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Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts

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Rights of Way, Red Flags, and Safety Valves: Business Self-Regulation and State-Building in the United States, 1850–1940¹

I Introduction

Over the last three decades, the study of modern business self-regulation has become a thriving interdisciplinary endeavor, pursued especially by sociologists, political scientists, legal academics, and professors of business management. This corps of social scientists has explored a widening array of domains in which governments have delegated considerable regulatory authority to corporations or business-related non-governmental organizations, known in the Anglo-American world as »Self-Regulatory Organizations« (SROs). The resulting interdisciplinary field of study is an outgrowth of the critique of the heavy-handed regulatory state that gained momentum in the 1960s and 1970s, which significantly influenced policy-making during the Thatcher government in Britain and the Reagan Administration in the United States. Amid budget cutbacks for regulatory agencies, deregulation of several industries, and a general drumbeat in favor of privatization of public functions, national policy-makers increasingly embraced strategies of self-regulation in contexts as varied as nuclear safety, the handling of toxic chemicals, workplace accident prevention, environmental protection, and prudential financial regulation. As the pace of globalization has quickened in more recent decades, political activists and institutional entrepreneurs have founded a slew of global self-regulatory institutions – some focused on the construction of technical standards for particular markets; others seeking to impose regulatory constraints on the environmental and labor practices of multinational corporations.²

1 The author would like to thank Joshua Specht for research assistance and Elizabeth Brake, Benjamin Waterhouse, Shana Starobin, and Karin Shapiro for their comments on drafts.

2 EDWARD J. BALLEISEN, *The Prospects for Effective »Co-Regulation« in the United States: A Historian's View from the Early Twenty-First Century*, in: EDWARD J.

Social scientists have had good reason to take a close look at strategies of business self-regulation, whether they entailed rule-making, monitoring, enforcement capacity, public education, or some combination thereof. The resulting research has probed the internal workings of corporate mechanisms of regulatory self-governance, as well as the operational culture of SROs.³ It has also increasingly investigated attempts to create and maintain public oversight of business self-regulation, which English-language scholars have labeled variously as »enforced self-regulation,« »audited self-regulation,« »responsive regulation,« and »co-regulation.« These share most of the basic characteristics of the German concept, »regulierte Selbst-Regulierung.«⁴

Critics of self-regulation, whether inside or outside the academy, have highlighted the tendency of many contemporary SROs to pursue strategies of deflection and public relations, rather than genuinely attempting to achieve regulatory objectives. Advocates of self-regulation have generally stressed its flexibility and adaptability, its capacity to elicit the cooperation of regulated entities, and its limited demands on the public purse. They have also increasingly been drawn to some form of »regulierte Selbst-Regulierung,« akin to the *regulierte Regulierung* that has emerged in the United States government through the auspices of the Office of Management and Budget's Office of Information and Regulatory Affairs, and in the European Union's »Better Regulation« initiative.⁵

BALLEISEN/DAVID MOSS, *Government and Markets: Toward a New Theory of Regulation*, New York 2009, p. 443–81; TIM BÜTHE/WALTER MATTLI, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton 2011; TIM BARTLEY, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, in: *American Journal of Sociology* 113 (2007), p. 297–351.

3 For overviews of this rich and varied literature, see: JOSEPH REES/NEIL GUNNINGHAM, *Industry Self-Regulation: An Institutional Perspective*, in: *Law & Policy* 19 (1997), pp. 363–414; CARY COGLIANESE/DAVID LAZER, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, in: *Law & Society Review* 37 (2003), pp. 691–730; BALLEISEN, *Prospects for Effective »Co-Regulation« in the United States* (n. 2).

4 JOHN BRAITHWAITE, *Enforced Self-Regulation: A Strategy for Corporate Crime Control*, in: *Michigan Law Review* 80 (1982), pp. 1466–1507; CYNTHIA ESTLUND, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, in: *Columbia Law Review* 105 (2005), pp. 319–404; ROBERT BALDWIN/JULIA BLACK, *Really Responsive Regulation*, in: *Modern Law Review* 71 (2008), pp. 59–94; JULIA BLACK, *Constitutionalizing Self-Regulation*, in: *Modern Law Review* 59 (1996), pp. 24–55.

5 JOHN D. GRAHAM, *The Evolving Regulatory Role of the US Office of Management and Budget*, in: *Review of Environmental Economics and Policy* 1 (2007), pp. 171–91; CLAUDIO RADAELLI/ANNE MEUWESE, *Better Regulation in Europe: Between Public Management and Regulatory Reform*, in: *Public Administration* 87 (2009), pp. 639–54.

The idea behind such meta-regulation is to ensure that business self-regulation meets public needs, rather than just private interests.

For the most part, social scientific inquiry into self-regulation has focused on relatively recent developments, whether in Europe, North America, Australia, or in global business contexts where the lack of international institutions has encouraged the emergence of transnational non-governmental organizations that set standards and try to enforce them, primarily through reputational strategies of certification and naming and shaming. *Selbst-Regulierung*, however, has a much longer history. This is the case not only in Europe, as the other essays for this volume demonstrate, but also in the United States. Historians and other historically-inclined social scientists have uncovered numerous examples from the mid-nineteenth-century onwards. Scholars have particularly probed the rich array of self-regulatory institutions that emerged amid the post-World War I conservative ascendancy of the 1920s, which sought to solve socio-economic problems through the public facilitation of private regulatory institutions.

This accumulation of scholarship has had something of a collective impact, as indicated by an important recent historiographic essay on the American state by the historian William Novak. »American power,« Novak observes, »has long been distributed among a series of individuals, groups, parties, associations, organizations, and institutions not readily designated as wholly *either* public or private.« Frequently eschewing an insistence on a monopoly of decision-making within »a central public sovereign,« elites within American governments have frequently and »less visibly distributed public goods and powers widely through the private sector – enforcing its public capabilities, expanding its jurisdiction, and enhancing its legitimacy in the process.«⁶ Recognition of the enduring centrality of American *Selbst-Regulierung*, though, hardly equates to a sophisticated periodization of the phenomenon over the *longue durée*. Despite many instructive case studies, we lack an overarching historical framework that takes note of developments across regulatory domains and accounts for the emergence and evolution of regulated business self-regulation as a basic strategy of American governance.⁷

This dearth of macro-historical perspective in the scholarship of the past two generations likely has several causes. As other social scientists mapped the variety of self-regulatory institutional forms and identified their strengths and weak-

6 WILLIAM NOVAK, *The Myth of the Weak American State*, in: *American Historical Review* 113 (2008), p. 770.

7 For an instructive recent plea for more analysis of the varieties of American self-regulation from political scientists, see CATHERINE RUDDER, *Private Governance as Public Policy: A Paradigmatic Shift*, in: *Journal of Politics* 70 (2008), pp. 899–913.

nesses in achieving regulatory goals, historians of the American state focused more on the themes of promotional investment and the construction of a welfare state. Public investment attracted scholarly attention as a crucial generator of American economic preeminence; the welfare state did so partly because of its role in mediating racial and gender relations – central concerns of the dominant social and cultural turns.⁸

Among the circumscribed cohort of historians who have focused on American regulation, there has been a strong inclination to concentrate on state institutions, perhaps because of the United States' distinctive choice of responding to the problem of monopoly primarily with pricing and entry regulation, rather than state ownership of public utilities.⁹ Furthermore, a number of these historians view regulated business entities and regulatory bodies with a pro-

8 These two themes, for example, receive far more attention in DANIEL RODGERS' *Atlantic Crossings: Social Politics in a Progressive Age*, Cambridge 1998, than do regulatory institutions. See also: LOUIS GALAMBOS, *Recasting the Organizational Synthesis: Structure and Process in the Twentieth and Twenty-First Centuries*, in: *Business History Review* 79 (2005), pp. 5–29; DAVID MOWERY, *Firm Structure, Government Policy, and the Organization of Industrial Research: Great Britain and the United States, 1900–1950*, in: *Business History Review* 58 (1984), pp. 504–31; ROBERT LEIGHNINGER, *Long Range Public Investment: The Forgotten Legacy of the New Deal*, Columbia 2007; THEDA SKOCPOL/JOHN IKENBERRY, *The Political Formation of the American Welfare State in Historical and Comparative Perspective*, in: *Comparative Social Research* 6 (1983), pp. 87–148; ROBERT LIEBERMAN, *Shifting the Color Line: Race and the American Welfare State*, Cambridge 1998; ROBERT JOHNSTON, *Re-Democratizing the Progressive Era: The Politics of Progressive Era Political Historiography*, in: *Journal of the Gilded Age and Progressive Era* 1 (2002), pp. 68–92; JENNIFER KLEIN, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State*, Princeton 2003. For a more balanced synthetic overview, though one that perhaps still downplays the significance of self-regulation, see MARC ALLEN EISNER, *The American Political Economy: Institutional Evolution of Market and State*, New York 2011.

9 For useful overviews of the literature on the American regulatory state, see THOMAS McCRAW, *Regulation in America: A Review Article*, in: *Business History Review* 49 (1975), pp. 59–83; LOUIS GALAMBOS, *Technology, Political Economy, and Professionalization: Central Themes of the Organizational Synthesis*, in: *Business History Review* 57 (1983), pp. 479–86; THOMAS McCRAW, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn*, Cambridge 1986; RICHARD VIETOR, *Contrived Competition: Regulation and Deregulation in America*, Cambridge 1994; WILLIAM CHILDS, *State Regulators and Pragmatic Federalism in the United States, 1889–1945*, in: *Business History Review* 75 (2001), pp. 701–38; EDWARD BALLEISEN, »Regulation«, in: *The Oxford International Encyclopedia of Legal History*, New York 2009, available through Oxford Reference Online, at: <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t277.e688-s1>.

foundly skeptical eye, whether they locate their interpretive touchstone in the works of Gabriel Kolko (a radical historian) or George Stigler (a conservative economist).¹⁰ As a result, the theme of regulatory capture has a significant footprint in the historiography of American regulatory institutions. In several historical accounts, politically influential business interests either lobby for the creation of rules and enforcement mechanisms that protect their market position, or quickly gain influence over regulatory bureaucracies, bending policy toward the same end.¹¹ If one doubts that business organizations ever focus on public interests, or that regulatory bodies (whether private, quasi-public, or lodged fully within the state) can do so for any length of time, the very concept of *regulierte Selbst-Regulierung* surely seems quixotic, if not a contradiction in terms.

In addition, one must take account of the balkanization that tends to afflict scholarly engagements with regulatory governance, regardless of the disciplinary lens. Aside from legal scholars, who tend to frame their expertise around the process of administrative law in general, social scientists interested in modern regulation, including historians, tend to specialize in a given policy domain – public utilities, antitrust, finance, workplace health and safety, or environmental protection. Almost all historical discussions of instances of American self-regulation, or regulated self-regulation, occur as part of a study framed around one of these discrete policy arenas, rather than the evolution of self-regulation as a mode of governance. This pattern militates against broader synthetic analysis.

My primary objective in this essay is to provide a first stab at such an overview, piecing together an over-arching narrative of the emergence and spread of regulated business self-regulation in the United States from just before the start of the American Civil War up to the eve of World War II. That story, in brief, goes something like this. From the mid-nineteenth century up to the beginning of the Great Depression, instances of business self-regulation occurred in almost every economic sector. This tendency emerged most powerfully in financial

10 GABRIEL KOLKO, *The Triumph of Conservatism: A Reinterpretation of American History, 1900–1916*, New York 1963; GEORGE STIGLER, *The Theory of Economic Regulation*, in: *Bell Journal of Economics and Management Science* 5 (1971), pp. 3–21.

11 For illustrative examples, see MARVER BERNSTEIN, *Regulating Business by Independent Commission*, Princeton 1955; JONATHAN HUGHES, *The Great Strike at Nushagak Station, 1951: Institutional Gridlock*, in: *Journal of Economic History* 42 (1982), pp. 1–20; EUGENE WHITE, *The Political Economy of Banking Regulation, 1864–1933*, in: *Journal of Economic History* 42 (1982), pp. 33–40; DONNA WOOD, *The Strategic Use of Public Policy: Business Support for the 1906 Food and Drug Act*, in: *Business History Review* 59 (1985), pp. 403–32; RUTH DUPRÉ, »If It's Yellow, It Must Be Butter«: *Margarine Regulation in North America Since 1886*, in: *Journal of Economic History* 59 (1999), pp. 353–71.

services and transportation, but also took place in agriculture, natural resource extraction, construction, manufacturing, mercantile trade, advertising, and service professions such as law, medicine, and engineering. Much of this institutional innovation was prompted by the challenges of creating a truly integrated national economy. As the pace of industrialization and economic integration quickened, so too did the tempo of experimentation with forms of self-regulation. Initially this ferment resulted overwhelmingly from internal dynamics within a given industry. Business leaders identified general problems of concern and concluded that overcoming bottlenecks to trade would require some form of industry-wide standard-setting – some rules about »rights of way,« to borrow a phrase from the era's dominant industry, the railroads. These business leaders then created private institutions to undertake that task.

Occasionally, as in the case of nineteenth-century commodity and stock exchanges, legislators explicitly clothed self-regulatory institutions in the color of state authority. In several other contexts, SROs successfully lobbied for the adoption of new laws and then assisted state officials with enforcement. Nonetheless, before the early twentieth-century, American governments, whether at the state or federal level, rarely constructed formal mechanisms of public oversight over SROs. They did not, in other words, fashion »regulated self-regulation.« In one area, however, late nineteenth-century American courts and legislatures did »raise red flags« (a signaling technique in nineteenth-century railroading that instructed engineers to stop) against private mechanisms of economic governance. As historians have long noted, the nineteenth-century American judiciary manifested an abiding intolerance for private attempts at price-fixing, whether through cartels or more informal arrangements. This enduring faith in competition, along with a suspicion of any collective effort to set prices, resulted in the passage and enforcement of anti-trust laws by states and the federal government.

Beginning in the 1880s, however, the relationship between the state and SROs slowly began to shift in two significant ways. First, as American states and the federal government increasingly fashioned regulatory policies to cope with the problems wrought by industrialization, the self-regulatory impulse became more reactive. In many cases, business leaders viewed the creation of SROs, or the expansion of the powers held by already existing SROs, as means of forestalling unwanted regulatory action by government. This dynamic, moreover, frequently occurred even when the professed regulatory goals involved not heightened economic efficiency or market expansion, but rather social protection of some kind. Here was an indirect kind of public influence over SROs, in which heightened public support for regulation prompted the business establishment to adopt strategies of accommodation – to construct institutional safety valves that would relieve political pressure. Because such efforts necessarily

entailed public outreach, they encouraged a more self-conscious and carefully articulated philosophy of self-regulation as an effective form of democratic self-governance.

