *Less Would Have Been More*, 56 *EVOLUTION* 2339-45 (2002); William F. Zimmerman, *Stephen Jay Gould’s Final View of Evolution*, 78 *Q. REV. BIOLOGY* 454-59 (2003); Francisco J. Ayala, *The Structure of Evolutionary Theory: On Stephen Jay Gould’s Monumental Masterpiece*, 3 *THEOLOGY & SCI.* 97-117 (2005); STEPHEN JAY GOULD, *THE RICHNESS OF LIFE: THE ESSENTIAL STEPHEN JAY GOULD* (Paul McGarr & Steven Rose eds., W. W. Norton & Co. 2007); Kenneth W. Krause, *Exquisite Complexity Revisiting Stephen Jay Gould*, 67 *HUMANIST* 10 (2007); P.Z. Myers, *A Short Sharp Slice of Evolutionary History*, *NEW SCI.*, May 12, 2007, at 54. *See generally* DAVID F. PRINDLE, *STEPHEN JAY GOULD AND THE POLITICS OF EVOLUTION* (Prometheus Books 2009).

10. *THE DYNAMICS OF EVOLUTION: THE PUNCTUATED EQUILIBRIUM DEBATE IN THE NATURAL AND SOCIAL SCIENCES*, *supra* note 8.

11. *See* GOULD, *THE STRUCTURE OF EVOLUTIONARY THEORY*, *supra* note 2, at 976-79 (discussing the various fields in which the punctuated equilibrium theory has been invoked, including economics, political theory, sociology, history, literary criticism, art history, and cartooning).

12. *Id.* at 952.

13. As one scholar put it:

Though developed in the physical and biological sciences, analyzing phenomena as complex dynamic systems has proven very productive in the social sciences as well. Within the past decade or so, there have been

theory provides a compelling template for an analysis of the historical development of administrative and regulatory structures in the United States.¹⁴ Political scientists have already relied on the punctuated equilibrium model to explain the volatile pace of policy innovation,¹⁵ particularly in the environmental area,¹⁶ the nature of American constitutional development,¹⁷ and other aspects of political and governmental change.¹⁸ Some legal scholars have noted the apt analogies that can be drawn between Eldredge and Gould's theory and analysis of the evolution of regulatory regimes in the area of securities regulation¹⁹ and other fields.²⁰

hundreds of applications in economics and finance, which have shed light on market-price fluctuations, oligopolistic behavior, business cycles, and other economic phenomena. Studies of business behavior and organizational change have also made considerable use of this analytical approach.

Robert Repetto, *Introduction to PUNCTUATED EQUILIBRIUM AND THE DYNAMICS OF U.S. ENVIRONMENTAL POLICY* 1, 9 (Robert Repetto ed., Yale Univ. Press 2006).

14. *Id.* at 8. In describing the phenomenon of stability and occasional discontinuous change, political scientists have borrowed a term from evolutionary biology: *punctuated equilibrium*. *Id.*

15. *See id.*

16. *See* Frank R. Baumgartner, *Punctuated Equilibrium Theory and Environmental Policy*, in *PUNCTUATED EQUILIBRIUM AND THE DYNAMICS OF U.S. ENVIRONMENTAL POLICY*, *supra* note 13, at 25 (discussing the use of punctuated equilibrium to help understand environmental policy-making).

17. *See* Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People*, 108 *YALE L.J.* 2237, 2250-51 (1999) (discussing the application of the "punctuated equilibrium alternative" to political science); *see also* Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 *AM. J. COMP. L.* 429, 464 (2006) (referencing Professor Ackerman's agreement that his theory "is that of punctuated equilibria").

18. *See* Burnham, *supra* note 17, at 2250 n.28.

19. *See, e.g.*, Joseph A. Grundfest, *Punctuated Equilibria in the Evolution of United States Securities Regulation*, 8 *STAN. J.L. BUS. & FIN.* 1 (2002) ("[t]here can, however, be no doubt that 'punctuated equilibrium' is a stunningly accurate description of the evolution of United States securities laws").

20. In the course of noting the role that "powerful organizations" have played in discouraging "aggressive measures to control greenhouse gas emissions," Professor Cass Sunstein recently makes reference to the work of Lee Lane in Political Science scholar Robert Repetto's volume *PUNCTUATED EQUILIBRIUM AND THE DYNAMICS OF U.S. ENVIRONMENTAL POLICY*, *supra* note 13. *See also* Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 *HASTINGS L.J.* 91, 172 (2003). Also, in a piece assessing the impact of "catastrophes" on "risk regulation," former Nuclear Regulatory Commission official Eric Pogue noted that the government "reacts with a flurry of responses to the risk that caused the catastrophe" and that, over time, "regulatory advancements often fail to develop along a steady, straight-line trajectory, but instead occur in sporadic leaps, which correspond to notable catastrophes." Eric R. Pogue, *The Catastrophe Model of Risk*

This Article attempts to reconcile theories of administrative structure and function with the observable realities of the administrative state. It describes the change in the scope and nature of administrative governance²¹ in light of the dominant theoretical model for administrative governance—the “public choice” theory.²² Much like the dramatic shifts in relevant ecosystems that result in significant evolutionary development in the natural world, significant shifts in administrative development are often the product of dramatic public events that alter the existing power, resource, and interest equilibrium (compellingly described by public choice theorists) that otherwise mandate long periods of regulatory status quo. Indeed, while Eldredge and Gould’s theory provided an explanation for the phenomenon of “stasis” that appeared to belay Darwin’s accepted gradualism thesis, this Article will demonstrate how the relative frequency of development of new administrative regimes (particularly those that at least ostensibly serve some articulable version of the broad “public interest”) can be understood within a public choice framework that describes governmental policy-making structures as inextricably tied to, and controlled by, intransigent private interests.

The argument is that some dramatic events, commonly observed and productive of the right kind of public narrative, serve to alter, if only briefly, the static dynamics that allow for private interest “capture” of legislative and regulatory entities.²³ The key to the domination by *private* interests of these regulatory and legislative entities is that the broad *public* interest in regulating a

Regulation and the Regulatory Legacy of Three Mile Island and Love Canal, 15 PENN ST. ENVTL. L. REV. 463, 465 (2007).

21. For a discussion of the historical development of the administrative state in the late-nineteenth and twentieth centuries, see Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

22. “Thus, starting in the 1970’s and accelerating into the 1980’s and 1990’s, the law school world has seen political science and economics perspectives supplemented by critical legal studies, the civic republican revival, feminist theory, critical race theory, postmodernist theory, libertarian political theory, and so forth. Not surprisingly, normative administrative law scholarship has drawn on these alternative intellectual perspectives to develop various rivalrous conceptions of the proper role of administrative common law, which academics have then urged on the courts.” Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1067-68 (1997).

23. For a discussion of the conditions that allow for change in administrative governance, see JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 165 (Longman, 2d ed. 2002) (using the concept of a “policy window,” which is “an opportunity for advocates of proposals to push their pet solutions, or to push attention to their special problems.”). Policy windows, according to Kingdon, open for a variety of reasons, including “a change of administration, a shift in the partisan or ideological distribution of seats in Congress, or a shift in national mood . . . ; or . . . because a new problem captures the attention of governmental officials . . .” *Id.* at 168.

certain industry is never as strong or focused as the interest of those most directly affected by any changes in regulatory policy.²⁴ The parties most directly affected by any regulation are likely to be regulated entities and not the “public.” Given the structure of our legislative and administrative rulemaking mechanisms, the interests of the regulated parties will invariably win any regulatory policy battle against advocates for the broad public interest because the private interests will be more forcefully and effectively communicated to the regulatory body.²⁵

Regulatory bodies will invariably have little, if any, real choice but to implement policy judgments produced in a process dominated to the point of exclusion of contrary perspectives by the entities they are tasked to regulate.²⁶ Barring a shift in the kind of consistent objectives of private entities, this kind of regulatory process is likely to produce a static and consistent set of regulatory demands (or lack thereof) on the private entities, allowing dominant actors to perpetuate the favorable conditions that have fostered their ascendancy.²⁷

Dramatic events²⁸ can intensify public focus on particular

24. See, e.g., GABRIEL KOLKO, *RAILROADS AND REGULATION 1877-1916*, 2-3 (Princeton Univ. Press 1965) (providing observations about the role played by railroad interests in the development of regulation for their industry).

25. See Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, “Agency Capture,” and Airline Security*, 10 AM. U. J. GENDER SOC. POL’Y & L. 381, 387-88 (2002) (“once a relatively small group of government officials is given substantial authority to make an enforce policy decisions . . . that group is likely to be subjected to extensive pressure from groups that have a particularly strong interest in the consequences of its policy determinations.”).

26. See, e.g., Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L.J. 34, 34 (1993) (discussing agency capture with respect to the EPA); Dion Casey, *Agency Capture: The USDA’s Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL’Y 142, 142 (1998).

27. Jonathan Remy Nash states:

Although it retains a focus on the actions and demands of interest groups, public choice theory does not suggest that government actors will be oblivious to, or act blithely contrary to, the broadly held wishes of their constituents. Ultimately, for legislators and executives, it is the electorate who decides whether they will remain in power. The question remains how public opinion may reach and influence politicians. First, it is conceivable that ‘voters sometimes exercise influence in ways that bypass interest groups.’ Second, public choice theory recognizes the possibility that public opinion on an issue will be enlisted by ‘political entrepreneurs.’ Political entrepreneurs harness latent public sentiment to achieve particular goals

Jonathan Remy Nash, *Economic Efficiency Versus Public Choice: The Case of Property Rights in Road Traffic Management*, 49 B.C. L. REV. 673, 682 (2008).

28. See Lawrence M. Friedman & Joseph Thompson, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 251 (2003) (discussing the legal responses to various disasters).

policy questions, however, and enhance the possibility that the inherent advantages enjoyed by private regulated entities in the process of policy-generation can be reduced. Change under these circumstances is most likely to occur, and to have a lasting impact, when a cohesive, yet nascent, political movement at odds in some relevant way with the dominant private-sector interest is already in place, poised to take advantage of the altered perceptions fostered by the dramatic event(s) and their accompanying narrative.

The terrorist attacks on September 11, 2001, for example, produced a measurable federal regulatory response including changes in law enforcement policy and procedure²⁹ and the imposition of new structures and requirements on the airline industry of a kind consistently and unsuccessfully proposed for decades by powerful, well-organized, consumer and safety activists.³⁰ The marked shift in policy by the Federal Aviation Administration resulted as much from the dominant post-September 11th narrative that the attacks were the result of holes in airline safety regulations,³¹ and the subsequent political mechanisms that magnified the political influence of this broadly-shared belief,³² as from the horrific events themselves.³³

But the events of September 11 are not the first dramatic public instance that helped usher significant regulatory development. Many substantial administrative evolutionary changes in the twentieth century can be tied to dramatic public events that played a critical catalyzing role within a fertile political context. In each instance, the dominant public narrative arising from the events was conducive to this change, and post-event political structures were formed that provided the kind of

29. See, e.g., John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 766 (2007) (“the ‘war on terror’ has accelerated the development of a new criminal process and . . . this new process has increasingly displaced traditional methods of investigating, prosecuting, and punishing people who have engaged in conduct that is subject to criminal penalties—whether or not the conduct is considered ‘terrorism’ . . .”). See also Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post 9/11 World*, 94 CAL. L. REV. 1655, 1655 (2006) (providing more background).

30. See Niles, *supra* note 25 (noting the challenges faced by such activists).

31. *Id.* at 382-83.

32. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 348 (2010), available at <http://www.9-11commission.gov/report/911Report.pdf>.

33. Eric G. Behrens, Note, *The Triangle Shirtwaist Company Fire of 1911: A Lesson in Legislative Manipulation*, 62 TEX. L. REV. 361, 372-73 (1983) (“Before change can occur, reformers must overcome the normal resistance to reform by creating an environment that is favorable to their program. Disasters produce such an environment. History shows that they are frequently the cause of important social change.”).

focus and power that could offset the inherent advantages otherwise enjoyed by the dominant regulated entities.³⁴

Part II of this Article provides a survey of major theoretical approaches to the administrative state and its development. It provides a brief summary of the “public interest” theory, and moves on to discuss “public choice” theory and its critique of the prior model.³⁵ It notes the conceptual power of public choice theory, but observes the lack of a readily apparent explanation for regulatory change in the stasis-predicting model.

Part III offers an explanation for the phenomenon of regulatory evolution employing the punctuated equilibrium theory as a model. Dramatic events, under the right circumstances, can serve to energize and focus the political will of enough of the general population (and enhance the political power of advocates for the “public interest”) to undermine the advantages usually enjoyed by regulated entities and relieve their stranglehold on regulatory entities enough to allow for genuine regulatory change.

Part IV focuses on just two of these evolutionary events,³⁶ two

34. See *id.* at 373 (arguing that a disaster only creates the potential for change and that interested parties must still advocate for reforms).

35. See Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL. L. 435, 444 (2002) (“Theories of, or justifications for, government regulation can be characterized in two basic ways. The first characterization is called public interest theory, in which natural monopoly, or other market imperfection, is controlled for the delivery of a reliable service or good in the public interest. The second characterization of government regulation is private interest group or public choice theory, which holds that government regulates at the behest of, and for the benefit of, the regulated industry rather than for the public.”).

36. It is important to emphasize that one can see instances of the substantial impact of dramatic events on the development of administrative or governmental structures in other areas not discussed at length in this Article. Scholars have discussed numerous other disasters, whether natural or man-made, which, to some extent, have had a profound impact on regulatory development. See, e.g., Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 466 (2009) (analyzing the government’s response to the financial crisis of 2009 and arguing that the government developed a “dealmaking” approach to the crisis); Pogue, *supra* note 20 (proposing a model called “the Catastrophe Model of Risk Regulation” and using the case studies of the Three Mile Island nuclear disaster and the Love Canal chemical spill to highlight how such catastrophes turn the deliberate and slow-moving regulatory process in the United States on its head, resulting in risk regulation proceeding in a series of jumps rather than along a continuum); Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DEPAUL L. REV. 251, 252-56, 263-69, 276-85 (2003) (examining how events such as the Johnstown Flood, Sinking of the Lusitania, Coconut Grove Fire, and Texas City Disaster of 1947, changed federal policy regarding fault and compensation); Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159 (1997) (“Reviewing the history of occupational health, Henry Selleck notes that ‘the biggest steps toward protection of life and limb have stemmed from the greatest tragedies—

“unresolvable *regulatory* moments,” (akin to Eldredge and Gould’s unresolvable *geological* moments): the Triangle Shirtwaist Factory fire in New York in 1911 and the Mississippi River flood of 1927, in order to flesh out a punctuated equilibrium model for regulatory change. It compares these events and their impact to another disaster during the same period, the explosion and fire in the coal mine at Monongah, West Virginia in 1907, that did not foster a measurable change in the status quo for regulation of the relevant industry. The comparison illustrates the dynamics that give rise to identifiable “punctuations” in the often static course of administrative regulatory development and those that do not.

II. THE DEVELOPMENT OF ADMINISTRATIVE THEORY

Much like creationist theologians, the proponents of the public interest administrative theory (and the related “civic republican” approach³⁷) posited a benevolent, morally-driven structure for the administrative state. The dominant critique of this theory, much like Darwin’s response to traditional theology-based explanations for the development of life, applied a rigorous empirical analysis to an assessment of administrative entities, and ultimately rejected the notion of a morally-centered and

a war, a holocaust, a disaster that rouses human indignation and starts a public clamor for drastic action.’ Dan Farber accounts for the ability of legislators to enact environmental laws that appear to overcome collective action problems by using the concept of ‘republican moments.’ The history of environmental law seems to suggest that Congress and the EPA respond to perceiving crises that demand public attention: for example, CERCLA was enacted in response to Love Canal and other incidents generating widespread public concern over uncontrolled hazardous waste sites; the origins of the Emergency Planning and Community Right-to-Know Act can be traced back to the Bhopal tragedy; and the Exxon Valdez oil spill broke more than a decade of legislative gridlock and produced the Oil Pollution Act of 1990.”)

37. For a discussion of the differences between public interest and civic republican theories, see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 16 (1998) (noting that while the civic republican theory “contemplates that those [participants in the regulatory decision making process] exhibit a certain amount of public-spiritedness,” the theory nonetheless “rejects the public-choice, interest group, and public-interest premise that regulatory decision making in one way or another involves simply preference aggregation). It holds instead that regulatory decision-making can, should, and to some extent does involve the identification of shared regulatory values—of what those with a stake in a decision ultimately come to prefer. *Id.* On this account, collective judgments about regulatory priorities and policies are identified following a process of dialogue and deliberation among all interested parties, during the course of which those parties settle upon a decision roughly constituting a consensus about the appropriate course of regulatory action, given all concerns.” *Id.* See generally Jack Van Doren, *Environmental Law and the Regulatory State: Postmodernism Rears its “Ugly” Head*, 13 N.Y.U. ENVTL. L.J. 441 (2005) (discussing of civic republican assessments of the administrative state).

essentially altruistic system.³⁸ The “public choice” theorists identified, instead, the individualistic nature of the development of both administrative structures and policies.³⁹ These theorists explained how powerful entities dominated the mechanisms for policy production and used those mechanisms to serve their individual needs⁴⁰ as opposed to some version of the broad public good.⁴¹

A. Public Interest Theory

The growth in the national regulatory regime, beginning in earnest at the turn of the twentieth century, initiated in depth theoretical assessment of its form and function. The critical formative moment in this development is generally identified as the creation of the first modern independent federal agency, the Interstate Commerce Commission (ICC), in 1887.⁴² The creation of

38. As Mackay, Miller and Yandle observe, public choice analysis of administrative and legislative function can be distinguished from its public interest counterpart by reference to the rigorous and scientific notion of the public choice theory. PUBLIC CHOICE & REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 3-4 (Robert J. Mackay et al. eds., Hoover Inst. Press 1987).

39. For example:

The public choice theory of regulation analogizes regulatory decision-making to market decision-making. Specifically, it treats legislative, regulatory and electoral institutions as an economy in which the relevant actors—including ordinary citizens, legislators, agencies, and organized interest groups most affected by regulatory policies—exchange regulatory ‘goods,’ which are ‘demanded’ and ‘supplied’ according to the same basic principles governing the demand and supply of ordinary economic goods. . . . Simply stated, the regulatory interests of the individual voter (or consumer) are dominated by the regulatory interests of organized subgroups of the citizenry because the latter have incentives to influence regulatory decision[.]making which the former lacks.

Steven P. Croley, *supra* note 37, at 34.

40. See Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1611 (2006).

41. See Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 31 (1990) (“In contemporary law and economics literature, the public interest theory of legislation is little more than a strawman. Writers describe it as an old-fashioned and now universally rejected school of economic thought, discuss it very briefly, and then move on the real (public-choice based) discussion.”); see also Michael E. Levine, *Why Weren’t the Airlines Regulated?*, 23 YALE J. ON REG. 269, 269 n.1 (2006) (“This theory is known as the ‘public choice’ theory of regulation. . . . It is usually contrasted with the ‘public interest’ theory of regulation, which posits that regulation is brought about by public-spirited government actors (legislators or administrators) to serve as a public corrective for inefficiencies and/or injustices brought about by market imperfections or failure of market outcomes to conform to social norms.”).

42. See B.H. Meyer, *The Past and the Future of the Interstate Commerce*

the ICC marked the first time “a national legislative scheme was enacted that provided for wide-ranging regulatory controls over an industry that was vital to the nation’s economy—the railroads.”⁴³ While the era was dominated by a broad faith (at least among legislators) in the value of “an autonomous market-controlled economy . . . [,] adherents to this view were willing to concede that the market systematically generated certain ‘excessively competitive’ practices . . . [and that] when these practices occurred repetitively . . . [it] constituted a nationwide problem.”⁴⁴ Many parties, including most private sector interests, favored national regulation over the “ad hoc approach”⁴⁵ of “judicially fashioned common law and statutory regulatory practices.”⁴⁶

With the ICC, and the perceived need for consistency it fostered as a template,⁴⁷ Congress expanded the federal regulatory sphere to cover food and drugs, commercial competition, shipping, electricity generation, commodity trading, and radio communication between 1906 and 1927.⁴⁸ Much of the scholarly

Commission, 17 POL. SCI. Q. 394, 394-437 (1902) (analyzing the early history of the Interstate Commerce Commission).

43. Rabin, *supra* note 21, at 1189.

44. *Id.* at 1192.

45. KOLKO, *supra* note 24, at 4 (“In formulating a program designed to cope with the unpredictable threat of control by the various states, and to protect themselves from their competitors or large shippers demanding expensive rebates, most railroad men approached the issue of regulation with purely opportunistic motives.”).

46. Rabin, *supra* note 21, at 1192. “[A] weaker model of government intervention based on common law tort and property principles was the prevalent form of ‘regulation,’ along with sporadic state and local controls, before the Commerce Act.” *Id.*

47. See generally Meyer, *supra* note 42, at 394 (analyzing the early history of the Interstate Commerce Commission); see Richard Stillman, II, *The Constitutional Bicentennial and the Centennial of the American Administrative State*, 7 PUB. ADMIN. REV. 4, 5 (1987) (stating that the creation of the administrative state was essential to carry out “vital and complex tasks”); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 470 (1952) (providing a history of the Interstate Commerce Commission); see also Eliza Wing-yee Lee, *Political Science, Public Administration, and the Rise of the American Administrative State*, 55 PUB. ADMIN. REV. 538, 544 (1995) (discussing the rise of the administrative state in the nineteenth century in response to structural changes in economic and social conditions); but see Paul P. van Riper, *The American Administrative State: Wilson and the Founders—An Unorthodox View*, 43 PUB. ADMIN. REV. 477, 478 (1983) (arguing that an American administrative state first emerged between 1789 and 1829).

48. RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 4 (4th ed., Aspen Publishers 2002). For an early public interest era analysis of the administrative state, see Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 201 (1887) (emphasizing that, due to societal changes engendered by the Industrial Revolution, a new “science of administration” emerged to systematically execute policy and “straighten the paths of government, to make its business less unbusiness-like, to strengthen and

analysis of these new administrative agencies “tended to view [them] and their statutory mandates as isolated phenomena, each a tailor-made response to a unique social problem.”⁴⁹ Early studies of the administrative state focused on two main issues: the legal basis for the assertion of administrative and executive authority and the judicial remedies available for those allegedly harmed by the exercise of this power.⁵⁰

The expansion of the administrative regime during the New Deal era⁵¹ prompted the passage, in 1946, of the Administrative Procedures Act, a set of rules applicable to all federal agencies that governed both the mandatory regulatory procedures and the nature and extent of judicial review of agency action.⁵² This expansion in federal regulatory authority, along with the creation of a set of rules that applied to a wide range of government entities in a similar way, also fostered a new scholarly focus that took a more systematic approach than that of scholars of the previous generation.⁵³

purify its organization, and to crown its duties with dutifulness.”)

49. CASS ET AL., *supra* note 48 at 4.

50. *Id.* at 5.

51. See Gary M. Anderson & Robert D. Tollison, *Congressional Influence and Patterns of New Deal Spending*, 34 J.L. & ECON. 161, 161-64 (1991) (observing that the rise of federal nonmilitary spending began with the New Deal and that, in the decades before the New Deal, federal nonmilitary spending ranged from twenty-five to thirty-four percent of all federal spending, and that by 1937 just over half of federal spending was devoted to nonmilitary spending); see also Richard S. Kirkendall, *The New Deal as Watershed: The Recent Literature*, 54 J. AM. HIST. 839, 840 (1968) (noting that the population of Washington, D.C. grew from 63,000 in 1933 to 166,000 in 1940 due to the increase in size of the federal government); Thomas Ferguson, *Industrial Conflict and the Coming of the New Deal: The Triumph of Multinational Liberalism in America*, in THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980 3-4 (Steve Fraser & Gary Gerstle eds., Princeton Univ. Press 1990) (describing the “burst” of regulatory legislation in the first 100 days of the President Roosevelt’s time in office).

52. CASS ET AL., *supra* note 48, at 5.

53. For example:

[T]he public interest theory of administrative governance . . . emerged as the dominant approach to regulation at the height of the New Deal and its immediate aftermath. Its earliest advocates were Louis Brandeis, Charles Francis Adams, and John M. Landis. Landis’s ideas about public interest regulation of railroads later were generalized by many scholars as well as Supreme Court Justices who promoted public interest administrative governance after having contributed to the building of New Deal institutions earlier in their careers.

Anthony E. Varona, *Toward A Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 11 (2009). See also Glendon A. Schubert, Jr., “The Public Interest” in *Administrative Decision-Making: Theorem, Theosophy, or Theory*, 51 AM. POL. SCI. REV. 346, 348-49 (1957) (characterizing the early ideal of the “administrative man” as a “robot” due to the scholars’ emphasis on making administrative decisions based upon “efficiency”—i.e., “maximiz[ing] the attainment of the governmental objectives . . . , by the efficient employment of

The new theorists evaluated administrative agencies and their regulatory and policy initiatives in terms of their impact on the development and protection of the "public good."⁵⁴ The defining assertion of the approach was that administrative agencies were distinguished from other governmental entities by the scientific or other relevant expertise of their officials.⁵⁵ While there was no guarantee that the agencies would produce some measurable net product of public good in any given instance of regulation, it was generally assumed by the commentators that "agency zeal in advancing the unalloyed, nonpolitical, long-run economic interest of the general public would be assured by the professionalism of administrators or by political mechanisms through which the administrative branch would eternally refresh its vigor from the stream of democratic desires."⁵⁶

. . . limited resources") (quoting HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* (1947)); Frank J. Sorauf, *The Public Interest Reconsidered*, 19 J. POL. 616, 618-24, 633 (1957), (summarizing various conceptions of the "public interest," as well as an analysis of the historical factors that have contributed to the term's "popularity and strength" in American politics).

54. See Frank Michelman, *Political Markets and Community Self Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-49 (1978) ("The . . . public-interest model depends at bottom on a belief in the reality . . . of public or objective values and ends for human action. In this public-interest model the legislature is regarded as a forum for identifying or defining, and acting towards those ends."); see generally R. H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357, 357-59 (1974) (analyzing the example of a lighthouse as a public good—a good or service that the government must provide because such goods and services are necessary to the community but which the private market cannot provide at reasonable costs or sufficient quantities) (citing PAUL A. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 45 (6th ed. 1964)); see also Vincent Ostrom & Elinor Ostrom, *Public Choice: A Different Approach to the Study of Public Administration*, 31 PUB. ADMIN. REV. 203, 206-07 (1971) (distinguishing public and private goods but discussing how a public choice theorist perceives public goods).

55. See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 452 (1999) ("[A]gencies are given broad regulatory power because they have professional expertise and the capability to implement technical regulatory requirements. In particular, the delegation of decision making to agencies is premised at least in part on their ability to collect and analyze information and to understand the technical issues relevant to the decisions agencies face."); see also ALAN BRINKLEY, *The New Deal and the Idea of the State*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980* 92 (Steve Fraser & Gary Gerstle eds., Princeton Univ. Press 1990) (noting that the New Dealers of the 1930's believed in "a common vision of government—a vision of capable, committed administrators who would seize command of state institutions, invigorate them, expand their powers when necessary, and make them permanent forces in the workings of the marketplace").

56. Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1682 (1975).

The theory born of this perspective on the defining characteristic of administrative governance became known as the “public interest” theory.⁵⁷ It was characterized by the belief that “the agency is obligated to exercise its discretion in implementing statutes with a view to the national interest or general welfare, rather than yielding to factional pressure at the behest of one or another powerful interest group.”⁵⁸ As Thomas Merrill notes, during the post-New Deal period between 1946 and 1966, “the dominant attitude toward the administrative state continued to be the public interest conception. This was the mindset of the men in their thirties and forties who had served in the New Deal, and who fanned out to fill administrative, academic, and judicial posts in the 1950’s and 1960’s.”⁵⁹ These public figures had “*faith* that complex problems can be mastered by human reason” and viewed the administrative agency as “an institution specifically designed to achieve this ideal.”⁶⁰ The public interest theorists also relied on what Merrill calls “a theory of comparative institutional advantage[,]” which involved their belief that “administrative agencies are more likely to achieve the objective of bringing complex phenomena under the control of human reason than” other institutions like the courts, legislatures, and markets.⁶¹

Public interest theorists relied less on “the existence of a public or general interest, apart from the aggregation of particular interests” and focused instead on producing mechanisms through which “each interest should be weighed accurately (based on numbers and intensity) in the political balance.”⁶² In other words,

57. For representative examples of the theory as articulated in the period, see Schubert, *supra* note 53, at 348. See also Thomas H. Malone, *Meaning of the Term “Public Interest” in the Federal Trade Commission Act*, 17 VA. L. REV. 676, 677 (1931) (“When may a ‘proceeding’ concerning unfair trade practices be deemed ‘to the interest of the public’? This is the question to be discussed, and simple as it may seem, the courts and the Commission itself have found it otherwise.”).

58. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 558 (2000). See also Michelman, *supra* note 54, at 148-49.

59. Merrill, *supra* note 22, at 1048.

60. *Id.* at 1049 (emphasis added).

61. *Id.* See also Freeman, *supra* note 58, at 558 (“As centralized, expert bodies with combined legislative, executive and adjudicative authority, theoretically insulated from politics, agencies represented the great hope that the systematic application of knowledge might lay social and economic ills to rest.”); Shaviro, *supra* note 41, at 31-32 (“Market economists since Adam Smith have recognized that government could play a wealth-enhancing role in the economy by responding to instances of market failure Later economists discussed using government to correct externalities[,] or costs and benefits associated with consumption or production that are not reflected in market prices.”).

62. Shaviro states:

With [a] group’s power generally proportionate to [the] size and intensity of interest, legislative outcomes tend to aggregate accurately the

the public interest theorists sought not to define the public interest so much as to create and protect structures which allowed an organically defined version of the public interest to percolate naturally to the top of the policy-formation process.⁶³

Critics of the theory⁶⁴ soon suggested that it was based less on empirical observation of the growing administrative state than on the beliefs of many of the New Deal architects about its possibilities.⁶⁵ Much like Darwin's application of the scientific method to challenge the conclusions of "Creationist" theology, beginning in the mid-1950s, scholars applied a different kind of empirical analysis, to support a contrary view of the nature of administrative policy making.⁶⁶

underlying interests of all individuals and those of society. Moreover, since everyone's interests are heard and weighed, decisions that were not abstractly correct in advance may be legitimated ex post by universal, process-based consent.

Shaviro, *supra* note 41, at 34-35.

63. See Michael Mont Harmon, *Administrative Policy Formulation and the Public Interest*, 29 PUB. ADMIN. REV. 483, 485 (1969) ("[T]he public interest is the continually changing outcome of political activity among individuals and groups within a democratic political system.") (emphasis omitted); Sorauf, *supra* note 53, at 623 ("[T]he process of compromise and accommodation, so characteristic of democratic politics, becomes the enunciator of the public interest."); A. J. Boudreau, *Public Administration and the Public Interest*, 16 CAN. J. ECON. & POL. SCI. 371, 373 (1950) ("It becomes, therefore, apparent that methods have to be devised in order to obtain a deeper and more thorough comprehension of the public interest. I shall mention three of these methods, namely: public advisory committees, mass consultation[,] and publicity and education.").

64. See, e.g., John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST L.J. 1075, 1079-80 (2005) ("Although public interest theory survives in a variety of forms, . . . skepticism regarding the role of government has grown increasingly common and now plays a more dominant role in economic and political theory. While initial challenges to public interest theory emerged much earlier, a consensus counterpoint began to take hold during the 1960's.").

65. See Leonard J. Arrington, *Western Agriculture and the New Deal*, 44 AGRIC. HIST. 337, 337 (1970) (analyzing whether "the New Deal attempted, or achieved, a measure of equal treatment for residents of the various states" based upon the level of need in those states). See also Anderson & Tollison, *supra* note 51, at 175 (finding that "while spending allocations were correlated with indicators of the relative geographic severity of the Depression, indicators of relative political influence also seem to be strongly related to spending patterns. New Deal spending went partly to the needy and partly to those with political clout."). See generally Vincent Ostrom, *Public Choice Theory: A New Approach to Institutional Economics*, 57 AM. J. AGRIC. ECON. 844, 844 (1975) (discussing of how economics influenced public choice theorists).

66. See Shaviro, *supra* note 41, at 42 (discussing skepticism of the public interest view of legislation).

B. Public Choice Theory

Just a few decades after the height of its influence and dominance in the judicial and academic arena, the faith-based public interest theory was challenged by a new generation of administrative scholars.⁶⁷ This new perspective on the administrative state began with an observation about the stages in the development of a single agency, and the mechanisms that lead that agency, over time, to succumb to the influence of the very entities it has been charged to regulate and control.⁶⁸ This observation, Marver Bernstein's 1955 articulation of "agency capture," led, in the decades to come, to a broader concept of the role of private influence over public policy-making in all democratic structures, both within and beyond federal regulatory agencies.⁶⁹ This concept became known as the "public choice"

67. For a discussion of the early development of public choice theory, see John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST L.J. 1075, 1081 (2005) ("Unlike public interest theory, which traces its roots back to republican theory of government, public choice theory finds its origins in the slightly more cynical 'pluralist' theory of government."). See also Todd R. Overman, *Shame on You: Campaign Finance Reform Through Social Norms*, 55 VAND. L. REV. 1243, 1247-51 (2002).

68. See JOHN H. KNOTT & GARY J. MILLER, *REFORMING BUREAUCRACY: THE POLITICS OF INSTITUTIONAL CHOICE* 79 (Prentice Hall 1987) (discussing of the growth of the administrative state and the essential accompanying growth of a class of regulatory bureaucracy and the impact of interest-group demands on this development).

69. See, e.g., Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J. L. & POL'Y 65, 77 (2004) ("The public choice theory, which has been particularly influential in law over the last two decades (although its influence now seems in decline), concentrates on the influence of small but well-organized interest groups and treats legislators as primarily interested in re-election."); Peter Chang, *Country of Origin Labeling: History and Public Choice Theory*, 64 FOOD & DRUG L.J. 693, 693-94 (2009) (arguing that the reemergence of country of origin labeling requirements is to be explained by public choice theory); Josh Benson, Comment, *The Guantanamo Game: A Public Choice Perspective on Judicial Review in Wartime*, 97 CAL. L. REV. 1219, 1247-59 (2009) (using an offshoot of the public choice theory to explain the actions of Congress, the President, and the federal courts when developing detention policy); Miron Mushkat & Roda Mushkat, *The Political Economy of Sovereignty Revisited: A Re-Examination of the Public Choice Model in Light of China's Accession to the World Trade Organization*, 7 ASPER REV. INT'L BUS. & TRADE 115, 119 (2007) (analyzing China's accession to the WTO under the public choice theory); John Setear, *Treaties, Custom, Iteration, and Public Choice*, 5 CHI. J. INT'L L. 715, 722-24 (2005) (applying the public choice theory to Presidential decision making within the context of international relations); Eric J. Gouvin, *Banking in North America: The Triumph of Public Choice*, 32 CORNELL INT'L L.J. 3-4 (1998) (arguing that public choice theory best explains recent liberalization in cross-border banking in North America); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 84-85 (1989) (applying the public choice theory to federal

theory of administrative governance and remains the dominant (albeit controversial⁷⁰) theory of the development and function of the American administrative state.⁷¹

In his 1955 work, "Regulating Business by Independent Commission," Bernstein observed a natural "life-cycle" of administrative agencies.⁷² He noted that while the early stages of development of agencies are characterized by the kind of "vigorous and independent regulation" that had been "imagined by the public interest literature,"⁷³ as time passes and agencies reach a "period of maturity," they tend to lose broad political support, and consequently, the ability "to extend regulation beyond the limits acceptable to the regulated groups" under their jurisdiction.⁷⁴ Bernstein argued that an agency will invariably fall into a status that he referred to as "senescence" in which it "becomes closely identified with and dependent upon the industry it is charged with regulating,"⁷⁵ and that during this stage the regulatory entity functions less as a "policeman and more [as] a manager of the industry."⁷⁶ He observed that the phenomenon results in agencies being transformed into "a friendly protector of private interest rather than an aggressive agent of the public welfare," providing supposedly "regulated groups with privileged access to government."⁷⁷

Adding to Bernstein's insights, "Mancur Olsen observed that some small groups impose an undue influence on government

regulations affecting the butter and margarine industries).

70. For critiques of public choice theory, see various articles in the 2002 Cornell Law Review Symposium entitled *Symposium Getting Beyond Cynicism: New Theories of the Regulatory State*, 87 CORNELL L. REV. 267 (2002). See also Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 220 (2005) (noting that "capture theory explains a great deal more of regulatory history than does the public interest theory alone. But there are key elements of the political struggle that the theory does not explain. It does not predict which of several competing interest groups caught in a political struggle will capture and which will lose out. Why, for example, did the eastern coal producers win and the western coal producers lose in 1977? . . . Capture theory thus represents a first step toward incorporating interest group politics into regulatory theory but it is inadequate as an explanation of regulator behavior.").

71. KNOTT & MILLER, *supra* note 68.

72. See generally MARVER BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (Princeton Univ. Press 1955) (noting that there is a general pattern of evolution and common experience for an independent commission).

73. *Id.* at 79-84.

74. *Id.* at 86-90.

75. Merrill, *supra* note 22, at 1060.

76. BERNSTEIN, *supra* note 72, at 87.

77. *Id.* at 266. See also KNOTT & MILLER, *supra* note 68, at 79-80 (noting that regulators were not only inclined to succumb to interest group pressure, but also to help generate such pressure when it served their needs).

decision making because of their enhanced interest in the specific consequences of regulatory decisions and ability to more effectively mobilize resources, including information, in support of their policy objectives than the public at large.”⁷⁸ This dynamic served to distract agencies from a focus on achieving some semblance of the broad public interest,⁷⁹ producing, instead, “systematic deviations from socially efficient outcomes.”⁸⁰ Other critics of the period, from both the political left⁸¹ and right,⁸² bemoaned the

78. See generally MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (Harvard Univ. Press 1965) (explaining how collective groups can have a stronger influence on the government than larger groups).

79. *Id.* at 48. See also Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 431-32 (2007) (stating that the EPA frequently relies on small organizations when issuing a change in nonbinding policy guidance).

80. David Strauss, *First Amendment Entitlements and Government Motives: A Reply to Professor Merrill*, 93 NW. U. L. REV. 1205, 1209 (1999).

81. See generally Theodore J. Lowi, *Interest Groups and the Consent to Govern: Getting the People out, for What?*, 413 ANNALS AM. ACAD. POL. & SOC. SCI. 86, 87 (1974) (stating that “[t]he connection between interests and consent is entirely theoretical and problematic. Furthermore, unless that connection is more carefully examined than it has been in the recent past, untested assumptions about the connection produce nothing but mythology.”); Theodore J. Lowi, *Four Systems of Policy, Politics, and Choice*, 32 PUB. ADMIN. REV. 298 (1972); See generally THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (W. W. Norton & Co. 1969) (noting the immense growth of the liberal state that allowed interest groups to tighten their grip on the government); See also Theodore Lowi, *The Public Philosophy: Interest-Group Liberalism*, 61 AM. POL. SCI. REV. 5, 8 (1967) (stating that “[a]nalysis of the real or potential impact of public policies shows how incomplete is the fit between the earlier public philosophy and the policies it is supposed to support and justify. It shows that those who espouse social change in the abstract, especially government-engineered social change, are seldom peddling policies that would clearly effect any such change.”); Theodore J. Lowi, *Review: American Business, Public Policy, Case-Studies, and Political Theory*, 16 WORLD POL. 677 (1964); GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (The Free Press 1963); KOLKO, *supra* note 24.

82. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (The Univ. of Chicago Press 1962); see generally George J. Stigler, *The Theory of Economic Regulation*, 2 J. ECON. & MGMT SCI. 3, 3 (1971) (stating “[w]ith its power to prohibit or compel, to take or give money, the state can and does selectively help or hurt a vast number of industries.”); see also Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 214 (1976) (expanding upon Stigler’s theory); see generally William C. Mitchell, *Chicago Political Economy: A Public Choice Perspective*, 63 PUB. CHOICE 283, 283 (1989) (summarizing the Chicago School of Economics’ “approach[] to politics”); Robert D. Tollison, *Chicago Political Economy*, 63 PUB. CHOICE 293, 293 (1989) (stating that the “[Chicago Political Economy] is a body of literature which analyzes government from the perspective of price theory and positive economics In CPE the state is a mechanism which is used by rational economic agents to redistribute wealth. Wealth transfers are the essence of regulatory and governmental behavior in this approach.”).

hyper-influence of private “interest groups,” which produced the various problems of undermining “genuine democracy,” “restrict[ing] entry and thus confer[ing] monopoly profits on industry incumbents,” and “allowing wealthy capitalist robber barons to bilk small farmers and business.”⁸³

Taken together, the capture theorists shattered the image of administrative regulation optimistically depicted by the public interest theorists. They observed that as a result of the hyper-influence of relatively small groups with identifiably specific interests, government agencies will rarely, if ever, set out to promote the “public interest,” let alone succeed in doing so.⁸⁴

The fact that private, regulated entities would seek to control the mechanisms for the development of government policy never appeared particularly remarkable to the early capture theorists. What surprised and concerned them more was the success that the regulated entities had in promoting their private interests in the form of favorable agency policy making.⁸⁵ Scholars observed that in the overwhelming majority of specific instances of regulatory

83. For an informative summary of the various political perspectives on the development of private control over government regulation during the early public interest period, see Merrill, *supra* note 22, at 1059-67; see also John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724 (1986) (discussing the remarkably similar conception of capture theory expressed by Kolko and conservative economist Milton Friedman).

84. See Merrill, *supra* note 22, at 1043 (stating “[a] key instrumentality of activist government—the administrative agency—came to be regarded as suffering from pathologies not shared by other governmental institutions such as legislatures or courts. The principal pathology emphasized during these years was ‘capture,’ meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating.”); see also Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1565-70 (1992) (noting that “[a]ccording to the capture hypothesis, instead of providing meaningful input into deliberation about the public interest, industry representatives co-opt government regulatory power in order to satisfy their private desires. Regulated entities are well organized and generally well funded, and they often have strong interests at stake, which they do not share with the polity as a whole.”).

85. See Fred S. McChesney, *Purchasing Political Inaction: How Regulators Use the Threat of Legal “Reform” to Extort Payoffs*, 21 HARV. J.L. & PUB. POL’Y 211, 213-14 (1977) (arguing both that special interest groups provide resources to policy makers to realize favorable policy and that policy makers, in turn, demand resources from special interest groups in return for not regulating those groups). “[P]rivate persons and firms are being shaken down and forced to pay protection money to politicians.” *Id.* at 214. This explains, for example, why banks had an interest in lobbying Congress to prohibit lending at certain times to congressional candidates. *Id.* See also Miller, *supra* note 69 (analyzing how the American dairy industry organized itself to fight the margarine industry through rent-seeking behavior in Congress); Gouvin, *supra* note 69 (applying the public choice theory to explain the removal of restrictions inhibiting cross-border banking in North America).

decision making, agencies will be ill-equipped to withstand the pressure that private interests will be capable of bringing to bear, often in the form of the presentation of overwhelming amounts of data and information, during agency “informal” rulemaking procedures.⁸⁶ The limited financial and political resources that agencies commanded in the context of increasingly restricted federal entitlement budgets, forced them to “rely on the regulated industries themselves to furnish the information upon which the regulators based their decisions.”⁸⁷ As Richard Stewart observed, given limited financial resources, agencies often depended upon “outside sources of information, policy development, and political support.”⁸⁸ These sources were primarily the regulated entities that had “a substantial stake in the substance of agency policy and the resources to provide such input” and also had a much stronger “personal stake in agency policy [than] . . . an individual member of an unorganized interest, such as a consumer, [for whom that interest] is normally too small to justify such representation.”⁸⁹

It was the combination of the hyper-interest that the private entities have in the results of the policy making process and their enhanced ability to advocate on behalf of their interests within the structures of our administrative process which convinced these scholars (and many judges⁹⁰) of both the reality and prevalence of

86. See 5 U.S.C. § 553(b)-(c) (2006) (requiring agencies to give formal notice of proposed rules, grant “interested persons an opportunity to participate in the rule making through submissions of written data, views, or arguments . . . ,” and mandating that agencies respond to these arguments and concerns in a “general statement of [the rules’] basis and purpose.”).

