Regulation—rule making—has many purposes, of course. They range from health and safety and environmental protection to working conditions, equality, equity, and social policy. National regulation specifically for economic purposes originated in the 19th century, beginning during America's development era—with the establishment of the Interstate Commerce Commission (ICC) to regulate railroads, the great new industry of the era.... Railways had become not only a critical industry but also a national force, erasing the boundaries of states as they tied the nation together. The ICC was created in order to ensure "just and reasonable" rates and equitable treatment of shippers and communities—and to limit manipulation by the robber barons....

By the late 19th century, America was well on its way to being an industrial nation. Its cities were becoming home to millions and millions of new immigrants, along with sprawling factories that spewed dark smoke out of their chimneys. The advent of industrialization and the transformation of living space brought a host of ills, which in turn became the target of a group of investigative journalists known as muckrakers. The term, borrowed from Bunyan's *Pilgrim's Progress*, was first used by President Theodore Roosevelt, a writer of considerable accomplishment himself.

Roosevelt did not mean the [term] as a compliment; he thought the writing of these journalists too negative, their work too focused on "the vile and debasing," and their impact too much a fan for the flames of revolution. Nevertheless, the muckrakers' exposes of the ailments of the new industrial society—dirty food, dirty working conditions, dirty cities, dirty business, dirty money, and dirty politics—set the agenda for turn-of-the-century America, and Roosevelt and other politicians embraced the cause. Regulation was the response to the catalog of abuses.

Much economic regulation focused on one problem—what to do about bigness and monopolies.... Monopolies seemed determined to extinguish the atomistic world of small, family-owned enterprises; they were indeed the dominating national issue of the time. Something had to be done. But what? Although he earned the sobriquet "trust buster," President Roosevelt was not against bigness per se. Combinations, he said, could be turned back no more easily than the spring floods on the Mississippi. But, he continued, "we can regulate and control them by levees"—that is, by regulation and public scrutiny. He distinguished between "good trusts" and "bad trusts." Only the latter should be destroyed.

The People's Lawyer

Others saw size itself as the enemy and were determined to demolish the trusts. The foremost proponent of that position was "the people's lawyer of the Progressive Era," Louis Brandeis, whose eyes were fixed on one evil—what he called "the curse of bigness." Brandeis was a man of outstanding intellect. Entering Harvard Law School at age 18, he quickly amassed a phenomenal record, one of the best in the entire history of the school. He "is supposed to know everything and to have it always in mind," one of his fellow students wrote of him. "The Profs. listen to his opinions with the greatest deference, and it is generally correct. There are traditions of his omniscience floating through the School."

Brandeis's subsequent career bore out his promise. He went on to become a formidable advocate, and on nothing was he was so powerful as in his advocacy of the destruction of bigness. He was a masterful attacker in the courtroom and no less masterly as a muckraker. The title of his most famous work—"Other People's Money and How the Bankers Use It"—told all. He was also a trenchant critic of Theodore Roosevelt. The president, he said dismissively, was in favor of "regulated monopoly," while he, in contrast, advocated "regulated competition." As for the public, he feared they "still admire the Captains of the trusts."

The issue of bigness and the trusts was thrashed out in both the political process and the courts. Although differentiating between "good" and "bad" trusts, the Roosevelt administration launched no fewer than 45 antitrust suits, many of them long-running. None was more prominent than the prosecution that culminated in the Supreme Court's decision in 1911 to break up John D. Rockefeller's Standard Oil trust.

For his part Louis Brandeis became the chief economic advisor to Woodrow Wilson, who was elected president in 1912. Brandeis thereafter played a major role in designing both the new

Federal Reserve System and the new regulatory agency, the Federal Trade Commission, which was intended to police bigness, restrict restraint of trade, and prevent "unfair" trade practices. Yet even Wilson did not fully satisfy the people's lawyer. "In my opinion," Brandeis explained, "the real curse was bigness rather than monopoly. Mr. Wilson (and others politically wise) made the attack on lines of monopoly—because Americans hated monopoly and loved bigness." In 1916, Wilson nominated Brandeis for the Supreme Court, and despite a fierce anti-Semitic campaign, he was confirmed. He served on the court for 23 years. He was an outstanding justice and, as it turned out, most committed to judicial restraint.