Second, in at least some regulatory domains, early twentieth-century policymakers in state legislatures and at the federal level began to incorporate SROs into a formal regulatory architecture, creating new obligations to furnish information and explicit structures of legal accountability. Thus by the 1930s, the American regulatory toolbox had expanded to include unambiguous forms of *Regulierte Selbst-Regulierung*. Even New Dealers, who extended formal state regulation into many new corners of the American economy, frequently incorporated this strategy of delegation.

Before fleshing out this periodization in greater detail and offering a few reflections on directions for future research, some definitional clarification is in order. In this essay, I use the term »business self-regulation« to refer to attempts by non-profit intermediary bodies, such as trade associations, professional organizations, chambers of commerce, or reform societies, to engage in the governance of economic life, ostensibly toward some public purpose. Such governance almost always concerned rule-making/standard setting; it frequently entailed forms of monitoring compliance with rules and standards, as well as public education to make businesses, and sometimes the wider public, aware of those norms; and it typically involved at least some efforts at enforcement, although in this regard options tended to be limited to strategies of ostracism or shaming unless an SRO could draw upon the legal power of the state.¹²

II Rights of Way: Self-Regulatory Organizations in the Engineer's Seat, 1850s to 1900s

The modern American regulatory state, with its scores of agencies, commissions, and bureaus at every level of government, had multifarious origins. All manner of socio-economic problems and regulatory aspirations eventually generated policy solutions predicated on expert fact-finding and administration. Policymakers turned to this mode of governance to tame the power of natural monopolies, advance the cause of public health, and address informational asymmetries in various markets; to protect small businesses from unfair competition and workers from unsafe working conditions; to conserve natural

12 For the period under review, there is no need to take account of »management regulation«, in which discrete corporations take on the task of achieving some regulatory goal through internally developed and implemented schemes, as this form of self-regulation has a much more recent history, dating only from the 1970s and 1980s.

resources and stabilize the business cycle.¹³ Private regulatory institutions in nineteenth- and early twentieth-century America reflected a similar, though perhaps not quite as variegated, array of motivations and objectives. For the most part, American SROs in this era sought to address particular collective action problems posed by a complex and increasingly continental economy. They also frequently represented attempts by members of emerging professional classes to use self-regulation as a means of cementing their economic and social positions.

Among the earliest SROs were urban chambers of commerce and securities and commodity exchanges. Although chambers of commerce tended to concentrate on economic boosterism, most developed default rules for commercial relationships concerning such issues as storage and brokerage rates, and obligations pertaining to merchandise delivery. Several also created arbitration mechanisms to settle commercial disputes among their members. The goal here was to streamline dispute resolution, avoiding the costs and lengthy delays often associated with reliance on the state's judicial process.¹⁴ Securities and commodities exchanges pursued far more comprehensive strategies of governance, seeking to impose order on the business of trading government bonds, banks and railroad company stocks, and eventually agricultural futures. Non-profit associations such as the New York Stock Exchange, Chicago Board of Trade, New Orleans Cotton Exchange, and Kansas City Livestock Exchange not only furnished a physical space for brokers and traders to conduct business, but also developed standard contractual terms and specified norms for trading conduct. With the development of continental telegraph networks after the close of the American Civil War, these platforms structured trading activity on a national basis by communicating prices to far-flung economic actors.¹⁵

- 13 See EDWARD J. BALLEISEN, Introduction, in: EDWARD J. BALLEISEN, *Business Regulation*, Cheltenham (forthcoming).
- 14 Decisions of the New Orleans Chamber of Commerce from Its Formation in 1834 to August 4th, 1856, New Orleans 1857; N.W. THOMAS, Cincinnati Chamber of Commerce, in: *Merchants' Magazine and Commercial Review* 25 (December 1851), pp. 751–52; The New York Chamber of Commerce, in: *Merchants' Magazine and Commercial Review* 36 (April 1857), pp. 441–44; The Chamber of Commerce of San Francisco, in: *Merchants' Magazine and Commercial Review* 44 (May 1864), pp. 170–72; CORY DAVIS, Building the «Business Congress»: Local Commercial Organizations and the Origin of the National Board of Trade, paper delivered at the Annual Meeting of the Business History Conference, March 2011, Saint Louis, Missouri (USA).
- 15 RANALD MICHIE, The London and New York Stock Exchanges, 1850–1914, London 1987; JONATHAN LURIE, The Chicago Board of Trade, 1859–1905: The Dynamics of Self-Regulation, Urbana 1979; L. TUFFLY ELLIS, The New Orleans Cotton Exchange: The Formative Years, 1871–80, in: *Journal of Southern History* 39 (1973), pp. 545–564; JAMES HAZLETT, Regulation in the Livestock Trade: The Origins and Operation of the Kansas City Livestock Trade, 1886–1921, Ph.D. diss., Oklahoma State University 1987.

The wrenching experience of nineteenth-century financial crises also prompted experimentation with self-regulation. Within the banking sector, two innovations stand out in this regard. Early in the nineteenth century, New England banks banded together to create the Suffolk Bank, a *de facto* regional central bank with the mission of constraining credit expansion by discounting bank notes and returning them for redemption. A few decades later, banks in key financial centers (first New York City in 1853) created non-profit clearinghouses. In good times, these new entities reduced the transaction costs associated with payment mechanisms and nudged banks to maintain sufficient quality assets and liquidity to meet maturing obligations. In the midst of financial panics, they offered sources of emergency loans to illiquid but solvent member banks and thus kept the credit system from seizing up.¹⁶

In the aftermath of financial panics, especially during the decades following the American Civil War, the pain of deflation periodically convinced industrial producers in a particular market segment that stabilization of prices was absolutely imperative. The result was a succession of pools and cartels similar to the ones that emerged at the same historical juncture in many European countries. These price associations sought to restrict output and raise prices, either by divvying up geographic territories for sales or setting production quotas. In the 1870s and 1880s, competing railroads similarly set about forming rate-setting associations.¹⁷

- 16 BRAY HAMMOND, *Banks and Politics in America: From the Revolution to the Civil War*, Princeton 1957, pp. 549–71; CHARLES CALOMARIS/CHARLES KAHN, The Efficiency of Self-Regulated Payments Systems: Learning from the Suffolk System, in: *Journal of Money, Credit, and Banking* 28 (1996), pp. 766–97; HARVEY WHITE MAGEE, *A Treatise on the Law of National and State Banks: Including the Clearing House and Trust Companies*, 3. ed., Albany 1921, pp. 631–65; RICHARD TIMBERLAKE, The Central Banking Role of Clearinghouse Associations, in: *Journal of Money, Credit, and Banking* 16 (February 1984), pp. 1–15; RONNIE PHILLIPS, Coping with Financial Catastrophe: The San Francisco Clearinghouse during the Earthquake of 1906, in: *Research in Economic History* 21 (2003), pp. 79–104.
- 17 WILLIAM BECKER, American Wholesale Hardware Trade Associations, 1870–1900, in: *Business History Review* 45 (1971), pp. 179–200; WILLIAM GRAEBNER, Great Expectations: The Search for Order in Bituminous Coal, 1890–1917, in: *Business History Review* 48 (1974), pp. 49–72; MARGARET LEVENSTEIN, Mass Production Conquers the Pool: Firm Organization and the Nature of Competition in the Nineteenth-Century, in: *Journal of Economic History* 55 (1975), p. 575; JOSEPH MCFADDEN, Monopoly in Barbed Wire: The Formation of the American Steel and Wire Company, in: *Business History Review* 38 (1978), pp. 465–89; D.T. GILCHRIST, Albert Fink and the Pooling System, in: *Business History Review* 34 (1960), pp. 24–49; GABRIEL KOLKO, *Railroads and Regulation, 1877–1916*, New York 1965; PAUL MCAVOY, *The Economic Effects of Regulation: The Trunkline Railroad Cartels and the Interstate Commerce Commission before 1900*, Cambridge 1965.

Periodic crises similarly nudged fire insurance companies to develop forms of industry self-regulation, although these episodes involved local events (destructive urban fires) rather than general business depressions. Throughout the first several decades in which American firms offered fire insurance, individual companies struggled to amass sufficient data about loss ratios to guide sensible policies for premiums, especially given the ferocious competition that placed ceilings on rates. As a result, periodic large-scale urban blazes invariably led to the failures of numerous companies. Beginning in the 1870s, insurance agents and companies in several cities began to address these problems through the creation of local underwriting boards and actuarial bureaus. These new entities received statistical data about claims from the insurers that belonged to them, instituted systemic inspections of insured buildings, and then made at least some attempts to construct premium schedules on the basis of the resulting data. By the early 1890s, the National Board of Fire Underwriters (NBFU) extended these efforts along several policy dimensions. In addition to specifying detailed standards for preventative devices such as sprinklers and alarms, it cooperated with the new profession of electrical engineers to create a safety code for electrical motors and wiring, which presented particularly worrisome fire risks. In 1894, the NBFU further created an Electrical Bureau in Chicago, which set about the business of testing the interactions of electrical infrastructure with various building materials, so as to set new safety recommendations.¹⁸

An additional array of self-regulatory initiatives focused on the challenges of coordinating and standardizing key features of particular markets or infrastructural systems. This pattern was especially prevalent within agricultural marketing and the maturing railroad industry. Non-uniform grades of wheat greatly complicated the process of moving massive American harvests to final markets. Multiple railroad gauges and the maintenance of »local time,« in which every community measured noon by the highest point of the sun in the sky, similarly created significant economic inefficiencies for railroads. The former required transfers of goods and people when the line of one railroad with a given track width connected to a second railroad with a different gauge; the latter greatly complicated scheduling and the avoidance of crashes on single-line tracks. Railroad personnel further had to cope with differences in train dispatching and signaling practices, and demonstrated a growing interest in

18 CHARLES HEXAMER, *Fire Insurance – Rates and Schedule Rating*, in: *Annals of the American Academy of Political and Social Science* 26 (1905), pp. 218–23; DALIT BARANOFF, *Shaped by Risk: The American Fire Insurance Company*, Ph. D. diss., Johns Hopkins University 2003, pp. 157–217; SCOTT KNOWLES, *Inventing Safety: Fire, Technology, and Trust in Modern America*, Ph. D. diss., Johns Hopkins University 2003, pp. 90–117.

developing shared technical standards for engines, brakes, couplers, and other key components and parts.

In these contexts, industry insiders eventually calculated that the adoption of unitary standards would create network efficiencies to the benefit of many firms and the economic sector as a whole. Accordingly, they set about forging private institutional means to develop and implement such standards, often through the medium of trade, industry, or professional associations. The pivotal actors with regard to the grading of agricultural commodities were grain elevator companies and exchanges like the Chicago Board of Trade.¹⁹ Within railroading, a wider set of organizations took on regulatory roles, including the National Railroad Convention, the National Time Convention, the Master Car Builders Association, and the American Civil Engineering Society. From the 1870s through the 1890s, however, one company – the Pennsylvania Railroad – took on an especially significant coordinating role. The Pennsylvania leveraged its financial resources and managerial expertise to drive the establishment of several industry committees and associations that formulated numerous policies on railroad operations, almost always in accordance with its own rules.²⁰

The process of standardization started a bit more slowly in American manufacturing and energy production than it had in railroading. By the 1880s, though, professional societies and trade associations increasingly turned their attention to such matters. Thus the Society of Mechanical Engineers set upon the task of developing an agreed upon approach to testing steam boilers, while the Master Steam and Hot Water Fitters' Association specified uniform expectations for the size and shape of flanges. Numerous trade organizations engaged in similar deliberations.²¹

Worries about informational asymmetries drove the formation of still other American SROs. Developments concerning anti-counterfeiting, commercial

19 HAROLD WOODMAN, *Chicago Businessmen and the »Granger« Laws*, in: *Agricultural History* 36 (1962), pp. 16–19.

20 *The New Time Standards*, in: *Scientific American* (October 27, 1883), p. 364; DOUGLAS PUFFERT, *The Standardization of Track Gauge on North American Railways, 1830–1890*, in: *Journal of Economic History* 60 (December 2000); STEVEN USSELMAN, *Regulating Railroad Innovation: Business, Technology, and Politics in America, 1840–1920*, New York 2002, pp. 177–268; BENJAMIN SCHWANTES, *Knowledge Generation, Managerial Reform, and Self-Regulation in the Nineteenth-Century American Railroad Industry*, a paper delivered to the Annual Meeting of the Business History Conference, March 2011, Saint Louis, Missouri (USA).

21 *A Standard Method of Steam Boiler Trials*, in: *Van Nostrand's Engineering Magazine* 32 (March 1, 1885), pp. 115–26; *The Master Steam and Hot Water Fitters' Association*, in: *American Artisan, Tinner, and House Furnisher* 27 (June 16, 1984), pp. 24–26.

credit evaluation, and seed certification constitute illustrations of this type. American efforts to combat counterfeiting and furnish credit reports on far-flung businesses often relied heavily on for-profit enterprises such as *Thompson's Counterfeit Detector* (a periodical that furnished extensive information about legitimate and spurious bank notes in circulation) or Dun & Bradstreet's (a credit reporting firm). This tendency distinguished the United States from Europe, where national mercantile communities depended on state authorities to safeguard the currency and non-profit trade associations to share information on creditworthiness. Nonetheless, as early as the 1830s, banks periodically created associations to share information about counterfeit bills in circulation, to investigate suspected counterfeiting rings, and finance criminal prosecutions. By the 1890s, concerned sales executives within American manufacturing and wholesaling joined forces to create the National Association of Credit Men, which attempted to supplement the for-profit credit reporters with non-profit credit bureaus. The creation of seed certification schemes in the 1890s and 1900s represented an outgrowth of the work of government agricultural experiment stations, which demonstrated that different seed led to significant variations in crop yields. Through formal certification processes, farmers' associations took it upon themselves to furnish their members with information about seed quality that individuals could not readily amass on their own, even through a wide network of producers.²²

Analogous motivations underlay the creation of professional associations that wished to control entry into such fields as medicine, law, engineering, and accounting. These new organizations argued that the demands and heavy responsibilities of these professions called for measures to ensure that practitioners possessed requisite expertise and lived up to ethical standards. In order to restrict what they saw as excessively easy occupational entry, they advocated the creation of stringent educational requirements and professional examinations for individuals who desired careers in these fields. To protect against problematic conflicts of interest and other abuses, they drew up codes of ethics for professional behavior and lobbied state legislatures for means of enforcing them.²³

- 22 STEPHEN MIHM, *A Nation of Counterfeiters: Capitalists, Con Men, and the Making of the United States*, Cambridge 2007, pp. 133–55, 209–59; ROWENA OLEGARIO, *A Culture of Credit: Embedding Trust and Transparency in American Business*, Cambridge 2006, pp. 13–79, 176–199; KATHY COOKE, *Expertise, Book Farming, and Government Agriculture: The Origins of Agricultural Seed Certification in the United States*, in: *Agricultural History* 76 (2002), pp. 524–45.
- 23 JAMES GORDON BURROW, *Organized Medicine in the Progressive Era: The Move toward Monopoly*, Baltimore 1977; RICHARD ABEL, *The Transformation of the American Legal Profession*, in: *Law & Society Review* 20 (1986), pp. 7–14; SAMUEL HABER, *The Quest for Authority and Honor in the American Professions*,