87. Dion Case, *Agency Capture: The USDA’s Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL’Y 142, 142 (1998).

Of particular importance to public choice theory is the existence of information and transactions costs and collective action (free-rider) problems that affect the likelihood that persons with common interests will establish and maintain an organized entity to promote their interests. Because persons are expected to be better informed about matters affecting their most immediate interests than about more general or public interests, public choice theory predicts that narrow or special interests will be better represented by organized interest groups than more general and public interests. Moreover, since the costs to establish and maintain an organized group and the incidence of free-riders are likely to increase as the number of potential members increases, public choice theory also predicts that relatively small numbers of persons with common interests are more likely to be represented by organized interest groups than large numbers of persons with common interests.

David G. Duff, *The Abolition of Wealth Transfer Taxes: Lessons from Canada, Australia and New Zealand*, 3 PITT. TAX REV. 71, 80 (2005).

88. Stewart, *supra* note 56, at 1686.

89. *Id.*

90. See *USA Group Loan Services, Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996) (criticizing an agency promise to promulgate as regulations any agreement reached by the regulated as “an abdication of regulatory authority

the agency capture dynamic.⁹¹

Subsequent authors took the logic of institutional, private hyper-influence and expanded its scope into what came to be known as “public choice”⁹² or “interest group”⁹³ theory. In the last quarter of the twentieth century, the focus turned from identifying the stages at which agency capture could be expected to occur, or to determining which agencies were more or less susceptible to the phenomenon, to understanding private-interest control of policy formation “as something more akin to the universal condition of the administrative state.”⁹⁴ Professor Stewart observed that by 1975, capture theory had dispelled the earlier “public interest” faith in the administrative state, noting that “to the extent that the belief in any objective ‘public interest’ remains, the agencies are accused of subverting it in favor of the private interests of regulated entities.”⁹⁵

While Merrill did not extend his capture analysis to legislatures and courts,⁹⁶ more recent scholars have challenged the notion that the administrative agency is particularly prone to the “capture” dynamic, and that other entities in our government are free of the pathological influence of organized private entities. Professor Jody Freeman notes that public choice theory “shares with interest representation a political model of interest group pressure on agencies, but it goes still further, treating agency outcomes as products of interest group appeals to individual bureaucrats’ preferences [extending] the pathology of capture, moreover, to legislatures.”⁹⁷ Others have addressed the limits of

to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the ‘capture’ theory of administrative regulation.”).

91. See *supra* notes 67-81 and accompanying text; see also Ostrom & Ostrom, *supra* note 54, at 204-12 (summarizing the development of the public choice theory and its core intellectual pillars).

92. See Dongsheng Zang, *Divided by Common Language: ‘Capture’ Theories in GATT/WTO and the Communicative Impasse*, 32 HASTINGS INT’L & COMP. L. REV. 423, 433 (2009) (explaining that “public choice” theory was developed in the 1950s and 1960s by a “group of economists interested in applying Ordoliberal doctrines to the study of political processes, such as public finance, voting, and lawmaking.”).

93. See Michael Rosensaft, *The Role of Purposivism in the Delegation of Rulemaking Power to the Courts*, 29 VT. L. REV. 611, 631-32 (2005) (stating that “interest group theory advocates that “rational” legislators responding to rational interest groups will not, in fact, produce purposive statutes.”).

94. Merrill, *supra* note 22, at 1060.

95. Stewart, *supra* note 56, at 1682. Stewart noted that it was, by then, “widely accepted . . . that the cooperative overrepresentation of regulated . . . interest[s] in the process of agency decision results in a persistent policy bias in favor of these interests.” *Id.* at 1713.

96. Merrill, *supra* note 22, at 1063.

97. See Freeman, *supra* note 58, at 561 (noting “[l]ike legislators motivated by desire for re-election, bureaucrats rationally pursue their own interests when exercising administrative discretion. The Theory treats administrative

the public choice theory in providing a convincing explanation for the empirical dynamics of the administrative state.⁹⁸ Additional related approaches, like civic republicanism and neo-pluralist theory, have provided additional insights into the nature of governmental rulemaking, filling some of the broad gap between public interest and public choice perspectives.⁹⁹ But the essential insight of the public choice approach, the acknowledgment of the dominant role of private interests in governmental policy making at the expense of a focus on a more broadly defined public interest, remains the foundation for assessment of the potential for administrative evolution.

III. PUNCTUATED EQUILIBRIUM: EVOLUTION IN THE ADMINISTRATIVE STATE

A. *The Mechanism for Change in the Public Choice Model*

One question left largely unanswered by the public choice analysis¹⁰⁰ is why, given the stifling control that private interests

procedures, moreover, as a set of controls imposed on agencies by legislators seeking to facilitate interest group monitoring of agencies.”). Professor Freeman goes on to offer a critique of public choice theory, noting that it fails to provide a satisfactory description of the interactions and relationships between public and private actors. *Id.* at 547-48.

98. See Croley, *supra* note 37, at 10 (explaining that Professor Croley seeks to determine whether “patterns of participation in administrative decision-making processes [are] especially consonant or dissonant with the expectations of any theory” noting, in regard to public choice theory that agency processes seem unlikely “mechanisms for facilitating the delivery of regulatory rents.”).

99. For a discussion and comparison of public interest, public choice, civic republican and neopluralist theories of government decision making, see Freeman, *supra* note 58, at 559-60. Ultimately, however, Freeman dismisses each of these theories and advances her own theory, which emphasizes the complex network of relationships and “interdependence” between public and private actors. *Id.* at 564-65. See also Croley, *supra* note 37, at 56-86 (discussing these theories of governmental decision making).

100. Spence and Cross note that public choice theorists have not provided much analysis into why legislatures create agencies. David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 104 (2000). Rather, these theorists have focused on the “politician-agency relationship, without making any explicit argument that particular kinds of power arrangements are desirable or undesirable in any sense.” *Id.* Some have characterized agencies themselves as rent-seeking interests. *Id.* at 99, 104. Agency officials, rather than striving to serve a public interest, seek instead to “pad [their] own pockets” by maximizing their budgetary resources. *Id.* at 104-05 n.36 (citing THE BUDGET MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE (Andre Blais & Stephane Dion eds., Univ. of Pittsburgh Press 1991) and WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (Transaction Publishers 1971)). Following the logic of public choice theorists, however, legislatures create agencies because rent-seeking interests desire the creation of agencies in order to regulate price or restrict

impose on governmental policy making, the creation of new regulatory demands on industries and other regulated entities could be expected to occur. The public choice model does not appear to leave much room for the possibility of significant or dramatic administrative evolution in the form of new policy requirements or new administrative entities.¹⁰¹ If the public choice theorists are right, and the broad public interest, however it might be defined in a given instance, has little, if any, chance of influencing agency decisions in the wake of the inherent private interest power and resource advantage, then one would expect very little in the way of genuinely innovative policy production. What incentive would entrenched private interests have in upsetting the regulatory status quo that provides the context for their ascendant status? If the entities that control policy formation are truly dominant, and achieved their dominance within a relevant regulatory landscape, it is difficult to imagine the motivations that might lead these entities to change this landscape—absent the need to undermine the vitality of new competitors who threaten their domination. But even if they were perceived as necessary to ensure the continued primacy of the regulated entities, any changes that could be expected to occur in the nature of regulation would involve no new burdens on the dominant private interests or a concomitant increase in benefits to a broadly defined public interest.¹⁰² In other words, the public

the entry of competitors into the market. Peltzman, *supra* note 82, at 214. Under Stigler's model, "[t]here is essentially a political auction in which the high bidder receives the right to tax the wealth of everyone else . . ." *Id.* at 212.

101. See Repetto, *supra* note 13, at 3 (explaining that "[w]hen environmentalists pushed for stronger action, industrial interests pushed back; when industry demanded regulatory relief, environmentalists and their allies resisted. The result has been a sort of rough equilibrium, with little sustained movement in any direction The same pattern of prolonged stalemate interrupted once in a great while by abrupt bursts of policy innovation has been seen in the history of particular environmental and resource issues.").

102. See KNOTT & MILLER, *supra* note 68 (arguing that legislators promote administrative agencies because it advances the goals of interest groups and advances the legislators' reelection goals). Knott & Miller attribute Congressional support for civil service reform during the early twentieth century to a desire on the part of Congress to "provide efficient, particularized services to the emerging organized interest groups." *Id.* at 78. Bureaucracies, in turn, cultivate relationships with interest groups and legislators by promoting the interest-group demands as a means to maximize their resources and status. *Id.* at 79-80. Knott and Miller further argue that a similar rationale caused Congress to create independent agencies. *Id.* at 82. Congress established the FTC, for example, at the height of power for two different interest groups: major corporations and those who favored antitrust regulation. *Id.* Rather than create an executive agency with specific objectives and procedures—and lose reelection in an ensuing crossfire between various

choice model would appear to allow for only two versions of administrative evolution: no significant change at all or only those changes that enhance the private interest of the dominant regulated entities at the expense of new competitors or the public at large.¹⁰³ But, much like Darwin's gradualism thesis, this conception of the nature of the administrative law over time is not borne out by political science's version of the "fossil record." The federal administrative regime has experienced waves of innovative and expansive change, in various eras, and in various forms, for a wide range of reasons.¹⁰⁴ From the ICC and the other early independent federal agencies, to the revolutionary expansion of regulatory requirements during the New Deal era,¹⁰⁵ to the increasing development of entitlement based "welfare-state"

interest groups—Congress created the FTC and gave it ambiguous powers and standards. *Id.* This "g[ot] individual members of Congress off the hook." *Id.*

103. See, e.g., Jon Simon Stefanuca, *The Fall of the Federal Election Campaign Act of 1971: A Public Choice Explanation*, 19 U. FLA. J.L. & PUB. POL'Y 237, 269-70 (2008) (arguing that campaign finance regulation, including the McCain-Feingold reforms, constitute the imposition of a "cartel"); Burton A. Abrams, *Campaign-Finance Reform: A Public Choice Perspective*, 120 PUB. CHOICE 379, 395-96 (2004) (concluding, upon an analysis of the Bipartisan Campaign Reform Act, that the legislation serves "special interests" rather than the "public interest"); F.G. Scrimgeour & E.C. Pasour, Jr., *A Public Choice Perspective on Agricultural Policy Reform: Implications of the New Zealand Experience*, 78 AM. J. AGRIC. ECON. 257, 263 (1996) (arguing that the New Zealand business community supported the country's deregulatory reforms, despite the business community's prior support of the regulatory regime, "because it found market activity more profitable than rent seeking"); Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 914 (1994) (noting that "[a]n agency that has been rendered obsolete by exogenous changes in the form of technological development or new marketplace developments will find that it must provide favors to discrete constituencies in order to preserve some measure of support for its continued existence."); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 346 (1988) (stating that "[l]egislators serve for more than one term; hence, as members of subsequent legislatures, they can keep legislative benefits flowing to their interest groups so the legislature itself can promote the durability of legislation and long-term contracts with interest groups."); L. L. Wade, *Administration, Public Choice and the Pathos of Reform*, 41 REV. POL. 350, 351 (1979) (providing that "[R]eform itself is costly, and in two ways: (1) bureaucrats will evaluate and support, undermine, or nullify reform proposals on the basis of what the new rules imply for their interests . . . (2) The movement from the status quo to a new system is itself costly for many societal interests."). *But see* Will Martin, *Public Choice Theory and Australian Agricultural Policy Reform*, 34 AUSTRALIAN J. AGRIC. ECON. 189, 197-209 (1979) (reviewing agricultural policy reforms and finding that the public choice model fails to fully account for the successful enactment of several of the reforms).

104. Rabin, *supra* note 21, at 1189.

105. See *supra* notes 38 and 46 and accompanying text.

reforms,¹⁰⁶ to national regulations affecting the workplace and the environment,¹⁰⁷ the administrative regime evinces significant developmental variety at the macro level. Much of this change appears to belie the central public choice thesis, in that it is intended to serve some notion of the public good at the expense of the private interests of the dominant regulated entities.¹⁰⁸

So how can this powerful and compelling theoretical framework be reconciled with the reality that does not seem, at first glance, to flow directly from its precepts? The answer offered here is that accepting the notion that, all other things being equal, the inherent advantages of special interests will overwhelm any expression of broad public interest perspectives, but this dominance can be undermined, at least periodically, in isolated instances. Specifically, the otherwise diffuse and insufficiently compelling broad interest in promoting salutary government action that is invariably drowned out by the more fervent expression of private concerns, is at certain times enhanced to such an extent that the normal dynamics of agency or legislative capture are neutralized. It is the instance of dramatic public events that has focused exceptional public attention and interest

106. See generally John Myles & Jill Quadagno, 76 SOC. SCI. REV. 34 (2002) (discussing the development of government entitlement programs); see also Paul Craig Roberts, *A Reconsideration of the Welfare State*, 142 PROC. AM. PHIL. SOC. 396, 396-98 (1998) (attacking the welfare state as fiscally unsustainable); see also Note, *Developing Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984, 2001 (1996) (arguing that devolving welfare programs to the states will exacerbate "the race to the bottom"); see also Carl A. Auerbach, *Is Government the Problem or the Solution?*, 33 SAN DIEGO L. REV. 495, 514 (1996) (highlighting major elements of the welfare state and arguing for their importance in "establish[ing] justice, promot[ing] the general welfare, and ensur[ing] domestic tranquility").

107. See generally Daniel Riesel & Dan Chorost, *When Regulatory Universes Collide: Environmental Regulation in the Workplace*, 13 N.Y.U. ENVTL. L.J. 613 (2005); Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 CORNELL INT'L L.J. 373, 375-96 (2000); Wayne B. Gray & John T. Scholz, *Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement*, 27 L. & SOC. REV. 177 (1993) (reviewing the pillars of the federal workplace health and safety regime under the Occupational Safety and Health Act of 1970).

108. As observed in the area of environmental regulation, for example, "across the entire range of federal environmental policy decision, as in other policy domains, patterns of budgetary change follow a similar pattern of incrementalism broken very infrequently by abrupt changes. The norm is stability from year to year. The infrequent exception is major change." Repetto, *supra* note 16, at 4. Further, "stable institutional structures, shared understandings of policy goals and available technologies, and a balance of power among interests ensure no dramatic shifts from the status quo While the punctuations may come only rarely, they can have long-lasting consequences." Baumgartner, *supra* note 16, at 24-25. Baumgartner loosely attributes punctuated changes to "momentum" of "social cascades" and the "simultaneous observ[ation]" of a "signaling event." *Id.* at 37-38.

in a particular area that have provided the rare enhanced efficacy of the “public interest” as a policy-making objective and the concurrent quantum shift in the regulatory landscape. This administrative version of “punctuated equilibrium” provides a model for understanding the limited, but significant dynamic of administrative evolution.

There are three ways in which dramatic public events alter the normal equilibrium of private interest influence over policy making to facilitate significant, public-focused regulatory change. First, events that result not only in some kind of serious injury or harm, but suggest a serious risk of similar harm for a broad cross-section of the population in an area where the risk either had not already been identified or was not taken particularly seriously, serve to focus and magnify broad public concern to a sufficient level to make the otherwise diffuse and weak public interest robust enough to counter private interests that would otherwise resist an alteration in the status quo.

Second, when the existing legal or regulatory framework is insufficient to provide a satisfactory response to a risk that is exposed by the dramatic event, or when the regulatory structure itself is seen as one of the root causes of the event, the newly enhanced focus and attention produces an imperative not just to “do something,” but specifically, to alter the existing regulatory structure, either enhancing it substantially or replacing it. It is the dramatic public events that meet both of these criteria—that expose substantial risks of future harm, and that seem impervious to existing structural remedies—that are the “unresolvable regulatory moments” that parallel Gould and Eldredge’s “geological” ones and that form the foundation for much of the measurable evolution of administrative entities and authority.

Third, dramatic public events can serve to alter political balance within a particular policy arena to the benefit of what had been, up to that time, the consistently “losing” side.¹⁰⁹ While they are unlikely, on their own, to produce a politically effective movement to counter the dominance of regulated entities over their regulators and their policy innovation, some dramatic events

109. As Repetto notes in regard to dynamic equilibria in the area of environmental policy:

Advocacy groups often try to bring new information to bear on policy issues, but with mixed results. Technological changes can be diverted to serve other non-environmental objectives, as has happened with automobile manufacturing in recent decades. A new president may find it impossible to challenge some entrenched interests successfully. . . . Nonetheless, disturbances brought about by such exogenous factors may represent moments of opportunity when other interventions might have an enhanced probability of bringing about significant change because the policy systems has been driven to a critical point.

Repetto, *supra* note 13, at 12.

and the political fallout and dominant public narrative they produce can serve to bolster existing, somewhat nascent, or at least unsuccessful, political structures and bring new power and potential for success.

The power of these events to provide the conditions where otherwise static political dynamics can be altered is enhanced by the dominant popular narrative(s) with which they are invariably associated. Indeed, it is often the way that the story of the event is told to, and understood by, the relevant portion of the polity, much more than the specific facts concerning the event itself, that gives rise to the conditions that make significant administrative evolution possible. Many factors play a role in the development of this dominant narrative including media coverage, propaganda, and the power and products of investigatory commissions, which are invariably offered as the first level government response to disasters.¹¹⁰ These commissions have demonstrated an exceptional capacity to focus and extend what is often brief public attention even to the most alarming of dramatic events, and to come up with specific and politically viable policy proposals.¹¹¹

The events chosen for analysis are not intended to constitute a complete list of dramatic public events that served to impact the nature and pace of administrative evolution in the United States, or even in the twentieth century,¹¹² or to suggest that this is the only viable model to explain regulatory and policy change over time.¹¹³ Such a broad analysis of all dramatic and impactful events

110. See generally, e.g., Report of the President's Commission on the Accident at Three Mile Island (1979), <http://www.threemileisland.org/downloads/188.pdf> (last visited Apr. 19, 2011); Andrew Cowper Lawson & Harry Fielding Reid, *THE CALIFORNIA EARTHQUAKE OF APRIL 18, 1906: REPORT OF THE STATE EARTHQUAKE INVESTIGATION COMMISSION* (Nabu Press 2010); *THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES*, *supra* note 32; various reports of the Financial Crisis Inquiry Commission, <http://www.fcic.gov/reports/> (last visited Apr. 19, 2011) (summarizing examples of governmental response to disasters).

111. However, not all great tragedies produce great change. Even after the worst oil spill in U.S. history, significant environmental reform is not anticipated. "Great tragedy, with the right timing, can bring great change When people are . . . sort of hunkered down over the economy, then that's not going to produce significant change." David A. Fahrenthold & Juliet Eiplerin, *Historic Oil Spill Fails to Produce Gains for U.S. Environmentalists*, WASH. POST, July 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/11/AR2010071103523.html> (quoting Kenneth P. Green, American Enterprise Institute).

112. For example, the Enron and WorldCom scandals led to the passage of the Sarbanes-Oxley Act in 2002. 15 U.S.C. § 7201 (2006).

113. The creation of the Department of Interior in 1849, for example, occurred decades after policymakers identified the need for the creation of an agency with oversight over internal affairs: "[the creation of the Department of Interior] was the direct result of the pressure of administrative burdens. There

would be impossible in this format, and I do not intend to argue that there are not various other reasons for changes in government structure and focus over time. The hope is that the three examples chosen for discussion will provide characteristic examples of the ways that publicly experienced disasters, along with other factors, can result in dramatic quantum shifts in the scope and substance of our administrative structures, or not.

B. Two “Unresolvable” Regulatory Moments

1. The Triangle Shirtwaist Factory Fire of 1911

On a late Saturday afternoon in early spring 1911, in the heart of one of the world’s most populace cities, 146 people died in a fire in a loft factory workshop—the “Triangle” factory—near Washington Square Park in Manhattan.¹¹⁴ The victims were garment workers, and like most other garment workers of the era, were mostly immigrant young women, many in their teens.¹¹⁵

The fire was at once both remarkable and routine. While it remains the most deadly workplace accident ever to occur in New York City,¹¹⁶ incidents of workplace injury and death were far from rare in the early twentieth century in New York City or elsewhere in the United States.¹¹⁷ But this workplace disaster,

is no evidence to show that general opinion outside administrative or Congressional circles had anything whatever to do with it. It was certainly not the outcome of wide-spread demand or popular pressure.” Henry Barrett Learned, *The Establishment of the Secretaryship of the Interior*, 16 AM. HIST. REV. 751, 770 (1911). Congress established the Federal Communications Commission after similar administrative concerns pertaining to radio transmissions emerged in the 1920s and 1930s. See generally R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) (discussing the development of government regulation). Finally, no dramatic public events played a role in the changes to Medicare under the Medicare Modernization Act in 2003. See generally Thomas R. Oliver et al., *A Political History of Medicare and Prescription Drug Coverage*, 82 MILBANK Q. 283 (2004) (discussing the regulatory and policy changes to Medicare under the Medicare Modernization Act).

114. See generally LEON STEIN, *THE TRIANGLE FIRE*, (Cornell Univ. Press 1962); DAVID VON DREHLE, *TRIANGLE: THE FIRE THAT CHANGED AMERICA* (Atlantic Monthly Press 2003) (detailing the tragic circumstances surrounding the Triangle Fire).

115. *Id.* at 270-83.

116. See *id.* at 3 (stating that the Triangle Shirtwaist Factory fire was the worst workplace accident in New York City for ninety years—until September 11).