Normalcy, "Not Nostrums"

And there regulation more or less stood for a number of years. Business seemed, in the worshipful fever of the 1920s, incapable of doing wrong, save for the occasional scandal such as that involving the naval oil reserve at Teapot Dome. Those captains of capitalism who had so exercised Brandeis were now heroes, and the less government did, the better. President Warren Harding opened the decade of the 1920s with a reassuring call for a return to "not heroism, but healing, not nostrums but normalcy."

A Republican attorney general denounced the Federal Trade Commission as nothing more than "a publicity bureau to spread socialist propaganda." "Association" and "cooperation" among businesses were encouraged; it was part of rationalization, one of the high values of the day. Even the critics got on board. Lincoln Steffens, among the most famous of muckrakers, declared that "big business in America is producing what the Socialists held up as their goal: food, shelter, clothing for all." Everything seemed to be working so well. "No Congress of the United States ever assembled," said President Calvin Coolidge in December 1928, "on surveying the state of the Union, has met with a more pleasing prospect than that which appears at the present time."

That prospect did not last long. Ten months later, on Black Thursday, October 24, 1929, the stock market crashed. Thereafter, the entire edifice of debt and credit both in the United States and around the world—banks, stock margin accounts, postwar reparations, loans to commodity-producing countries—came tumbling down. The nascent democracies in Germany and Japan succumbed to dictatorship. With unemployment at almost 25 percent in the United

States and the GNP falling by half, it was not all that certain that democratic capitalism in the United States would survive.

The New Deal: "I Never Felt Surer of Anything"

Franklin Roosevelt came to office in March 1933 with a mandate to do something, and to do it fast. Inauguration Day, his wife, Eleanor, observed, was "very, very solemn and a little terrifying." Roosevelt told the frightened country that the only thing it had to fear was fear itself; he immediately set about restoring confidence through words and spirit—and a great fury of vigorous economic improvisation. One line of effort was emergency response—a bank holiday, relief, welfare, and food programs. Another was "cooperation" and national planning. In his second Fireside Chat, in May 1933, Roosevelt called for "a partnership in planning between government and business, with government having the right to prevent, with the assistance of the overwhelming majority of that industry, unfair practices and to enforce this agreement by the authority of government."

While the president was working on the speech, one of his assistants, Raymond Moley, warned him, "You realize, then, that you're taking an enormous step away from the philosophy of equalitarianism and laissez-faire?" The president was silent for a moment, and then replied with great earnestness, "If that philosophy hadn't proved to be bankrupt, Herbert Hoover would be sitting here right now. I never felt surer of anything in my life than I do of the soundness of this passage."

That thinking was embodied nowhere more clearly than in the National Recovery Administration. The NRA was premised on the belief that the essential problems were overproduction and too much supply—of virtually everything. In response, the NRA sought to get labor, business, and government to cooperate in a grand partnership—a corporatist combine to reduce output, set prices, and thus push up incomes....

Indeed, the NRA began with an initial burst of enthusiasm, emblazoning its blue-eagle emblem in windows across the nation and filling New York's Fifth Avenue with ticker tape and throngs of well-wishers in a promotional parade in September 1933. But it did not work. America was not so eager to toss aside its deeply rooted suspicion of concentration and cartels, or to put its confidence in the forthrightness of businessmen and government officials to harness these dangerous forces for the public good.... Within two years the NRA and its mandate were tossed out by the courts.

Instead, the New Deal pursued another approach—regulation instead of ownership or nationalization, antitrust rather than concentration and rationalization, decentralized control instead of planning. In so doing, the New Deal put in place a system to regulate markets and ensure that they worked better—and, by-the-by, to save capitalism from itself. Despite the wide variety in the purposes of the various regulatory agencies, there were two unifying themes—the failure of markets and the problem of monopoly.