For all the diversity among the SROs that shaped American marketplaces the mid-nineteenth-century through the 1920s, their activities tended to fall within a discrete set of regulatory functions. Figure 1 summarizes two pivotal clusters of regulatory objectives. The first cluster involved the constitution of markets through the adoption of basic ground rules, the provision of a place for trading,

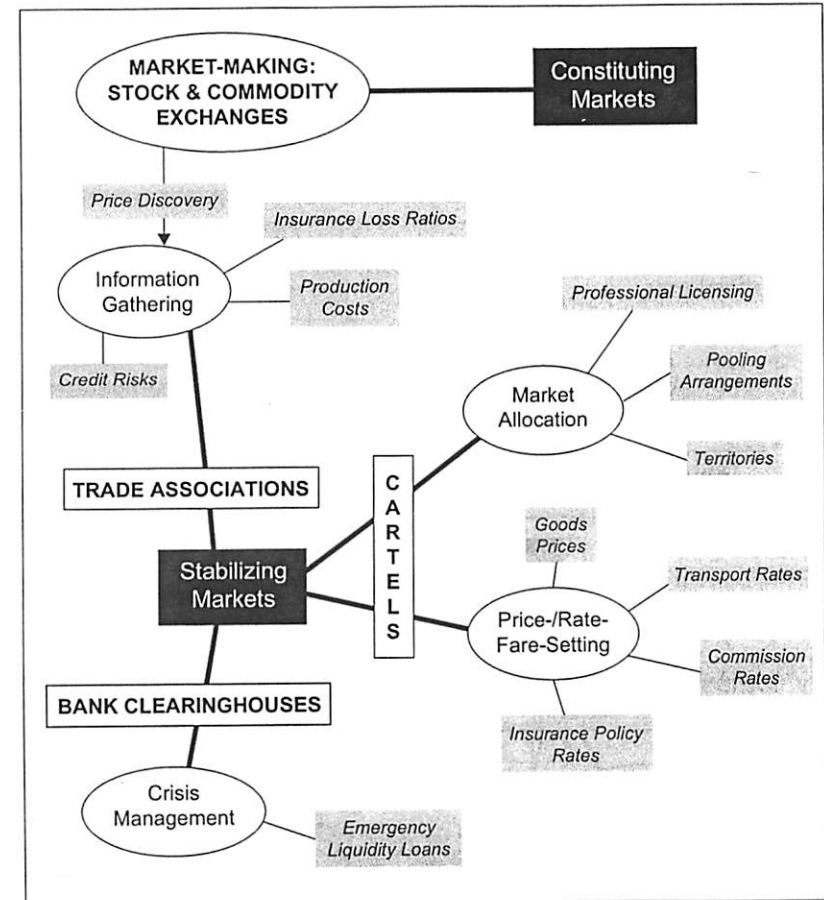


Figure 1: Key Objectives of American Self-Regulatory Organizations, 1850–1920: Creating and Stabilizing Markets

1750–1900, Chicago 1991; MARC LAW / SUKOO KIM, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, in: *Journal of Economic History* 65 (2005), pp. 723–56.

and the dissemination of pricing information – commodity and stock exchanges served as the prototypical examples in this regard. The second and larger cluster involved attempts to impose order on chaotic business environments, either through shared endeavors to gain a better handle on economic conditions, measures to respond to financial crises (largely the province of banking clearing houses), or attempts to replace competitive market conditions with restrictions on the entry of new firms and cooperative determination of prices.

As Figure 2 depicts, a third cluster of regulatory goals, mostly but not uniformly carried out by SROs operating within a single industry, involved the formulation of norms of one kind or another. These specifications defined quality or the expected characteristics of goods in a given industry or market,

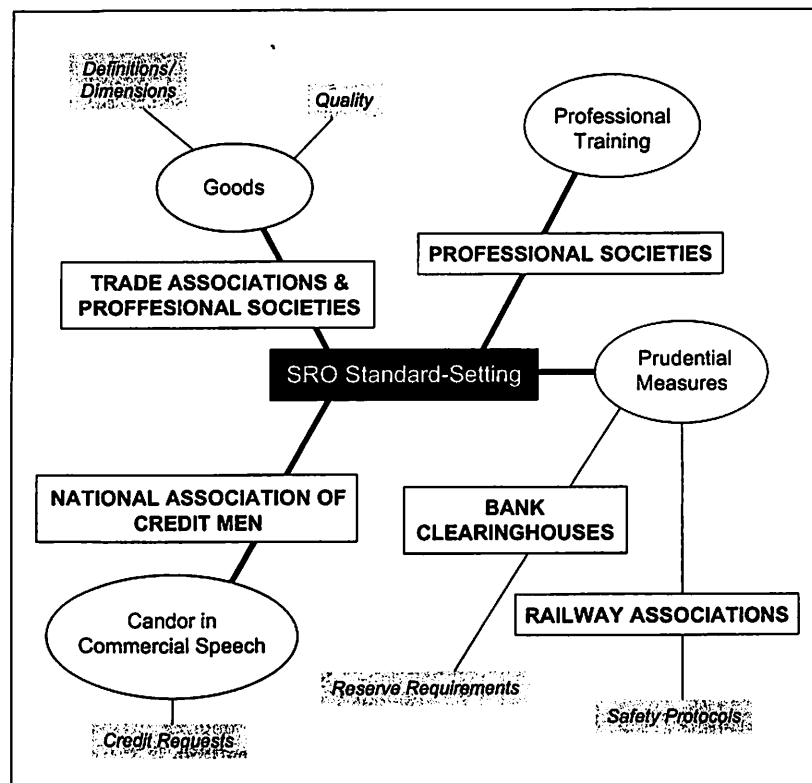


Figure 2: Key Objectives of American Self-Regulatory Organizations, 1850–1920: Creating and Stabilizing Markets

set standards for professional training or the coordination of activities so as to enhance safety, or identified the principles of candor in commercial communication with counterparties or customers. In general, the point of these standards was to improve economic efficiency or increase demand by shoring up the confidence of counterparties. Such norms were, in the parlance of economists, »market-enhancing« rules.²⁴

Some self-regulatory organizations, of course, embraced multiple, overlapping goals. Others, like the various anti-vice societies that emerged in post-Civil War cities, pursued objectives that did not fit comfortably within the above categories. These anti-vice organizations, staffed for the most part by evangelical merchants and clerks, sought to uphold traditional visions of moral economy that they saw as threatened by the rapid migration of young men to burgeoning American urban environments, where they lived apart from the constraints of neighborhood and family. Anti-vice activists additionally worried about the often unmarried, unsupervised working-class women, usually immigrants or participants in the post-emancipation migration of African-Americans to cities, who found employment in the vice trades. This band of mostly Protestant reformers trained their sights on businesses that they viewed as morally abhorrent, including houses of prostitution, pornographers, abortion providers, and gambling establishments, as well firms in more reputable fields that engaged in deceptive practices.²⁵

Whatever their objectives, SROs in the late nineteenth- and early twentieth-centuries usually made at least some attempts to increase public awareness of their new standards, most commonly targeting the firms in their economic domains, but also occasionally seeking out the ears of the broader society. They also tended to invest at least some resources in monitoring particular marketplaces to ascertain the degree of compliance with rules, as when a stock exchange or board of trade audited the accounts of member firms. In addition, almost every SRO had to grapple with the problem of enforcement. Even without access to the legal sanctions enjoyed by the state, SROs possessed some room to

24 For a useful discussion of this concept, see ROBERT ZERBE, *The Origin and Effect of Grain Trade Regulations in the Late Nineteenth Century*, in: *Agricultural History* 56 (1982), pp. 176–79.

25 NICOLA BEISEL, *Class, Culture, and Campaigns against Vice in Three American Cities*, in: *American Sociological Review* 55 (1990), pp. 44–62; ANDREA TONE, *Devices and Desires: A History of Contraceptives in America*, New York 2001, pp. 4–57; GAINES FOSTER, *Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865–1920*, Chapel Hill 2002, pp. 47–90; ELIZABETH SMITH, *River Queens: Disorderly Women and the Fight for Public Order in Reconstruction New Orleans*, Ph. D. diss., University of North Carolina 2012.

maneuver. Their representatives might (and often did) engage in strategies of moral suasion, seeking to nudge rule violators to toe some self-regulatory line, often by appealing to collective, long-term self-interest, or by inculcating normative visions of communal identity and fairness. Alternatively, there were the possibilities of fine, censure, suspension, and even commercial excommunication, at least for SROs that had the character of business clubs, such as stock and commodity exchanges or professional associations. These self-regulatory organizations had the option of casting miscreants out of the club.²⁶

In many ways, then, American SROs mirrored the strategies of public regulatory institutions. As a result, they often constituted institutional rivals to the nineteenth-century and early twentieth-century state. Yet, instead of assiduously protecting their own prerogatives and turf, as one might expect, government officials tended either to stay out of the way of American SROs or actively facilitate their work. Accommodation took many forms. Many of the most prominent securities and commodity exchanges asked for and received corporate charters that furnished a legal foundation for their activities. In many American states, professional associations gained legislative authorization for supervising the licensing of new practitioners, fashioning rules of professional conduct, and enforcing those rules.²⁷ Of particular significance, America's legal officialdom frequently reinforced the authority of SROs. Bereft of resources to investigate economic crimes that crossed jurisdictional boundaries or otherwise involved complex challenges in the collection of evidence, state officials gladly worked with those organizations willing to take on such tasks. Anti-counterfeiting associations, anti-vice societies, and by the end of the nineteenth-century, a variety of anti-fraud organizations, all built up significant capacity to investigate and gather evidence against criminal enterprises, frequently instituting prosecutions themselves.²⁸ The judiciary also proved solicitous of self-regulatory

26 For an illustrative discussion of SRO monitoring and enforcement mechanisms in the late nineteenth-century, see HAZLETT, *Regulation in the Livestock Trade* (n. 15), pp. 109–14, 126–29, 146–53.

27 GALAMBOS, *Technology, Political Economy, and Professionalization* (n. 9), pp. 485–91. Though for an argument that in at least some states, such as Illinois, state officials demonstrated considerable willingness to shape the process of professional licensing, see THOMAS GOEBEL, *Professionalism and State Building: The State and the Professions in Illinois, 1870–1920*, in: *Social Science History* (1994), pp. 309–37.

28 *The Suppression of Counterfeiting*, in: *Banker's Magazine* 3 (May 1854), pp. 892–903; *The Suppression of Counterfeiting*, in: *Banker's Magazine* 5 (April 1856), pp. 798–806; *Suppressing Vice*, in: *New York Observer and Chronicle* 55 (January 18, 1977), p. 22; *Twenty Years of Hard Fighting*, in: *New York Evangelist* 63 (March 10, 1892), p. 4; ANTHONY COMSTOCK, *Historical and Modern Safeguards to Public Morals*, in: *Christian Advocate* 69 (January 4, 1894), p. 4;

prerogatives in at least some circumstances. In several pivotal civil cases around the turn of the twentieth century, American courts confirmed that the price quotations that came from securities and commodity exchanges constituted a type of property right to which they could restrict access. This ruling greatly assisted the exchanges' capacity to shut down »bucketshops« – unaffiliated brokerage outlets that sought to muscle in on the exchanges' business.²⁹ Indeed, in the relatively few instances where nineteenth-century legislatures transferred effective regulatory authority from already existing SROs to public administrative officials, they invariably did so at the behest of business interests and the leaders of private regulatory organizations. Thus when the state of Illinois created a public scheme of grain inspection in the early 1870s, some of the most strident petitioners for action were grain traders and their representatives within the Chicago Board of Trade, who had lost faith in the grading practices of elevator companies. Similarly, the adoption of local building codes and safety inspection regimes by municipal governments tended to occur as the result of lobbying by insurance companies, insurance agents, and the associations that they set up to ascertain loss ratios for building types. As insurance industry leaders came to recognize that shoddy construction practices disproportionately resulted in fires, they called upon municipal governments to impose new rules for builders that would lessen their incidence and impact, and hence lessen insurance claims. The NBUF went even further, collaborating with professional associations involved in urban construction to draft model fire prevention ordinances.³⁰

During the decades of America's First Gilded Age, then, the leaders of self-regulatory institutions often enjoyed considerable autonomy. From the 1850s through the turn of the early twentieth century, very few Americans advocated that the federal government should once again establish a central bank along European lines, which would wrest away the crisis-related responsibilities from the New York Clearing House Association. Even in the midst of financial panics,

National Association of Credit Men, in: *Hardware Dealers' Magazine* 10 (July 1, 1898), pp. 54–57; *Credit Men and Credit Associations*, in: *American Lawyer* 7 (September 1899), p. 416.

29 JONATHAN LURIE, *Private Associations, Internal Regulation, and Progressivism: The Chicago Board of Trade, 1880–1923, as a Case Study*, in: *American Journal of Legal History* 16 (1972), pp. 233–38; DAVID HOCHFELDER, »Where the Common People Could Speculate«: *The Ticker, Bucket Shops, and the Origins of Popular Participation in Financial Markets, 1880–1920*, in: *Journal of American History* 93 (2006), pp. 335–58; JONATHAN LEVY, *Contemplating Delivery: Futures Trading and the Problem of Commodity Exchange in the United States, 1875–1905*, in: *American Historical Review* 111 (2006), pp. 307–35.

30 WOODMAN, *Chicago Businessmen and the »Granger« Laws* (n. 19), pp. 19–23; BARANOFF, *Shaped by Risk* (n. 18), pp. 186–87; KNOWLES, *Inventing Safety* (n. 18), pp. 88–90.

the presidents of commodity and stock exchanges rarely worried about the possibility of legislatures imposing strong-armed public oversight.