117. See *id.* (noting that “death was an almost routine workplace hazard in those days. By one estimate, one hundred or more Americans died on the job every day in the booming industrial years around 1911.”). Exactly four months before the Triangle tragedy—on November 25, 1910—fire broke out in an old four story building at Orange and High Streets in Newark, New Jersey. *Id.* In minutes, twenty-five factory workers, most of them young women, were dead. *Id.* Of these, six were burned to death, nineteen jumped to death. *Id.*

unlike all the horrible ones that had come before,¹¹⁸ served as a catalyst for a significant evolution of workplace regulation, first in New York, and then in the rest of the United States.¹¹⁹

The Triangle fire occurred in the waning years of Tammany Hall control of New York City government.¹²⁰ The Democratic political machine that was only rarely out of power in the fifty years leading up to the fire based its success, in large measure, on its ability to identify and defeat evolving political rivals. The most feared challenge to its authority in 1911 was the Progressive movement, personified in two important New York politicians, Governor Charles Evans Hughes and recent past-President Teddy Roosevelt. "Progressive" elected officials had recently enjoyed some political success by pushing workplace reforms,¹²¹ many of which were struck down by the courts in cases like *Lochner v. New York*¹²² and similar cases between 1910 and 1925.¹²³ As David Von Drehle observed in his recent history of the Triangle fire and its impact, "the machine protected the established order—which was, after all, quite good to Tammany."¹²⁴ But as powerful as the Tammany machine was, it depended on one primary energy source—votes, and the basis for its ongoing concern about other political entities or movements was the potential they had to siphon away significant numbers of their loyal voter base.

The increase in immigration at the time from southern and

118. See U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, INDUS. ACCIDENTS STATISTICS, BULL. NO. 157 (1915) (discussing the frequency of industrial accident statistics in the United States in the early twentieth century). Industrial accidents were a common occurrence at the time, accounting for approximately eighty-three thousand deaths per year in the United States. *Id.* at 12. Most of these deaths and injuries resulted from accidents claiming a few lives each. U.S. DEPT. OF LABOR, GOV'T REGULATION OF WORKERS' SAFETY AND HEALTH 1877-1917: CHAPTER 5, PROGRESSIVE ERA INVESTIGATIONS, available at <http://www.dol.gov/oasam/programs/history/mon-o-regsafepart05.htm>.

119. See Friedman & Thompson, *supra* note 36, at 256-57 (stating that the fire became a symbol of rampant worker abuse of the time and helped to "galvanize support" for the labor-reform movement).

120. VON DREHLE, *supra* note 114, at 21-22.

121. *Id.* at 21 (discussing the progressive movement and two of its leaders, Charles Evans Hughes and Theodore Roosevelt).

122. See *Lochner v. New York*, 198 U.S. 45 (1905) (holding state law setting a maximum on the number of hours in a work week violated the due process clause of the Fourteenth Amendment).

123. See *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (holding law requiring standardized weights for loaves of bread unconstitutional); *Adkins v. Children's Hospital*, 261 U.S. 525 (1917) (declaring a law setting minimum wage for women unconstitutional); *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down a Kansas statute prohibiting employers from conditioning employment on an employee's agreement to refrain from joining a labor union); *Adair v. United States*, 208 U.S. 161 (1908) (declaring unconstitutional law requiring employers to hire employees with union membership).

124. VON DREHLE, *supra* note 114, at 21.

central Europe provided the basis for an electoral threat to Tammany power in the form of thousands of potential voters who worked, among other places, in the garment sweatshops that were the basis of Manhattan's industrial economy.¹²⁵ And in the years leading up to the Triangle disaster, these groups—both recent immigrants and garment workers—had become increasingly politically active.¹²⁶ High-level Tammany officials understood that their political futures “depended on Tammany’s continued hold on the loyalty of the working-class voters, the backbone of the Hall’s power for more than half a century.”¹²⁷

In November 1909, growing dissatisfaction with working conditions, wages, and hours in the garment industry produced a large-scale general strike with at least 20,000 (and perhaps as many as 40,000¹²⁸) garment workers walking out of their jobs.¹²⁹ Almost immediately many of the smaller factories collapsed under the pressure and agreed to many of the union demands including a pay increase, a reduced fifty-two-hour work-week, and union-only factories.¹³⁰ But the majority of owners, and all of the large factory owners—like those of the Triangle Factory—resolved to resist the strike and do everything in their power, including physical violence (imposed by both strike breakers and the Tammany-controlled police), to destroy the union.¹³¹ The large factory owners employed one additional strikebreaking tactic—offering to send all of the labor disputes, with the exception of the union shop requirement won in many of the smaller shops, to arbitration.¹³² The union’s local office rejected the offer immediately, but the proposal had the (possibly intentional) effect of exacerbating a

125. ROBERT A. SLAYTON, *EMPIRE STATESMAN: THE RISE AND REDEMPTION OF AL SMITH* 89 (2001) (discussing New York’s role in the women’s garment manufacturing industry).

126. VON DREHLE, *supra* note 114, at 53.

127. *Id.* at 189 (“New York’s working-class population was growing at a phenomenal rate. If a way could be found to make the new immigrants as loyal as earlier generations, then Tammany might one day dictate policy for the entire Democratic Party and send its own men to the White House.”); see also Daniel Citro, *Underworlds and Underdogs: Big Tim Sullivan and Metropolitan Politics in New York, 1889-1913*, 78 J. AM. HIST. 536, 553 (1991) (analyzing the growing importance of labor and immigrant issues in Tammany Hall politics through the early years of the twentieth century).

128. VON DREHLE, *supra* note 114, at 62.

129. ELIZABETH V. BURT, *THE PROGRESSIVE ERA: PRIMARY DOCUMENTS ON EVENTS FROM 1890 TO 1914* 206 (Greenwood Press 2004) (describing the Uprising of Thirty Thousand as lasting from November 1909 to February 1910 and the demands of the strikers—including “adequate fire escapes and unlocked doors”).

130. See *id.* (stating that some employers made concessions to the strikers, but 3000 employees returned to work at factories, including the Triangle Shirtwaist Company, without any changes having been made).

131. VON DREHLE, *supra* note 114, at 63.

132. *Id.* at 80.

growing fissure between the union leadership and the wealthy progressive women who had provided personal and financial support for the strike.¹³³ This support fell off substantially, and the strike soon collapsed.¹³⁴ But the emergence of a potent political alliance between wealthy progressives and immigrant workers, albeit short-lived, was of great concern to Tammany officials in New York and Albany¹³⁵ and would prove to be more effective and resilient in the years and decades to come.

It was with the failed uprising of the "30,000" in 1909–1910 as an immediate backdrop that the Triangle fire occurred. In many ways, the working conditions at the Triangle Shirtwaist Factory, notwithstanding the passionate and ultimately successful anti-union stance of its owners, were state of the art, and relative to many of the other garment factories in New York City, quite safe. But judged by the standards of fire safety in buildings in other parts of the country, and in other industries, the Triangle factory was a severe fire and safety hazard.¹³⁶ Innovations such as "firewalls, fire doors, fire stairs, and most of all, automatic sprinklers, were available, in theory, to Manhattan factory owners. But it was virtually impossible to find such features anywhere in the city."¹³⁷ Before the Triangle fire "reformers had met with little progress in achieving legislative reform, either at the city or state level. The City failed to provide adequate safety laws and did not enforce the few, deficient standards already in existence."¹³⁸

The factory was housed in the Asch Building, a loft¹³⁹ high-rise near New York University and Washington Square Park.¹⁴⁰

133. *Id.* at 81 (stating that many progressive sympathizers viewed the radicals' rejection of the arbitration proposal as too extreme).

134. Behrens, *supra* note 33, at 364–65.

135. At the time, New York State Tammany leader Charles Murphy: surely realized that an unprecedented alliance for change—centered in the very heart of Tammany's power, downtown Manhattan—had shattered as quickly as it had come together. Though the strike continued through January, it no longer threatened Murphy's world. He could continue to approach change at his own pace. The uprising once hailed as another Lexington or Bunker Hill had deteriorated into a tangle of resentments.

VON DREHLE, *supra* note 114, at 84.

136. *Id.* at 160.

137. *Id.* at 161 (discussing the influence of insurance companies on the lack of risk reduction in New York City buildings).

138. Behrens, *supra* note 33, at 365.

139. Friedman & Thompson, *supra* note 36, at 257 (noting that "[t]he New York labor code mandated 250 cubic feet of air per worker; but the company was able to pack workers in very tightly because the building was a loft with high ceilings and thus had enough air space to meet the ventilation requirements.").

140. The loft was an innovation both in architecture and industrial design that had become overwhelmingly popular during this period. VON DREHLE,

The Triangle factory was not precisely a “sweatshop”¹⁴¹ but one of the early “modern” factory floors.¹⁴² While an improvement on the sweatshop model in several respects, including more comfortable working conditions and more ventilation, the primary drawback of this innovation was the distance between the workers and the ground floor.¹⁴³ And one drawback for the owners was that the increased number of workers in the same place facilitated union organization.¹⁴⁴

Max Blank and Isaac Harris, the owners of the Triangle Company, devised various approaches to deal with the threat posed by labor organization of their workforce. They brought contractors into the factory with their own workers to provide a buffer between high-level management and a portion of the workforce, and they established a sham in-house “union” that they hoped would draw the attention of their workers away from the real thing.¹⁴⁵ But Blank and Harris found these tactics unsuccessful and were forced, in 1909, to lock-out their workers to make good on a threat to fire anyone who joined a union.¹⁴⁶ More ominously, on other occasions, they were alleged to have intentionally locked their workers *in* (and locked potential labor organizers out) by locking the stairwell doors on the several floors they occupied in the Asch Building loft.¹⁴⁷

The Triangle Factory occupied the entire eighth, ninth, and

supra note 114, at 47. See also *141 Men and Girls Die in Waist Factory Fire; Trapped High Up in Washington Place Building; Street Strewn With Bodies; Piles of Dead Inside*, N.Y. TIMES, Mar. 26, 1911, reprinted in BURT, *supra* note 129, at 210-11 (describing the building as “fireproof” and stating that it showed no external signs of the fire).

141. A sweatshop would be a modified tenement space with primary resident families and extended families providing the labor. SLAYTON, *supra* note 125.

142. The new design provided real benefits over the late nineteenth century fixtures not so much in terms of working conditions, but in the efficiency and profitability of production. VON DREHLE, *supra* note 114, at 47.

143. “A decade into the new century, half the workers in Manhattan toiled on the seventh floor or above—which was at least one floor higher than the city fire department could easily reach.” *Id.* at 48.

144. Increasingly, the home-based tenement sweatshops, with workers for the same company spread out across buildings and neighborhoods, were replaced with the centralized factory, where “scores—even hundreds—of workers gathered each day in the same place.” SLAYTON, *supra* note 125, at 90.

145. See STEIN, *supra* note 114, at 163.

146. VON DREHLE, *supra* note 114, at 49.

147. Notwithstanding the relative modernity of their facilities, Blank and Harris were two of the more infamous garment factory owners and had been the subject of various complaints from current and former workers, and even from law professors at the neighboring NYU law school who had observed and made formal complaints about overcrowding in the factory. VON DREHLE, *supra* note 114, at 135.

tenth floors of the Asch Building.¹⁴⁸ March 25, 1911, the day of the fire, was a Saturday, which meant it was the last day of the six-day work-week of a garment worker. The fire began just before 5 p.m. as the factory was closing and hundreds of people were gathered in the adjacent Washington Square Park to enjoy the perfect early spring evening.¹⁴⁹ It apparently started from a carelessly discarded cigarette in a bin of fabric remnants near a cutting table.¹⁵⁰ The small fire grew to an inferno in a matter of seconds, fed by the highly flammable cloth, cotton, and tissue paper at or near the cutting tables, bits of which were soon floating around the room spreading the fire wherever they landed.¹⁵¹ The approximately 180 people who had been working on the eighth floor fled in three separate directions.¹⁵² After water pails proved ineffective, one worker tried the eighth floor water hose, and then another the ninth floor hose pulled down from above, but when the valves were opened no water came out.¹⁵³ A large group of workers gathered at the Washington Street door, which was locked until one of the managers arrived with a key and provided an escape route for scores of the workers.¹⁵⁴

Most of the occupants of the tenth floor (approximately seventy in total), including Harris and Blanck's two young daughters, escaped through the spreading flames to the roof by way of the Greene Street stairs only to find no safe access either to the ground (130 feet down) or to the adjacent buildings, which were significantly higher than the Asch Building.¹⁵⁵ This group was eventually saved by Frank Sommer, a law professor at New York University, and his students, who found two ladders on the roof of their neighboring building, and used them to lead the escapees to safety.¹⁵⁶

The workers on the ninth floor (approximately 250 of them, more than eighty percent of them young women)¹⁵⁷ suffered most.¹⁵⁸ Some escaped to the roof by way of the Greene Street stairway.¹⁵⁹ The other stairwell door, on the Washington Street

148. *Id.* at 117-20.

149. STEIN, *supra* note 114, at 11-14 (discussing the neighborhood around the factory).

150. *World Reporter Finds Indications That Locked Doors Caused Big Loss of Life in Fire*, N.Y. WORLD, Mar. 27, 1911, reprinted in BURT, *supra* note 129, at 212-13 (describing the Fire Chief's beliefs as to the origins of the fire).

151. VON DREHLE, *supra* note 114, at 119.

152. *Id.*

153. *Id.* at 121.

154. *Id.* at 118, 121-23, 126-27, 133.

155. STEIN, *supra* note 114, at 43-47.

156. *Id.* at 48-50.

157. VON DREHLE, *supra* note 114, at 139.

158. STEIN, *supra* note 114, at 51-66 (describing the fire from the perspective of those trapped on the ninth floor).

159. *Id.* at 59-62.

side, was locked.¹⁶⁰ Within about six minutes of the fire entering the room, it had blocked the Greene Street stairs leaving the elevator, fire escape, and the windows as the only exit routes.¹⁶¹ Some workers escaped through the elevator, although it was soon forced out of service as the fire blocked the shaft and the bodies of desperate workers filled its roof.¹⁶² The fire escape, soon crowded with far more people than it was built to hold,¹⁶³ collapsed almost immediately, sending scores of workers to their deaths.¹⁶⁴ Barely ten minutes into the fire, the only remaining exit for anyone left in the loft, most on the ninth floor, was to jump from the windows.¹⁶⁵

The first jumper came down at 4:40 followed by scores of others.¹⁶⁶ Fire fighters and other onlookers tried their best to catch jumpers in nets or tarps,¹⁶⁷ but the nine-story drop and the number of people jumping made it impossible to do so.¹⁶⁸ The firefighters had the fire under control on all three floors by 5:15, but it was decidedly too late.¹⁶⁹ In just thirty minutes, 146 Triangle workers, 123 of them women, had died.¹⁷⁰

The spectacle of the Triangle workers, mostly young women, jumping to their certain deaths from the ninth floor was witnessed by thousands of stunned New Yorkers.¹⁷¹ The time and location of the fire combined to ensure a large audience.¹⁷² Once word of the fire got out, thousands were able to travel mere blocks to witness the vivid tragedy. Frances Perkins, the executive secretary of the

160. VON DREHLE, *supra* note 114, at 164.

161. *Id.* at 149.

162. STEIN, *supra* note 114, at 65-66.

163. VON DREHLE, *supra* note 114, at 147.

164. "Some victims smashed through the skylight and into the cellar. Others were impaled on the spiked iron fence that bisected the bottom of the shaft. Some came down burning and, when they landed, set off fires in the Asch Building basement." *Id.* at 148.

165. *Id.* at 153.

166. SLAYTON, *supra* note 125, at 90 (workers were forced to make "the impossible choice between being burned alive or jumping to their deaths.").

167. Friedman & Thompson, *supra* note 36, at 258-59. "The fire department arrived soon after the fire began, but it was of little help to the victims. The tallest fire ladder reached only to the sixth floor and the limited water pressure of the time only allowed fire hoses to reach the seventh floor." *Id.*

168. VON DREHLE, *supra* note 114, at 156-157.

169. *Id.* at 165.

170. *Id.* at 166.

171. *Id.* at 159.

172. Approximately 2.3 million people lived in Manhattan in 1910, and 4.7 million people lived in New York City. DEPT OF COMMERCE, BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR, VOL. 3, 188 (1910), available at <http://www.census.gov/prod/www/abs/decennial/1910.htm>. In comparison, San Francisco, CA had a population of 417,000. DEPT OF COMMERCE, BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR, VOL. 4, 149 (1910), available at <http://www.census.gov/prod/www/abs/decennial/1910.htm>. Chicago, IL had a population of 2.2 million. *Id.* at 436.

Consumers League, and by 1911 a veteran advocate for workplace safety,¹⁷³ was one of these neighboring witnesses.¹⁷⁴ She would become a central figure in the post-fire drive for reform,¹⁷⁵ and later, the Secretary of Labor under Franklin Roosevelt.¹⁷⁶

Many observers made the immediate connection between the disaster and the failed recent garment workers strike.¹⁷⁷ As one observer noted, "I remember their great strike of last year, in which these girls demanded more sanitary workrooms, and more safety precautions in the shops. These dead bodies told the result."¹⁷⁸ And unlike some industrial accidents, notably the far less visible instance of coal and other mining disasters common at the time, where the victims perished within their dark and inaccessible workplaces (often unknown to anyone but their co-workers, family, and friends), the Triangle fire produced the indelible spectacle of public deaths, over and over again before a crowd of thousands who had never, and would never again, see anything like it.¹⁷⁹

Nonetheless, labor activists had little hope that the fire, dramatic as it was, would have any real impact on safety

173. See Jeanine Ferris Pirro, *Reforming the Urban Workplace: The Legacy of Frances Perkins*, 26 *FORDHAM URB. L.J.* 1423, 1424-26 (1999) (explaining the education background and past employment of Frances Perkins).

174. See VON DREHLE, *supra* note 114, at 195 (discussing Frances Perkin's perceptions on the day of the fire).

175. Frances Perkins was named executive secretary of the Committee of Safety formed by New York State in the aftermath of the Triangle fire. *Id.* at 1426-27.

176. Pirro, *supra* note 173, at 1427. Frances Perkins was the first woman cabinet member in the United States: appointed as Secretary of Labor by President Franklin in 1933. *Id.*

177. See VON DREHLE, *supra* note 114, at 193 (describing a public demand for fire safety at the Metropolitan Opera House and a later funeral march); see also STEIN, *supra* note 114, (stating "[I]t was the same policemen who had clubbed [the Triangle workers] back into submission who kept the thousands in Washington Square from trampling upon their dead bodies, sent for ambulances to carry them away and lifted them one by one into the receiving coffins.").

178. VON DREHLE, *supra* note 114, at 177.

179. See Elizabeth V. Burt, *Working Women and the Triangle Fire: Press Coverage of A Tragedy*, 30 *JOURNALISM HIST.* 189, 190 (2005) (noting

Reporters were on the scene within minutes to record the accounts of eyewitnesses, stunned survivors, and grieving relatives, and photographers provided gripping scenes of police and firefighters piling charred and broken bodies in the street. . . . The story was picked up by newspapers from coast to coast, and on their editorial pages many began to ask how safe the factories in their own cities were. This had all of the elements of a sensational story—the number of victims (146), the character of the victims (mostly women, many of them girls), the location (downtown New York City), the time (broad daylight), and the inherent conflict involved (the criminally negligent owners and the negligent city inspectors.).

conditions in factories.¹⁸⁰ As socialist leader Meyer London characteristically concluded, “[W]e will get an investigation that will result in a law being referred to a committee that will report in 1913. And by 1915 a law will be passed—and after that our grafting officials will not enforce it!”¹⁸¹

But this prediction, justified as it was by London’s experience and the track record of the Tammany Democrats in the city and state government, was wrong. The Triangle fire was the undeniable initiating moment of a dramatic shift in New York politics and regulatory policy, paving the way for the development of substantial new administrative structures and regulatory requirements. It was the paradigmatic “unresolvable *regulatory* moment” punctuating the otherwise static equilibrium of governmental workplace safety policy.

The initial legal response to the fire was the criminal prosecution of Max Blanck and Isaac Harris by the District Attorney’s office.¹⁸² The two were quickly indicted on manslaughter charges—with the intentional locking of the ninth floor door as the main incriminating allegation.

But even as the indictments were issued, activists fought to keep the post-fire attention on the broader issue of working conditions in all of New York, not just in the Triangle factory, and to use the fire as the motivating force for the kind of significant regulatory change that they, and their past and present allies, had been seeking for a generation.¹⁸³ This initiative was enhanced when the criminal trial of Blanck and Harris ended in a not guilty verdict in December of 1911.¹⁸⁴ Legal culpability and blame for the

180. See Behrens, *supra* note 33, at 366 (describing the activists’ skepticism, which was partially the result of the 1909 strike).

181. VON DREHLE, *supra* note 114, at 171-73 (noting that Meyer’s skepticism was well-founded).

182. *Id.* at 180 (stating that District Attorney Whitman could have gone “after the building department, which would cast the fire as a problem of the bureaucracy, or he could go after the owners, which would cast the disaster as an individual crime.”).

183. A high degree of labor strife characterized the years near the turn of the century in New York City. See *Knights of Labor Tailors to Strike*, N.Y. TIMES, Sept. 7, 1894 (noting that city tailors will strike due to a wage dispute); *Injunctions in Labor Disputes*, N.Y. TIMES, Jan. 27, 1903 (arguing that labor leaders seek to employ “sterner” rather than “peaceful” measures to reach their goals); *Thousand New Men to Break Cab Strike*, N.Y. TIMES, Dec. 21, 1908 (discussing the employment of one thousand contractors coming into the city to replace striking cab drivers).

184. *The Meaning of an Acquittal*, N.Y. TIMES, Dec. 29, 1911, reprinted in BURT, *supra* note 129, at 221-22 (stating that the jury would have had to find that the ninth-floor door was locked on Harris and Blanck’s orders and that the pair was “personally connected with and responsible for the death of one particular victim,” and the state could not meet this burden); see generally STEIN, *supra* note 114, at 177-203 for a detailed description of the trial, including testimony and arguments.