The Securities and Exchange Commission (SEC) was a highly visible and critically important part of this effort. It was meant to make the battered financial markets work better, and to restore confidence in them through increased disclosure requirements and the establishment of a level playing field that did not give insiders an unfair advantage....

James Landis, "The Prophet of Regulation"

The guiding hand in the creation of the SEC was James Landis, a brilliant lawyer. He was tenured at Harvard Law School before age 30 and was its dean before age 40. In between, he joined the New Deal, where he was among the brightest of its young stars. He also became, in the historian Thomas McCraw's phrase, one of the "prophets of regulation"—along with Louis Brandeis, for whom he worked as a Supreme Court clerk. Indeed Landis looked to be Brandeis's likely heir at the intersection of intellectual work and policy, defining the relationship between state and marketplace for the next generation. He seemed destined for the same sort of grand national career that Brandeis had achieved.

An urgent summons from his mentor Felix Frankfurter, Harvard professor and Roosevelt confidant, took Landis down to Washington on a Friday train in April 1933. Landis expected to stay the weekend, help out, and then head back to Cambridge by Monday. As it turned out, he stayed four years. He was the quintessential New Dealer, working day after day until midnight, often sleeping for a few hours on a cot in his office, drafting legislation almost around the clock through the economic emergency, and rushing back and forth to the White House to confer directly with the president. "You can't drive your mind as though it were a brewery horse," Frankfurter warned him. But he did not give up the pace. Details of daily

living eluded him, a sloppiness that would come back to haunt him. His personal life took second place to the national emergency. His wife, invited to bring her husband to a party, responded, "What husband?"
Landis served first as a federal trade commissioner and then as a commissioner on the new Securities and Exchange Commission, which he had done much to create. And in so doing he set out to give all the interested parties a stake in the new system. Among his shrewdest decisions in creating the SEC was to enroll the business community as a partner in the process. For instance, one of the requirements instituted for public companies was the disinterested audit. By instituting this requirement, Landis did much to establish the profession of the independent accountant.

Another of Landis's monuments was the Public Utility Holding Company Act of 1935, which created the structure for the electric power industry in the United States that lasted until the middle 1990s. Electric power was among the issues that most viscerally engaged President Roosevelt personally. Viewing electricity as a great tool for economic development and conservation, he promoted, against enormous opposition, both rural electrification and the Tennessee Valley Authority. The latter was unprecedented—a far-reaching public corporation that built dams, generated huge amounts of power, manufactured fertilizers, controlled floods, restored forests, and replenished the soil—all of it in the cause of economic development. Roosevelt was very proud of it....

The result was the Public Utility Holding Company Act. The legislation dismantled much of the holding-company structure and severely restricted what remained, in order to prevent holding companies from "exploiting" operating companies. It also gave the SEC power to promote physical integration of electric utilities to achieve greater engineering efficiencies. The act was bitterly opposed by industry, which enlisted in its cause such legal luminaries as John Foster Dulles, Dean Acheson, and John W. Davis, the 1924 Democratic presidential candidate. It took a full decade of legal challenges before the law was finally accepted.

Landis was not only an activist. He was a theorist, and did more than anybody else to set out the doctrine for economic regulation. As a young law professor he had pioneered the study of the legislative process and the implementation of law. In 1938, having left the SEC, he put down his thinking in what became a classic work on regulation, *The Administrative Process*.

Markets themselves, he said, had big problems, problems too large and sprawling for traditional government, which was simply too weak, too incoherent, and too lacking in expertise. "In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems."

Legislation was the beginning, not the end. There was a need for, in effect, a fourth branch of government—the "administrative branch"—embodied in independent regulatory agencies that would be "quasi-legislative, quasi-executive, quasijudicial" and that would ensure the implementation of the legislation. And he admonished policy makers not to be cowed by the growth of government activity this task would entail. "A consequence of an expanding interest of government in various phases of the industrial scene must be the creation of more administrative agencies if the demand for expertness is to be met...."