This, after all, was a society long practiced in the fashioning of voluntary organizations to address perceived public needs, whether western land claim clubs, reform associations, schools, religious institutions, local economic boosterism, or the rationalization of markets and industries. Such deference accorded with longstanding elite preferences regarding socio-economic self-governance, as well as more recent Spencerian assumptions about economic liberty that had gained many adherents among the commercial, political, and legal classes. Reliance on self-regulatory institutions also limited impositions on the public purse and avoided the creation of sizeable regulatory bureaucracies. The frequency with which late nineteenth-century Americans turned to SROs is indicative of the era's more general resistance to the adoption of a European-style activist state.³¹

Nonetheless, one should be careful not to overstate the significance of self-regulation as a mode of responding to the collective challenges posed by a maturing American capitalism. Gilded Age SROs arose at the same time as many new state regulatory institutions – state boards of public health, inspection regimes for fertilizer quality and safety in mines and factories, commissions to set railroad rates, and the municipal definition of red-light districts, among many, many others.³² In the United States, public policy responded to many

31 CHESTER McARTHUR DESTLER, *The Opposition of American Businessmen to Social Control during the "Gilded Age"*, in: *Mississippi Valley Historical Review* 39 (1953), pp. 641–72; JAMES WILLARD HURST, *Law and the Conditions of Freedom in the Nineteenth-Century United States*, Madison 1956; ALLAN BOGUE, *The Iowa Claims Clubs: Symbols and Substance*, in: *Mississippi Valley Historical Review* 45 (1958), pp. 231–253; ROBERT WAIBE, *The Search for Order, 1877–1920*, New York 1967, pp. 113–32; CHARLES McCORDY, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, in: *Journal of American History* 61 (1975), pp. 970–1005; WORTH ROBERT MITLER, *The Lost World of Gilded Age Politics*, in: *Journal of the Gilded Age and Progressive Era* 1 (2003), pp. 49–67.

32 ALBERT SHAW, *The American State and the American Man*, in: *Contemporary Review* 51 (1887), pp. 695–711; CHARLES ROSENBERG, *The Cholera Years: The United States in 1832, 1849, and 1866*, Chicago 1962, pp. 175–225; ALAN MARCUS, *Setting the Standard: Fertilizers, State Chemists, and Early National Commercial Regulation*, in: *Agricultural History* 61 (1987), pp. 47–73; MARK ADRICH, *The Perils of Mining Anthracite: Regulation, Technology, and Safety, 1870–1945*, in: *Pennsylvania History* 64 (1997), pp. 361–70; DAVID BRIAN ROBERTSON, *Capital, Labor and State: The Battle for American Labor Markets from the Civil War to the New Deal*, Lanham 2000, pp. 37–55; WILLIAM DOEZEMA, *Railroad Management and the Interplay of Federal and State Regulation, 1889–1916*, *Business History Review* 75 (2001), pp. 701–38; MARA KEAR, *Red-Light Districts and the Regulation of Vice in the United States, 1890–1933*,

constituencies, if not always in equal measure. It also drew upon political traditions and intellectual legacies that included robust defenses of government action on behalf of economic fairness, public security, community health, and the general commonweal, alongside paeans to individual liberty and critiques of overbearing government.³³ Thus state regulation and business self-regulation emerged in tandem. The ongoing expansion of the American regulatory state, moreover, would soon have important implications for the roles of SROs and the mindsets of the people who ran them.

III Red Flags and Safety Valves: The Paths to American *Regulierte Selbst-Regulierung*, 1880s to 1940

The concept of regulated self-regulation, at least as English-speaking social scientists currently think about it, presupposes a complex institutional hierarchy in which private or quasi-public regulatory institutions formally answer to public regulatory overseers. Private regulators have detailed obligations, report regularly to their public superiors, and potentially face sanctions should they not meet their responsibilities. No such ongoing bureaucratic relationship existed in the nineteenth-century governance structures of the United States. Nonetheless, the American state never completely gave way to self-regulatory initiatives, and as pressure for the expansion of state regulatory authority gathered momentum amid rapid industrialization and urbanization, the political context surrounding business self-regulation shifted. State actors and politicians increasingly exerted informal influence over SROs, often nudging them toward more aggressive policies and more sustained public articulations of their philosophies of governance. Amid the clashing interests and experimental culture of Progressive Era policy-making, these interactions eventually encouraged the incorporation of SROs into a variety of state-mandated regulatory frameworks.

Late nineteenth- and early twentieth-century American legislatures and courts did impose one very important set of constraints on self-regulatory impulses and activities. Politicians and jurists often vigorously opposed efforts by manufacturers or wholesalers to subvert competitive dynamics by cooperatively setting prices or divvying up marketing territories. This point has long been a basic tenet of historical comparisons between late nineteenth-century European and American political economy.

33 BALTIMORE 2010, pp. 5–22; MICHAEL LES BENEDETTI, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, in: *Law and History Review* 3 (1985), pp. 293–331; NOVAK, *Myth of the Weak American State* (n. 6), pp. 752–61. WILLIAM NOVAK, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, Chapel Hill 1996.

In Europe's largest economies, governments tended to give industrial cartels considerable room to maneuver. Officials reasoned that in a world of tumultuous business cycles and rapid technological change, businesses in a given trade should be able to respond collectively to the challenges of modern capitalism. European courts often proved willing to enforce private agreements to limit output, set prices, and/or divide markets, and even more frequently upheld agreements between cartels and third parties. Judges in France, England, and especially Germany accepted the argument that such contractual arrangements were necessary to meet the competition of foreign cartels.

Unlike their counterparts across the Atlantic, American judges usually viewed pools and cartels with deep misgivings, at least within the purely domestic economy, seeing them as threats to common law precepts against restraints of trade. Partly an intellectual holdover from the Jacksonian suspicion of special privilege associated with concentrations of economic power, the disinclination to enforce price-fixing was reinforced by later movements for anti-trust legislation, which small business owners and farm-owners demanded as policy responses to the emergence of the large industrial corporation in post-Civil War America. With the passage of the Sherman Antitrust Act in 1890 and companion antitrust laws in most states, judicial scrutiny of American trade associations intensified. The federal courts did exempt some economic sectors, such as insurance, from the dictates of the Sherman Act on the grounds that they did not constitute interstate commerce. Certain states, such as California, eventually carved out exceptions for agricultural cooperatives in their state antitrust provisions. Even so, attempts to form cartels in transportation and the setting of prices for commodities or manufactured goods shipped across state lines faced significant legal barriers. When litigants alleged that their counterparts had colluded to create cartels, judicial signalmen consistently raised legal red flags. The judiciary struck down scores of such cooperative arrangements in the three decades following passage of the Sherman Act, with the tempo of such cases accelerating after 1900. Since cartel members could not count on the courts to recognize their contractual obligations, they had powerful incentives to break whatever agreements they made. As a result, the periodic efforts by railroads to set freight rates or by manufacturers and wholesalers to tamp down competitive pressures might work during periods of strong economic growth, but they rarely survived the era's periodic economic downturns.³⁴

34 WALLACE BELCHER, *Industrial Pooling Agreements*, in: *Quarterly Journal of Economics* 19 (1904), pp. 111–23; GILBERT MONTAGUE, «Cooperation» and the Anti-Trust Laws, in: *Annals of the American Academy of Political and Social Science* 63 (January 1916), pp. 69–83; THEODORE MARBURG, *Government and Business in Germany: Public Policy toward Cartels*, in: *Business History Review* 38 (1964), pp. 78–101; WILLIAM LETWIN, *Law and Economic Policy in*

Still, outside the related realms of price-setting and market entry, instances of far-reaching business self-regulation continued to multiply and sink roots during the first decades of the twentieth century. Perhaps the most significant expansion involved the early twentieth-century truth in advertising movement, which sought to root out deception in American marketing. Leaders within the maturing advertising industry came to worry that misleading advertising undermined public confidence in the believability of advertisements and compromised the social status of upright advertising men. They responded with a particularly ambitious strategy of self-regulation. By the early 1920s, they had founded a national network of urban Better Business Bureaus (BBBs), which set standards for truthfulness in advertising copy, monitored advertising and sales practices, and pressured firms that consistently violated BBB rules. In many states, they further lobbied for the passage of laws that specifically criminalized intentionally false advertisements, which provided BBB investigators with the capacity to threaten wayward businesses with prosecution if they did not clean up their marketing practices. Within the world of medicine, the American Medical Association pursued an analogous campaign against quack doctors and other purveyors of spurious drugs and medical treatments.³⁵ Other noteworthy self-regulatory schemes flourished within the construction, manufacturing, and insurance sectors, all involving privately managed technical standards and all

America: *The Evolution of the Sherman Act* Chicago 1965; MORTON KELLER, *The Pluralist State: American Economic Regulation in Comparative Perspective, 1900–1930*, in: THOMAS McCRAW, *Regulation in Perspective: Historical Essays*, Cambridge 1981, pp. 56–72; THOMAS ULEN, *Railroad Cartels before 1887: The Effectiveness of Private Collusion*, in: *Research in Economic History* 8 (1983), pp. 125–44; VICKIE SAKER WOESTE, *The Farmers' Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865–1945*, Chapel Hill 1998. More recent research has demonstrated that collusion proved more durable in some contexts – especially foreign trade or shipping, where antitrust rules did not apply; and some markets characterized by tight oligopoly, in which occasional price wars assisted in the renegotiation of collusive understandings. DREW KEELING, *Transatlantic Shipping Cartels and Migration between Europe and America, 1880–1914*, in: *Essays in Economic and Business History* 17 (1999), pp. 195–213; MARGARET LEVENSTEIN, *Do Price Wars Facilitate Collusion? A Study of the Bromine Cartel before World War I*, in: *Explorations in Economic History* 33 (1996), pp. 107–37.

35 H. J. KENNER, *The Fight for Truth in Advertising*, New York 1936; EDWARD J. BALLEISEN, *Private Cops on the Fraud Beat: The Limits of American Business Self-Regulation, 1895–1932*, in: *Business History Review* 83 (2009), pp. 113–60; *The Public Health Defense League: A National Anti-Quackery Organization*, in: *American Druggist and Pharmaceuticals* (November 26, 1912), p. 311; *American Medical Association, Nostrums and Quackery, Chicago 1911–1921*; JAMES HARVEY YOUNG, *The Medical Messiahs: A Social History of Health Quackery in Twentieth-Century America*, Princeton 1975, pp. 129–57.

building on nineteenth-century foundations. Amid the rise of Taylorist scientific management in the early twentieth century, the search for technical industrial standards became even more of an abiding preoccupation. By the mid 1910s, American trade and engineering journals teemed with proposals and debates about such technical norms, egged on by new multi-sector private standard-setting organizations, such as the American Society for Testing Materials (founded by leading engineers in 1898), as well as government agencies such as the United States Bureau of Standards. As construction firms took on more expansive projects, architects, builders, and civil engineers judged that standardization of materials and building components would create substantial efficiencies and enable purchasers to compare costs far more easily.³⁶ An analogous set of developments occurred throughout American manufacturing. Automobile companies and their parts suppliers were among the most ardent participants in this process, since uniform standards quickly became a prerequisite to the achievement of economies of scale, as well as the capacity to furnish appropriate maintenance and repair services. Indeed, most sectors of American industry joined the standardization movement.³⁷

The expansion of self-regulatory endeavors within the early twentieth-century insurance industry partly reflected the ambitions of one especially successful SRO. After several years of testing building materials and electrical infrastructure, the Electrical Bureau of the NBFU, renamed Underwriters Laboratory (UL) in 1901, looked to branch out, chiefly by offering to test manufacturers' products

36 Standardization in Culvert Construction Makes Great Savings, in: *Concrete* 11 (April 1911), pp. 60–62; Specifications for Structural Timber, in: *Construction News* 24 (July 6, 1907), p. A7; ERNEST TRIGG, The Standardization of Farm Buildings, in: *National Builder* 60 (November 1, 1918), pp. 72–78; Standardization in the Building Trades, in: *American Architect* 116 (November 26, 1919), p. 662; Is There a Need for Further Standardization in American Construction?, in: *American Architect* 116 (December 31, 1919), pp. 827–30.

37 Among myriad illustrations, see *Manufacturers Make Strides in General Standardization Work*, in: *New York Times*, June 9, 1912, X15; *Storage Batteries*, in: *Electrical Engineering* 52 (November 1, 1918), pp. 22–24; *Motor Gasoline Specifications Revised*, in: *Automotive Manufacturer* 61 (December 1, 1919), pp. 18–20; COKER CLARKSON, *Auto Engineers' Important Work: Further Advance of Standardization of Automobile Parts*, in: *New York Times*, January 7, 1917, A20. For useful overviews of standardization throughout the world of American industrial production, its extension into the international sphere, and the role of the Bureau of Standards in these developments, see PAUL AGNEW, *The Work of the Bureau of Standards*, in: *Annals of the American Academy of Political and Social Science* 82 (March 1919), pp. 278–88; C. A. ADAMS, *Industrial Standardization*, in: *Annals of the American Academy of Political and Social Science* 82 (March 1919), pp. 289–99. On Taylorism, see SAMUEL HABER, *Efficiency and Uplift: Scientific Management in the Progressive Era, 1890–1920*, Chicago 1964.

for a fee. Having built a solid reputation for professionalism, they soon attracted heavy demand. By the 1910s, UL's engineers were annually carrying out laboratory investigations on thousands of intermediate and consumer goods. Depending on the item, UL might subject it to controlled explosions, corrosion, weathering, pressure, heat, chemical exposure, or collision. The organization developed technical safety standards on the basis of their findings and then offered certification to those products that met these criteria, granting the firms that made them the right to affix a UL metal tag to their goods. The organization further offered site visits by engineers to assess whether manufacturing methods were sufficient to maintain quality and safety standards. The insurance companies that underwrote UL's basic expenses approved of these various activities. UL's new services were in line with the general commitment of insurers to keep fire prevention methods abreast of technological change. UL also furnished much needed information relevant to new insurance lines, such as that for automobiles, plate glass, and airplanes. Insurers could use UL determinations as a basis for setting differential rates for the coverage of new risks or for refusing to write policies altogether.³⁸

One must keep in mind, however, that in the years before World War I, the continuing appearance of new self-regulatory institutions and the expansion of some existing ones occurred within an evolving political and cultural context. As historians of American political economy have long noted, the pace of state regulatory action quickened considerably during these decades. The same forces of industrialization, economic integration, and urbanization that encouraged the creation of SROs also generated political constituencies for far more forceful governmental oversight of economic relationships. By the early years of the new century, this process was facilitated by two other developments that reshaped the intellectual premises of regulatory policy making. The first involved muck-raking journalism, which catered to the burgeoning urban middle classes and earned a reputation for investigating and exposing abuses of public and private power. The writers of this brand of journalism demonstrated a willingness to envisage much more vigorous regulatory action by the state.³⁹ The second was centered

38 KNOWLES, *Inventing Fire Safety* (n. 18), pp. 184–259. As a measure of the enormous impact that UL had on manufacturing standards in the Progressive Era, the archival database »American Periodicals Series Online« almost a thousand articles that discuss its work in trade journals between 1905 and 1920. On the UL's role in assisting the formulation of frameworks for new insurance lines, see: *Automobile Council Is Organized at Laboratories*, in: *Chicago Tribune*, August 8, 1918, p. 17; A. R. SMALL, *Plan of the Underwriters' Laboratory to Classify Airplanes for Insurance Purposes*, in: *Economic World* 20 (December 4, 1920), pp. 816–17.