Triangle owners could have produced a sense that justice had been done, and that the tragedy was the result of irresponsible and reckless individuals and not something systematic about working conditions and regulatory structures in the city. The acquittals sent almost the opposite message, one more conducive to a broad regulatory response: that the fire was the result not of an isolated act of criminal cruelty or recklessness but was endemic of a flawed and dangerous workplace environment.¹⁸⁵

One of the activists who fought to use the fire as an impetus for regulatory reform was Frances Perkins. She soon became a central figure, along with two young Tammany-affiliated state legislators, Alfred E. Smith and Robert F. Wagner,¹⁸⁶ in post-fire political mobilization that would change working conditions in New York. By the time of the fire, Perkins was already working as a lobbyist in Albany advocating for regulations of women and child labor, and for workplace and fire safety.¹⁸⁷ Indeed, Perkins, after personally witnessing the tragedy of the Triangle fire, had recently learned that her primary legislative initiative, a fifty-four-hour work-week, had been killed in the legislature at the behest of powerful manufacturing interests¹⁸⁸ who saw the working limitations as a threat to their profits.¹⁸⁹

After the fire, Smith told Perkins that a commission of legislators, not well-meaning public advocates, was needed if any substantial regulatory initiatives could be expected.¹⁹⁰ He and

185. See Behrens, *supra* note 33, at 367 (describing how the trial had the effect of keeping the fire in the public's consciousness, which aided the reform movement).

186. Robert F. Wagner, at thirty-three, was installed as the youngest Senate leader in New York history. While in the Assembly, Alfred E. Smith became majority leader a few days after turning thirty-eight. [Charles] Murphy, the saying went in Albany, had promoted the "kindergarten class." VON DREHLE, *supra* note 114, at 200. Smith, Wagner and Perkins were all destined to wield extensive political influence over the following few decades—Smith as a long-time popular New York governor and presidential candidate (who governed, in David Von Drehle's words, "as though the ghosts of the Triangle were looking over his shoulder"), while Wagner and Perkins were founding architects of the New Deal working with Smith's political successor in Washington, Franklin Roosevelt. *Id.* at 262-63. And while all three could point to various reasons for their success, the Triangle fire and its aftermath were the crucial moments for all their careers, and consequently, for development of liberal social policy for a generation or more. *Id.* at 262-63.

187. *Id.* at 199.

188. Smith confided in Perkins, at the time, that one of the forces opposed to the bill was the Huyler candy company, a major contributor to the Democratic party. *Id.* at 206.

189. *Id.* at 205.

190. *Id.* at 208. Smith's assessment of how ineffectual a committee of civic leaders and activists would be mirrors at least one aspect of the public choice school's basic calculus for why private interests invariably dominate broad public concerns in any legislative battle—the inability of advocates for the

Wagner spear-headed the creation of the Factory Investigating Committee just three months after the fire, with nine members: five legislators and four gubernatorial appointments, with themselves, the two "Tammany Twins," as chairman and vice-chairman respectively.¹⁹¹ The Commission was granted "the power to subpoena witnesses and documents, to elect its own members, to employ experts, and to change its own rules . . . [to] remake its charter and replace its members."¹⁹² It hired a union official as chief investigator, who in turn sent a team of ten more investigators¹⁹³ "into nearly two thousand factories, covering twenty industries" by the end of 1911.¹⁹⁴ The Commission heard from 222 witnesses and inspected 1836 industrial establishments during its tenure.¹⁹⁵ As historian Robert Slayton has observed, the findings of the commission mirrored the initial public sense that the Triangle disaster had been the result of a dearth of relevant regulations.¹⁹⁶

By the end of the year the commission had proposed fifteen new laws addressing fire safety, workplace inspections, and women's and children's labor, eight of which were ultimately enacted.¹⁹⁷ In 1912, the commission expanded the scope of its investigation from the original nine cities to an additional forty-six, and expanded its focus "far beyond simple fire safety to the broader issue of industrial conditions."¹⁹⁸ It proposed many more bills, with twenty-five becoming law by the end of 1913.¹⁹⁹ Perhaps most significantly, the new legislation included a reorganization of the state's Department of Labor to monitor and enforce these new

public interest to invest the kind of time and energy that the private interest can always be counted on to display. *Id.*

191. *Id.* at 210.

192. *Id.* at 212. SLAYTON, *supra* note 125, at 93 (discussing the state's limitations on the powers of the Commission).

193. One of the investigators was Clara Lemlich, a union activist and one of the main instigators of the "uprising of the 20,000." VON DREHLE, *supra* note 114, at 213.

194. *Id.*

195. STEIN, *supra* note 114, at 208-09.

196. SLAYTON, *supra* note 125, at 94. "The problem, they discovered, was not that the owners violated the safety codes but rather that the codes were far too lax to protect workers' safety. The Asche Building, for example, was considered a model of fireproofing, and in one sense it was: the building remained relatively undamaged, while all inside perished." *Id.*

197. VON DREHLE, *supra* note 114, at 214.

198. SLAYTON, *supra* note 125, at 93. The Commission's focus "included fire hazards, unsanitary working conditions, occupational illnesses, factory inspection, tenement sweatshops, and the status of existing laws and enforcement. . . . The broader scope of this commission, however, meant that New York had become the first state in the country to launch a general investigation into the conditions of industrial work." *Id.* at 94.

199. VON DREHLE, *supra* note 114, at 215.

requirements²⁰⁰ and concentrated responsibility for fire prevention in the city, previously divided between several departments, into one Bureau of Fire Prevention.²⁰¹ The Bureau was the first of its kind in the country, and it gave the fire department unfettered authority to carry out fire safety inspections without seeking prior approval from the Bureau of Building, the Department of Water Supply, or any other agencies with a less direct focus on safety concerns.²⁰²

The new rules and regulations, to an overwhelming extent, mirrored the specific conditions that had caused or exacerbated the Triangle disaster and demonstrated a genuine motivation not merely to grandstand for political gain, but to identify and solve real problems.²⁰³ The new legislation required, among other things, automatic sprinklers in high-rise buildings, fire drills in workplaces, and fire doors to remain unlocked and swing outward to allow more room for egress.²⁰⁴ And the new regulations were opposed vigorously by the manufacturing interests in the state and imposed heavy financial and procedural burdens on employers throughout the state.²⁰⁵

But the new rules also demonstrated the particular political and emotional impact of the fire and the dominant public narrative it fostered. Much of the immediate post-fire legislation focused on workplace rules for women and children, suggesting, along with much of the contemporary press coverage and public statements by government officials, that the gender and age of the majority of the fire's victims was one of the factors that created such strong outrage and the correspondingly lasting initiative for change.²⁰⁶ While the furor for reform abated significantly by 1914,²⁰⁷ the Commission had already achieved remarkable changes in the law, making New York one of the forerunners of

200. *Id.* at 215. The post-fire political focus on the issues of working people and recent immigrants had the effect that Charles Murphy and other Tammany leaders had hoped. *See id.* at 217-18 (stating that Tammany had its largest state-wide victory ever in autumn 1913).

201. SLAYTON, *supra* note 125, at 99.

202. *Id.*

203. *See* SLAYTON, *supra* note 125, at 98-99 (providing examples of how the Commission's rules and regulations are still in force today).

204. *Id.*

205. *Id.*

206. As Professor Slayton writes:

Investigators roamed through the tenements, fining sweatshops where women worked by street light to save the cost of gas, unaffordable on their slim wages. Children cried from exhaustion, their parents' only response to urge their small fingers on, paste another petal on the artificial flower, in the rush to earn a few pennies more for bread.

SLAYTON, *supra* note 125, at 95.

207. Only three of the Commission's bills passed during that year. Behrens, *supra* note 33, at 371.

modern workplace safety reform. The period following the Triangle fire is even now remembered as “the golden era of remedial factory legislation” and has justly been called a “turning point” in social progress. Frances Perkins noted, “The extent to which the legislation in New York marked a change in American political attitudes and policies toward social responsibility can scarcely be overrated.”²⁰⁸ This administrative expansion influenced the federal administrative boom of the following decade, and the post-Triangle legal structures in New York “became the model for federal laws on these subjects.”²⁰⁹

A combination of factors made the Triangle fire perhaps the paradigmatic unresolvable moment of twentieth century administrative evolution.²¹⁰ First, it was a dramatic public disaster that was experienced by a large number of people and remained a topic of great public interest for a long time. Second, the story that arose from the fire, and which became the conventional narrative, was simple and compelling: young girls crammed into a factory, who had only recently fought for safer working conditions, died in horrible ways, and no one could find a law that was violated or someone to blame. Third, the fire was not a one-time aberrational event that could be dismissed as a passed tragedy—there was an ongoing and immediate potential for recurrence of a similar catastrophe. Fourth, there was nothing idiosyncratic about the cause of the event—the owners of the factory were not convicted for some kind of special malice, and the factory itself was not a fringe sweatshop that would have been an embarrassment to the industry, but instead was a modern and somewhat safe workplace based on the standards of the time. And finally, a committee was appointed by a relevant legislative body with authority to both investigate the causes of the disaster and make recommendations for new legislation and regulation that might make the recurrence of a similar event significantly less likely. Perhaps this feature is the most important, as the post-Triangle fire commission was able to focus the kind of specific political activism for reforms that was at least designed to serve

208. *Id.* See also SLAYTON, *supra* note 125, at 98 (explaining how New York’s reputation as a leader in manufacturing safety developed following the fire and subsequent reforms).

209. Pirro, *supra* note 173, at 1427. The broad national impact of this legislative explosion in New York in the early twentieth century was enhanced by the historical coincidence of Perkins, and other key figures in the post-Triangle drama, taking on important positions in the federal government in the 1930s. *Id.*

210. See Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 60-61 (2000) (describing that the Triangle fire caused massive deaths that led to public outcry for reform, which ultimately culminated in the creation of the New York State Factory Investigating Commission and an overhaul of New York labor laws).

the broad public that could challenge and ultimately defeat the entrenched private interests that otherwise so effectively stifle any real change in the regulatory status quo.

The focus on regulations governing women and the young in workplaces is testament to the formative impact of the fire, of the compelling narrative that arose from it, and its particular impact on the regulatory evolution that followed. It is also an indication of the importance played not only by the disastrous events themselves, but by the dominant societal narrative that developed to explain the events and their significance to the polity as a whole. It is indeed the story that is initiated by, and flows from, these dramatic events that serves as the critical mechanism in the punctuated evolution of the administrative structure because of its impact in energizing otherwise nascent and diffuse public opinion in support of regulatory change.

2. *The Mississippi River Flood of 1927*

Unlike many disasters that break suddenly on unsuspecting victims, the Mississippi flood of 1927 developed slowly over the course of many months under the watchful and anxious eyes of millions. Consistent heavy rains began to fall throughout the Mississippi River valley²¹¹ in August 1926 and did not abate for six months.²¹² The result, by April 1927, was rising water and ever-increasing anxiety in Mississippi River communities from Illinois to New Orleans.²¹³ Most officials responsible for flood prevention publicly expressed confidence that the system of levees²¹⁴ that protected much of the lower Mississippi, from Southern Illinois south to the Gulf of Mexico, would hold.²¹⁵ When the river reached flood stage in Cairo, Illinois on January 1, 1927, Congressional “representatives from Mississippi, Alabama, and Tennessee wired their respective governors to find out if they should seek federal aid for their flooded districts. The governors unanimously wired

211. See JOHN M. BARRY, *RISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA* 173-82 (Simon & Schuster 1997) (noting that the Mississippi River valley covers much of the continental landmass between Montana and New York).

212. *Id.* at 173-82.

213. *Id.* at 187-88. The rain first began in the region during summer and persisted in intensity resulting in the destruction of crops and the rising of the river causing anxiety to increase amongst the public during this period. *Id.* at 173-74.

214. See *id.* at 190 (describing the general structure and function of levees, which are huge, usually earthen, structures built on the banks of the river high enough, supposedly, both to hold the water in its banks and concentrate pressure downward to create a deeper riverbed).

215. See *id.* at 175 (explaining the residents' faith in the strength of the levees).

back that no help was needed.”²¹⁶ A month later, when more heavy rains caused flooding in New Orleans, the chairman of the Mississippi River Commission²¹⁷ assured the public that while the river was “high for [that] time of year, no serious trouble with flood waters [was] expected [that] spring unless more rain than usual fell in the upper valley and tributaries.”²¹⁸

This optimism²¹⁹ was misplaced, however, as serious fears soon began to grow as rivers in the Mississippi system were flooding throughout the country.²²⁰ Emergency mechanisms were finally employed to keep the water in its banks.²²¹ “The Mississippi National Guard was mobilized to guard the levees” to prevent residents of one area from damaging or destroying levees in another area in order to relieve the pressure and force the seemingly inevitable flood waters to wash away homes in a neighboring community instead of their own.²²² The chief engineer of the Mississippi Levee Board asked for money to raise the low spots in the Mississippi Delta for two months until supplies were finally received.²²³

The reliance on levees as the only mechanism for flood prevention had been a point of contention for decades.²²⁴ But by 1885, the Mississippi River Commission had reached the conclusion, clearly erroneous by even contemporary engineering standards, that the levee system served as a sufficient flood prevention device by “scouring and enlarging” the river beds and channel, allowing for more water to flow without escaping the river banks.²²⁵ To a great extent, this acceptance of the levees-only model was mandated by the fact that no financial support was available for any other flood prevention structures or policies. Before 1927, the states in the Mississippi region did not have the resources to institute other flood prevention plans, and the notion

216. *Id.* at 179.

217. The Mississippi River Commission is the body entrusted with managing the Mississippi flood plane. *Id.* at 157.

218. *Id.* at 182. In early 1927, the head of the Mississippi River Commission’s Memphis district declared that “if the river does not go any higher than has been forecast by the meteorologist at Memphis, no serious trouble with the United States levee system is anticipated.” *Id.* at 183.

219. *Id.* at 175 (stating that U.S. Weather Bureau data indicated that the river gauges at the end of 1926 on the three largest rivers in North America—the Ohio, the Missouri, and the Mississippi—were the highest on record, and that a flood the following spring was not unexpected).

220. Pittsburgh flooded on January 23, and Cincinnati flooded five days later. *Id.* at 181.

221. *Id.* at 162.

222. *Id.* at 182.

223. *Id.* at 182-83.

224. See *id.* at 21-92 (discussing in depth, Mississippi River flood prevention efforts in the late-nineteenth and early-twentieth centuries).

225. *Id.* at 157.

that the federal government should step in to provide funds for the creation and improvement of the national infrastructure was anathema.²²⁶ The levee-reliant policy was also a product of authority for decision making being placed in the hands of officials with limited expertise in the substantive scientific areas relevant to flood management²²⁷ and in the unwillingness of these officials to challenge what had become the conventional wisdom.²²⁸

As labor was mobilized to perform the tasks necessary to fight back the river, the same racial dynamics that had always governed life in the Mississippi Valley applied. Masses of black laborers²²⁹ were organized under small numbers of white supervisors, in difficult and dehumanizing conditions, in an attempt to avoid or limit the coming disaster.²³⁰ Blacks were forcibly pressed into service as sandbaggers in an attempt to forestall overflow of the levees,²³¹ while at the same time restricted from any duties that might involve possible violence against whites.²³²

On April 16, the first Mississippi River Commission levee crumbled at Dorena, Missouri. The Commission had insisted up until then that "[t]here [had] never been a single break nor a single acre of land flooded by a break on a levee constructed according to Government specifications The river poured through the breach, tearing down trees, sweeping away buildings, and destroying faith."²³³ Many levees upriver from Mississippi collapsed in the days that followed.²³⁴ And then the weather got even worse, with violent storms hitting the area on April 19 and 20, bringing both heavy rain and high winds and producing waves that pounded against the sides of the levees.²³⁵ Much of the increasingly frantic disaster prevention efforts focused on a particularly vulnerable section of the levee complex, at Mounds

226. *Id.*

227. *Id.*

228. As one expert on flood control observed at the time:

It is so much easier to believe than to think; it is astounding how much more believing is done than thinking. It is more astounding that an honest study was not made of conditions resulting from [the levees-only policy]. Not only was essential data not available but it appeared as though the failure to acquire it was deliberate. The determination to carry out this impossible theory was so great that, with many, it appeared to be an obsession.

Id. at 160.

229. Up to 30,000 black laborers worked the plantations in the Delta region, and would have no real choice but to answer the call when flood prevention (and later flood relief) workers were needed. *Id.* at 184.

230. *Id.* at 183-84.

231. *Id.* at 195-96.

232. *Id.* at 192.

233. *Id.* at 194.

234. *Id.* at 194-98.

235. *Id.* at 198.

Landing just north of Greenville, Mississippi.²³⁶

At 6:30 a.m. on April 21, a small break opened in the levee at Mounds Landing.²³⁷ At gunpoint, hundreds of black men worked to fill the growing break, filling sandbags and throwing them into the breach, but to no avail.²³⁸ Maude Williams,²³⁹ a fourteen-year-old girl from the outskirts of Greenville, Mississippi, sat with her family on the roof of their home in Mounds Plantation, watching the mighty, muddy, Mississippi roll by. The house was almost completely submerged by water.²⁴⁰ The next day, a boat came to rescue Maude, her parents, and her four brothers and sisters and take them to a shelter in downtown Greenville where she and her family would live for the next several months.

A total of 185,459 people had lived in the affected portion of the Mississippi Delta directly in the path of the escaping water; there is no record of how many of them died.²⁴¹ Approximately thirty thousand fled soon after the levee gave way, but most stayed, living in makeshift shelters and camps.²⁴² The sheer enormity of the catastrophe²⁴³ grabbed the attention of newspapers from coast to coast, and pleas for help splashed across the headlines.²⁴⁴

President Coolidge, who had ignored repeated calls from the governors of several states in the Ohio-Mississippi flood plane for months,²⁴⁵ finally called a meeting on the day after the Mounds

236. *Id.* at 198-200.

237. *Id.* at 200.

238. *Id.* "The water poured through in a growing torrent, washing the sandbags away as fast as they threw them in. Under their feet the levee quivered, shook. The breach was wider, deeper. The river was overflowing the levee along a front of several miles." *Id.* at 201.

239. Maude Williams, who married Hilliard Coleman in 1941, is the mother of Marianne Coleman Niles and the grandmother of the author of this Article.

240. BARRY, *supra* note 212, at 201.

241. *Id.* at 206. According to the Mississippi Historical Society, in the flood in Mississippi alone "a total of 41,673 homes were flooded; 21,836 buildings were destroyed; 62,089 buildings were damaged; and 2,836 work animals, 6,873 cattle, 31,740 hogs, and 266,786 poultry were drowned. And an entire crop year was lost." Princella W. Nowell, *The Flood of 1927 and Its Impact in Greenville, Mississippi*, MISSISSIPPI HISTORY NOW, <http://mshistory.k12.ms.us/articles/230/the-flood-of-1927-and-its-impact-in-greenville-mississippi> (last visited Mar. 16, 2011).

242. BARRY, *supra* note 211, at 206.

243. Friedman & Thompson, *supra* note 28, at 269. "The great flood of 1927 on the Mississippi River left a total of 16,570,627 acres under water, an area stretching over parts of seven states and home to a population of 4,459,238 people. In all, 162,017 homes were flooded, 41,487 buildings destroyed, and \$102,562,395 worth of crops lost." *Id.*

244. BARRY, *supra* note 211, at 208-09.

245. *Id.* at 262.

Even before the Mounds Landing crevasse, the governors of Oklahoma, Illinois, Missouri, Kentucky, Arkansas, and Mississippi had begged Coolidge for help and asked him to name Commerce Secretary Herbert

Landing crevasse to discuss what form a federal government response to the tragedy might take.²⁴⁶ He appointed Herbert Hoover, then Commerce Secretary, as the chair of a five-member cabinet-level committee to investigate the issue, make recommendations, and implement needed programs.²⁴⁷ Hoover gathered as much information as he could about the flood and its victims. He initially saw the post-flood efforts as “more ambitious than a simple provision of goods,” but instead as a calculated effort to “end the dependence of the region on cotton and sugar by distributing soybean and other vegetable seeds, which he believed would ‘lift the entire region out of squalor,’”²⁴⁸ but when his committee concluded that there was no immediate fix that would avoid another catastrophe like the Mounds Landing crevasse,²⁴⁹ he focused instead on providing relief for the victims and on regional rehabilitation.²⁵⁰ Hoover’s committee placed local Red Cross chapters, already established in most locations, in charge of delivering and coordinating relief.²⁵¹ Hoover also quickly and efficiently streamlined the relief system by centralizing policy and decentralizing execution.²⁵²

By mid-May 1927, Hoover had turned his focus to regional reconstruction.²⁵³ He planned to reduce the region’s dependence on cotton by introducing new crops²⁵⁴ and provided seeds so that refugees could grow vegetable gardens.²⁵⁵ He developed a credit

Hoover head of a special rescue effort. Hoover had repeatedly solved massive logistics problems of feeding hundreds of thousands of people. But Coolidge had done nothing until he had to.

Id.

246. *Id.*

247. *Id.*

248. Friedman & Thompson, *supra* note 28, at 272. “The reconstruction effort was (in Hoover’s view) not purely an act of charity. Rather, the project was, Hoover felt, ‘based on self-help, credit, employment and relief.’” *Id.*

249. *Id.* at 212.

250. *Id.* at 272.

251. BARRY, *supra* note 211, at 274. The Red Cross had first come to national prominence in the United States as a result of its role in the disaster relief for another historic American flood, the Johnstown Flood of 1889. See Friedman & Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, *supra* note 36, at 252 (stating that 2209 people died in the flood, which was the result of a poorly designed and maintained dam failing during a fierce rain storm).

252. See BARRY, *supra* note 211, at 274. (stating that this arrangement worked well for Hoover, and “in case of scandal Baker pointed out decentralizing would put responsibility ‘squarely on the local community and not the national organization Therefore, criticism may be localized very definitely.”).