In addition to the preexisting Interstate Commerce Commission and the Federal Trade Commission, both of which were strengthened, the New Deal also bolstered the Federal Power Commission with new responsibilities for electricity and natural gas prices. The Roosevelt administration created not only the Securities and Exchange Commission but also the Federal Communications Commission, the Civil Aeronautics Board, and the National Labor Relations Board. The attack on business took on an added fervor in the late 1930s, when liberals blamed business for a steep recession because of what was its alleged failure to invest (the "capital strike"). Roosevelt denounced "economic royalists" for deliberately fostering the recession in order to undermine the New Deal. Thus, as the 1930s came to a close, the Roosevelt administration had finally completed the blueprint of the New Deal strategy, after its early fits and starts. The cozy partner relationship with business envisioned in the early New Deal had given way to James Landis's more prickly and vigilant vision.

"Delay, The Hallmark of Federal Regulation"

Thus, the postwar years were a time of a regulatory equilibrium. The activism and zeal promised by James Landis in 1938 were once again stayed by a changing economic focus. But not everyone was quite so sanguine about the state of regulation. As early as 1946, an investigation concluded that new rules—in the form of the Administrative Procedures Act—were needed to ensure equal treatment and due process. But more troubling was the lack of understanding about exactly how the government would oversee the decentralized and growing hydra of the "administrative branch." In 1949 Truman appointed former president Herbert Hoover to examine the issue. The Hoover Commission recommended that the executive branch be reorganized along functional lines, but it had no idea how to deal with the regulatory agencies.

Dwight Eisenhower was similarly baffled. His team entered office in 1952 as "determined, even jaunty reformers, 'modern' Republicans at last in charge of government which for twenty years has been misused by liberals." But Eisenhower slowly came to realize that he did not even have control over the executive branch. The New Deal had irreversibly extended government obligations with its rhetoric and its creation of a new administrative branch through the process of "delegation" of authority. Regulation during the Eisenhower administration was not particularly vivid or distinguished. It was a stable business, rather clubby in nature.

John Kennedy sought to revivify the regulatory idea. He appointed strong chairmen—such as Newton Minow, at the Federal Communications Commission, who captured national headlines by declaring that television had become a "vast wasteland." But real scrutiny of the regulatory system, which had become entrenched, inefficient, and overloaded with cases that it moved through with none of the vigor envisioned by its New Deal framers, would come from the man who had been so instrumental in creating it—James Landis.

Landis had not fared well after the New Deal. Unlike Brandeis, he had not fulfilled his early brilliant promise. After an unhappy tenure, he resigned as dean of the Harvard Law School, served as head of the Civil Aeronautics Board during the Truman administration until Truman fired him, and then went to work in the private sector for his old boss at the SEC, Joseph Kennedy. He did a variety of odd jobs, including helping with the research for John Kennedy's Pulitzer Prize-winning book, *Profiles in Courage*. When Kennedy was elected president in 1960, he asked Landis to prepare a detailed diagnosis of the regulatory apparatus. And with all his old fire renewed, Landis delivered a devastating critique of the system that had developed unsatisfactorily since his optimistic 1938 work.

Whereas in the 1930s he had celebrated the idea of regulation as the means to efficiency, he now denounced the practice for its rigidity and incapacity. The report found that "delay had become the hallmark of federal regulation," and cited as two main causes the absence of an overall regulatory policy and the deterioration of the quality of regulatory personnel. He identified the Federal Power Commission as "the outstanding example" of "the breakdown of the administrative process." It would take 13 years, he said, to clear up the natural-gas-price cases already pending. And the number of cases likely to be filed over those thirteen years would not be cleared up until 2043—even with a tripling of staff.

Kennedy made Landis a special assistant, with the charge to reform regulation and upgrade the quality of the regulators and their output. Despite his initial impact, Landis never really had a chance to get back into the fray. The reason was personal. It turned out that Landis had failed, for inexplicable reasons, to pay his taxes over several years. He resigned, stood trial, spent 30 days in jail, plus a year on probation, and was suspended from the practice of law for a year. His brilliant reputation as the leading thinker about the regulatory idea was spent. A few years later, he was found floating in his swimming pool, dead. His house was seized by the government, to pay off his remaining tax penalties.