39 JAMES DAVID CHALMERS, *The Social and Political Ideas of the Muckrakers*, New York 1964; STANLEY SCHULTZ, *The Morality of Politics: The Muckrakers' Vision of*

in the nation's universities (the University of Wisconsin in particular), as a cohort of social scientists, many trained in European universities, committed themselves to the study of socio-economic problems and the formulation of policy strategies to address them.⁴⁰

As the era's municipalities, states, and the federal government more frequently flexed their regulatory muscles, they reflexively borrowed from the institutional arrangements fashioned by European governments. At the same time, they also engaged in considerable institutional innovation, often with the help of progressive academics. Such innovation occurred especially in the arena of public utilities, where Americans proved far less amenable than Europeans to the solution of public ownership. Throughout the country, governments embraced the independent, expert commission as a fundamental institution of regulatory governance. Legislators at every level gave these insulated regulatory agencies authority to pursue specialized fact-finding, set rules (or in the case of public utilities, fares and rates) on the basis of those investigations, and then enforce those rules (or fares and rates).⁴¹

These altered political circumstances for governance had significant consequences for the practice of business self-regulation in the United States. In several important policy domains related to financial services, SROs came under unprecedented public scrutiny. In the case of banking clearinghouses, the trigger was the Panic of 1907. After a speculator's failed scheme to corner the copper market raised questions about the solvency of several New York City trust companies and banks, depositors initiated runs on several financial institutions. The New York Clearing House Association (NYCHA), assisted by America's leading investment banker, J. P. Morgan, stepped in to quell the panic, taking on

Democracy, in: *Journal of American History* 52 (1965), pp. 527–47; LOUIS FILLER, *Progressivism and Muckraking*, New York 1976; DANIEL RODGERS, In Search of Progressivism, in: *Reviews in American History* 10 (1982), pp. 113–32; MICHAEL MCGERR, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870–1920*, New York 2003, pp. 147–81.

40 MARY FURNER, *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1865–1905*, Lexington 1975; THOMAS HASKELL, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority*, Urbana 1977; LAVERN RIPPLEY, Charles McCarthy and Frederic C. Howe: Their Imperial German Sources for the Wisconsin Idea in Progressive Politics, in: *Monatshefte* 80 (1988), pp. 67–81; DAVID MOSS, *Socializing Security: Progressive-Era Economists and the Origins of American Social Policy*, Cambridge 1995; JOHN LOUIS RECCHIUTI, *Civic Engagement: Social Science and Progressive-Era Reform in New York City*, Philadelphia 2007.

41 SAMUEL O. DUNN, *Regulation by Commission*, in: *The North American Review* 199 (1914), pp. 205–18; WIEBE, *The Search for Order* (n. 31), pp. 164–95; RODGERS, *Atlantic Crossing* (n. 8), pp. 76–159.

the crisis management functions of European central banks. The NYCHA pressured some managers with links to the copper speculators to resign and examined the books of banks and trust companies that found themselves under pressure. The Clearing House issued emergency loan certificates to those institutions that they deemed solvent and arranged for additional loans from the United States Treasury, while simultaneously denying such liquidity to some less well-connected institutions, forcing them to shut their doors. These actions successfully quelled the Panic, much as the NYCHA had done in response to earlier financial crises in 1873, 1890, and 1893. Whereas those earlier panics had occasioned only minimal public comment, events in 1907 prompted searching analyses from muckraking journalists, as well as high profile congressional investigations. The power of the NYCHA, a »private club,« to determine which financial institutions received liquidity lifelines struck a growing number of Americans as constituting »autocratic powers« out of step with democratic values.⁴²

The public spotlight focused on rate-setting SROs within the insurance industry not so much because of a single epochal event as an ongoing series of revelations about questionable business practices. Discomfort with insurance rating bureaus had already led some states to pass »anti-compact laws« toward the end of the nineteenth century, which ostensibly made cooperative premium schedules illegal. In the early years of the new century, investigative journalists uncovered evidence of cronyism and questionable investments among the nation's life insurance behemoths, such as The Equitable and the New York Life Insurance Company, findings confirmed by a 1905 inquiry by the New York state legislature.⁴³ Partly as a result, many Progressive Era state legislators introduced further proposals for state-level antitrust measures targeting insurance. During the ensuing debates, the various ratings bureaus and cooperative premium schedules created by fire insurance companies came under heavy criticism. Journalists and politicians picked up on allegations from policyholders that these mechanisms lacked transparency, since neither ratings bureaus nor

42 GEORGE CAREY, *The Clearing House and the Panic*, in: *Outlook* 87 (November 16, 1907), pp. 568–70; O. M. W. SPRAGUE, *The Proposal for a Central Bank in the United States: A Critical View*, in: *Quarterly Journal of Economics* 23 (1909), pp. 363–415; *Five Men the Power in Clearing House*, in: *New York Times*, June 7, 1912, p. 3; *Five Money Kings Rule over Banks*, in: *New Orleans Times Picayune*, June 7, 1912, p. 1; *Swear New York Clearing House Wrecked Banks*, in: *Chicago Tribune*, June 8, 1912, p. 1; *The Money Trust Inquiry*, in: *Manchester Guardian*, December 11, 1912, p. 6; FRANKLIN SACHA, *Between Stability and Enterprise: Panics, Politics, and the Evolution of Private Financial Regulation in American History*, Senior Thesis, Duke University 2012, pp. 132–54.

43 MORTON KELLER, *The Life Insurance Enterprise: 1855–1910*, Cambridge 1963, pp. 245–64; BARANOFF, *Shaped by risk* (n. 18), pp. 248–51.

insurance companies were willing to publicize the statistics on which they ostensibly based their premium classifications. Critics further charged that the unavailability of such statistics enabled insurers to practice unfair rate discrimination, both between sections of the country and within particular cities.⁴⁴

Complaints about unaccountable exercises of private regulatory authority in these two domains of financial services eventually led to early experimentation with versions of regulated self-regulation. In the case of banking regulation, heightened public awareness and pointed political critiques led to a wholesale reorganization of governance. In 1913, Congress created a new system of twelve clearing houses, known as regional Federal Reserve Banks, which significantly displaced the older clearing houses. (The older clearinghouses did not entirely disappear, as they continued to furnish services to some banks and trust companies that chose not to join the new reserve system – but to facilitate their operations, the clearinghouses usually required that their own members maintained accounts at the new Reserve Banks.) The Reserve Banks in turn answered to a national Federal Reserve Board that had the responsibility to adjust interest rates, set reserve requirements, and respond to financial crises, acting through the auspices of the regional reserve banks. Private interests nonetheless continued to have significant sway over regulatory policy, since the regional Reserve Banks were technically private entities owned by member institutions, and those banks had the authority to choose two-thirds of the Reserve Banks' directors. In addition, the regional Reserve Banks each appointed one of its directors to an Advisory Council that made policy recommendations to the Reserve Board. This approach moved the formulation of banking policy far more within explicit state structures, but did so in a way that sustained significant elements of business self-regulation.⁴⁵

In fire insurance, the pivotal generator of regulated self-regulation lay with state legislatures rather than the national Congress. Progressive politicians in

several states proposed the introduction of full state regulation of fire insurance rates and, in 1909, Kansas Republicans enacted legislation that mandated non-discrimination in rate-making and required rate reviews by the state Insurance Commissioner. In the next few years, Texas, Missouri, and Louisiana passed similar statutes. After these new laws resulted in a wave of premium reductions by political appointees, northeastern insurance companies and state officials began to reimagine strategies for rate setting, ostensibly to ensure that the process would be based on expert collection and analysis of relevant statistics. Their efforts first bore legislative fruit in New York, which in 1911 passed a bill that prohibited rate discrimination, but left premium-making in the hands of private insurance bureaus, subject to an obligation to furnish the state insurance department with all of the data used to set those premiums. This information would then permit the department to rule on any allegations of discrimination. Here was an instance of full-fledged American *regulierte Selbst-Regulierung*, with an ongoing bureaucratic relationship between private rule-maker/implementer and public overseer. Under its terms, local bureaus soon faced pressures to pool their statistical data about loss ratios and standardize their classification schemes, which it did through a newly established New York Fire Insurance Exchange (NYFIE). Since policyholders now had the opportunity to appeal their rates to an ostensibly impartial government department, popular suspicions of premium-setting dissipated.⁴⁶ Within a few years, enough states had followed New York's lead that the NBFU saw an opportunity to create truly national statistical analysis, which it pursued through an Actuarial Committee that essentially carried on the work of the NYFIE on a continental basis. The Committee set about the business of constructing a nationwide classification system for building types and sizes, fire prevention methods, and a host of other factors relevant to premium setting, drawing on the latest in computational technology. It also worked closely with state insurance commissions and departments, readily making available its data and statistical analysis. Those state agencies in turn increasingly hired officials with insurance industry expertise to take charge of oversight responsibilities, and by the 1920s even mandated that company reports go to the NBFU. Figure Three depicts the resulting regulatory hierarchy that linked local ratings bureaus, insurance companies, the NBFU Actuarial Committee, and State Insurance Departments in a flow of statistical reports, premiums, and premium reviews. Once in place, this basic regulatory framework spread to other insurance markets, including workman's compensation and automobile, plate glass, agricultural crop, and burglary insurance. Throughout the industry, insurers and regulators looked for ways to place rate-making on

44 State Insurance Rates Will Be Re-Scheduled, in: *Anaconda Standard*, September 29, 1907, p. 1; *Excessive Costs of Insurance*, in: *New Orleans Times Picayune*, October 1, 1908, p. 6; *Fire Underwriters Accused*, in: *Washington Post*, May 19, 1910, p. 4; ROBERT RIEGEL, *Fire Insurance Rates: Problems of Cooperation, Classification, Regulation*, in: *Quarterly Journal of Economics* 30 (August 1916), pp. 704–37; BARANOFF, *Shaped by risk* (n. 18), pp. 225–34.

45 E. M. PATTERSON, *The Organization and Work of the Federal Reserve Board*, in: *Annals of the American Academy of Political and Social Science* 63 (January 1916), pp. 88–96; O. M. W. SPRAGUE, *The Federal Reserve Banking System in Operation*, in: *Quarterly Journal of Economics* 30 (1916), pp. 627–64; *Relations of Reserve Banks to Member Banks and Inter-Relations of Federal Reserve Banks*, in: *Annals of the American Academy of Political and Social Science* 99 (January 1922), pp. 87–95; ROBERT CRAIG WEST, *Banking Reform and the Federal Reserve, 1863–1929*, Ithaca 1977.

46 RIEGEL, *Fire Insurance Rates* (n. 44), pp. 715–20; BARANOFF, *Shaped by risk* (n. 18), pp. 248–53.

an actuarial basis. Their innovations led to a new form of »regulated competition,« which, in the words of sociologists Tim Bartley and Marc Schneiberg, »shifted insurance from a setting characterized by political conflict and uncertainty about the efficacy of market organization and meaning of regulation into a more stable setting, one where the models of appropriate organization were more clearly defined and the actions of the state were more predictable.«⁴⁷

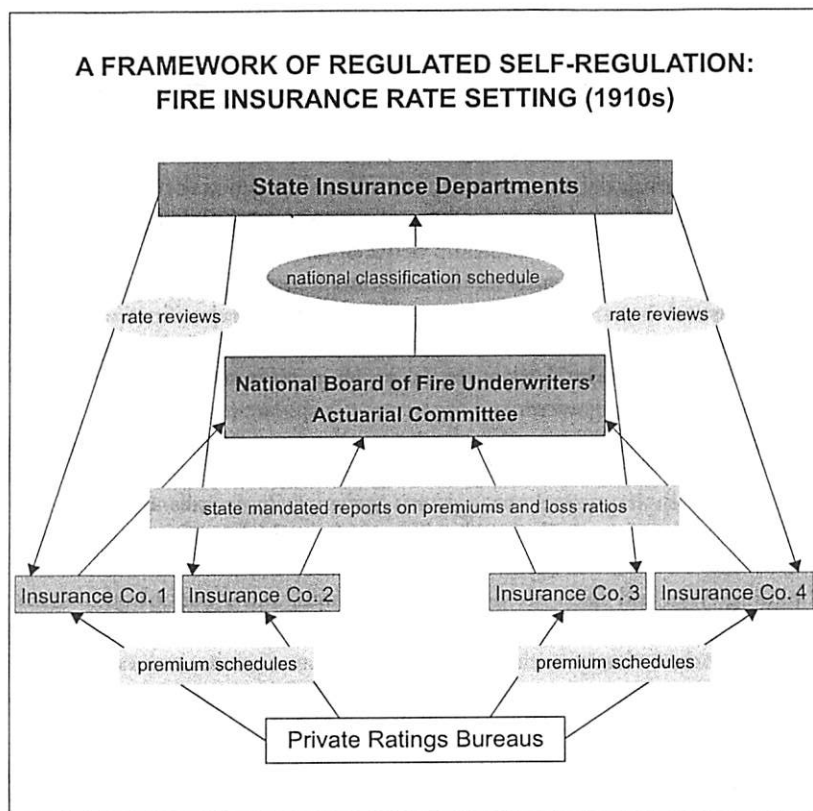


Figure 3: The Early Construction of American *Regulierte Selbst-Regulierung*: Setting Rates for Urban Fire Insurance

47 C. E. UNDERWOOD, Standard Classification of Fire Risks, in: The Independent (February 2, 1914), pp. 178–80; New York Won't Fix Insurance Rates, in: New York Times, May 10, 1914, p. C8; Efforts Made for Standardizing of Cotton Insurance, in: Fort Worth Star-Telegram, February 24, 1916, p. 16; Causes of Fires Are Analyzed in Tables from Under Writers, in: Montgomery Advertiser, January 6, 1917, p. 8; RIEGEL, Fire Insurance Rates (n. 44), pp. 727–35; Insurance

Defensive impulses motivated the fire insurance industry's deepening investments in self-regulation. The key objective, at least at first, was to hold the advocates of top-down, prescriptive state regulation at bay. Anxieties about the prospects for expanded state regulatory authority often served as a catalyst for the founding of American self-regulatory bodies in other economic sectors, even if other considerations might then shape institutional development. As early as the mid 1880s, the threat of regulatory legislation prompted the creation of livestock exchanges in key market centers such as Chicago and Kansas City. Initial attempts to create such organizations foundered on differences among the livestock markets' various constituencies. But the increasing political intensity of western cattlemen's demands for federal measures to regulate the health of animals in transit across state lines, and for state legislation to address manipulative business practices in the stockyards, concentrated the minds of commission merchants, brokers, and stockyard owners. All of these participants in the trade preferred their own voluntary associations to government overseers.⁴⁸

As regulatory action by the federal government and the states became more common in the early twentieth century, so did the embrace of self-regulation as a political strategy of deflection. Such tactics usually were championed by a contingent of Republicans with close links to the business community. Although the construction of America's modern regulatory state proved to be a bipartisan affair, championed by Progressives in both major political parties, a group of conservatives viewed the growth of powerful public bureaucracies with grave concern. They saw the embrace of administrative governance as one of several developments that threatened American liberties, along with the expansion of American unions, the rise of Soviet Communism, and the heightened popularity of America's Socialist Party in the 1910s. If political demands for regulatory action were sufficiently great to ensure some type of policy response, these figures hoped to assuage those demands through some form of business self-regulation – ideally without formal state oversight; or if unavoidable, as part of a scheme of public regulation.