253. *Id.* at 365. He announced the beginning of his reconstruction efforts on May 27, 1927. *Id.*

254. *Id.* at 366.

255. *Id.* at 365-66.

and loan system, believing that it would provide the South with the means to lift itself from the flood-induced squalor.²⁵⁶ But Hoover's plans required a great deal of money, and there was no ready or obvious source of funds.²⁵⁷ The federal government, although enjoying an extensive budget surplus, provided no direct relief funding.²⁵⁸ Hoover thus turned to private sources of financing,²⁵⁹ but unfortunately, only a small fraction of the funds was actually translated into loans for flood victims.²⁶⁰ Of the money that was made available, many of the people who needed it most lacked the collateral to borrow,²⁶¹ or could not afford the interest rates associated with loans offered by commercial banks.²⁶² The bank-funded reconstruction efforts consequently accomplished little in the way of extensive financial assistance, suggesting to many the limited "ability of the private sector alone to meet a crisis" of this magnitude.²⁶³

Those frustrated by the insufficiency of the early government-organized, privately-funded relief efforts included several members of Congress. Legislators besieged President Coolidge with calls for the commencement of a special session of Congress with the goal of drafting federal legislation to provide needed relief.²⁶⁴ Coolidge refused to call for such a session.²⁶⁵ Some prominent members of the press defended his decision on the grounds that the situation could and should be addressed without the direct involvement of the federal government.²⁶⁶ Most of the nation's media, however, saw and expressed the need for federal involvement to resolve such an extensive personal and financial disaster.²⁶⁷

256. *Id.* at 366. Hoover believed "the key to rebuilding . . . was credit." *Id.* Hoover had an enlightened, selfish, and political-economic approach. His plan reflected his own economic values: Its goal was not to provide for the refugees, but rather to help the refugees provide for themselves. *Id.* at 370.

257. *Id.* at 369.

258. *Id.* at 371.

259. *Id.* at 371.

260. *See id.* at 377 (stating that "[i]n the end, the Mississippi corporation made loans amounting to barely 5 percent of what Hoover had envisioned, and the Arkansas and Louisiana corporations did little better.").

261. *Id.* at 375-76.

262. *Id.*

263. *Id.* at 377.

264. *Id.* at 372.

265. *See BARRY, supra* note 211, at 372. Congress was not going to convene until January 1928. *Id.* The Red Cross would not spend money reinforcing the levees and the Army funds were exhausted; "legally, Congress had to pass an appropriations bill." *Id.*

266. *See id.* (stating that "[t]he New York Times applauded Coolidge's refusal to convene Congress and deemed Hoover's program sufficient: 'Fortunately, there are still some things that can be done without the wisdom of Congress and the all-fathering Federal Government.'").

267. *See Friedman & Thompson, supra* note 28, at 273.

The leading historian of the flood and its aftermath has identified the efforts as a “watershed” in the national consciousness concerning the proper role of the federal government in responding to the consequences of dramatic public disasters.²⁶⁸ John Barry referred to the growing calls for a federal role in the relief efforts as the moment “when the nation first demanded that the federal government assume a new kind of responsibility for its citizens.”²⁶⁹

Herbert Hoover, ambitious as his post-flood plans had been, did not ride the new wave of opinion about the role of the federal government, and he and the President continued to promote and implement privately funded relief efforts.²⁷⁰ He used his personal relationships and political influence to quiet demands for a special congressional session, and personally rebutted media attacks on his reconstruction plan.²⁷¹ In his annual message to Congress, President Coolidge made a strong argument against the use of federal funds to provide relief for the flood victims, noting that:

The Government is not an insurer of its citizens against the hazard of the elements. We shall always have flood and drought, heat and cold, earthquake and wind, lightning and tidal wave The Government does not undertake to reimburse its citizens for loss and damage incurred under such circumstances.²⁷²

Even as the inability of the private efforts to get the needed funds to victims became clear, Hoover continued to tout the success of his privately funded emergency response regime.²⁷³

While Hoover was campaigning for and implementing his rehabilitation program, many people called for President Coolidge to convene a special session of Congress to discuss the appropriation of federal relief funds for the flood victims. Newspapers throughout the country ran editorials pleading with the President to call on Congress to meet and provide relief—a special session that would respond to the ‘grave crisis’ facing victims.

Id.

268. See, e.g., BARRY, *supra* note 211, at 374 outlining the devastating effects of the infamous flood).

269. *Id.*

270. See Friedman & Thompson, *supra* note 28, at 271.

On April 22, 1927, just days after the break at Mounds Landing, President Calvin Coolidge made a national appeal for contributions to the Red Cross. In a meeting with Red Cross officials on that day, it was decided that \$5 million would be needed to sustain the relief effort.

Id.

271. See BARRY, *supra* note 211, at 323 (demonstrating Hoover’s deceiving schemes with his political peers).

272. Friedman & Thompson, *supra* note 28, at 273.

273. It was not the only controversy that Hoover would struggle to cover and suppress during the course of the flood. BARRY, *supra* note 211, at 322-23. He would also minimize damaging media coverage of the atrocities in Greenville Mississippi *Id.* In doing so, he would develop a relationship with Robert Russa Moton that would ultimately sour, likely costing him a significant percentage

Meanwhile, hundreds of thousands lived in camps for months, their livelihoods destroyed.²⁷⁴

As the waters finally began to recede in the late summer,²⁷⁵ President Coolidge appointed a quartet of southern political leaders to focus less on the call for direct federal relief for victims and more on the development of long-term flood control policies and procedures.²⁷⁶ The unique role of the Mississippi River in the American economy and ecology, and the vast impact of its periodic flooding, was providing justification, even for Coolidge, for considering some kind of orchestrated federal response.²⁷⁷

While broad and innovative action was contemplated,²⁷⁸ it only took half an hour for the men to agree on the basic framework of the legislation.²⁷⁹ Up until this bill, local areas were generally required to match federal expenditures on flood projects.²⁸⁰ The committee knew that a bill that sought to buck this standard too openly would be destined for political failure, including promised opposition from the President,²⁸¹ who noted that it would be “revolutionary” and “unwise” for the federal government to pay for the entire flood protection program.²⁸² At the same time, there was no way that the devastated region could come up with any significant funds.²⁸³ The committee envisioned a one-time exception to the matching requirement: Because local state spending on flood control and relief already outweighed the federal

of the black vote in his campaign for re-election against FDR. *Id.*

274. *Id.* at 285-86.

275. *Id.* at 285.

276. Friedman & Thompson, *supra* note 28, at 274.

277. *Id.*

Throughout 1927, along with calls for federal relief funds for flood victims, there were calls for federal control measures on the Mississippi and its tributaries. There seemed to be a growing national consensus that flooding on the river was a national problem and that the federal government should assume control of flood control projects. As Senator James E. Watson asked rhetorically, “If thirty-one states drain into the Mississippi and if more than 600,000 of our own people in these great river States are rendered homeless and destitute by the flood, due largely to that cause, does not that make it a national problem?”

Id.

278. See BARRY, *supra* note 211, at 399 (stating that “it would be the most ambitious and extensive single piece of legislation Congress had ever passed.”).

279. *Id.* at 403.

280. *Id.* at 401-02.

281. Friedman & Thompson, *supra* note 28, at 273. President Coolidge argued that the states “should share with the Federal Government the burden of assisting the levee districts and individual property owners, especially in view of the fact that the States benefit directly by the increased taxes from land made more valuable by reason of its protection.” *Id.* at 274.

282. *Id.* at 274-75.

283. See BARRY, *supra* note 211, at 401-02 (describing many local levee districts as being financially destitute).

government spending, the requirement would be waived.²⁸⁴ But the committee concluded that it would not ask for direct federal monetary relief for the flood victims, fearing that such a request would be the motivation not to provide a long-term flood prevention infrastructure.²⁸⁵

Notwithstanding its myriad limitations, the federal law that would ultimately arise out of these proposals, the 1928 Flood Control Act, was a significant moment in the evolution of the administrative structures in the United States. It marked the federal government's "acceptance of federal responsibility for flood control,"²⁸⁶ and brought a level of federal "involvement in state and local affairs that was largely unprecedented."²⁸⁷ President Coolidge signed the law on May 15, 1928, and it provided \$325 million to be used to develop flood control mechanisms, mostly in the lower Mississippi Valley.²⁸⁸ It provided a ten-year plan for flood control and constituted the "largest public works project undertaken up to that time in the United States."²⁸⁹ It also included a provision expressly limiting civil liability for the federal government as a result of any flood control related activity.²⁹⁰ While an expensive bill adjudged by contemporary standards, it did not provide for direct aid to any flood victims.²⁹¹ Nonetheless, it was hailed at the time by one of its sponsors as "the greatest piece of legislation ever enacted by Congress," and by historian John Barry as setting "a precedent of direct, comprehensive, and vastly expanded federal involvement in local affairs" and a "major shift in what the nation considered the proper role and obligations of national government, a shift that both presaged and prepared the way for far greater changes that would soon come."²⁹²

284. *Id.* at 402.

285. *Id.* at 401.

286. Saul Jay Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the "Takings" Clause*, 17 B.C. ENVTL. AFF. L. REV. 323, 334 (1990).

287. Friedman & Thompson, *supra* note 28, at 270.

288. *Id.* at 275.

289. Mary Jean Pederson, *Boudreau v. United States: Government Immunity Under the Flood Control Act of 1928 and the Effect of Outdated Legislation on Society*, 41 VILL. L. REV. 1487, 1488 (1996) ("It is clear from the legislative history of the Act that Congress's decision to undertake such an expensive project was based on its desire to protect citizens' property from any future flood disasters and a strong humanitarian concern for those who suffered as a result of the 1927 flood.")

290. *See id.* at 1493 (stating that "[t]he remarks of Representative Snell, Chairman of the House Rules Committee in 1928, indicate that Congress's purpose in enacting section 702(c) was to allow the government to establish federal public works projects near flood prone rivers, while at the same time limit the government's liability resulting from those projects.")

291. Friedman & Thompson, *supra* note 28, at 275.

292. BARRY, *supra* note 211, at 406-07.

The 1927 flood can be seen as another “unresolvable regulatory moment” within the punctuated equilibrium model of administrative evolution. This time, however, the impact was not on government regulation of a particular area of law but on the broader attitude of the government about the scope of its role. The dominant attitude before the flood was that disaster relief was the province of individuals and private-sector charities. But the Mississippi flood was too large a problem, and one impacting too many different states and regions of the nation, to be solved or even effectively addressed by even a coordinated private response. While there have been flawed federal responses to many later disasters, including the aftermath of flooding in the same region of the country after Hurricane Katrina in 2005,²⁹³ there has never been any doubt since 1927, at any point on the political spectrum, that the federal government bears primary responsibility for responding to the devastation caused by natural disasters and to preventing or alleviating that impact where possible.

While certainly not the only factor leading to this shift in focus,²⁹⁴ the Mississippi flood of 1927 was perhaps the most significant turning point.²⁹⁵ Much like the Triangle fire, which was far from the first or even most serious workplace disaster in the

293. For a discussion of the governmental role in Katrina relief, see generally William P. Quigley, *Obstacle to Opportunity: Housing that Working and Poor People can Afford in New Orleans Since Katrina*, 42 WAKE FOREST L. REV. 393 (2007); Sandra Selmer, *A Tale of Two Imperiled Rivers: Reflections from a Post-Katrina World*, 59 FLA. L. REV. 599 (2007); Wendy B. Scott, *From an Act of God to the Failure of Man: Hurricane Katrina and the Economic Recovery of New Orleans*, 51 VILL. L. REV. 581 (2006); and Meredith M. Stead, *Implementing Disaster Relief Through Tax Expenditures: An Assessment of the Katrina Emergency Tax Relief Measures*, 81 N.Y.U. L. REV. 2158 (2006).

294. See Friedman & Thompson, *supra* note 28, at 251 (noting that “over the last century-and-a-half or so, attitudes toward calamity have changed dramatically. What was once accepted or reviled as inevitable, or fate, came to be seen as somehow anomalous and (more importantly) as giving rise to a claim for relief or payment Accidents had to be somebody’s fault; and somebody should pay. Or, if nobody was at fault, government or some insurance program must take care of the problem Compensation became normal; and the more normal it became, the more it became expected.”).

295. BARRY, *supra* note 211, at 422.

The Great Mississippi River Flood of 1927 forced many small steps. Even in the narrowest and most direct sense the flood’s legacy was felt in Washington, in New Orleans, in Greenville, in every community along the banks of the Mississippi River and its tributary rivers, and in the nation’s black community . . . it shifted perceptions on the role and responsibility of the federal government—calling for a great expansion—and shattered the myth of a quasi-feudal bond between Delta blacks and the southern aristocracy, in which the former pledged fealty to the latter in return for protection. It accelerated the great migration of blacks north. And it altered both southern and national politics. The changes would not all come quickly. But they would come.

Id.

United States,²⁹⁶ the Mississippi flood was not the first devastating flood to hit in the United States. But prior floods, including the Johnstown Flood in Pennsylvania in 1889 that killed more than 2000 people,²⁹⁷ did not have the same broad impact on the evolution of the federal administrative state. Perhaps because the Johnstown flood involved an isolated dam that could be readily identified as poorly managed over a number of years, as opposed to a system of levees covering thousands of miles at the very heart of the nation's agricultural and trading center, and perhaps because it occurred in an era when the federal administrative structure was still in its early infancy, the primary response to the Johnstown flood involved a cascade of donations from private parties and state and foreign governments, not a mobilization of federal relief mechanisms.²⁹⁸ As James Lawrence Fly, then General Counsel of the Tennessee Valley Authority, noted in 1938, the 1927 flood "destroyed whatever remained of insular thinking on the flood problem. With dramatic suddenness it brought home to the nation its second major responsibility in the control of inland waters [in addition to ensuring their navigability]."²⁹⁹ Fly further noted that "with the occurrence of the 1927 flood disaster, there developed a general recognition that the control of a great flood is a national problem which can only be solved by the most comprehensive national measures."³⁰⁰ Once the federal government took on the responsibility for addressing this critical area of national life, the path was open, particularly during and after the Great Depression that was just a few years away, for

296. The 1860 collapse and fire at the Pemberton Mill in Lawrence, Massachusetts killed 145 and injured 166. *The Fall of the Pemberton Mill*, N.Y. TIMES, Apr. 18, 1886, at 1.

297. JOHNSTOWN FLOOD MUSEUM, *Facts about the Johnstown Flood*, <http://www.jaha.org/FloodMuseum/facts.html> (last visited Apr. 19, 2011).

298. See Friedman & Thompson, *supra* note 28, at 256 (noting that "[t]he reaction to this disaster was, in short, typical of the late nineteenth century (and earlier). Relief was the responsibility of private charities. The 'accident' was attributed to natural forces and [it was], thus, nobody's fault. If there was blame—and many people thought there was, or should be—the remedy, if any, lay in punishing the guilty.").

299. James Lawrence Fly, *Role of the Federal Government in the Conservation and Utilization of Water Resources*, 86 U. PA. L. REV. 274, 281 (1938).

300. *Id.* at 283. With the federal government's response (or lack thereof) to the aftermath of Hurricane Katrina in New Orleans and other parts of the Gulf Coast, there was no longer any serious debate about whether the federal government had an appropriate role to play in providing relief to those affected by the disaster. Indeed the focus on post-Katrina analysis has been the failure of the federal and local governments in meeting long standing obligations to provide the kind of relief that was unprecedented in 1927 after the great flood. See also *supra* notes 288-95 and accompanying text (discussing the enactment of the 1928 Flood Control Act, which vastly expanded the federal government's involvement in flood control activities).

extending federal attention to other areas of national importance.

C. *The Monongah Mine Incident: Disaster Without Regulatory Change*

1. *The Monongah Disaster*

On Friday, December 6, 1907, mines six and eight at the Monongah mining facility in Fairmont, West Virginia, exploded.³⁰¹ The blast,³⁰² of uncertain origin,³⁰³ was so powerful it destroyed the brick power-house, flung a ten-ton fan a half-mile, and could be heard eight miles away.³⁰⁴ Perhaps as many as 550 coal miners,³⁰⁵ men and boys, died in the underground explosion.³⁰⁶ A

301. DANIEL CURRAN, *DEAD LAWS FOR DEAD MEN: THE POLITICS OF FEDERAL COAL MINE HEALTH AND SAFETY LEGISLATION* 61 (Univ. of Pittsburgh Press 1993). The mine was owned by Consolidation Coal and operated by the Fairmont Coal Company. *Id.* The Consolidation Coal Company, which owned the Monongah mines at the time of the disaster, owned more than one hundred mines in West Virginia and Kentucky and 340,000 acres of land throughout Appalachia. *Id.* at 62-63.

302. *Id.* at 65.

Mine operators increasingly placed a premium on productivity, a strategy that simultaneously encouraged carelessness through the production initiative. This production orientation brought with it a greater use of explosives or blown-out shots, which increased the likelihood of disaster. Basically, the term *blown-out shot* refers to the placement of an explosive into a pre-drilled hole in a seam of coal. At the time of the disaster, one of these blown-out shots was cited as the cause of the explosion at the Monongah mines. According to some accounts, the shot that caused the disaster had been improperly made by inexperienced miners who used a massive amount of powder hoping to dislodge maximum coal. It was estimated that the miners set off a shot that had the power to volatilize over fifty tons of coal and created over two hundred cubic feet of explosive gases.

Id.

303. *See id.* at 66 (describing the original theory that too much gun powder had been placed in a charge was later dispelled sixty-five years later when a former employee stated that a fifty-pound case of dynamite had been left near the explosion site); *see also* DAVITT MCATEER, *MONONGAH: THE TRAGIC STORY OF THE 1907 MONONGAH MINE DISASTER, THE WORSE INDUSTRIAL ACCIDENT IN U.S. HISTORY* 160-62 (W. Va. Univ. Press 2007) 161-62 (summarizing the three theories as to what caused the accident at Monongah: The mining company claimed a boy playing with powder set off the explosion, while objective experts argued that either a runaway coal train sparked methane gas or coal dust, or that a blown out shot ignited gas or dust throughout the mine).

304. MCATEER, *supra* note 303, at 116-17.

305. *See* JEFF GOODELL, *BIG COAL: THE DIRTY SECRET BEHIND AMERICA'S ENERGY FUTURE* 56 (Houghton Mifflin Co. 2006) (explaining that “[s]ome historians believe that as many as 550 miners were killed at Monongah . . . Although the coal company kept an accurate record of the number of mules working in the mine, it never bothered to count the number of men, and after the disaster, the mine was sealed up before all the bodies could be recovered.”).

306. *See* CURRAN, *supra* note 301, at 61 (noting that the “official record

fifteen-year-old miner was thrown, burning, two hundred yards by the blast.³⁰⁷ When rescuers entered the mine they found horrific scenes: “A headless body sat in the seat of a cutting machine, its hands still gripping the handles of the machine Some [miners] were completely destroyed, others were split open as a result of being thrown violently against the mine.”³⁰⁸ Other men suffocated: “one held a pencil and paper in his hands. . . . One miner was found with a spoon in his hand, eating his last meal.”³⁰⁹ Only one miner survived the Monongah disaster.³¹⁰

Miner fatalities were common occurrences in the industry at the time,³¹¹ but “[t]he large number of deaths and the spectacular way in which the miners died meant that the Monongah disaster received much media coverage.”³¹² Much as the Triangle fire would in the next decade, the Monongah disaster focused public attention across the United States onto safety concerns posed by the industry. But unlike the Triangle fire, the resulting public attention failed to foster the development of a new regulatory dynamic.

The Monongah mine had been considered a “model” mine up until the time of the accident.³¹³ Many of the miners were recent immigrants, lured from Europe by recruiters of the mining industry.³¹⁴ While all men, the list of dead included the full spectrum of American racial and ethnic demographics, with large numbers of white and African-American victims, along with miners recently, and not so recently, emigrated from Northern and Eastern Europe.³¹⁵ The xenophobia that pervaded the nation at

shows that 361 miners lost their lives in the Monongah disaster”).

307. MCATEER, *supra* note 303, at 118.

308. *Id.* at 139.

309. *Id.*

310. CURRAN, *supra* note 301, at 61.

311. *See id.* (stating that “[b]y far the worst coal mining year was 1907. From all causes, over 3,000 perished with [eight separate explosions killing 1,148 miners]. But in one month alone of that year, the last one, a climax of horrors was reached as ‘officially’ 702 miners were killed from explosions: two in Pennsylvania, one each in West Virginia, Alabama, and New Mexico territory.”); *see also* MINING SAFETY & HEALTH ADMIN., Coal Fatalities for 1900 Through 2010, <http://www.msha.gov/stats/centurystats/coalstats.asp> (last visited Apr. 19, 2011) (indicating that at no point before 1945 did fewer than 1000 coal miners die in a year in the United States).

312. CURRAN, *supra* note 301, at 61.

313. *See* YOUTUBE, *Monongah 1907 Mine Disaster*, <http://www.youtube.com/watch?v=8Nq2ryRSdpk> (last visited Apr. 19, 2011) (showing a clip of a documentary by Davitt McAteer, former Assistant Secretary for Mine Safety and Health at the Department of Labor, regarding the Monongah Mine Disaster).

314. *See id.* (noting the arguments against safety regulation included elements of classism and racism—“these people,” poor immigrants, did not need health and safety regulation).