During the 1910s and 1920s, this pattern emerged most clearly with regard to the securities markets and the movie industry. Abuses in the stock markets abounded in the years before and after World War I, including the marketing of fraudulent companies, manipulation of stock prices, and rampant insider trading. As tens of thousands of Americans sought to cash in on general prosperity

Rates to Be Rechecked, in: Lexington Herald, April 22, 1919, p. 5; BARANOFF, Shaped by risk (n. 18), pp. 254–66; TIM BARTLEY/MARC SCHNEIBERG, Rationality and Institutional Contingency: The Varying Politics of Economic Regulation in the Fire Insurance Industry, in: Sociological Perspectives 45 (2002), pp. 47–79 (quote at p. 58).

48 HAZLETT, Regulation in the Livestock Trade (n. 15), pp. 60–86.

and the rise of the public industrial corporation, shady operators quite happily took advantage of their lack of sophistication. Together, a drumbeat of journalistic exposes, memoirs of stock operators, and legislative investigations, such as the 1912 Pujo hearings into the operations of the »Money Trust,« made the public far more aware of abuses on Wall Street and in other securities markets.⁴⁹ At the same time, the largely unaccountable authority of stock exchanges (over what their members could charge as commissions and with whom they might conduct business, who might receive stock quotations, and what companies might list their shares) struck many progressive observers as incompatible with democratic norms. As one influential lawyer argued in a 1915 broadside against the New York Stock Exchange, »it should not be permitted to maintain a dangerous monopoly under the pretext of acting as a self-constituted policeman, with the added power of judge and jury, to determine the fate of citizens in this *ex parte* fashion.«⁵⁰ Here were powerful echoes of the contemporaneous assaults on allegedly autocratic banking clearing houses and insurance bureaus.

The salience of these issues only intensified after millions of Americans became comfortable with investing in government bonds during World War I. State legislatures across the country responded to the growing evidence of profound information asymmetries in the securities markets by proposing a variety of regulatory measures, many of which became law. Some states, like Kansas in 1911, required that corporations submit their securities offerings to a state agency for scrutiny and approval before they could sell them to the public. Others, like New York in 1921, gave their Attorneys-Generals extensive powers to investigate and prosecute misrepresentations or fraud in the marketing of stocks and bonds. Regulation on the Kansas model had little significance because of limited bureaucratic capacity and the increasingly interstate nature of the securities' markets. The New York approach had more impact, but still only put a dent into abusive practices. As a result, pressures grew within Congress to use federal powers to clean up Wall Street.⁵¹

49 THOMAS LAWSON, *Frenzied Finance: The Crime of Amalgamated*, New York 1905; GEORGE GRAHAM RICE, *My Adventures with Your Money*, New York 1911; HENRY MARTIN, *The New York Stock Exchange and the 'Money Trust'. A Review of the Report to the House of Representatives by the Pujo Committee*, New York 1913; CEDRIC COWING, *Market Speculation in the Muckraker Era: The Popular Reaction*, in: *Business History Review* 31 (1957), pp. 403–13; JULIA OTT, *When Wall Street Met Main Street: The Quest for an Investors' Democracy*, Cambridge 2011, pp. 9–35.

50 SAMUEL UNTERMAYER, *Speculation on the Stock Exchanges and Public Regulation of the Exchanges*, in: *American Economic Review* 5 (1915), pp. 24–64.

51 BLUE SKY LAWS, in: *Columbia Law Review* 24 (1924), pp. 79–86; ALBERT OTTINGER, *The Martin Act: Its Construction and Enforcement*, in: *Proceedings* (1926), pp. 218–36; GERALD NASH, *Government and Business: A Case Study of*

Confronting these political cross-currents, the investment banking establishment developed a set of strategies predicated on self-regulation. They pushed for a tightening of listing standards on securities exchanges and then successfully lobbied state legislatures to exempt issues listed on recognized exchanges from licensing requirements. In addition, they joined forces with the still young »truth-in-advertising« movement, helping Better Business Bureaus (especially the BBB in New York City) to develop investment departments, which investigated allegations of fraud against unlisted stocks, warned the public against dodgy stock promotions, and cooperated with public prosecutors. By the end of the 1920s, the BBBs constituted something of a private securities regulator.⁵²

The nascent American film industry confronted a similar array of regulatory threats, though in this case they emanated from municipalities as well as the states and the national government. The key issue involved standards of decency in subject matter and modes of presentation. Amid the meteoric rise of film as a form of commercialized entertainment, some deeply religious Americans worried that the new art form might threaten community norms of civility, morality, and decorum. In 1909, a group of Protestant New York City elites appointed themselves movie censors. In the next decade, several cities throughout the country enacted ordinances calling for municipal censorship boards, hoping to save the motion pictures from Mephistopheles. Frustrated by the necessity of jumping through dozens of regulatory hoops, the major film studios banded together to create the Motion Picture Producers and Distributors Association in 1922, led by attorney Will Hays. Initially focusing on public outreach, Hays solicited advice from several national civic groups and religious organizations before formulating a set of general norms for movie content that the motion picture companies agreed to observe. However, as studios continued to churn out films that struck evangelical and women's groups as promoting suspect sexual morality, concern about the industry in urban and small-town America intensified, which in turn generated scores of legislative proposals for

State Regulation of Corporate Securities, 1850–1933, in: *Business History Review* 38 (Summer 1964), pp. 150–57; MICHAEL PARRISH, *Securities Regulation and the New Deal*, New Haven 1971, pp. 10–30; JOEL SELIGMAN, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance*, 3. Aufl., New York 2003, pp. 44–49; BALLEISEN, *Private Cops on the Fraud Beat* (n. 35).

52 THE STOCK EXCHANGE IS TO REFORM ITSELF, in: *New York Times*, December 28, 1912, p. 1; STOCK EXCHANGE REFORMS AS RESULT OF PRESENT ATTACKS, in: *Wall Street Journal*, December 30, 1912, p. 5; ROBERT REED, »Blue Sky« LAWS, in: *Annals of the American Academy of Political and Social Science* 88 (May 1920), pp. 177–87; H. J. KENNER, *The Fight on Stock Swindlers*, in: *Annals of the American Academy of Political and Social Science* 125 (May 1926), pp. 54–58; BALLEISEN, *Private Cops on the Fraud Beat* (n. 35), pp. 124–38.

stern regulation – either censorship mechanisms or federal prohibitions on block booking arrangements, which limited the capacity of theatre owners to control what they could show on their screens. This heightened pressure elicited a tightening of the industry's voluntary guidelines in the late 1920s and the adoption of a formal industry code in 1930, which »set out in the minutest detail what may and may not be shown.« After strenuous complaints from activists that the code lacked teeth, Hays hired a sufficiently large bureaucracy to evaluate scripts and monitor film shoots in advance of public release.⁵³

For all the various examples of American self-regulation that occurred in late nineteenth- and early twentieth-century America, this institutional strategy became even more commonplace in the 1920s. It was driven not only by attempts to ward off proposals for public regulation, but also by heightened desires to improve economic efficiency. A far more comprehensive expression of the earlier efforts to develop industry-wide norms with regard to technical matters and business practices, this campaign was spearheaded by two leading figures within the post-World War I Republican Party: Secretary of Commerce (and then President) Herbert Hoover and Federal Trade Commissioner William Humphrey. The watchwords for Hoover and Humphrey were »economic waste,« something that any self-respecting business should obviously avoid, but that many businesses did not necessarily recognize, and »confidence,« something that all businesses and the overall economy required for long-term success, but that sometimes called for limits on firm opportunism in marketing practices. The domestic experience of coordinating production for the Great War heavily influenced these priorities, as it suggested the enormous impact that administrative coordination by self-regulatory bodies could have on the output of particular industries.⁵⁴

During the 1920s, Hoover and Humphrey encouraged scores of trade associations to study economic problems that afflicted their industries and then find solutions that would improve efficiency and bolster consumer confidence. In essence, these government leaders prodded business organizations to emulate

53 Film Censorship: An Administrative Analysis, in: Columbia Law Review 39 (1939), pp. 1383–1405; NANCY ROSENBLOOM, »From Regulation to Censorship.« Film and Political Culture in New York in the Early Twentieth Century, in: Journal of the Gilded Age and Progressive Era 3 (2004), pp. 369–406; FRANCIS COUVARES, Hollywood, Main Street, and the Church: Trying to Censor the Movies before the Production Code, in: American Quarterly 44 (1992), pp. 586–605; STEPHEN VAUGHN, Morality and Entertainment: The Origins of the Motion Picture Production Code, in: Journal of American History 77 (June 1990), pp. 39–65.

54 PAUL KOISTINEN, The »Industrial-Military Complex« in Historical Perspective: World War I, in: Business History Review 41 (1967), pp. 378–403.

the work of Underwriters Laboratory and the NBFU's Actuarial Bureau, applying systematic collection of data and experimentation in the service of standardization and the definition of best practices. In some cases, as with analysis of production costs by American lumber associations, the key outcomes were industry-wide deliberations about how best to measure costs and the sharing of information about production methods, a process that facilitated cost cutting. In others, such as the accounting profession's efforts to standardize the analysis and presentation of corporate performance, a continued attachment to secrecy limited practical adoption of recommendations. Most frequently, trade associations developed detailed standards and norms of practice, and then adopted them at formal industry conferences, often sponsored either by the United States Commerce Department or the Federal Trade Commission (FTC). Such conferences occurred in dozens of economic sectors during the 1920s, including new industries such as radio, motion pictures, and airplane construction, and older ones such as chemicals, petroleum, plumbing, and the grocery trade. The FTC usually went so far as to ratify the results of these gatherings, making them the federal standard of fair business practice in a given industry. Insofar as FTC officials participated in these deliberations and later exercised discretion in the enforcement of the resulting trade practice rules, these processes represented further, if perhaps weak, versions of *regulierte Selbst-Reglierung*.⁵⁵

Whether the post World War I advocates of business self-regulation viewed it as a safety valve to release pressures for the adoption of more worrisome exercises of state power, or rather as a way to improve efficiencies in particular economic sectors, they expended considerable effort to explain this mode of governance to the public. Before World War I, the term »self-regulation« rarely occurred in social commentary about American political economy. In the database American

55 Federal Trade Commission, Trade Practice Submittals, Washington, D. C. 1925; I. L. SHARFMAN, The Trade Association Movement, in: American Economic Review 16 (1926), pp. 203–18; WAINWRIGHT EVANS, The Trade Practice Conference, in: Nation's Business 17 (May 25 1929), pp. 37–38; DAVID HAWKINS, The Development of Modern Financial Reporting Practices among American Manufacturing Corporations, in: Business History Review 37 (1963), pp. 135–56; ELLIS HAWLEY, Herbert Hoover, the Commerce Secretariat, and the Vision of an »Associative State«, 1921–1928, in: Journal of American History 61 (1974), pp. 116–40; ELLIS HAWLEY, Three Facts of Hooverian Associationalism: Lumber, Aviation, and Movies, 1921–1930, in: THOMAS McCRAW (ed.), Regulation in Perspective: Historical Essays, Cambridge 1981, pp. 95–123; KENDRICK CLEMENTS, Herbert Hoover and Conservation, 1921–33, in: American Historical Review 89 (1984), pp. 67–88; GERALD BERK, Communities of Competitors: Open Price Associations and the American State, 1911–1929, in: Social Science History 20 (1996), pp. 375–400; GERALD BERK, Discursive Cartels: Uniform Cost Accounting among American Manufacturers before the New Deal, in: Business and Economic History 26 (1997), pp. 229–51.

Periodical Series Online, which includes dozens of trade journals and general business magazines, the term occurred in discussions of economic and regulatory policy barely forty times between 1880 and 1915. When writers did use the term, moreover, they typically meant to convey the ability of a business firm to direct its own affairs free from government interference, or rather, the capacity of a business to demonstrate discipline in its dealings with counterparties.⁵⁶ After the war, the phrase gained far greater currency and more regularly connoted some institutional scheme whereby the members of a particular economic community governed themselves so as to further some aspect of the common good.⁵⁷

The leaders of SROs, along with Hoover, Humphrey, and other key figures of the business and political establishments, were largely responsible for this linguistic shift. They made »Self-Regulation by Business« the central theme of annual conferences (as did the U. S. Chamber of Commerce in 1926) and annual reports of government agencies. They gave speeches to business groups and wrote articles for business publications that articulated the premises of self-regulation as a general mode of policy-making. In all of these venues, the champions of business »self governance« emphasized its advantages as a means of addressing many economic and social problems. This approach, they argued, was democratic – it gave firms in a given industry the opportunity (and the responsibility) to construct the rules for business conduct in their own economic domains. They further insisted that self-regulation was effective because the business leaders within a given industry possessed crucial knowledge about how it functioned. This local knowledge enabled them to formulate rules without unnecessary introduction of bureaucracy and to adjust those standards in light of changing circumstances. Together, the institutional extensions and attention to political rhetoric in the 1920s produced a much more cohesive analytical framework for economic self-regulation in the United States. Described by one historian as Hoover's »associative state,« this framework offered policy-makers a general way to make sense of policy dilemmas, as well as blueprints for institutional design.⁵⁸

56 See Commission Rule for Big Business, in: Atlanta Constitution, December 6, 1912, p. 7; L. W. MITTENDORFF, How Mail Order Competition Can Be Counteracted, in: Grand Rapids Furniture Record, April 1, 1909, p. 5.

57 One can find isolated instances of the more modern usage before World War I. For an example, see MAURICE MUHLEMAN, The Stock Exchange, in: The Independent, December 26 1912, p. 1483.

58 For a representative sample of such discourse, see: Trade Associations Win Hoover Praise, in: New York Times, July 16, 1923, p. 22; Will Government Be Kept out of Business?, in: Outlook 137 (May 21 1924), p. 86; MERLE THORPE, Home Rule for Business, in: Nation's Business 14 (June 5, 1926), pp. 9–10; Self-Regulation of Radio Is Suggested by Hoover, in: Baltimore Sun, July 14, 1926,

Historians of American politics and policy typically portray the associative state as overtaken by events. Once the enormity of the Great Depression ushered in the Roosevelt Administration and a thoroughly Democratic Congress in 1933, this venerable line of interpretation suggests, Hooverian associationalism foundered on the imperatives of reforming America's most basic economic institutions. The New Dealers recognized that associationalism was no match for the circumstances of sharply declining aggregate demand and the cutthroat competition that it made inevitable. They accordingly went about the business of saving the capitalists from themselves, and brokering among the jostling elbows of corporate elites, farm representatives, and labor leaders. Their exertions produced a slew of state agencies, a vastly expanded welfare state, numerous public rules of the economic road, and a policy tilt toward the beefing up of state bureaucratic capacity (if not nearly as much of a tilt as some scholars deemed necessary to the occasion). Historians have spiritedly disagreed about which interest groups had the most influence over policy formulation within the New Deal state, what motivations guided administration officials and policymakers, how profoundly the conservative political reaction of 1938 hamstrung the further implementation of progressive policies, and the extent to which relatively autonomous political and governmental institutions mediated crisis-driven change. They have differed, however, far more about descriptions of political purposes and ideological tendencies than about policy tools and institutional implications.⁵⁹

p. 2; Billions in Waste Saved, in: Los Angeles Times, February 12, 1927, p. A1; Federal Trade Commission, Annual Report for the Fiscal Year Ended June 30, 1927, Washington, D. C., 1927, pp. 1–12; WILLIAM HUMPHREY, A New Spirit in Federal Trade Cases, in: Nation's Business 15 (July 1927), pp. 30–31; E. H. SIMMONS, Mechanics of the Stock Exchange, in: North American Review 227 (March 1929), pp. 287–92.

59 For scholarly syntheses in accord with this interpretation, see WILLIAM LEUCHTENBERG, Franklin D. Roosevelt and the New Deal, 1932–1940, New York 1963; BARTON J. BERNSTEIN, The New Deal: The Conservative Achievements of Liberal Reform, in: BARTON J. BERNSTEIN (ed.), Towards a New Past, New York 1968, pp. 263–288; THEDA SKOCPOL, Political Response to Capitalist Crisis: Neo Marxist Theories of the State and the Case of the New Deal, in: Politics and Society 10 (1980), pp. 155–201; ROBERT McELVAINE, The Great Depression: America, 1929–1941, New York 1984; ALAN BRINKLEY, The End of Reform: New Deal Liberalism in Recession and War, New York 1995; RODGERS, Atlantic Crossings (n. 8), pp. 409–46; DAVID KENNEDY, Freedom from Fear: The American People in Depression and War, 1929–1945, New York 1999. For a useful overview of the historiography up to the late 1980s, see STUART KIDD, Redefining the New Deal: Some Thoughts on the Political and Cultural Perspectives on Revisionism, in: Journal of American Studies 22 (December 1988), pp. 389–401. More recent critical examinations of the New Deal from conservative historians have sought

This story of self-regulation's relative decline before a much more statist New Deal certainly has some truth to it. The Roosevelt Administration did not shy away from the creation of new regulatory institutions or centralized modes of regulatory policy-making, as its policies with regard to transportation, banking, communications, labor relations, and the energy markets make clear.⁶⁰ Skepticism about stand-alone self-regulation also grew among political elites. The era's dramatic exposures of malfeasance in key sectors of the economy, such as that uncovered by the Senate Pecora Committee in the financial world, built a powerful political consensus for more vigorous state involvement in shaping the rules of economic life.⁶¹ Nonetheless, the New Deal signified the consolidation of *regulierte Selbst-Regulierung* as a strategy of governance more than it did the vanquishing of self-regulation as a meaningful or respected approach to regulatory policy.

In many policy domains, the Roosevelt Administration looked to draw upon self-regulatory approaches rather than sweep them away. Roosevelt's first signature effort to revive the American economy, the National Industrial Recovery Act, explicitly looked to build on the premises of associationalism. Before the Supreme Court struck the National Recovery Administration (NRA) down as unconstitutional, the agency convened dozens of industry trade conferences, known as code authorities. Ostensibly possessing expanded representation for labor and consumers alongside businesses, these councils hammered out industry-wide agreements about business practices in the hopes of stabilizing prices and reviving production. At least some of these code authorities were run by the former heads of SROs.⁶²

Even after most New Dealers came to view the NRA as a poorly designed mistake, the incorporation of self-regulatory frameworks continued to occur in several policy arenas. Within agriculture, the New Deal created local, democratically-elected committees of farm-owners to implement its regulatory policies. These bodies determined the distribution of crop allocations and translated soil conservation directives into specific enforcement measures. By 1939, two dozen states joined the battle against soil erosion by authorizing their own soil conservation districts, whose actions required ratification by local farmers.⁶³ In the realm of agricultural commodities trading, the 1936 Commodities Exchange Act required grain and livestock exchanges to apply for licenses and increased reporting requirements for traders and exchanges. But the Roosevelt Administration remained content to rely on the exchanges as the primary policemen on this particular regulatory beat, now subject to formal and informal oversight by the Agricultural Department.⁶⁴

Nowhere, however, did the principles of self-regulation receive more attention from New Dealers than in the regulation of securities marketing and trading. The New Deal regime of disclosure to investors, of course, was predicated on the vigor of the new Securities & Exchange Commission. But as the SEC undertook the work of creating regulatory frameworks for the securities markets, and as Congress filled in various regulatory gaps later in the 1930s, policy-makers explicitly shied away from centralization of regulatory rule-making in Washington. Instead, they fashioned a complex hierarchy that: incorporated previously existing SROs (chiefly stock exchanges); created an entirely new SRO with a quasi-public character, the National Association of Securities Dealers (NASD), to serve as the front-line regulator of the over-the-counter (OTC) markets; and vested new authority and responsibility in the

to reinforce the theme of statism. See for example AMITY SCHLAES, *The Forgotten Man: A New History of the Great Depression*, New York 2007.

60 MERILL ROBERTS, *The Motor Transportation Revolution*, in: *Business History Review* 30 (1956), pp. 80–95; VIETOR, *Contrived Competition* (n. 9); DAVID MOSS/MICHAEL FEIN, *Radio Regulation Revisited: Coase, the FCC, and the Public Interest*, in: *Journal of Policy History* 15 (2003), pp. 389–416.

61 JOHN BROOKS, *Once in Golconda: A True Drama of Wall Street, 1920–1938*, New York 1969; MICHAEL PERINO, *The Hell-Hound of Wall Street: How Ferdinand Pecora's Investigation of the Great Crash Forever Changed American Finance*, New York 2010.

62 NATHAN ISAACS/CARL TAEUSCH, *The NIRA in the Book and in Business*, in: *Harvard Law Review* 47 (1934), pp. 458–78; WILSON COMPTON, *The Trade Institutes and Code Authorities*, in: *American Statistical Journal* (March 1934), pp. 171–76; National Recovery Administration, *Report of Survey of Changes in Labor and Trade Practices*, Washington, D.C. 1936; CHARLES PEARCE, *NRA Trade Practice Programs*, New York 1939; WILLIAM ROBBINS, *The Great Experiment in Industrial Self-Government: The Lumber Industry and the National Recovery Administration*, in: *Journal of Forest History* 25 (1981), pp. 128–43;

PAMELA PENNOCK, *The National Recovery Administration and the Rubber Tire Industry, 1933–1935*, in: *Business History Review* 71 (1997), pp. 543–68.

63 *Agricultural Adjustment and Marketing Control*, in: *Yale Law Journal* 46 (1936), pp. 130–42; Secretary Wallace's Address on Present and Future of Federal Aid to Farmers, October 15, 1938, p. 6; DALE CLARK, *The Farmer as Co-Administrator*, in: *Public Opinion Quarterly* 3 (1939), pp. 482–90; Roosevelt Speech to Farmers, in: *New York Times*, March 9, 1940, p. 6; JAMES ANDERSON, *Agricultural Marketing Orders and the Process and Politics of Self-Regulation*, in: *Review of Policy Research* 2 (August 1982), pp. 97–111; LLOYD PARTAIN, *Community Attack on Soil Erosion*, in: *Journal of Land and Public Utility Economics* 15 (1939), pp. 354–58; ELIZABETH BRAKE, *Uncle Sam on the Family Farm: Farming Families, Farm Policy, and the Business of Southern Agriculture, 1900–1980*, Ph. D. diss. Duke University 2013.

64 J.M. MEHL, *Objectives of Federal Regulation of the Commodity Exchanges*, in: *Journal of Farm Economics* (1937), pp. 313–18; *Prevention of Commodity Futures Manipulation under the Commodity Exchange Act*, in: *Harvard Law Review* 54 (1941), pp. 1373–79; LURIE, *Chicago Board of Trade* (n. 15), pp. 210–11.

hands of a few professional organizations, such as the American Institute of Accountants (AIA).⁶⁵

Figure 4 depicts this intricate regulatory hierarchy. The Securities and Exchange Commission SEC rested at the top of the pyramid. It set the broadest policy frameworks, adopting and overseeing the work of the SROs underneath it.

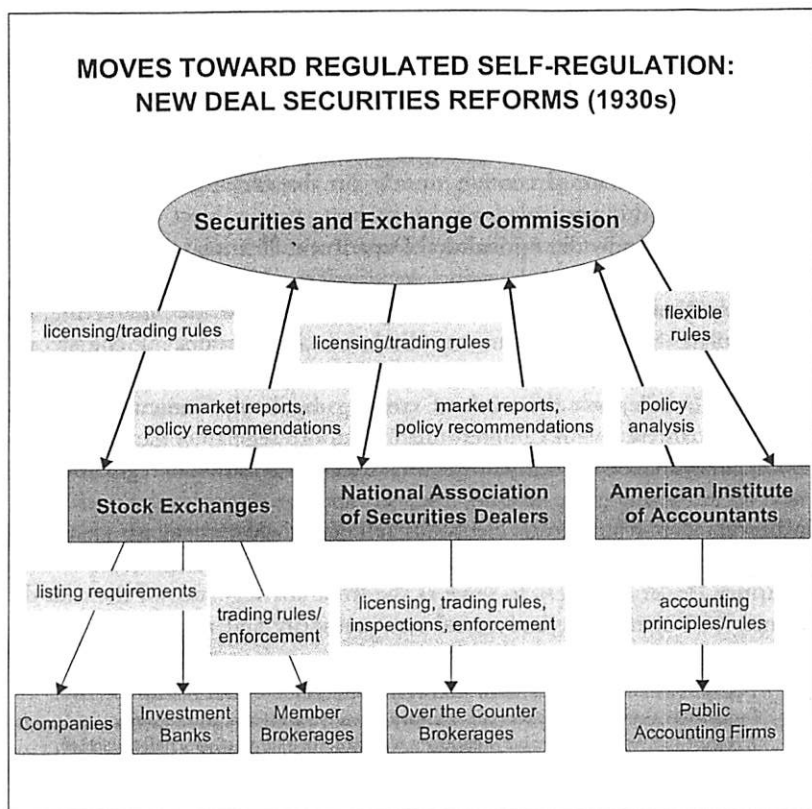


Figure 4: *Regulierte Selbst-Regulierung* in New Deal Securities Regulation

65 Over-the-Counter Trading and the Maloney Act, in: Yale Law Journal 48 (1939), pp. 633–50; JOHN HANNA / EDGAR TURLINGTON, Protection of the Public under the Securities Exchange Act, in: Virginia Law Review 21 (1935), pp. 251–85; THOMAS McCRAW, With Consent of the Governed, in: Journal of Policy Analysis and Management (1982), pp. 346–70; PAUL MIRANTI, JR., Associationalism, Statism, and Professional Regulation: Public Accountants and the Reform of the Financial Markets, 1896–1940, in: Business History Review 60 (1986), pp. 460–468; SELIGMAN, Transformation of Wall Street (n. 51), pp. 183–89.

Those SROs, however, had the responsibility for a great deal of fact-finding, the initial formulation of many policy analyses and draft rules, frontline monitoring of the marketplace, and a great deal of enforcement. The SEC had to ratify SRO rule proposals – whether those by stock exchanges with respect to listing requirements or capital reserves by member brokerages; by the NASD with respect to the rules of practice governing the OTC markets, including the fiduciary responsibility of brokers to steer clients to suitable investments; or the AIA with respect to accounting definitions and standards for the auditing of public companies. In addition, when the monitoring authorities at stock exchanges or the NASD uncovered improprieties by public companies, investment banks, brokerages, or accounting firms, or evidence of insolvency at any of the same, they had obligations to report their findings to the SEC. The SROs similarly had to furnish the public regulator with regular reports about their day-to-day activities. Lastly, the SEC at least occasionally checked up on SRO monitoring by sending its own investigators to assess the compliance of brokerages with market rules.

This elaboration of a fairly sophisticated American version of regulated self-regulation in the three decades before World War II reflected a combination of political pressures and intellectual currents. *Regulierte Selbst-Regulierung* usually emerged in policy domains (insurance risk calculation, agricultural futures trading, formulation of trade practices, and the operation of the securities markets) in which self-regulatory institutions had already emerged, and in which policy-making depended on a strong grasp of technical matters and commercial customs. Once in place, SROs fought tenaciously to retain relevance in the new regulatory environment, and they invariably had the support of the powerful business interests (insurance companies, commodities and stock exchanges, brokerages, investment banks, and accounting firms) that had sponsored their creation. None of these constituencies would have accepted fully statist regulatory arrangements without a vigorous fight.

In addition to the lobbying of these influential constituencies, the policy-makers who constructed schemes of regulated self-regulation had to take account of fiscal and bureaucratic realities. A full-scale replacement of SROs with state bodies would have been expensive, requiring the recruitment and training of large numbers of officials. By incorporating SROs into new frameworks of governance, and in some cases, as with the oversight of the OTC market, requiring the creation of new SROs, policy-makers could take advantage of the regulatory expertise that already existed within particular markets or that might emerge with some nurturing from the state. Industry insiders knew how their marketplaces functioned. As insiders, they also possessed a degree of legitimacy that fostered consent to the new rules and enforcement mechanisms among industry firms.

All of these practical considerations dovetailed with the philosophical intuitions of key architects of New Deal policies, such as James Landis and William Douglas, who each served as Chairman of the SEC in the 1930s. As Progressive legal scholars, Landis and Douglas were committed to the notion of an engaged state and the possibility of expert governance. As close observers of the stock and commodities markets, they recognized that traders, brokerages, investment banks, and accountants all had to answer to the coercive power of the state. Yet they also had seen enough evidence about the workings of regulatory commissions to harbor concerns about bureaucratic over-reaching and inflexibility. Douglas repeatedly explained that with regard to securities regulation, he preferred that the »exchanges take the leadership with the Government playing a residual role. Government would keep the shotgun, so to speak; behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used.«⁶⁶ Such sentiments provided an intellectual anchor for regulated self-regulation within some of the most consequential elements of the New Deal order.