315. *See* MONONGAH MINES RELIEF COMMITTEE, HISTORY OF THE

the time impacted the public response to the disaster.³¹⁶

The accident generated significant and full-throated media coverage, exemplified by this account from the *Pittsburgh Dispatch*:

What had first seemed like distant thunder, in a few seconds was transformed into a roar of a thousand Niagaras. Like an eruption of a volcano the blazing gas rushed to the surface, and vomited tongues of red flame and clouds of dust through the slopes. The thirty foot fan which supplied fresh air [to Mine Number Eight] was lifted like a toy and wafted across the river. Poor little Charles Honaker, fifteen years old, a trapper, with clothing ablaze, literally a human torch, was enveloped in the fiery torrent. Several men who were in the mine near the entrance were likewise carried in the claws of death and strewn in the pit mouth.³¹⁷

Accounts of this kind were not exaggerations. "Streets sagged as mine tunnels collapsed; buildings shook and windows rattled or shattered; fire and smoke belched from both portals of the mine"³¹⁸ The immediate response of the public was unprecedented. Twenty-five thousand people came to Monongah to see the disaster site, requiring the presence of the National Guard,³¹⁹ with one rail-company providing a special train from Baltimore to Monongah for the purpose.³²⁰ Foreign embassies in Washington, D.C. sent representatives to Monongah to look after the interests of their various peoples.³²¹ In addition, the American Red Cross changed its long-time policy of refusing assistance in man-made and industrial disasters.³²² Even an open letter written by a local bishop requesting aid circulated in thousands of American

MONONGAH MINES RELIEF FUND: IN AID OF SUFFERERS FROM THE MONONGAH MINE EXPLOSION, WEST VIRGINIA 4-8 (Monongah Mines Relief Comm. 1910) (listing the names of the identified victims by nationality, a substantial majority of whom were immigrants from eastern and south-eastern Europe); see also MCATEER, *supra* note 303, at 14-15, 74-77 (stating that the workers in Monongah were a hodgepodge of ethnic groups, as in the first decade of the twentieth century, immigrants from central and southeastern Europe poured into the United States). Companies preferred immigrants because they worked in dangerous conditions for low pay and were difficult to unionize. *Id.* at 76. The Monongah miners shared this ethnic diversity; the company even posted notices at the entrance to the mine in seven languages. *Id.*

316. See DUANE LOCKARD, *COAL: A MEMOIR AND CRITIQUE* 64 (Univ. of Va. Press 1998) (noting that some natives asserted that the mine explosion was caused by "the large number of aliens. . . . The men are for the most part illiterate, and of a lower standard of intelligence than their counterparts of some years ago.").

317. CURRAN, *supra* note 301, at 62.

318. LOCKARD, *supra* note 316, at 64.

319. MCATEER, *supra* note 303, at 144.

320. CURRAN, *supra* note 301, at 62.

321. MCATEER, *supra* note 303, at 146

322. *Id.* at 175.

newspapers.³²³ Donations poured in from across the country.³²⁴ Enough money was raised to distribute funds to the immediate families of the victims, as well as those families of immigrants who remained in Europe.³²⁵ The mining company offered to pay for funeral expenses, but it offered only to compensate the victims' families by giving one hundred fifty dollars for those that lost adults, and seventy-five dollars for the families of victims under the age of sixteen.³²⁶

The day after the explosion the county coroner³²⁷ impaneled a grand jury and charged it with the responsibility of ascertaining "when, how and by what means . . . [the victims] came to their deaths."³²⁸ The grand jury exonerated the mine operator on January 15, 1908,³²⁹ concluding—despite contrary testimony from the director of the West Virginia Department of Mines that the mines could have been safer—that methane gas and coal dust levels were controlled "as far as were deemed practical."³³⁰ Given the stranglehold that Consolidated Coal, through its Fairmont Coal Company, had on the locality, with its effective ownership of the town and everything in it, the public, including the governor of West Virginia, expressed broad support for the mining company immediately after the accident.³³¹ A local pastor gave a sermon a week after the accident in which he blamed human error for the accident, noting the "increased sympathy" that existed "between this community and the Fairmont Coal Company."³³²

2. Regulation of the Coal Industry before Monongah

American coal production began in earnest with the development of coal mining in Western Pennsylvania near what

323. See *id.* at 178-79 (stating that letter and a subsequent letter, both encouraging support of the victims, were circulated in nearly 2000 newspapers throughout the country).

324. See *id.* at 180-85 (listing a variety contributing sources of relief aid).

325. *Id.* at 185.

326. CURRAN, *supra* note 301, at 64; see also LOCKARD, *supra* note 316, at 65-66 (responding to complaints that relief funds distributed to the families of deceased miners were too low, the attorney for the Fairmont Coal Company argued that "The company has never contributed anything to persons here or abroad otherwise as a gratuity or donation . . . I think the \$2,000 distributed principally among 41 children and 20 widows would be quite a Christmas present.").

327. At the time, the county government was the only judicial system with criminal or civil jurisdiction over the mine. MCATEER, *supra* note 303, at 199, 208.

328. *Id.* at 200.

329. *Id.* at 207.

330. *Id.* at 207-08.

331. CURRAN, *supra* note 301, at 63-64.

332. *Id.* at 63.

would become Pittsburgh in the late-eighteenth century.³³³ The nineteenth century saw a dramatic rise in American coal production and consumption,³³⁴ due in large part to the growing scarcity of wood and the need for an alternative energy source,³³⁵ and the increased energy needs created by the nation's industrial expansion, particularly the burgeoning railroad industry.³³⁶ Much like other industries at the turn of the century, a handful of companies dominated coal production.³³⁷ These companies exerted enormous influence over the small towns throughout Appalachia that produced labor for the mines as a result of their isolation and the lack of other economic opportunities.³³⁸ Coal companies provided housing for workers, usually on the condition that they continued their work for the company,³³⁹ and their leases often included clauses prohibiting workers from entertaining "objectionable" persons—union or union-sympathetic visitors—in company homes.³⁴⁰

From 1800 to 1900, coal production in the United States increased from 108,000 tons to 250 million tons, and then doubled

333. *Id.*, at 18; see also LOCKARD, *supra* note 316, at 15-16 (noting that during the eighteenth century, mines in Virginia and New England supplied coal to Philadelphia and Pittsburgh).

334. CURRAN, *supra* note 301, at 18 ("In 1800, the United States' total coal industrial output was just 108,000 tons. In a short span of forty years, however, coal would replace wood as the United States' chief energy source.").

335. *Id.* at 19.

336. *Id.* at 20.

Railroads played a central role in the growth of the coal industry for several reasons. First, as the railroad system grew, the demand for coal increased rapidly. By the end of the nineteenth century, the railroad system was the largest single consumer of bituminous coal. . . . Second, the establishment of a national rail system resulted in a regional shift in coal production. Mines had tended to be located near waterways or major population centers. As railways developed, older coalfields could be abandoned for areas with richer coal deposits. . . .

Id.; see also THOMAS G. ANDREWS, *KILLING FOR COAL: AMERICA'S DEADLIEST LABOR WAR* 51-57 (Harvard Univ. Press 2008) (analyzing the relationship between the railroads and the coal industry and noting that "[w]ithout railroads, coal mining would have remained a marginal industry.").

337. CURRAN, *supra* note 301, at 25-26.

338. See *id.* at 28 (explaining that "approximately one half of those working in the mines lived in company-owned dwellings. . . . 'The pure capitalist mining community is therefore a company town in which the company is a party to all the principal economic transactions carried on within it.'"); see also Wendy B. Davis, *Out of the Black Hole: Reclaiming the Crown of King Coal*, 51 AM. U. L. REV. 905, 914-16 (2002) (discussing the role of mining throughout Appalachia in the nineteenth and twentieth centuries).

339. CURRAN, *supra* note 301, at 28-29.

340. *Id.* at 29; see also MCATEER, *supra* note 303, at 51-62 (describing the dominant role of mining companies, through company housing, company stores, and payment of scrip, in the economies of local mining communities).

to 500 million tons in the first decade of the twentieth century.³⁴¹ A symbiotic relationship between the railroad and coal industries developed, which resulted in substantial political influence by the railroad companies over the politics of coal, including policies concerning unionization and safety regulation.³⁴² The period also saw significant advances in coal mining technology, which served to alter the status of the coal miners, who had previously been relied on for their expertise in extracting coal, but were increasingly reduced to following the machines and performing somewhat simple tasks.³⁴³ The industry continued to be quite labor intensive, with the total coal mining workforce reaching as high as four hundred thousand by 1900, but “[t]he mining skills of the past were no longer necessary to gain employment underground; all that was needed was a good back. Mechanization had broadened the qualified labor force significantly.”³⁴⁴

This dynamic further enhanced management power over their workers, leading to low wages in comparison to profits, and difficulties in unionization of the diverse, unskilled labor force, which included African-American workers migrating from the South, and Southern and Eastern Europeans emigrating from abroad.³⁴⁵ In the 1860s, fledgling mine workers unions were founded, but they dissolved by the end of the decade; and labor organizers experienced similar failures in the 1880s.³⁴⁶ But publicity generated by the activities of some of these short-lived unions resulted in increased “[p]ublic awareness of conditions in the mines . . . [,] public support for the miners[,] and resentment [toward] the industrialists”³⁴⁷ On January 25, 1890, two long-time rival labor organizations merged to form the United Mine Workers of America (UMWA), which, while representing only a small portion of the total labor mining workforce (maybe as little as five percent of the then four hundred thousand miners), soon became the dominant labor bargaining agent in the coal industry.³⁴⁸ The preamble of the UMWA constitution listed eleven

341. CURRAN, *supra* note 301, at 22.

342. *Id.* at 21-22.

343. *See generally* ANDREWS, *supra* note 336, at 93-96 (discussing the transition from the use of skilled miners to unskilled laborers).

344. CURRAN, *supra* note 301, at 27; *see also* ANDREWS, *supra* note 336, at 96 (stating that “[t]he paradox of coal, then, was this: even as the introduction of fossilized energy into transportation, gold and silver mining, metallurgy, manufacturing, domestic technologies, and urban infrastructure was ‘reduc[ing] human muscles to . . . a marginal source of energy,’ the provision of the new energy forms remained utterly dependent on human brawn and organic energy supplies.”).

345. CURRAN, *supra* note 301, at 27.

346. *Id.* at 29-30.

347. *Id.* at 30.

348. *Id.* at 31; *see also* LOCKARD, *supra* note 316, at 115-20 (discussing the historical development of the United Mine Workers of America and its early

“objectives” including improving “working conditions and [reducing] accidents and disasters in the mines.”³⁴⁹

While it struggled at the outset to promote membership, the UMWA staged a dramatic strike in 1897 with more than one hundred thousand miners participating³⁵⁰—including those at the Monongah Mine—garnering significant political support in the form of statements from three governors in the mining region.³⁵¹ The strike was ultimately successful, securing a twenty-five percent pay increase for miners and fostering a substantial increase in union membership, rising to the level of more than two hundred fifty thousand miners by the early 1900s.³⁵² Notwithstanding this success, however, the union was unable to achieve one of its primary goals—unionization of miners in the West Virginia coalfields.³⁵³ The hard-fought concessions also focused almost exclusively on wage increases and did not address workplace safety.³⁵⁴ While the union did push for more health and safety protections, it did not achieve the same kind of success with federal government officials as it had with the coal companies over wage concessions. Some union officials blamed public apathy for the lack of government response to mine-related dangers.³⁵⁵

Work in the mines remained extremely hazardous during the

successes under John Mitchell).

349. CURRAN, *supra* note 301, at 32.

350. *Id.* at 38.

351. *Id.* at 39-40.

352. *Id.* at 40; *see also* BARBARA FREESE, *COAL: A HUMAN HISTORY* 140-41 (Perseus Publ'g 2003) (describing the success of the 1902 coal strike under the leadership of John Mitchell).

353. CURRAN, *supra* note 301, at 41; *see also* MCATEER, *supra* note 303, at 95-100 (noting the failure of the 1897 strike at the Monongah mines).

354. *See* CURRAN, *supra* note 301, at 43 (stating that “[t]he union’s membership grew at an unprecedented rate after the turn of the century. More important for the workers were the concessions made by the operators in the area of wages. The 1898 agreement marked the beginning of a steady climb in compensation for miners, a rise that continued into the late 1920s.”).

355. *Id.* at 57.

The daily press simply records the event in a matter-of-fact manner, and, after expressing the usual formal sympathy, dismisses the subject entirely without any appeal for better conditions, an investigation or other manifestation of interest, and the public . . . are disposed to look upon this as a visitation from God upon those whose lot it is to enter the dark and gloomy caverns of the earth in search of her treasures, and the whole affair is dropped from view.

See id. (agreeing with the UMWA analysis and further stating that “[t]he routine nature of mining deaths, the hidden character of coal mining fatalities relative to other industries . . . meant few people recognized that mining was the nation’s most dangerous occupation. Lawmakers tended to address the visible problems first, since they were in the public eye.”); *see also* Davis, *supra* note 338, at 907-08 (describing Appalachia as a “colony” of the industrial Northeast for which the people of Appalachia deserve reparations).

period.³⁵⁶ In 1900 alone, a total of 1489 miners died in coal mines in the United States.³⁵⁷ During the first decade of the twentieth century, as coal production increased, so too did the fatalities and injuries in American mines.³⁵⁸ In a 1900 assessment of the nature and extent of safety concerns in the American mining industry, a mine inspector observed that:

Those calamitous disasters which startle us so frequently, sweeping away, instantaneously, valuable lives by the tens and even by the hundreds, are having a dreadful effect, and in fact the finer sensibilities of the public generally have become shocked or almost paralyzed at their frequency [D]uring such distressing events we have, as usual, a plenteous crop of apologists and general utility men who appear upon the surface . . . bringing panacea healing for all our ills. False However much these alarming mine explosions may shock the people generally and cause distress in so many homes simultaneously, yet the blighting social effects caused by such incidents sink in insignificance when we compare the number of deaths resulting therefrom, with the number of fatalities resulting from other causes which happen one by one and in such a manner as

356. See Alison D. Morantz, *Mining Mining Data: Bringing Empirical Analysis to Bear on the Regulation of Safety and Health in U.S. Mining*, 111 W. VA. L. REV. 45, 46 (2008) (stating that “[i]n part, the industry’s unique salience is explained by its unique hazards: for much of the 20th century, mining was one of the most dangerous occupations.”). Also, contemporary observers understood the distinct dangers of coal mining. A 1902 report to President Roosevelt stated:

Coal mining is more hazardous than any other class of underground work, for in addition to the usual dangers from falling rock and premature blasts, the coal miner runs risk of fire, explosion, and suffocation. The temporary shutting off of the supply of air may place in jeopardy the life of every worker in a coal mine. The flame from a ‘blown-out’ shot may explode a mixture of gas, or dust and air, and result in the death or injury of many men. The danger of tapping a gas pocket is always present

ANTHRACITE COAL STRIKE COMM’N, REPORT TO THE PRESIDENT ON THE ANTHRACITE COAL STRIKE OF MAY-OCTOBER, 1902 27 (Cornell Univ. Library 2009).

357. Mining Safety & Health Admin., *Coal Fatalities for 1900 to 2009*, <http://www.msha.gov/stats/centurystats/coalstats.asp> (last visited Apr. 19, 2011); see also LOCKARD, *supra* note 316, at 53-54 (stating that “[i]n the first three decades of this century an average of 2,210 miners were killed each year. Part of the reason for this toll of death underground is that coal mining is inherently dangerous. If the roof doesn’t fall and crush you, you are endangered by clumsy machinery swinging around in restricted space in poor light and obscuring clouds of coal dust. And if that doesn’t get you, there is danger lurking in high-voltage cables and in escaping gases that are poisonous or explosive. It is therefore not surprising that historically coal mining has been the worst of American industries in its rate of accidental death and injury.”).

358. LOCKARD, *supra* note 316, at 53; see also Davis, *supra* note 338, at 946-47 (stating that “[b]etween 1930 and 1972, a total of 1.5 million miners were injured in the mines.”).

to escape public notice or compassion.³⁵⁹

Information presented to Congress documented the increase in coal related deaths at the turn of the century, but demonstrated that only a small portion of these deaths were caused by what would be considered a dramatic mining “disaster,” with only 6.6 percent of mining deaths at the end of the 1890s, and 17.1 percent at the beginning of the 1900s, arising from large scale explosions or other more conspicuous occurrences.³⁶⁰

Another important dynamic of the time was the comparative rate of mining injuries and fatalities in the United States as compared to other industrialized nations. Fatality rates in U.S. coal mines were consistently higher in this period than those in Belgium, Great Britain, and Germany.³⁶¹ And the death rates in these nations were declining at the same time that the rates in the U.S. were increasing dramatically.³⁶² Daniel Curran postulates that this phenomenon can be explained by “the earlier establishment of trade unions and . . . national mine safety laws” in the other industrialized nations.³⁶³

359. CURRAN, *supra* note 301, at 49-50.

360. *Id.* at 50.

361. *Id.* at 50.

362. *Id.* at 52. (“The rate in Germany, for example, dropped from 2.86 per thousand in 1898 to 1.71 per thousand in 1908, whereas the U.S. fatality rate rose from 2.59 to 3.64 during the same period.”); *see also* MCATEER, *supra* note 303, at 243-44 (stating that “[i]t is very doubtful whether natural conditions in any other country in the world are as favorable as in the United States for getting out coal with the minimum amount of danger to [the] workmen employed. . . . Yet during the five years that preceded Monongah, the United States had the highest rate of deaths per ton of coal produced by any major producer. Mines in the United States killed an average of 3.39 miners per thousand employed each year, compared to 2.06 for Prussia, 1.28 for Great Britain, 1.00 for Belgium, and .91 for France.”).

363. CURRAN, *supra* note 301, at 52; *see also* MCATEER, *supra* note 303, at 244 (citing a report contemporary to Monongah that explained the disproportionate fatalities in American mines as caused by “the lack of proper and enforceable mining regulations, and in part to the lack of reliable information concerning the explosives used and the conditions under which they could be used safely.”); *but see* LOCKARD, *supra* note 316, at 57-60 (postulating that coal operators viewed American miners as more expendable than their British counterparts and that “[t]he United Mine Workers of America emphasized the pay envelope and neglected safety except to talk about it strategically, whereas the [British] National Union of Miners sought pay increases but had to settle for safety. Great Britain could not afford wages like those in America but found safety less expensive; American companies could afford both but chose to put off spending for safety until political developments in the 1970s compelled some action—at last.”). The first relevant national legislation in England was characterized by its hostility to workers and the labor movement, with late-eighteenth century laws like the 1769 Malicious Injuries Act, which imposed penalties for miners who damaged equipment or stole coal, and the Combination Laws and Act of 1799 and 1800, which criminalized all trade unions and worker-organizing activities. CURRAN,

In the United States, however, the progress toward comprehensive mine safety regulation occurred later, more slowly, and with less success. Although the first national proposal for mine safety regulation came in 1865 with the proposal of a bill in Congress to set up a Federal Mining Bureau, it never became law.³⁶⁴ Curran cites two reasons for the lack of effective national regulation during the nineteenth century: first, that the “states were autonomous in their handling of the coal industry and were responsible for the administration of programs within their domain, with minimal interference from Washington,”³⁶⁵ and second, that the habitual and frequent occurrence of mining accidents resulting from routine circumstances and involving relatively few deaths

Seemed . . . somehow less worthy of public attention than the great disasters. The routine nature of [the] mining deaths, the hidden character of the coal mining fatalities relative to other industries (like railroading, where spectacular accidents drew national attention), meant few people recognized that mining was the nation’s most dangerous occupation. Lawmakers tended to address the visible problems first, since they were in the public eye.³⁶⁶

supra note 301, at 52-53; see also Bridget Montgomery, Comment, *The European Community’s Draft Fifth Directive: British Resistance and Community Procedures*, 10 COMP. LAB. L.J. 429, 441-43 (1989) (discussing the hostile legal response to trade unions in nineteenth century England). A generation later, in 1824 and 1825, laws were passed that repealed the Combination Laws and other repressive anti-labor provisions, and in a climate of significant and growing labor agitation, the English government stepped in to diminish labor unrest in an industry of increasing importance to the national economy by addressing some of the concerns expressed by workers. CURRAN, *supra* note 301, at 53-54; see also Ulrich Mueckenberger, *Juridification of Industrial Relations: A German-British Comparison*, 9 COMP. LAB. L.J. 526, 546-47 (1976) (noting Parliament’s repeal of the Combination Acts and providing legal recognition and protections of unions). An explosion in a mine in Northeast England that killed fifty-two workers is commonly credited for fostering the first national mine safety legislation in 1842, followed in close succession by several other similar laws. CURRAN, *supra* note 301, at 54-55; see also FREESE, *supra* note 352, at 77-78 (describing the work conditions of child miners and parliamentary investigations into their use).

364. CURRAN, *supra* note 301, at 56.

365. *Id.* at 56; see also MCATEER, *supra* note 303, at 245-46 (stating that “[i]n 1907, the regulation of safety and health risks in mines was the jurisdiction of the state, with no federal involvement. As a result, a patchwork of legislation existed that reflected, among other factors, the relative political influence of the mining industry in particular states and whether there were balanced interests of labor organizations and industry.”).

366. CURRAN, *supra* note 301, at 57; see also MCATEER, *supra* note 303, at 245 (noting that coal operators had regularly argued that coal mining was inherently dangerous and therefore enhanced regulation would not increase worker safety); LOCKARD, *supra* note 316, at 58-59 (stating that “[o]ne possible reason is the composition of the American mine work force. American miners in the late nineteenth century were mainly . . . mountaineers, immigrants, and

Curran cites a portion of the 1900 UMWA journal to demonstrate the contemporary awareness of this phenomenon and its impact on the development of mine safety regulation: "One astounding and alarming feature in connection with . . . mine catastrophes . . . is the apparent indifference upon the part of those directly affected and the public in general."³⁶⁷

In 1891, the United States government passed the first national mine safety legislation, but it applied only to mining in U.S. territories and did not regulate mining within the forty-four states of the Union.³⁶⁸ During the same period, a new initiative in support of comprehensive regulation was promoted by the owners and operators of coal mines. Public choice scholars have responded to these initiatives by noting that "[t]he need to ensure a stable work force was one factor influencing this dramatic transition. Another factor was that coal operators realized federal regulations would serve their interests by circumventing existing state safety legislation, which was often incompatible with the expanding national market."³⁶⁹ The coal mining interests sought to promote the promulgation of mining safety regulation on terms and under conditions they could control and that would promote, as opposed to hinder, their long-term financial objectives.³⁷⁰ Shortly before the turn of the century, the American Mining Congress, an organization of coal mining operators, proposed and lobbied to Congress for its passage of a wide-ranging set of mine safety regulations, including the creation of a federal Bureau of Mines.³⁷¹

In the relatively "progressive" political climate of the early 1900s, when conditions were somewhat favorable for some kind of mine safety regulation, the pace and significance of mine accidents began to accelerate,³⁷² moving "the formerly underpublicized

blacks, and all three were looked down upon to some degree by most other Americans. . . . [T]here was a seemingly inexhaustible supply of recruits from the Appalachian mountain country, the South, and abroad; and though they died in the thousands every year, replacements always seemed ready to fill the diminished ranks.").