IV Assessing American *Regulierte Selbst-Regulierung* in Action – A Research Agenda

This review of nearly a century of the American experience with business self-regulation from the 1850s through the Great Depression underscores its variability. Modern *Selbst-Regulierung* in the United States has always been a many-splendored institutional beast, emerging in multiple sectors, possessing varying aims, and adopting multiple policy techniques. It has always co-existed with public forms of regulation, sometimes in cooperation with them, sometimes in antagonistic competition. Thus, it has always formed part of a complex ecology of American regulatory governance, in which private modes of rule-making, monitoring, enforcement, and public education have interacted with public modes, themselves often fractured across jurisdictional levels and policy areas. For some years now, the theme of legal pluralism has become an abiding concern for historians who study early modern European states and their imperial expansions, sociologists of modern legal systems, and legal scholars interested in contemporary efforts toward transnational and global political integration. Institutional pluralism similarly provides an essential lens for understanding many dimensions of post-1850 American economic and social regulation.⁶⁷

66 Text of Speech by Commissioner W. O. Douglas, in: Wall Street Journal, May 26, 1938, p. 3; Landis Hails Self-Regulation, in: Wall Street Journal, April 16, 1937, p. 2; McCRAW, With Consent of the Governed (n. 65), pp. 349–57.

67 For leading works in these domains, see: LAUREN BENTON, Law and Colonial

For all the variation, some patterns and common fracture lines stand out. Instances of American business self-regulation between the mid nineteenth century and the start of World War II had their origins in a discrete number of impulses. These institutions usually arose because of: opportunities to constitute new types of markets; the desire within given economic sectors to impose order on especially chaotic markets by adopting economy-wide standards that would clarify market choices, improve quality, and strengthen trust among counterparties; or the perceived imperative of heading off widely supported proposals for state regulatory action. In a great many contexts, moreover, initial experiments with *Selbst-Regulierung* eventually generated heated controversies over the meaning of democratic governance amid integrated, national markets, complex technologies, and technocratic managerial systems. Fights over business self-regulation exposed some deep fault lines in modern American theories of democratic governance.

SROs that may have initially done their work largely outside the notice of most Americans often, over time, attracted public scrutiny, whether because of crisis events, the emergence of new political interests such as the proto-consumer movement, or a heightened culture of journalistic investigation. In such moments, the American preference for decentralized distribution of authority bumped up against the enduring Madisonian suspicion of concentrated, unaccountable power, whether private or public. Proponents of self-regulation increasingly sought to mediate this tension, which the emergence of the modern regulatory bureaucracy only intensified. For the advocates of Hooverian associationalism, democracy was threatened less by concentrations of private economic power than by the specter of supposedly independent experts insulated from both the hurly burly world of politics and close judicial scrutiny. By the 1910s, and even more by the 1930s, these clashes between divergent visions of economic democracy generated forms of *regulierte Selbst-Regulierung*, which incorporated at least some public checks and balances.

Regulated self-regulation, then, represented an uneasy compromise between political constituencies who especially worried about untrammled corporate

Cultures: Legal Regimes in World History, 1400–1900, New York 2001; LAUREN BENTON, A Search for Sovereignty: Law and Geography in European Empires, 1400–1900, New York 2010; SALLY ENGLE MERRY, Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans, Chicago 1990; DALIA TSUK MITCHELL, Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism, Ithaca 2007; MIREILLE DELMAS-MARTY/NAOMI NORBERG, Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World, Portland 2009; PAUL SCHIFF BERMAN, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders, New York 2012.

behemoths and those who particularly distrusted unaccountable government functionaries. This new approach to institutional design accepted the Progressive premises that many complex socio-economic problems called for expertise in fact-finding, analysis, and policy formulation, and that the experts needed some freedom of action to do their job properly. It simultaneously reflected the associationalist intuition that embedding business-affiliated organizations into regulatory machinery would at once improve that machinery's performance and deepen its legitimacy, at least among regulated businesses/industries. It further represented a commitment to the much longer standing Madisonian insistence on accountability, for the regulated and the regulators alike. A jumble of cross-cutting faiths and fears, the experiments with American *regulierte Selbst-Regulierung* tried to direct private mechanisms of administrative governance into channels that would further public objectives – often objectives that SROs and the business community would never have prioritized on their own initiative.

By the eve of the United States' entry into World War II, one can plausibly describe *regulierte Selbst-Regulierung* as a maturing strategy of American governance. Indeed, the post-1933 expansion in the regulatory reach of government agencies in no way signaled the demise of self-regulatory innovations, even before a rejuvenated conservatism further heightened their significance after 1980. Regulation and self-regulation continued their intertwined co-evolution during the post-World War II decades, and regulated self-regulation became an increasingly attractive framework as federal and state policy-makers contemplated the dilemmas of institutional design. During World War II, the imposition of price controls and the administration of the military draft leaned heavily on local civilian boards, which were responsible for the implementation of policy in communities across the country, but which in turn had to answer to regulatory superiors in Washington.⁶⁸ Once the rapid growth of television raised a series of controversies over the moral standards that would govern content and other programming practices, federal policy-makers quickly accepted the National Association of Radio and Television Broadcasters' 1951 Television

Code as the basis for oversight.⁶⁹ When post-World War II state governments moved into the business of licensing hospitals, they invariably chose to rely heavily on the Joint Commission on Accreditation of Hospitals (JCAH), a non-profit organization, which in turn answered to state departments of health. Congress followed this example in creating the Medicare Program in 1964, making eligibility for reimbursement contingent on JCAH certification.⁷⁰ Rather than displacing business self-regulation, in other words, the expanding American regulatory state often incorporated it, even in the two decades following World War II, when the New Deal order arguably reached its zenith.

Regrettably, historians of American political economy have for the most part ignored questions about the evolution of regulated self-regulation in practice. There are some important exceptions. Jonathan Lurie and Thomas Hazlett have produced careful analyses of the Chicago Board of Trade and Kansas Livestock Exchange, respectively. They each stress the pluralist character of these associations, their successful brokering of commercial interests to build platforms for innovation and mercantile competition, and their eventual skew toward the preferences of large, well-organized constituencies. The historical sociologist Marc Schneiberg has offered a sophisticated account of the eventual waning of fire insurance associationalism in the post-World War II period. He shows that renewed antitrust investigations in the 1940s, prompted by a bribery scandal in Missouri, raised serious questions about the supposedly scientific basis of the NBFU's classification schemes, as well as the willingness of state regulations to challenge rate schedules. Renewed scrutiny from federal antitrust prosecutors,

68 10,000 Price Boards to Have Local Say, in: New York Times, April 29, 1942, p. 17; HENRY PARKMAN, JR., The Local Rationing Board in Massachusetts, in: Public Administration Review 2 (1942), pp. 195–98; Judicial Review of Classification by Local Draft Board under Selective Service Act of 1940, in: California Law Review 30 (1942), pp. 226–30; Lives Are in My Hands, in: Nation's Business 31 (January 1943), pp. 20–23; E.T. GREYER, Price Control and Rationing under the Office of Price Administration: A Brief Selective Appraisal, in: Journal of Marketing 7 (1943), pp. 300–18; MEG JACOBS, »How about Some Meat?«: The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–46, in: Journal of American History 84 (1997), pp. 910–41.

69 FRANK ORME, The Television Code, in: Quarterly Journal of Film, Radio and Television 6 (Summer 1952), pp. 404–13; ROBERT SWEZEY, Give the Television Code a Chance, in: Quarterly Journal of Film, Radio and Television 7 (Fall 1952), pp. 13–24; ROBERT DORANG, FCC Prods TV to Devise Self-Enforcement Plan, Hints Crackdown on Licenses, in: Wall Street Journal, December 21, 1959, p. 4; Self-Policing by TV Held Better Than U.S. Controls, in: Los Angeles Times, October 18, 1960, p. B1; Regulation of Program Content by the FCC, in: Harvard Law Review 77 (1964), pp. 701–16; MATTHEW MURRAY, Broadcast Content Regulation and Cultural Limits, 1920–1962, Ph. D. diss., University of Wisconsin-Madison 1997.

70 College of Surgeons to Share Accreditation of Hospitals, in: Washington Post, October 20, 1951, p. B11; Approval Granted to 3,265 Hospitals, in: New York Times, June 23, 1953, p. 27; Hospital Accreditation, in: Baltimore Sun, September 22, 1958, p. 10; ARTHUR HESS, Medicare after One Year, in: Journal of Risk and Insurance 35 (March 1968), pp. 121–26; EDWARD FORGOTSON/RUTH ROEMER, Government Licensure and Voluntary Standards for Health Personnel and Facilities: Their Power and Limitation in Assuring High-Quality Health Care, in: Medical Care 6 (1968), pp. 345–54; TIMOTHY JOST, The Joint Commission on Accreditation of Hospitals: Public Regulation of Health Care and the Public Interest, in: Boston College Law Review 24 (1983), pp. 845–59.

along with the emergence of firms who wished to integrate vertically by cutting out independent insurance agents, helped to create a much more competitive pricing environment.⁷¹ In addition, the historian Thomas McCraw and legal scholar Joel Seligman have given considered attention to the post-World War II interplay between the SEC and the various SROs involved in securities regulation. They both conclude that these arrangements helped to restore public confidence in the securities markets, which had been shattered by the Great Depression, and that they permitted for a more expeditious and flexible enforcement regime than would have been possible through reliance on public bureaucracies alone. That said, Seligman also stresses the role of SROs in restricting entry into stock brokerage and maintaining and even increasing fixed commission rates for several decades, which constrained options for the purchasers of stocks.⁷²

Many pertinent questions about the history of American regulated self-regulation, however, remain largely unanswered. One area that calls out for scholarly attention is the apparent clustering of American self-regulatory institutions in some economic sectors. Why, for example, did New Dealers turn to regulated self-regulation especially in agriculture and financial services, even when they could not build on already existing institutional arrangements? Did the interests in these areas have especially great political clout? Were the architects of institutional design in these regulatory contexts particularly drawn to self-regulatory methods, or at least especially familiar with them? Did the structural nature of the regulatory problems in these areas lend themselves to decentralized policy strategies?

Furthermore, despite the careful research produced by Lurie, Hazlett, Schneiberg, McCraw, and Hazlett, we have only begun to delve into the practical operation of American regulated self-regulation. This is especially the case before the 1980s, when various self-regulatory schemes began to attract the interest of social scientists other than historians.⁷³ The histories of these regulatory experiments beckon as a way to explore the shifting interplay between the impulse of many business elites to preempt public regulatory proposals, and the impulse of many governmental officials to outsource regulatory administrative and enforce-

71 MARC SCHNEIBERG, *Combining New Institutionalisms: Explaining Institutional Change in American Property Insurance*, in: *Sociological Forum* 20 (2005), pp. 93–137.

72 LURIE, *Chicago Board of Trade* (n. 15); HAZLETT, *Regulation in the Livestock Trade* (n. 15); McCRAW, *With Consent of the Governed* (n. 65), pp. 358–63; SELIGMAN, *Transformation of Wall Street* (n. 51), pp. 301–305, 316–17, 393–416, 451–63, 490–97.

73 For an especially detailed examination of one more contemporary self-regulatory scheme, see JOSEPH REES, *Hostages of One Another: The Transformation of Nuclear Safety since Three Mile Island*, Chicago 1994.

ment burdens, while still holding those private or quasi-public entities accountable.⁷⁴ More specifically, we might know far more than we do about:

- the direction of influence between America's regulated SROs and public regulatory bodies in the construction of regulatory rules, and the degree of public oversight that the latter maintained as the initial events that resulted in the imposition of that hierarchical relationship receded into the past;
- the degree of transparency associated with decision-making at America's regulated SROs, and the extent to which they accorded regulated entities due process rights mirroring those furnished by public regulatory bodies;
- the nature of politics within SROs, as the various interest groups within a particular sector (smaller and larger firms; retail brokers and market makers; underwriters and independent insurance agents; public, non-profit, and for profit hospitals) contended with one another over rule formation and enforcement priorities;
- the extent to which regulated SROs nurtured a professional ethos that identified with public service and the public interest, separate from the interests of the business sector concerned;
- the strategies that SROs adopted in the effort to persuade firms to abide by its rules, internalize its norms, and overcome the collective action problems besetting its area of focus, as well as the companion strategies that SROs used to develop and sustain their wider legitimacy, or the reputation of business self-regulation more generally;
- the reciprocal influences, if any, between twentieth-century regulated SROs/public overseers of SROs in one policy context and others (the extent, in other words, of institutional borrowing across policy domains);
- the reciprocal influences, if any, between twentieth-century American SROs/public overseers of SROs and their counterparts in Europe; and
- the successes and failures of given instances of regulated self-regulation in achieving their purported goals.

Exploring such themes would require intensive historical case studies, not only of the initial experiments with American regulated self-regulation (insurance rating, agricultural futures trading, trade practices, and securities regulation), but also with their historical trajectories into the post-World War II decades. Ideally, these longitudinal studies would be complemented by investigations of more recent instances of regulated self-regulation, including those in broadcast content, healthcare accreditation, workplace safety, environmental protection, and nuclear safety. Such studies will be crucial for the construction of a more comprehensive long-term periodization of American *regulierte Selbst-Regulierung*.

74 I am indebted to Elizabeth Brake for this framing.

They would also potentially have great relevance for numerous contemporaneous policy debates about the design of regulatory institutions, including:

- the circumstances in which business self-regulation can achieve public goals, or may prove especially prone to self-serving protection of an industry's interests;
- the possibilities for injecting democratic participation into self-regulatory processes, or sustaining a regard for public purposes within the organizational culture of SROs; and
- the role that SROs might serve in the design of adaptive policy frameworks that can adjust effectively to quickly changing technological realities and market conditions.⁷⁵

Detailed studies of this sort may well confront daunting logistical barriers. SROs rarely have the sort of obligations to retain internal documents that public regulatory agencies have, and so do not necessarily possess extensive archival records. At the same time, one can find many footprints of these organizations in trade journals and the archives of the state agencies charged with overseeing them. Furthermore, the histories of many SROs are sufficiently recent to make oral history a viable research strategy. We can certainly hope that a new generation of historians, cognizant of the significance of business self-regulation in the twentieth- and twenty-first century United States, will rise to the challenge of reconstructing the impact that SROs and regulated self-regulation have had on practices of American regulatory governance, business culture in particular economic sectors, and the shifting configurations of American political economy writ large.

Edward J. Balleisen

Appendix:

Selected Organizations in American Business Self-Regulation, 1850–1940

(Instances of State-Facilitated Self-Regulation Regulated in ALL CAPS;
Instances of State-Prohibited Self-Regulation in *Italics>;*
Instances of State-Regulated Self-Regulation in **Bold and ALL CAPS**)

75 For a more extensive discussion of these themes and how they relate to the broader interdisciplinary study of modern regulatory governance, see the conclusion in BALLEISEN/MOSS, *Government and Markets* (n. 2), pp. 538–44.