367. CURRAN, *supra* note 301, at 57.

368. *Id.* at 57.

369. *Id.* at 59.

370. As articulated by American Mining Congress president J.H Richards in 1904: "We therefore affirm that if a Department of Mines and Mining could broaden the markets for the products of our mines . . . such accomplishments would create a new atmosphere and a new hope. . . ." *Id.* at 60.

371. *Id.* at 59-60 ("The motivation of these operators had little to do with coal mining safety: rather, they were concerned with the aid an agency could provide in the production and discovery of mineral resources.").

372. *Id.* at 64-65.

The rapid increase in major mining accidents can be linked primarily to a series of production changes in the coal industry. The introduction of undercutting machinery greatly altered the skill level required for mine workers Mine operators increasingly placed a premium on

industry into the public spotlight.”³⁷³ From 1905 to 1910 there were eighty-five *major* mine accidents in the U.S. resulting in 2640 deaths, with the total deaths from all mining accidents in the period reaching 12,664.³⁷⁴ The worst of these years was 1907, the year of Monongah and other disastrous accidents.³⁷⁵

3. Regulation of the Coal Industry after Monongah

The national political response to the Monongah incident took on a strikingly different character than the decidedly pro-management attitude in the Fairmont area. In the days after the incident, newspapers published editorials arguing “loss of life should no longer be considered a part of the cost of doing business in the expanding economy.”³⁷⁶ The argument by coal operators against increased regulation—that mining was an inherently dangerous activity—was coming under serious scrutiny for the first time.³⁷⁷ The Governor of West Virginia reacted by calling the legislature into session, raising concerns among the coal operators that the state would enact serious mining regulations.³⁷⁸ But despite some support from the ex-governor and even an owner of the Monongah mine, West Virginia failed to pass any substantial safety legislation in the wake of the disaster, in large part because of substantial opposition from coal operators.³⁷⁹

Despite this local victory, organized coal interests, sensing at least the threat of possible federal regulation, established the West Virginia Mining Association to lobby Congress.³⁸⁰ The Association’s express objectives were to seek appropriation of funds to research mining disasters, a resolution stating that the causes of mine disasters was unknown, and a resolution that the federal government should not act until the specific causes of mine disasters were established.³⁸¹

productivity, a strategy that simultaneously encouraged carelessness through production initiative. This production orientation brought with it a greater use of explosives or blown-out shots, which increased the likelihood of disaster.

Id.

373. CURRAN, *supra* note 301, at 61.

374. *Id.* at 61 (“By far the worst coal mining year was 1907. From all causes, over 3,000 perished with 8 separate explosions killing 1,148 miners.”).

375. *Id.* at 64. Just two weeks after the Monongah disaster, a mining accident in Jacobs Creek, Pennsylvania, killed 239 more miners.

376. MCATEER, *supra* note 303, at 245.

377. *Id.*; see also LOCKARD, *supra* note 316, at 61 (calling the traditional view, that even union leaders shared, that mining was simply a dangerous activity, “fatalistic”).

378. MCATEER, *supra* note 303, at 245.

379. *Id.*

380. *Id.* at 253.

381. *Id.* at 253. President Roosevelt supported this goal, stating “[t]he loss of life in the mines is appalling. The larger part of these losses of life and

The first national mine safety regulation, the Organic Act, passed on May 16th, 1910.³⁸² The Act identified its intent as “the improvement of the safety and working environment in the mineral industries” and created the Bureau of Mines as part of the Department of the Interior to promote this goal.³⁸³ At least one scholar hailed the creation of the Bureau of Mines as a significant advancement in the safety regulation of the mining industry,³⁸⁴ and pointed to the Monongah disaster as the “trigger” for its development.³⁸⁵

But the functions of the Bureau of Mines were limited to investigation, education, training, and “research intended to assist and advise the mining industry, rather than police it.”³⁸⁶ The Act provided no provision for inspecting working conditions and expressly barred Bureau employees “any right or authority in connection with the inspection or supervision of mines . . . in any state.”³⁸⁷ The Bureau would not be granted any inspection authority by Congress for another forty-two years, and in the intervening period, its “effectiveness in improving the working environment in the mines was less than spectacular.”³⁸⁸ Congressman James Tawney of Minnesota asked during debate: “Has [the agency’s mission] anything to do with the safety of the people engaged in mining? Who are the beneficiaries of this work if performed by the bureau of mines and mining? The owners of the great coal mines.”³⁸⁹ As Daniel Curran observes in his history of the politics of mine safety legislation, the 1911 budget allocation for the bureau was only for \$505,200, with a low salary allocated for the director (a fact that limited the pool of qualified candidates).³⁹⁰

The development of a lax regulatory framework,³⁹¹ in the

property can be avoided. It is of the utmost importance that a Bureau of Mines be established . . . to reduce the loss of life in mines . . .” *Id.* at 254.

382. CURRAN, *supra* note 301, at 66.

383. *Id.*; see also Organic Act, Pub. L. No. 61-179, 36 Stat. 369-70 (1910) (detailing the Act).

384. See J. Davitt McAteer, *Mine Safety and Health: A Formula for Continued Success*, 96 W. VA. L. REV. 847 (1994) (discussing the Federal Coal Mine Safety Act).

385. Morantz, *supra* note 356, at 46.

386. CURRAN, *supra* note 301, at 67; see also Organic Act, Pub. L. No. 61-179, § 2, 36 Stat. 369-70 (1910) (stating that “it shall be the province and duty of said bureau and its director . . . to make diligent investigation of the methods of mining, especially in relation to the safety of the miners . . .”).

387. CURRAN, *supra* note 301, at 67 (quoting Organic Act, Pub. L. No. 61-179, § 5, 36 Stat. 369-70 (1910)).

388. CURRAN, *supra* note 301, at 67.

389. *Id.* at 68.

390. *Id.* at 67.

391. *Id.* at 68 (“The Organic Act of 1910, with its emphasis on production over safety, was clearly inadequate to safeguard the lives of miners. More than

wake of Monongah can be explained with reference to various factors. First, there were insufficient political structures in place to take advantage of any legislative opportunities the disaster may have provided. Unlike New York in 1911 at the time of the Triangle fire, there were no experienced and reasonably well-financed and organized activists already working the halls of the state legislature with substantial numbers of progressive political allies, albeit mostly unsuccessfully, seeking the kind of regulatory changes for which the Triangle fire graphically demonstrated the need. In the absence of the same kind of political force, the natural impulse to “do something” or at least to be perceived as “doing something” after Monongah resulted in a weak and almost entirely cosmetic initiative that did little, if anything, to make coal mining more safe.³⁹²

In addition, the way in which the story of Monongah specifically, and mining fatalities in general, was told and understood helped to foster the tepid regulatory response. The dominant narrative associated with the disaster, and other similar catastrophes, did not provide the kind of argument for regulatory or governmental innovation produced by either the Triangle fire or the Mississippi flood. The coal companies and their lobbying operation were remarkably successful at communicating the message that coal mining accidents were caused by the carelessness—or even willful misdeeds—of the miners themselves.³⁹³ The creation of the Bureau of Mines, followed from this storyline.³⁹⁴ The legislation flowed from “the philosophy of the operators who were instrumental in its passage. ‘Mine accidents result from the carelessness of the miner.’”³⁹⁵ This view, which provided the conceptual basis for the “regulatory” structure contemplated by the Organic Act “was echoed in the press and espoused by businessmen and professionals in the scientific community.”³⁹⁶ “Drunkenness and lingual or intellectual disability

seventy thousand miners were to die during the next forty years.”); see also Mining Safety & Health Admin., *Coal Fatalities for 1900 to 2009*, http://www.msha.gov/stats/centurystats/coalstat_s.asp (last visited Apr. 19, 2011) (indicating that miner fatalities did not consistently fall below 1000 until 1949).

392. Congress created an agency to research production that was powerless in the area of safety and was “clearly inadequate to safeguard the lives of miners.” CURRAN, *supra* note 301, at 67-68. Soon after the passage of the Organic Act, Federal concern over conditions in the mining industry faded. *Id.* at 69.

393. *Id.* at 67.

394. See *supra* note 394 to *infra* note 402 and accompanying text (explaining the creation of the Bureau of Mines).

395. CURRAN, *supra* note 301, at 67.

396. *Id.* (“A statement in the *Coal Trade Bulletin* epitomized this position, posting without data, that 99 percent of all mine accidents ‘are due absolutely to the carelessness or willful negligence of the men employed in them [sic].’”).

or illiteracy, particularly among the large number of immigrant miners, were other factors cited by the operators as the cause of accidents.³⁹⁷ And the coal miners union, which viewed recent immigrant workers as competitors as opposed to potential union members,³⁹⁸ was complicit in the development of this narrative, concurring implicitly with the association of blame with the relative incapacity of the immigrant miners, about whom the union generally took a negative view given their use for undermining their organizing efforts through strike-breaking and other means.³⁹⁹

Other atmospheric factors played a role. While the Triangle fire occurred in the heart of the most densely populated city in the United States, Monongah, as dramatic and horrific as the stories were, and as broadly disseminated, occurred in a rural and isolated area, and was witnessed by few people not already painfully aware of the dangers inherent in the industry. And even for those on the site at the time of the accident, it happened in an instant, and the deaths occurred almost completely out of sight of any survivors or bystanders, unlike the drawn out and public drama in Washington Square Park in 1911.

And while the sense that a dramatic event might recur without some sort of regulatory response likely had an impact on the impetus for administrative evolution in response to the Triangle fire and Mississippi flood, the sense that coal mining is so inherently dangerous by its nature—in the dark, underground, with explosives—that a certain inevitability of further incidents limited the initiative on the part of legislators to propose regulatory imperatives that were likely perceived as having little ability to foretell the unavoidable likelihood of future and continued loss of life in the coal mining industry.⁴⁰⁰

397. *Id.*

398. The diversity of the increasingly immigrant workforce, language difficulties, and antipathy of race hindered union organization. *Id.* at 27.

399. CURRAN, *supra* note 301, at 68.

400. For a discussion of the inherently dangerous nature of the coal mining industry in the context of the Massey Mine disaster in West Virginia, see the transcript of interview of U.S. Congressman George Miller on *Countdown with Keith Olbermann*, taped on April 15, 2010:

O'Donnell: Congressman, as you know, mining has always been our most dangerous occupation. The most dangerous work you can do in this country, far more dangerous than law enforcement. And yet Congress seems to have allowed, over decades and decades of these kinds of disasters, for this lax enforcement to continue. What is it that Congress can't get a-hold of here . . . ?

Miller: You've got to recognize the power of the economic interest. Let's not pretend—you were in Washington. You know the power of coal, coal state representatives. And when push comes to shove, there's a tendency to go with the industry, with some wonderful exceptions in representatives. But the fact is that the power of coal, they control in

In comparison to the Triangle fire at least, the demographics of the victims of Monongah cannot be ignored in assessing its relative lack of impact on the regulatory dynamic. The victims of the Triangle fire were mostly young women, and the nature of the regulatory response indicates the importance of this fact to the legislators who were influenced by the disaster. The overwhelming majority of the post-Triangle regulatory reforms provided limits and protections for women and child labor. As noted above, the narrative of the Triangle fire was dominated by the loss of young, female life, and, most likely by a sense among many that young girls had no business in these kinds of workplaces, if they belonged in the workforce at all, and that it was certainly a particularly objectionable kind of tragedy for them to die in such a place. The victims of the explosions and fire at Monongah were almost all men or boys. There was no comparable sense of an additional tragedy that the deaths of more than one hundred young women would produce less than five years later in New York City.

Significant coal mine safety legislation, and a related increase in mine safety,⁴⁰¹ did finally come, in the form of the Coal Mine Health and Safety (CMHS) Act,⁴⁰² but not until more than sixty years after the incident at Monongah. The CMHS Act of 1969 provided some of the more credible regulatory structures absent in the post-Monongah initiatives, empowering inspectors “not only to inspect coal mines but also to issue monetary and criminal penalties for statutory violations,” and has been credited with “heralding a new era of federal regulation” above and beyond the

these communities. They control the livelihood. They control the economics. They want to control it like it's the 1800's, as opposed to 2010 But the fact of the matter is the law is inadequate to provide the kind of protection that these miners are entitled to. It's just that simple. The law is inadequate. And everybody recognizes the loopholes, the regulators, the mining companies, the unions, the workers, the Congress. And so maybe now we have a catalyst where we can get rid of the loopholes and have a law that leads to safer and safer mining practices.

'Countdown with Keith Olbermann' for Thurs., Apr. 15th, 2010, MSNBC TV, http://www.msnbc.msn.com/id/36645334/ns/msnbc_tv-countdown_with_keith_olbermann/ (last visited Apr. 19, 2011).

401. Morantz, *supra* note 356, at 46.

402. See Coal Mine Health and Safety Act, 30 U.S.C. §§ 801–804 (2000) (establishing several critical components to effective mine regulation). The legislation applied to all mines, regardless of size, that generated coal entering commerce. *Id.* § 803. It also required the promulgation of mine safety standards, as well as firmly established the right of federal mine inspectors to regularly enter private mines. *Id.* §§ 101(a) and 103(a), (b)(1) and (g). See also Morantz, *supra* note 356, at 48 (noting that “[b]y most accounts, the passage of this comprehensive regulatory scheme was a marked success. The sharp decline in mining fatality rates that characterized most of the 1970s has generally been attributed to the deterrent impact of federal regulation.”).

mining industry.⁴⁰³ The Act has led at least one mine safety advocacy group to observe that the last thirty-five years have been the safest in the American coal mining industry—citing only sixteen “coal mine disasters” from 1976 to 2010, as compared to thirty-five between 1951 and 1975, and 147 between 1926 and 1950.⁴⁰⁴

But these more recent developments have not prevented mining disasters in the decades since the CMHS,⁴⁰⁵ as demonstrated by a vivid recent example. On April 5, 2010, at the Upper Big Branch Mine in Montcoal, West Virginia, an explosion tore apart the mine and ultimately killed twenty-nine miners.⁴⁰⁶ The Upper Big Branch Mine, and its owners, Massey Energy, had a history of safety violations.⁴⁰⁷ It had been evacuated three times in the two months prior to the blast due to unsafe levels of methane,⁴⁰⁸ and a subsidiary of the management company was required to pay record safety fines after pleading guilty to violations that resulted in the death of two miners.⁴⁰⁹ Despite miners’ warnings to public officials, violations doubled in 2008 compared to those in 2007.⁴¹⁰ In response to a myriad of attacks in the mainstream media, Massey officials defended their actions by echoing the familiar refrain of citing the inherent danger in coal mining.⁴¹¹ Massey Chief Executive Don L. Blankenship stated that “[v]iolations are unfortunately a normal part of the mining process.”⁴¹² *The New York Times* presented a similar note of fatalism: “In an age of robotically assembled automobiles and pilotless drones, extracting coal remains a stubbornly labor intensive and dangerous enterprise.”⁴¹³ Eventually, observers

403. Morantz, *supra* note 356, at 46-47.

404. See United States Mine Rescue Ass’n, *Historical Data on [Coal] Mine Disasters in the United States*, saxsewell/historical.htm (last visited Apr. 19, 2011).

405. *Id.* Other recent mining disasters, including Sago in 2006 (twelve miners were killed in an explosion in Tallmasville, West Virginia, on January 2), Huntington and Crandall Canyon in 2007 (six miners died in a collapse on August 6, and three more rescue workers were killed in a subsequent collapse on August 16 in Huntington, Utah), Jim Walter No. 5 Mine in 2001 (thirteen miners died in an explosion in Brookwood, Alabama, on September 23), and Wilberg Mine in 1984 (twenty-seven miners died in a fire in Orangeville, Utah, on December 19).

406. See EDITORIAL, *Lessons From the Big Branch Tragedy*, N.Y. TIMES, Apr. 14, 2010, at A26 (stating that the death toll of twenty-nine was “the nation’s worst mining disaster in four decades.”).

407. Ian Urbina & Michael Cooper, *Deaths at West Virginia Mine Raise Issues About Safety*, N.Y. TIMES, Apr. 7, 2010, at A1.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. Bill Marsh, *Where Running for Cover is Part of the Job*, N.Y. TIMES,

scrutinized the agency charged with regulating the mining industry, describing the Mining Safety and Health Administration as “fundamentally weak”—lacking key tools such as subpoena power—and applying timid enforcement.⁴¹⁴

Some observers have suggested that the continued level of risk of serious injury associated with coal mining might relate as much to a lack of sufficient regulation as to the unavoidable dangers inherent in the process.⁴¹⁵ United States Representative George Miller, Chairman of the House Education and Labor Committee, has noted that the coal companies retain extraordinary influence over Congress and regulators, especially those elected officials who represent coal communities.⁴¹⁶ This influence can be found in the same relationships and structures that foster private interest hyper-influence on agency policy making and enforcement across the spectrum of the administrative state—control and dissemination of information and the “revolving door” of personnel between industry on one hand and legislatures and agencies on the other.⁴¹⁷

Apr. 11, 2010, at WK3.

414. Michael Cooper et al., *In Mine Safety, a Meek Watchdog*, N.Y. TIMES, Apr. 11, 2010, at A1.

415. See, e.g., Arianna Huffington, *The West Virginia Mining Disaster and the Financial Crisis . . .*, HUFFINGTON POST, Apr. 12, 2010, www.huffingtonpost.com/arianna-huffington/the-west-virginia-mining_b_534665.html (last visited Apr. 19, 2011) (stating that “[o]fficials say it’s too soon to pinpoint the exact cause of the tragic explosion at the Upper Big Branch mine in West Virginia that took the lives to 29 miners, but we certainly know enough to identify the root cause. It’s the same cause that led to the 2007 Crandall Canyon mine disaster in Utah that killed six miners and three rescue workers. It’s the same cause that led to the 2006 Sago mine disaster in West Virginia that killed 12 miners. And it’s also the same cause that led to the Lehman Brothers disaster, the Citigroup disaster, the bursting of the housing bubble, and the implosion of our financial system: a badly broken regulatory system.”).

416. See Transcript, Countdown with Keith Olbermann, Apr. 15, 2010, MSNBC TV, ‘Countdown with Keith Olbermann’ for Thurs., Apr. 15th, 2010, http://www.msnbc.msn.com/id/36645334/ns/msnbc_tv-countdown_with_keith_olbermann/ (last visited Apr. 19, 2010).

417. See, Kimberly Kindy & Dan Eggen, *W. VA Mine Disaster Calls Attention to Revolving Door Between Industry, Government*, WASH. POST, Apr. 18, 2010, at A1 (noting that “more than 200 former congressional staff members, federal regulators and lawmakers are employed by the mining industry as lobbyists, consultants or senior executives” Finally, modern observers arrived at conclusions past students of the Monongah disaster would eventually reach. *Id.* First, “[w]hat is clear is that federal oversight of the industry must be greatly strengthened.” *Lessons from the Big Branch Tragedy*, *supra* note 406, at A26. Second, the disaster was preventable. EDITORIAL, *It Appears that the W. Va. Mine Disaster Could Have Been Averted*, WASH. POST, Apr. 10, 2010, at A 16. Third, “[t]he 29 people killed last week in the West Virginia coal-mine explosion will soon be as forgotten by the nation as are the 362 miners who were killed in a 1907 explosion in that state, the worst mining disaster in American history.” George F. Will, *This Nuclear Option is Nuclear*, NEWSWEEK, Apr. 19, 2010, www.newsweek.com/2010/04/08/this-nuclear-option

IV. CONCLUSION

The dynamics created by dramatic public events constitute a blunt and imprecise instrument to foster administrative change. Most dramatic negative events have a long list of proximate causes, and the true role of each in ultimately leading to the tragedy is rarely clear. The impact that these events ultimately have on the regulatory regime is often determined by the dominant interpretation of the events and its causes, by the particular risk of future harm that is most effectively communicated in their aftermath, and the political context in place at the time. This multiplicity of relevant factors has resulted in a mixed record for the relative effectiveness of regulatory evolution that can be connected in some causal way to a dramatic initiating event.

Those events that do play a measurable role in fostering regulatory change or development appear to share some defining similarities. First, is the tragic and harmful impact of the event and the possibility or likelihood that something like it could happen again. Second, is the lack of an existing legal structure—criminal or regulatory in nature—that can address this future risk and provide some just resolution for the tragic event. Third, is the presence of an existing political movement or structure that has a set of regulatory initiatives in mind and is on the verge of successful advocacy for them at the time of the tragic event. And finally, the existence and perpetuation of a clear, understandable narrative regarding the tragedy that provides the popular impetus for regulatory change that is seen by enough people and appropriate to withstand the political realities that usually serve to prevent any meaningful regulatory development at the measurable expense of the dominant private interests that effectively command much of the policy formation in this country.

One potential consequence of this punctuated equilibrium model of administrative evolution is that the pace of administrative change may be expected to increase over time, if only because of the ever-increasing “public” nature of our society. The explosion of information technology and media entities that utilize it has already resulted in a far greater potential for events to have a broad public impact no matter when or where they occur. A power outage in New York becomes a national news story, potentially enhancing the perceived risk caused by aging power generation technology to an extent that would have been impossible without national news networks and the Internet. The Triangle fire could not have had the impact it did in 1911 if it had happened in Pittsburgh, or even in a more out of the way part of New York at a different time of day. But there is no real limit in

today's media-saturated climate to where and when the next dramatic event, producing the next unresolvable regulatory moment, might occur.